

THE LAWYERS' CODE: THE TRANSFORMATION OF AMERICAN LEGAL PRACTICE, 1828—1938

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The Lawyers' Code

The Transformation of American Legal Practice, 1828–1938

Abstract

During the nineteenth century, U.S. legal practice departed from its common law origins and adopted its modern form. This transformation centered on the 1848 New York Code of Civil Procedure, known as the Field Code. The code declared the common law forms of action abolished and the separate traditions of law and equity united. It ended the public regulation of lawyers' fees and made parties competent to take the oath in their own causes. By 1938, over thirty jurisdictions had copied the code, which became the basis for federal practice as well.

Jurists and academic commentators since then have grappled with the apparent failure of the code to achieve its aims. Common law formalisms persisted, and a vast body of case law adapted the code to traditional practices rather than accept it as the novel reconstruction it professed to be. The standard narrative of American codification declares the modern rationalization of the common law an inevitable development, yet finds it was successfully resisted by a conservative bar that merely tinkered with procedure to subvert real, substantive reform until the progressivism of the twentieth century.

By exploring the legal, political, and cultural context of the code – with assistance from digital textual analysis – this study shows how the politically contingent development of the code created the very concept of “civil procedure” and cast it as a benign field of legislative experimentation. But even the most reformist codifiers inadvertently imported their old habits of thought and practice, causing their code to revoke its own transformative measures. In the way it accounts for the path dependencies of the law, this study presents law reform not as the selection of one path among many possibilities, but as a set of possibilities whose boundaries and constraints have already come pre-determined by a

practical legal tradition. The Field Code – and the modern American practice it created – became the lawyers’ code, not just because lawyers controlled its political fortunes and benefited from its enactment, but also because its silences and inconsistencies could be filled only by the American bar’s inherited practices.

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THE LAWYERS' CODE

INTRODUCTION

“You see, you’ve got to come and answer old man Granville’s complaint, and after that you will have a trial. You’ll have to get a lawyer, and I expect there’ll be smart of fuss about it before it’s over. But you can afford it; a man as well fixed as you, that makes such terbacker as this, can afford to pay a lawyer right smart. I’ve no doubt the old man will get tired of it before you do; but, after all, law is the most uncertain thing in the world.”

—Albion Tourgée, *Bricks Without Straw* (1880)

In the wake of the Civil War, the young New York-educated lawyer Albion Tourgée (1838–1905) traveled to the South with his wife and settled in Greensboro, North Carolina. The Tourgées were quintessential “carpetbaggers” — staunchly abolitionist northerners migrating to the war-torn South to improve their health and fortunes while educating freedmen and white southerners alike about the operations of free labor. Tourgée had been seriously wounded in the opening battle of the war, but after resuming his military commission in the Chickamauga campaign, he believed his health had been improved by the southern climate. At the time of their relocation, the Tourgées’ wealth may indeed have fit into a carpetbag, but in the depressed economy of North Carolina the two quickly secured the loans necessary to establish their homestead.¹

As a lawyer, legislator, and judge in North Carolina, Tourgée developed a reputation as a fierce opponent of the Ku Klux Klan in an especially Klan-infested district, and he would go on to great eminence as an early civil rights lawyer. At the end of the century, Tourgée represented Homer

¹ Among early biographies of Tourgée, Otto Olsen’s is particularly helpful on Tourgée’s career as a legislator before his more famous turn as a judge and novelist. Otto Olsen, *Carpetbagger’s Crusade: The Life of Albion Winegar Tourgée* (Johns Hopkins 1965). Interest in Tourgée’s career has been reviving among scholars of Reconstruction. See, for instance, David W. Blight, *Race and Reunion: The Civil War in American Memory* (Belknap 2001), 85–97, 217–21; Mark Elliott, *Color-Blind Justice: Albion Tourgée and the Quest for Racial Equality from the Civil War to Plessy v. Ferguson* (Oxford 2006).

Plessy at the U.S. Supreme Court in the unavailing challenge to the separate but equal doctrine. Swaying only John Marshall Harlan's dissent, Tourgée's advocacy nevertheless eventually became a cornerstone in modern civil rights doctrine.² But in his own lifetime, Tourgée's most widely recognized contribution to civil and racial equality stemmed from his bestselling companion novels *A Fool's Errand* and *Bricks Without Straw*.³

Less well-known today, Tourgée's novels in the 1880s were viewed as sequels of sorts to Harriet Beecher Stow's antebellum work *Uncle Tom's Cabin*, circulating as widely and generating nearly as much controversy. The novels provided a semi-autobiographical account of Tourgée's sojourn in the Reconstruction South, chronicling southern resistance to federal authority and the struggle of freedmen to turn the paper promises of the Reconstruction Amendments into actual rights. Of course, the novels featured Klan violence, but they also documented ways in which white southerners used legal processes to oppress freedmen through both civil suits and criminal accusations.

In *Bricks Without Straw*, just after freedmen Nimbus and Eliab Hill are able to acquire their own land and hire their fellow freedmen as workers, a white former master sues them for \$1,000 for enticing away his workers. Translating the formal language of the summons, the sheriff explains to Nimbus that he is called to court by "a civil action—an action under the code, as they call it, since you Radicals tinkered over the law." Under this civil action, Nimbus will have "to come and answer old man Granville's complaint, and after that you will have a trial." Nimbus, recognizing the civil action as of a piece with Klan violence, vows to resist both: "I ain't ter be druv off wid law-suits ner Ku Kluckers. I'se jest a gwine ter git a lawyer an' fight it out, dat I am." The sheriff doubts that former master Granville can get a real remedy, and "no doubt the old man will get tired of it before you do,"

² See Elliott, *Color-Blind Justice*, 231–95.

³ Albion W. Tourgée, *A Fool's Errand: By One of the Fools* (1879); Albion W. Tourgée, *Bricks Without Straw* (1880). For modern critical editions, see John Hope Franklin, ed., *A Fool's Errand*, by Albion W. Tourgée (Belknap 1961); Carolyn L. Karcher, ed., *Bricks Without Straw*, by Albion W. Tourgée (Duke 2009).

but the final legal remedy here is not the point: “You’ll have to get a lawyer, and I expect there’ll be smart of fuss about it before it’s over.” Hiring a lawyer, the sheriff indicates, will turn Nimbus’s act of resistance into Granville’s means of oppression. The freedman will have to spend scarce capital on legal representation, defending a meritless suit that may yet turn against him, for “after all, law is the most uncertain thing in the world.”⁴

Tourgée placed in the sheriff’s mouth words that had often been directed at him, for he was the chief Radical who had “tinkered over the law” with a code that introduced this new legal device known as a civil action. In the early days of Radical Republicanism in North Carolina, Tourgée had joined a commission to draft a new code of laws for the state that would modernize the state’s civil institutions and conform them to the free labor and civil rights provisions of the state’s 1868 constitution. Tourgée’s opponents recognized the code of practice as a centerpiece of Radical rule. “The grandest mistake in our existing Constitution, and that which, of itself, would warrant the call of a Convention to remedy it, is the change it has made in our Judicial system,” two Democratic senators wrote, mourning that the “splendid temple in which such men as Gaston and Ruffin ministered as high priests, is in ruins. The people remember and long for it again, like the captive Jews longed for their ruined sanctuary. Shall it not be rebuilt?”⁵

Joining Tourgée on the commission was Victor Barringer, scion of a Democratic planter family in Concord. Barringer too had been wounded in the first battle of the Civil War—but fighting on the opposite side of Tourgée. The son of a German immigrant who preferred railroad construction to slaveholding, Barringer had a mildly reformist disposition that kept him from clashing with Tourgée as much as one might expect, but few of Barringer’s party tolerated the northern interloper so well. In

⁴ Tourgée, *Bricks Without Straw*, 266–73.

⁵ “Report of Senators Robbins and Murphy on the Convention Bill,” *Wilmington Journal* (Wilmington, N.C.), February 19, 1870. The senators were referring to Thomas Ruffin (1787–1870) and William Gaston (1778–1844), two supreme court justices who dominated the North Carolina bench during their long tenure (1829–1858). Between them, they wrote two of the most influential opinions on the law of slavery, Ruffin on the absolute power of slaveholders in *State v. Mann*, 13 N.C. 263 (1829), Gaston on preserving criminal liability for masters and overseers who mistreated slaves in *State v. Will*, 18 N.C. 121 (1834). See Alfred L. Brophy, “The Nat Turner Trials,” 91 *North Carolina Law Review* 1817 (2013).

a biography of Victor, Barringer's granddaughter Anna repeated charges against Tourgée common in newspapers of the 1870s. "Since the Carpet-baggers controlled [the commission], they were in a position to put their constitutional theories into definite form," she wrote. "There was a radical departure from the North Carolina Law as it had been written in the wisdom of its judges and the lives of its people, since the American Revolution. The laws of New York were a major influence." Indeed, Tourgée had adapted the state's new code from one that had appeared in New York twenty years earlier and that was benignly titled "the Code of Civil Procedure." But as for what it meant to exchange the legal procedures of North Carolina for those of New York, Anna Barringer had little to offer, generalizing that "many of the best features of the old were omitted and much of the new utterly foreign to the customs and ideas of the State." She concluded weakly that "in the light of today, much does not seem so radical."⁶

This study seeks to recapture what it was about a New York procedure code that originally seemed so radical, so politically and socially disruptive, in the mid-nineteenth-century United States. A staple first-year course in modern legal education, civil procedure is, by definition, one of the more technical departments of the law. Procedure prescribes technique itself: the processes whereby courts gain jurisdiction over a dispute, lawyers access the bar, litigants summon one another to court and demand a remedy, juries weigh the proofs, and sheriffs execute a judgment. One might be excused for thinking of procedure as a dry subject of interest only to specialists, but as Tourgée's southern career shows, civil procedure once occupied a significant part of the public square. In the United States, procedure was headline news, the subject of bestselling novels, daily editorials, and constitutional conventions. Within its rules lawyers and laymen alike believed that important policies of the day would be advanced or hindered. Freedmen might find deliverance or re-enslavement in

⁶ Anna Barringer, "The First American Judge in Egypt," 198 (manuscript biography of Victor C. Barringer), Barringer Family Papers, University of Virginia Library, Special Collections.

the rules of procedure; depressed economies might recover or collapse; civilization itself, some said, might rise or fall.

* * *

For civil procedure to accomplish any of these things, it first had to be invented as a field. As Amalia Kessler has recently noted, “That the category of procedure did not exist in any meaningful way before the mid-nineteenth century is difficult to conceive—and perhaps for this reason has received no scholarly attention.”⁷ While academic proceduralists like to argue that “process” and “law” form a spectrum rather than a dichotomy,⁸ the distinction between procedure and “real” law has such a hold in modern legal thought as to appear too natural to seriously question. Yet, as Kessler argues, that distinction is surprisingly recent, an “unknown entity” until the New York code “recognized and gave content to the conception.”⁹ Before then, lawyers spoke not of procedure but of “pleading,” not of legal rights but of legal writs courts used to award remedies.¹⁰

This dissertation tells a story of legal practice in the United States as it underwent this transformation from “pleading” to “procedure,” from an all-encompassing law of practice to a segmented law of substantive right and procedural remedy that remains familiar in American courts and law schools today. Its central focus is the New York code of procedure, known colloquially as the Field Code after its chief drafter, the Manhattan trial lawyer David Dudley Field II (1805–1894). “The” Field Code was not a single statute but rather a series of drafts—some enacted in New York, some not—that went on to influence or be directly copied by some thirty other jurisdictions in the

⁷ Amalia D. Kessler, *Inventing American Exceptionalism: The Origins of Adversarial Legal Culture, 1800–1877* (Yale 2017), 11.

⁸ See, e.g., John Hart Ely, “The Irrepressible Myth of Erie,” 87 *Harvard Law Review* 693 (1974). See also Jay Tidmarsh, “Procedure, Substance, and Erie,” 64 *Vanderbilt Law Review* 877 (2011) (reviewing the post-Ely literature).

⁹ Kessler, *Inventing American Exceptionalism*, 10.

¹⁰ See Daniel J. Hulsebosch, “Writs to Rights: ‘Navigability’ and the Transformation of the Common Law in the Nineteenth Century,” 23 *Cardozo Law Review* 1049 (2002), 1050–55.

nineteenth-century United States.¹¹ Around the time the code spread to Albion Tourgée's North Carolina, the New York jurist John Norton Pomeroy sought to provide a comprehensive intellectual treatment of codified remedies "according to the reformed American procedure."¹² Granted that this procedure was newly formed, not re-formed, this study seeks to capture the broad scope of this "reformed American procedure," both by surveying its outer bounds and by plumbing what the codifiers themselves identified as the code's foundations.

What Field and his imitators achieved was the creation of a lawyer's code, written and enacted by lawyers, and written for and addressed to the trial bar. It was a lawyer's code not only in the way it addressed professional interests, but in the way it assumed them. As a code, it was geared towards easing the burden of practicing lawyers by giving them a single volume to consult rather than the "vast irregular mass" of case law on pleading.¹³ It advanced professional interests most notably by eliminating the public regulation of fees and thereby ushering lawyers into an age of market capitalism. In addition to control over their compensation, the code effectively gave lawyers control over a host of proceedings, from the mode of trial, to the investigation of facts, to the election of remedies and the speed of their enforcement. But most of all the code was a lawyer's code for what it did not say. Despite its attempt at comprehensiveness, the massive code neglected to define the key terms of its most fundamental requirements for legal practice, leaving it to the lawyers to fill the gaps with inherited habits of thought and practice. Quite contrary to the intention of Field and the other codifiers, the lawyers' code preserved much of the common law tradition, but it nevertheless spurred the gradual transformation of the law itself from practice into procedure.

¹¹ For a guide to the chronology of the multiple drafts and reports that made up "the" Field Code, see Mildred V. Coe & Lewis W. Morse, "Chronology of the Development of the David Dudley Field Code," 27 *Cornell Law Review* 238 (1942).

¹² John Norton Pomeroy, *Remedies and Remedial Rights by the Civil Action, According to the Reformed American Procedure* (1876). See also Douglas Laycock, ed., *Modern American Remedies: Cases and Materials* (Wolters Kluwer, 4th ed., 2010), 1-2.

¹³ David Dudley Field, *Legal Reform: An Address to the Graduating Class of the Law School of the University of Albany* (1855), 21.

To be sure, a conceptual distinction between substantive and procedural law had some life before the Field Code. French law arguably distinguished a domain of procedural law as early as 1667, but as the leading study of continental procedure asserts, “it is not too bold a statement to say that . . . civil procedure in Continental Europe starts with the 1806 French Code of Civil Procedure.”¹⁴ In America, Napoleon’s codes, including the procedure code, supplied the basis for codifications in Louisiana in 1808 and 1825.¹⁵

At the time Napoleon promulgated his codes, the Anglo-American common law had no word for procedure, though it had much to say about “practice and pleading.”¹⁶ By learning practice and pleading, a law student became acquainted with the medieval writ system, and through the writs he learned what rights could be vindicated and in what manner. As one legal historian explained of the early forms of action, “substantive law” was “secreted in the interstices of procedure,” so much so that one blended seamlessly into the other.¹⁷ A wrong required a remedy; a remedy was obtained by a writ; each writ had a distinct set of processes to follow and requests to make. But wrong, remedy, and writ were tightly bound up in a practical legal logic that did not neatly divide into an abstract proposition about “rights” and the merely “technical” processes for complaining about a violation of one’s rights.

Trying to describe English common law scientifically, William Blackstone (1723–1780) in his famed *Commentaries* attempted to use a continental structure; but instead of expounding the law of Persons, Things, and Actions, the closest analogues Blackstone could come up with were Persons, Things, and Wrongs (Private and Public). It was left to Blackstone’s antagonist Jeremy Bentham (1748–

¹⁴ C.H. van Rhee, “Introduction,” in C.H. van Rhee, ed., *European Traditions in Civil Procedure* (Intersentia 2005), 5.

¹⁵ See John W. Cairns, *Codification, Transplants and History: Law Reform in Louisiana (1808) and Quebec (1866)* (Talbot 2015).

¹⁶ See, e.g., Joseph R. Swan, *The Practice in Civil Actions and Proceedings at Law and Precedents in Pleading* (1845); Robert Edmund Daniell, *Pleading and Practice of the High Court of Chancery* (1st. Am. ed., 1846); Henry Whittaker, *Practice and Pleading under the Codes* (1852).

¹⁷ Sir Henry Summer Maine, *On Early Law and Custom* (London, 1890), 389.

1832) to develop a vocabulary of “substantive” law as distinguished from “adjective,” or procedural, law.¹⁸

But it was one thing to claim a distinction between a law of private rights and a law of procedure, and quite another to demonstrate it. That work of division is what the Field Code and its imitators set out to do for law in the United States. By taking apart the common law writ system and re-describing Anglo-American practice in terms of “a civil action” consisting of complaints and answers, trials and remedies, the codes created legal procedure by drawing lines between substance and form among their thousands of detailed regulations.¹⁹

If that project sounds rather mundane, that was precisely the codifiers’ hope. Marking off procedure as a distinct domain from “real” law was supposed to neutralize it, reduce its political stakes, and ensure that lawyers would control its reform. Technical procedure was to be a field only lawyers could love. But because American procedure codes classified remedies as procedural, the domain of procedure continued to expand into “substantive” domains and threatened to swallow the law itself. That classification was defensible as a matter of common law tradition, since the writs of pleading had been so closely bound to the remedies courts could grant, and the substantiality of the procedure code was usually not a consequence intended by the codifiers. But it made the lawyers’ code unique, and uniquely difficult to fit with their theory of procedure’s relative superficiality and unimportance. No civilian procedure code contained the law of remedies, a field seen as naturally “substantive” in European eyes.²⁰ Tourgée’s experiences in North Carolina, and the many other

¹⁸ See Michael Lobban, *The Common Law and English Jurisprudence 1760–1850* (Clarendon Press 1991), 33–46; David Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth-century Britain* (Cambridge 1989), 219–40. See also Chapter 1.

¹⁹ For the three key drafts of the code defining a civil action in New York, see 1848 New York Laws 497, 510ff; 1849 New York Laws 613, 630ff.; *Final Report of the Commissioners on Practice and Pleadings*, in *Documents of the Assembly of the State of New York*, 73d sess., No. 16 (1850), 2:3ff.

²⁰ See generally van Rhee, ed., *European Traditions in Civil Procedure*. On the codifiers’ political theory of procedure, see Chapters 2 and 3.

political squabbles recounted in this study, belied the codifiers' pretensions that a "mere" procedure code of remedial law could be insulated from matters of substantive policy.

The political volatility of procedure becomes especially clear when one turns to the four key reforms that codifiers from New York to the Carolinas identified as the foundation of the "reformed American procedure": the abolition of the common law forms of action and their replacement with the admonition to plead plain "facts"; the authorization to allow parties and interested witnesses to take the oath and testify in their own cases; the privatization of lawyer fees; and the fusion of the formerly separate institutions and traditions of law and equity. Changing the rules of pleading might seem the most quotidian and internalist of legal debates, but it went to the heart of the lawyers' craft and therefore defined access to the profession and to the mediation of legal remedies. Changing rules about who could testify in court went hand in hand with core definitions of citizenship and debates about whether women, children, or racial minorities could speak with authority and "competency" in the public courts. Attorney compensation turned on the status of lawyers in society, whether they were public officers or the zealous private servants of their clients. The supplemental jurisdiction of equity guarded the legal system's most powerful remedies of injunctions and civil imprisonments, so the debate about its "fusion" into the courts of common law provoked questions about the fundamental powers of public courts to resolve putatively private disputes.

None of these reforms were viewed as superficial or merely procedural at the time, either inside or outside of the legal profession. Each of these foundational reforms, and the political and legal contests that swirled around them, receives a chapter-length treatment in Chapters 4 through 7. Because these reforms were passed in the form of a code, central to all these reforms were questions about the nature of law and legislation, whether law could or should be codified, and whether the resulting codes could meaningfully distinguish a superficial and value-neutral procedure from the substance of the law itself. Accordingly, Chapters 1 through 3 and Chapter 8 discuss those questions in detail.

This dissertation makes five contributions to American legal, political, and intellectual history. First, methodologically, this study applies techniques from digital text analysis to trace how the Field Code migrated to other states, telling a national story even though the politics of procedural codification had to play out in many separate jurisdictions. Second, this study offers an alternative approach to the “critical legal histories” methodology by focusing on how logics of practice constrained the “multiple trajectories of possibility” that critics typically emphasize.²¹ Third, it holds several major aspects of legal practice together as a system and resists the conventional approach which conflates Field’s code with Field’s biography. Fourth, this study offers an account of why the procedure-substance divide has become both so well entrenched but also so contested in American law by tracing these contestations back to their origins rather than focusing on the more prominent instances of “substantive procedure” in the twentieth century.²² Finally, this study complements recent intellectual histories of common law jurisprudence by restoring the codifiers to their rightful place as conversation partners to the major common law jurists. Each of these contributions is detailed in turn below.

* * *

Codification is, as Lawrence Friedman has written, “one of the set pieces of American legal history.” Law reformers advocated for codification of the common law from the earliest days of the Republic through the Gilded Age, from Massachusetts to South Carolina. Efforts ranged from mere compilations of existing statutes to attempts at writing a full European-style code meant to be an entirely comprehensive and systematic statement of the law.²³ At its most basic level, codification proposed that legislation ought to be the sole source of law. Law was to be made by democratically responsible legislators in terse, unambiguous statements, not discovered through application and

²¹ Robert W. Gordon, “Critical Legal Histories,” 36 *Stanford Law Review* 57 (1984), 112.

²² See, for instance, Stephen B. Burbank, “Procedure and Power,” 46 *Journal of Legal Education* 513 (1996).

²³ Lawrence M. Friedman, *A History of American Law* (Simon & Schuster, 3d. ed., 2005), 302. See also Charles M. Cook, *The American Codification Movement: A Study in Antebellum Legal Reform* (Greenwood 1983); Maurice Eugen Lang, *Codification in the British Empire and America* (Lawbook Exchange 1924).

analogy in particular cases by judges. Debates over codification thus ranged from the metaphysics of law to political theories of institutional competency and the separation of powers. Codification remained a major interest of the American bar throughout the nineteenth century. When the intellectual historian Perry Miller developed a reader surveying *The Legal Mind in America*, codification was its central theme, as Miller argued it was the only intellectual topic that could attract lawyers away from their practices long enough to debate.²⁴

By the 1840s, enterprising practitioners had collated case law and oral traditions of practice into dozens of marketable treatises, but these remained works of private opinion – no court was bound to agree with the treatise writers as to the weight, relevance, or proper interpretation of a legal statement.²⁵ The common law was accordingly known as “unwritten law,” despite the proliferation of published texts, because the common law was not precisely determined until a particular case demanded resolution. Statutes, on the other hand, were “written law,” prescribing or reforming the rules even before a case put the precise question in issue. Within the realm of written law, codes were the ultimate statutes.²⁶

The pure form of codification as a complete repudiation of the unwritten common law and as a total restraint on the reasoned decision-making of judges came to America in the proposals of Jeremy Bentham and especially in the advocacy of the Irish exile and renowned litigator William Sampson (1764–1836). Field admired both Bentham and Sampson, but held more modest hopes for codification. Field expected judges to continue to issue reasoned opinions that analogized to and built up legal precedents by accretion, but as a practitioner who believed his craft was being inundated by ever more

²⁴ Perry Miller, ed., *The Legal Mind in America: From Independence to the Civil War* (Doubleday 1962), 11.

²⁵ For the rise of treatises in America generally, see Angela Fernandez & Markus D. Dubber, *Law Books in Action: Essays on the Anglo-American Legal Treatise* (Hart 2012); G. Edward White, *The Marshall Court and Cultural Change, 1815–1835* (Oxford 1988), 81–104; and A. W. B. Simpson, “The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature,” 48 *University of Chicago Law Review* 632 (1981).

²⁶ Or, to use a term from contemporary analysis, “super statutes.” William N. Eskridge Jr. and John Ferejohn, *A Republic of Statutes: The New American Constitution* (Yale 2010). See also Lieberman, *The Province of Legislation Determined*; Farah Peterson, “Statutory Interpretation and Judicial Authority, 1776–1860” (Ph.D. dissertation, Princeton University, 2015).

hopelessly unorganized precedents, Field's aim for codification was to gather all the law on a subject into one authoritative volume and thus ease the research burdens of lawyers. That codification would have to be periodically repeated seemed no shortcoming to Field.²⁷

Thus, not only was "the" Field Code a set of multiple drafts in New York, then a set of multiple codes enacted across the nation, it was also a set of re-enactments and re-codifications, usually about once per decade in every state that adopted the code. A major source for this study is, of course, the code itself, including its iterations that migrated to thirty different jurisdictions and were instantiated in multiple drafts and re-enactments. The magnitude of that corpus presents a unique historical challenge, one that rewards a non-traditional approach. The Field Code was the longest proposed statute of its time in American history, and its imitators were usually the longest regulations on the books of their respective jurisdictions until the legislation of the Progressive Era. The shortest version of the New York code was nearly 400 sections; the final draft was 1,885 sections spanning 800 pages. Derivative procedure codes averaged nearly 750 sections in 200 pages. Re-enactments across the thirty code jurisdictions, as well as comparisons to non-Fieldian codes from other states brings an adequately analytic project up to about 180,000 distinct rules and regulations spread across 50,000 pages.

Understanding the history of the Field Code requires not only attention to its political context but also a detailed examination of the substance of what was borrowed and what was revised in each jurisdiction. Exploring these borrowings is a daunting task, however. The procedure codes were long, technical documents, and although each jurisdiction copied large swaths of text, each also modified that text along the way. Traditional close reading or textual criticism on a corpus of 18 million words is simply not a feasible research task.²⁸ Yet by turning to the digital analysis of texts, this study has

²⁷ See Chapter 1.

²⁸ Gathering the corpus, on the other hand, is quite feasible thanks to digitization efforts that have made the contents of academic libraries – which hold most of the sessions laws for most of the fifty states – publicly available in Google Books or the Hathi Trust. Since the commencement of this project, the subscription database HeinOnline has also made significant strides toward a comprehensive digital collection of state legislative materials. These digitization efforts are not without their own political valences. See Lara Putnam, "The Transnational and the Text-Searchable: Digitized

resolved the difficulty and tracked how states borrowed their codes of civil practice from one another. Within the corpus of legislation, algorithmic analysis of texts can reverse engineer and visualize which texts were borrowed, which modified, and how extensively.²⁹

In this project, digital analysis of the structure of the code's migration directed much of the archival research. This project thus shows how insights from digital analysis feed back in to traditional research and close readings to produce a narrative of historical change. This introduction itself is one product of this reciprocal interpretive method. As Chapter 3 shows in more detail, digital analysis of the codes highlighted Reconstruction North Carolina as a promising site for future study, a study that then brought me to Albion Tourgée, his novels, and Anna Barringer's biography of her codifier grandfather.

* * *

Although a study of the New York code is almost perfectly suited for the methods of Critical Legal History, this dissertation takes a somewhat different tack. Whether followed explicitly or implicitly, critical legal history is by far the dominant model of crafting legal history in the United States today, thanks largely to the agenda-setting work of Robert W. Gordon.³⁰ The power of Gordon's work lies in its clarity. Gordon has spelled out a useful, even aesthetically pleasing, way to write legal history so as to point out the revolutionary possibilities of where and how the law could be different, less locked in an inflexible structure, less oppressive. Gordon writes that one should see law "as situated not on a single developmental path but on multiple trajectories of possibility," then figure out "the roads not taken," and finally explain whether those alternatives failed because they were

Sources and the Shadows They Cast," 121 *American Historical Review* 377 (2016), 399–400. The American South, in particular, is extremely underrepresented in digital archives.

²⁹ A full accounting of the methodology appears in Appendix B of this study, as well as in Kellen Funk & Lincoln A. Mullen, "The Spine of American Law: Digital Text Analysis and U.S. Legal Practice," 123 *American Historical Review* 132 (2018).

³⁰ See especially Gordon, "Critical Legal Histories"; Robert W. Gordon, "James Willard Hurst and the Common Law Tradition in American Legal Historiography," 10 *Law & Society Review* 9 (1975); Robert W. Gordon, "Historicism in Legal Scholarship," 90 *Yale Law Journal* 1017 (1981).

politically “weaker and lost out in their struggle” or because “both winners and losers shared a common consciousness that set the agenda for all of them, highlighting some possibilities and suppressing others completely.”³¹

Following Gordon, sometimes in politics but certainly in method, critical legal histories begin by highlighting a major discontinuity, some internal or external collapse that shocks the legal order. They then proceed to survey the proposed responses in the immediate aftermath, usually highlighting one or two paths toward what might have been. But then the curtain rises on Act III, compromises are made, reactions set in, the paths are constrained, and the legal order that results is the legal order you get.³²

The New York code, by abolishing “the forms of all . . . actions and suits heretofore existing” and creating “hereafter” a new form of action “for the enforcement or protection of private rights and the redress or prevention of private wrongs,” could certainly be considered one such discontinuity.³³ Because the code and its imitators were products of legislation, they were debated in conventions, legislative halls, and political newspapers, putting Gordon’s multiple trajectories of possibility in the air and on the agenda. In time even the codifiers themselves came to see the code as failing to achieve its aims, with jurists lamenting the “cold, not to say inhuman, treatment which the infant code received from the New York judges.”³⁴

However, in my view, critical legal history provides an inadequate account of how law reform runs up against constraints both inside and outside of the constituted legal order. One problem, taken

³¹ Gordon, “Critical Legal Histories,” 112.

³² Among the many possible examples, a few outstanding works include John Fabian Witt, *The Accidental Republic: Crippled Workingmen, Destitute Widows, and the Remaking of American Law* (Harvard 2004); Risa L. Goluboff, *The Lost Promise of Civil Rights* (Harvard 2010); Laura F. Edwards, *The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South* (UNC 2009). See also, in general, the bibliography compiled in Robert W. Gordon, “Critical Legal Histories Revisited: A Response,” 37 *Law & Social Inquiry* 200 (2012).

³³ 1848 New York Laws 510 § 62.

³⁴ *McArthur v. Moffet*, 143 Wis. 564, 567, 128 N.W. 445 (1910). The case was a favorite quotation of the codifier of the Federal Rules of Civil Procedure, Charles E. Clark. See, for instance, Charles E. Clark, “Addresses on the Proposed Rules of Civil Procedure,” 22 *ABA Journal* 787 (1936), 787; Charles E. Clark, “Union of Law and Equity,” 25 *Columbia Law Review* 1 (1925), 2–3.

up as a dominant theme in this dissertation, is that critical accounts treat the alternative paths as clearer and more coherent than they were—or are. In these accounts, the counterfactual paths not taken tend to be presented as if they were crystalline and coherent,³⁵ while actual practices on the ground, if described at all, appear as already muddied up by political compromise and obscured by multifactor forces inside and outside the law. But in the account that follows, it is the reform ideas that are the incomplete and incoherent ones. No reformer or codifier completely rethought their world of legal practice from the ground up. Though they proclaimed themselves revolutionaries, their reforms came already preloaded with inherited structures of thought and habit filling in the gaps of their thinking. If with the distance of time and altered practices a historian can make anything clear about the discontinuities of the past, it ought to be the practical logics as they existed on the ground, not the necessarily incomplete ideas about reforming these (usually under-described) practices in the first place.

A study of procedure is a productive ground for offering this critique of critical legal history, because procedure is often what has been abandoned by critical theory and methodology. Gordon himself has been highly dismissive of procedure and procedural codification, writing in one instance that when procedure is changed, “no one calls the result ‘law reform.’”³⁶ I take that to be a somewhat overstated response to an article by Lawrence Friedman schematizing procedural change as one of the main avenues of law reform in American legal history.³⁷ Nevertheless, Gordon has consistently criticized the American legal profession on this ground, claiming that lawyers in every era have abdicated their public duties and dismissed real social reform by retreating into the realm of procedure, tinkering with technicality while the substantive problems of the world pass by.³⁸

³⁵ One need look no further than the list of six alternatives Gordon rattles off to (the unnamed) Hurst’s loggers and their legal liens. Gordon, “Critical Legal Histories,” 111.

³⁶ Robert W. Gordon, “The American Codification Movement,” 36 *Vanderbilt Law Review* 431 (1983), 439.

³⁷ Lawrence M. Friedman, “Law Reform in Historical Perspective,” 13 *St. Louis University Law Journal* 351 (1969).

³⁸ See Robert W. Gordon, “Law and Lawyers in the Age of Enterprise,” in Gerald Geison, ed., *Professions and Professional Ideology in America* (UNC 1983), 70–110; Robert W. Gordon, “‘The Ideal and the Actual in the Law’: Fantasies and Practices of New York City Lawyers, 1880–1910,” in Gerard Gawalt, ed., *The New High Priests: Lawyers in Post-Civil War*

There is a missed opportunity here, and by delving into procedure, the work that follows highlights the major departure I take from Gordon's analysis. In one of the more famous notes in Gordon's "Critical Legal Histories," Gordon distinguishes himself from Willard Hurst, a pioneer of modern American legal history.³⁹ Gordon wrote that Hurst "takes the consciousness of nineteenth-century lawmakers . . . as the product of a liberal, middle-class mind-set forged in European historical conflicts of the seventeenth and eighteenth centuries, and pretty much fixed since then." But, argues Gordon, "no political consciousness can persist simply because of inertia," and the role of legal historians must be to explain how "the unexamined background common sense of the time[] was reproduced and transformed and its centrifugal tendencies kept under control."⁴⁰ Although Gordon acknowledges that "legal forms and practices are central to these processes,"⁴¹ his subsequent work overlooks the fact that it is in procedure where legal forms and practices do their consciousness-building work, so that the literal *re-form* of procedure cannot help but be caught up in the core structuring of the American legal outlook.

It is also in procedure where the central contradictions of the American legal enterprise become manifest, though they are not the contradictions identified by Gordon and the critics. Gordon has noted that critical legal histories following his account, although they frequently demonstrate the internal inconsistencies of contradictions of legal imaginations, have rarely focused on the primal contradiction that Gordon and fellow critic Duncan Kennedy identified as fundamental to legal order (not just American, or western, but legality itself): the contradictory human impulses towards "individuality" and "fusion" in community.⁴² I too find it difficult to give that idea much traction in a

America (Greenwood 1984), 51-74; Robert W. Gordon, "The Independence of Lawyers," 68 *Boston University Law Review* 1 (1988); Robert W. Gordon, "The Lawyer Citizen: A Myth with Some Basis in Reality," 50 *William & Mary Law Review* 1169 (2009).

³⁹ On the significance of the exchange, see Hendrik Hartog, "Introduction to Symposium on 'Critical Legal Histories,'" 37 *Law & Social Inquiry* 147 (2012), 149-52.

⁴⁰ Gordon, "Critical Legal Histories," 111-12 n.120.

⁴¹ Gordon, "Critical Legal Histories," 112 n.120.

⁴² Gordon, "Critical Legal Histories," 114; see also Gordon, "Critical Legal Histories Revisited: A Response," 203, 205, 207, 209; Duncan Kennedy, "Form and Substance in Private Law Adjudication," 89 *Harvard Law Review* 1685 (1976).

history of nineteenth-century form, at least not without conceding to Hurst that the major legal structures of private rights and public fora was established in the deep past and enjoys a history only of “instantiation” in the nineteenth century.⁴³

Instead, I follow the nineteenth-century English legal historian Frederic Maitland (1850–1906) in positing that the fundamental contradiction navigated by legal practices is that any human system of justice must commit at the outset to tolerating harms that lie without a remedy. Time is too short; the facts are too complicated and abundant, for every case – perhaps even for any case – to be judged aright. So how did people abide this contradiction in the past? Where did they – where must we – let the gaps lie in a system of justice? For a startling number of cases, as Maitland recognized, the answer to those questions could not be found in a substantive rule of rights, at least not originally, but in the procedures that culled the facts and the time into a manageable if artificial problem that was then capable of resolution.⁴⁴ It “may seem true enough to us,” Maitland lectured at the end of his career, “that in order of logic Right comes before Remedy. There ought to be a remedy for every wrong.” But legal history was not logic. Political struggle and compromise gradually legitimated certain forms of proceeding in the public courts. From then on, Maitland concluded, “the forms of action are given; the causes of action must be deduced therefrom.”⁴⁵ Rights that could not be made to fit the compromised and limited forms of vindication available were, therefore, no rights at all.

Hurst thought something similar. Although both Hurst and Maitland wrote well before the historical turn towards cultural anthropology, both had a keenly developed sense, anticipating that future literature, that practice was not reducible to abstract propositions on a page but inhered in embodied rituals and performances. Because practice is embodied, it is subject to real constraints, above all the constraint that human life is not infinite. As Hurst put it, “something that modern [critical

⁴³ Cf. Gordon, “Critical Legal Histories,” 112 n.120.

⁴⁴ See F. W. Maitland, *Equity and the Forms of Action at Common Law: Two Courses of Lectures*, ed. A. H. Chaytor & W. J. Whittaker (Cambridge 1910), 304–05; Frederick Pollock & Frederic W. Maitland, *The History of English Law Before the Time of Edward I* (2d. ed., Cambridge, 1898), 561–62.

⁴⁵ Maitland, *Equity and the Forms of Action at Common Law*, 300.

legal studies] enthusiasts . . . tend to overlook” is that “people are limited. They don’t have endless stocks of energy to spend on anything. This is part of history.”⁴⁶ Although Gordon is surely right that “enormous energy and effort . . . must be poured into reproducing” political consciousness,⁴⁷ it is equally true that enormous energy is required to rethink and reform a political consciousness that is bound up in inherited practices. That is especially so where those inherited practices have already navigated and addressed, if uneasily and temporarily, where to spend the time and resources available to a system of public justice.

If that sounds almost theological, perhaps it is.⁴⁸ But one reason why is that scholars of religion have done a much better job of thinking deeply about the interpretation of craft practices and embodied ritual performances than legal historians have.⁴⁹ One particularly challenging source from that realm is Charles Taylor’s gloss on Pierre Bourdieu.⁵⁰ What does it mean for practice to have a logic, Taylor asks? Or to pose it as Wittgenstein did, what does it mean to “follow a rule” in practice? Taylor affirms Wittgenstein’s dilemma that practice is itself a form of understanding, a way of knowing, but one that is essentially unarticulated, a logic that is always in the background. Once explicate the logic of practice, and the practice ceases to be as such. Instead it becomes a rule purporting to represent practice. Taylor concludes that articulated rules represent practice only in the way a map represents a place. It can be a kind of guide, even an “accurate” one, but reading a map is

⁴⁶ Hendrik Hartog, “Snakes in Ireland: A Conversation with Willard Hurst,” 12 *Law & History Review* 370 (1994), 375.

⁴⁷ Gordon, “Critical Legal Histories,” 112 n.120.

⁴⁸ Hurst credited the writings of Reinhold Niebuhr for inspiring and structuring his thoughts about human limitations within legal history. See Hartog, “Snakes in Ireland,” 375–76. I have a sympathetic affinity, though I prefer to return to the source of Niebuhr’s theology in Augustine, or at least Augustine’s political theory as interpreted by Oliver O’Donovan, *The Ways of Judgment* (Eerdmans 2008) and Charles T. Mathewes, *A Theology of Public Life* (Cambridge 2008). The problem of limitations as I have framed it here also owes much to R.A. Markus, *Saeculum: History and Society in the Theology of St. Augustine* (Cambridge 1988).

⁴⁹ There are, of course, exceptions. For an outstanding reading of courtroom rituals in the Revolutionary Era, see Richard Lyman Bushman, “Farmers in Court: Orange County, North Carolina, 1750–1776,” in Christopher L. Tomlins & Bruce H. Mann, eds., *The Many Legalities of Early America* (UNC 2012), 388–413. Works on spatial legal history shares a promising kinship with ritual studies. See especially Judith Resnik & Dennis E. Curtis, *Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms* (Yale 2011); Nicholas Blomley et al., *The Legal Geographies Reader: Law, Power and Space* (Wiley-Blackwell 2001).

⁵⁰ Charles Taylor, “To Follow a Rule . . .,” in Richard Shusterman, ed., *Bourdieu: A Critical Reader* (Blackwell 1999), 29–44.

almost nothing like traversing real terrain. “The practical ability exists only in its exercise, which unfolds in time and space.” Fundamentally, practice can only ever be “embodied, not represented” – a real challenge for a dissertation seeking to convey something of the realities of legal practice.⁵¹

I have found Ronald Grimes’s *The Craft of Ritual Studies* particularly helpful for addressing Taylor’s challenge.⁵² Perhaps it is inevitable, as Bourdieu and Taylor contend, that “distortion arises from the fact that we are taking a situated, embodied sense and providing an express depiction of it.”⁵³ Nevertheless, Grimes offers his handbook as a guide to interpretive labor that “is most productive when it circles a ritual, approaching it from multiple vectors,” such as various modes of formal, production, and reception criticism. Representation cannot offer the same kind of understanding that practice does, but it can at least “‘triangulate’ a ritual [practice] by crosscutting it in several ways to develop a critical interpretive edge.”⁵⁴

A partial aim of this study is to triangulate the rituals and practices of mid-nineteenth-century law in the United States by crosscutting many different types of legal and lay literature from the era. But the primary aim is to recognize that this kind of triangulation was in fact the activity that many lawyers of the time were engaged in, at least the ones that produced the legal literature that has endured. Thus a primary source for this study, in addition to the codes themselves and direct commentary on them, consists of legal treatises. I read these treatises not as a guide – not even a map – of legal practices but as an attempted articulation of a background understanding that had been up to that time and even afterwards remained largely ineffable. By looking to the procedure treatises so long neglected by critical historians, we can get a sense of what their authors politically and practically were trying to accomplish, for and against the novelties of the New York code.

⁵¹ Taylor, “To Follow a Rule,” 31–32, 37–39.

⁵² Ronald L. Grimes, *The Craft of Ritual Studies* (Oxford 2014).

⁵³ Taylor, “To Follow a Rule,” 39.

⁵⁴ Grimes, *The Craft of Ritual Studies*, 73–75.

* * *

It bears repeating that this study is primarily about a code, and about legal practices before and after it. It is not primarily a study of the man who wrote the code, even if he necessarily appears everywhere throughout it. The numerous works on the Field Code tend to fall into one of two tracks. The first is quasi-biography, in which studies of the code seek to illuminate its reforms, especially the concept of “fact pleading,” from the life and psychology of David Dudley Field.⁵⁵ In the second track, works seek to excavate the practices and theories surrounding one or another aspect of codified practice on its own, say fact pleading,⁵⁶ or cost shifting,⁵⁷ or witness examinations.⁵⁸

The trouble with both tracks is that neither provides the right scale to understand practice as such. The biographies treat the procedure code as one constellation in the broader galaxy of Field’s work. But the other literature takes one segment of the code and treats it as a whole universe. We commonly speak of “the legal system.” Yet it is increasingly rare for legal historians to treat legal practice as a system, self-contained yet constantly invaded by external forces, and with many internal moving and interlocking parts.⁵⁹ Without that sense of system, we can easily miss how changes to one practice were in fact guided by or made in response to another, seemingly disparate, practice in the system.⁶⁰ One weakness of this dissertation may be that its treatment of facts and oaths and equity –

⁵⁵ E.g., Stephen N. Subrin, “David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision,” 6 *Law & History Review* 311 (1988); J. Newton Fiero, “David Dudley Field and His Work,” 51 *Albany Law Journal* 39 (1895). In some works of this kind the procedure code can at most take up a chapter or two since Field’s life and legal practice spanned so many other codifications and reform (or anti-reform) efforts. See, e.g., Daun Van Ee, *David Dudley Field and the Reconstruction of the Law* (Garland 1986); Michael Joseph Hobor, *The Form of the Law: David Dudley Field and the Codification Movement in New York, 1839–1888* (Ph.D. dissertation, University of Chicago, 1975).

⁵⁶ William P. LaPiana, “Just the Facts: The Field Code and the Case Method,” 36 *New York Law School Law Review* 287 (1991); Robert G. Bone, “Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules,” 89 *Columbia Law Review* 1 (1989).

⁵⁷ John Leubsdorf, “Toward a History of the American Rule on Attorney Fee Recovery,” 47 *Law & Contemporary Problems* 9 (1984); Peter Karsten, “Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, a History to 1940,” 47 *DePaul Law Review* 231 (1998).

⁵⁸ Amalia D. Kessler, “Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial,” 90 *Cornell Law Review* 1181 (2005).

⁵⁹ One of the chief virtues of the early legal historians such as Frederic Maitland, Frederick Pollock, and Henry Maine was, for whatever faults they might have had, this capacity to see legal rituals operating within a wider system of practice.

⁶⁰ I don’t mean by this statement to resolve the debate between so-called “internalist” and “externalist” approaches to legal history. See the discussion in Kessler, *Inventing American Exceptionalism*, 8–13. For the most part, I side with the

and even of codification—in nineteenth-century legal practice is necessarily cursory. We could profit from volume-length treatments of any of these.⁶¹ But the strength of this approach is that it binds together as best it can the slippery and dynamic practices that jarred and pulled one another along as the codified legal system launched into motion. After all, fact pleading and fee-shifting were not discrete practices under the Field Code. Rather, both were centrally concerned with a lawyer’s daily work, how that work should be valued and monetized, and what parts of that work the public had a right to regulate.⁶² The two practices have to be understood together before either can really make sense on its own.

All that said, because he was one of the leading thinkers writing on the question of the lawyer’s value and the lawyer’s craft, it is useful to get some sense of who the archetypal codifier of procedure was up front. Though generally unknown today, the man who drafted much of the New York code was a fascinating figure of American history. The life of David Dudley Field spanned nearly the entire nineteenth century and intersected with a number of its more famous events. The Fields rivaled the Adams family in number of talented members and public servants across the generations. David’s younger brother Cyrus laid the transatlantic cable that first allowed instantaneous communication between continents. Another brother, Stephen, became one of the more transformative justices of the U.S. Supreme Court. Field’s sister became one of the first American missionaries to Turkey. Her son,

externalists who argue that internalists—those who see legal history as primarily driven forward by the unfolding of legal logics, for legal institutional reasons—have a hard time of explaining why a certain legal logic unfolds at the precise time and place that it does historically. See, e.g., James Q. Whitman, “The Transition to Modernity,” in Markus D. Dubber & Tatjana Hörnle, eds., *The Oxford Handbook of Criminal Law* (Oxford 2014), 91–94. But I would not go as far as Lawrence Friedman’s claim that law is entirely “relative and molded by economy and society,” with no “kingdom unto itself, not as a set of rules and concepts, not as the province of lawyers alone, but a mirror of society.” Friedman, *A History of American Law* (1st ed., 1973), 15–16. Instead, and despite its almost oxymoronic quality, I find Sally Falk Moore’s concept of law as a “semi-autonomous” domain compelling, with law as neither a fully autonomous totalizing discourse (despite its ambitions and pretensions to be such) nor as a total mirror reflecting only external forces. Sally Falk Moore, “Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study,” 7 *Law & Society Review* 719 (1973).

⁶¹ Such volumes have appeared, but mostly in reference to English legal practice. See, for instance, Barbara J. Shapiro, *A Culture of Fact: England, 1550–1720* (Cornell 2003); Wendie Ellen Schneider, *Engines of Truth: Producing Veracity in the Victorian Courtroom* (Yale 2016); Gary Watt, *Equity Stirring: The Story of Justice Beyond Law* (Hart 2009); Robert A. Yelle, *The Language of Disenchantment: Protestant Literalism and Colonial Discourse in British India* (Oxford 2012).

⁶² See Chapter 7.

David Brewer, joined his uncle Stephen on the Supreme Court. Among David Dudley's other siblings (eight total) were prominent lawyers, engineers, and clergymen.⁶³

No one person in America – or in the world, perhaps – produced as much original legislation in one lifetime as David Dudley Field. By the time of his death in 1894, Field had drafted a penal code, civil code, political (constitutional) code, as well as codes of criminal and civil procedure, of evidence, and even of international law (in two volumes). For such a prolific legislator, the striking feature of Field's career is that he never won a regular election to legislative office. He ran unsuccessfully for the New York Assembly in 1841 and for the state constitutional convention in 1846. He briefly served in the nation's Forty-fourth Congress, but only as a vacancy appointment.⁶⁴

In his biography of his brother, Henry Martyn Field explained David Dudley's lack of success at the polls as resulting from his never having precisely the right political convictions at the right time and place. An ardent Democrat in a Democratic ward, Field nevertheless alienated many Catholics by opposing state funding for parochial schools on the (very Protestant) ground of "separation of church and state."⁶⁵ An antislavery man, Field joined a vocal minority of New York Democrats in opposing war with Mexico on the ground that it would expand the territory of slave states. The party of Polk thus denied Field election to the state convention in 1846.⁶⁶ Over the next three decades, Field switched parties four times in the search for a political home that best supported his free market and free labor principles. He joined the Free Soil revolt from the Democratic Party in 1848, became a Republican in the 1850s, a Liberal Republican in the 1870s, and he finally rejoined the Democracy after the end of Reconstruction.

⁶³ Field's personal papers, such as they are (most were burned), are found in the collection of Sir Anthony Musgrave, Field's son-in-law. Duke University Library Special Collections, Durham, N.C. On Field's family, see the biography by his layman (in the legal sense) brother, Henry M. Field, *Life of David Dudley Field* (1898).

⁶⁴ The Congressional vacancy was caused by Smith Ely Jr.'s resignation to become the mayor of New York. As a formality, the vacancy was filled by popular vote, Field winning 5,000 votes of the nearly 6,500 cast, but most newspapers announced Field's appointment as soon as he had been nominated as the choice of Samuel Tilden and the assembly Democrats. "Mr. Ely's Successor," *New York Herald*, December 31, 1876; *New York Tribune*, January 3, 1877.

⁶⁵ Field, *Life of David Dudley Field*, 46

⁶⁶ Field, *Life of David Dudley Field*, 110–13.

While his forays into electoral politics proved ineffectual, Field thrived as a lawyer – both in the office and in the courtroom. Field may have been the first American lawyer to make a million dollars from a single representation. Saying he “earned” it might put it too strongly, for it is not clear that Field’s forensic skills were any sharper than the average lawyer’s. A survey of Field’s reported cases found that he lost more than he won, and some accounts portray Field as a humorless and intemperate oral advocate, easily lured into counterproductive outbursts when he felt his honor impugned.⁶⁷ Instead, Field’s genius seems to have been of the out-of-court tactical sort. Field excelled at moving through New York’s high society, connecting the right people to broker deals or settlements, and to foster relationships. Herman Melville’s introduction to Nathaniel Hawthorne; Cyrus’s financial backing from Peter Cooper, and John C. Fremont’s offloading of troublesome land litigation before his presidential nomination—all these lines ran through David Dudley Field’s drawing room.⁶⁸

Indeed, Field’s chief political influence was not as a public legislator but as a back-room mediator. Field was one of the New Yorkers who helped to swing the 1860 Republican nomination to Abraham Lincoln against William Seward, a prominent New York Whig and one of Field’s arch-rivals from his Democratic days.⁶⁹ Sixteen years later, after bitterly fighting to take down Field’s client William “Boss” Tweed in New York, the Democratic reformer Samuel Tilden also hired Field as his own counsel to broker the deal that resolved the disputed presidential election of 1876 between Tilden and Rutherford B. Hayes. Historians still do not know the exact details negotiated by which Lincoln and Hayes became presidents while Seward and Tilden did not. But we do know that, like a famous New York lawyer before him, Field was in the room where it happened.⁷⁰

⁶⁷ See Van Ee, *David Dudley Field and the Reconstruction of the Law*, 57–112, 156–61.

⁶⁸ Bernard A. Drew, *Literary Luminaries of the Berkshires: From Herman Melville to Patricia Highsmith* (Arcadia 2015), 41–44; John Steele Gordon, *A Thread Across the Ocean: The Heroic Story of the Transatlantic Cable* (Bloomsbury 2002), 40–42; Van Ee, *David Dudley Field*, 156–58.

⁶⁹ Philip J. Bergan, “David Dudley Field: A Lawyer’s Life,” in *The Fields and the Law* (Federal Bar Council 1986), 34–35.

⁷⁰ Lin-Manuel Miranda, *Hamilton: An American Musical* (2015).

For some, Field's "switching sides" to represent Tilden proved the mercenary quality of his lawyering—after voting for Hayes, Field seemed to happily follow a paycheck to deprive Hayes of the presidency. But for others, Field's representation of Tilden enhanced his reputation and ennobled him—here was a man who voted for Hayes but followed his principles against his political interests when he saw that Tilden had the stronger legal right to the office. The same debate swirled around Field's Gilded Age representations when Jim Fisk, Jay Gould, and Boss Tweed became his major clients. Again, Field's oral arguments often proved unavailing—the robber barons "lost" most of the claims litigated by Field. But the time and expense consumed in litigation, and the many procedural roadblocks Field threw in the path of his opponents, touched off a major phase in America's long-running debate about the dual role of the lawyer as both a public servant and a private zealot for his client.⁷¹

The modern American bar association traces its origins to this debate. Originally formed to censure Field and reign in his mercenary lawyering, the Association of the Bar of the City of New York ended up excusing him and adopting the zealous-advocate model as their professional ideal. The organization of the ABCNY then became a model for the national American Bar Association founded in Saratoga Springs in 1878.⁷² By the ABA's tenth anniversary, Field had been elected its president. Still, the dual view of Field as grasping soldier of fortune and consummate professional would dog him to the end of his life, and biographers since have rarely succeeded at holding the two sides of the mercenary lawyer and the international statesman together.⁷³

⁷¹ Michael Schudson, "Public, Private, and Professional Lives: The Correspondence of David Dudley Field and Samuel Bowles," 21 *American Journal of Legal History* 191 (1977).

⁷² See George Martin, *Causes and Conflicts: The Centennial History of the Association of the Bar of the City of New York, 1870–1970* (Fordham 1997); John A. Matzko, "'The Best Men of the Bar': The Founding of the American Bar Association," in Gawalt, ed., *New High Priests*, 75–96.

⁷³ Henry M. Field, for instance, never even mentions his brother's corporate clients in his *Life of David Dudley Field*. Other biographical works that focus on Field's jurisprudence apart from his practice include Subrin, "David Dudley Field and the Field Code"; LaPiana, "Just the Facts."

Perhaps the best way to get a handle on Field's multifaceted career, personality, and politics is to think of him as a quintessential nineteenth-century American liberal. Field adamantly opposed slavery in principle and the Slave Power in politics, but he was almost equally opposed to the growth of statist institutions and especially of federal power.⁷⁴ After helping to found the Republican Party on an explicitly antislavery platform, Field became one of the most effective opponents of Republican rule in Reconstruction. Field argued several of the signature Reconstruction cases before the Supreme Court, including *Cruikshank*, the case limiting the reach of the Reconstruction Amendments to "state action" only. This time, Field succeeded in every argument he made before the high Court, occasionally seeing his brief copied into majority opinions written or joined by his brother Stephen.⁷⁵ After striking significant blows against federal power in his Supreme Court advocacy, Field turned his attention to fighting the "agrarian" impulses of a rising populism.⁷⁶ Free Labor and Free Men – but not Free Land – was the core ideology of Field.⁷⁷

Field's attempt to codify international law flowed along similar liberal lines. Field generally opposed any attempt to create a supranational institution with coercive powers. The code itself was to be the only such institution, and Field expected the code to be enforced only by voluntary enactment of each state. The "rules" Field codified favored ad hoc arbitral bodies formed by consent rather than permanent courts or parliaments. Overall, the code largely functioned as a guide to choice-of-law rules rather than offering substantive commitments on rules of contract or redress of injury. Even so, Field openly worried that it "may not be possible to extend [the code] to heterogeneous races" of the East

⁷⁴ Field's ideology was quite similar to that of the antislavery democrats described in Sean Wilentz, "Slavery, Antislavery, and Jacksonian Democracy" in Melvyn Stokes and Stephen Conway, *The Market Revolution in America: Social, Political, and Religious Expressions, 1800–1880* (UVA 1996), 202–23.

⁷⁵ Among Field's successful Supreme Court arguments were *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866) (holding the trial of civilians by military commission unconstitutional); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1867) (striking a loyalty oath as unconstitutional); *Ex Parte McCordle*, 74 U.S. (7 Wall.) 506 (1869) (affirming the power of Congress to "strip" the Court of habeas jurisdiction); and *United States v. Cruikshank*, 92 U.S. 542 (1875) (enforcing the Fourteenth Amendment only against "state action").

⁷⁶ For Field's attack on "agrarian" populism, see David Dudley Field, "Corruption in Politics," (1877) in A.P. Sprague, ed., *Speeches, Arguments, and Miscellaneous Papers of David Dudley Field* (1884), 2:494.

⁷⁷ Cf. Eric Foner, *Free Soil, Free Labor, Free Men: The Ideology of the Republican Party Before the Civil War* (Oxford 1995).

and concluded the international code was best understood as a “public law of Christendom.”⁷⁸ The autonomous liberal individual—free, implicitly white, male, and Protestant (but certainly not zealously so)—was the basic actor in Field’s legal imagination.⁷⁹

In this liberal legal orientation, Field was typical of the American codifiers. Claims of typicality can be dangerous to make, but I have undertaken significant work to substantiate this one by compiling profiles of the American codifiers. Appendix A provides the ages, party affiliations, and professional training and experiences of every major U.S. “codifier,” defined as an originating author commissioned to draft a procedure code in the nineteenth-century United States. While there are of course marginal characters (one secessionist, one black freeman, a couple of laymen), most align with Field’s politics and professional outlook. Political affiliations spanned the spectrum, but nearly all were antislavery unionists in the early or midpoint of their legal careers. Judges were plentiful, but by far the most common experience of code commissioners was trial lawyering. Often that experience came through some kind of federal appointment to the territories, meaning the codifiers were well connected enough to draw the attention of a presidential cabinet member. Indeed, a significant number were the sons, brothers, or law partners of Supreme Court justices, presidents and vice presidents, governors and attorneys general. With a few minor exceptions, the codifiers were every bit as elite and “orthodox” as their opponents who have received the lion’s share of historiographical attention.⁸⁰ And at their center, in most relevant ways the mean and median codifier, was David Dudley Field.

⁷⁸ David Dudley Field, “On a Project for an International Code,” 22 *Law Magazine & Law Review Quarterly* (3d Series, 1867), 151. See also David Dudley Field, *Applicability of International Law to Oriental Nations: Address Before the Institute of International Law at the Hague* (Aug. 1875), 447, 450.

⁷⁹ See Barbara Young Welke, *Law and the Borders of Belonging in the Long Nineteenth-Century United States* (Cambridge 2010).

⁸⁰ Cf. Morton J. Horwitz, *The Transformation of American Law: The Crisis of Legal Orthodoxy, 1870–1960* (Oxford 1992), 117–21. See below for a more detailed discussion of Horwitz’s conception of legal orthodoxy.

* * *

I survey Field's biography at some length here both to introduce the man but also to relieve this dissertation of the burden of biography. What follows is decidedly not a biography of Field. In a way, Field's life was too colorful, complicated, and contradictory for one study to track while simultaneously explicating the civil justice system he attempted to craft. From another perspective, Field's life was much smaller than the life of his code. Field was not, after all, a lone genius laboring in isolation. The original code was produced by a commission of three lawyers which included the equally talented and prolific David Graham, who might have received more credit for the code if he had not died in 1852. Field traveled the world to promote his code, but he did comparatively little traveling in the United States, and it took a host of other codifiers to copy, adapt, promote, and enact the code in other states. While Field moved on in his codification efforts, others like his law partner Thomas Shearman were left to write the treatises that would guide lawyers in the actual practice of the reformed system.⁸¹

A study that stuck too closely to Field's life would thus be overburdened with detail yet remain analytically incomplete. What follows then is not a biography of Field but a biography of a legal text, or more precisely, of a set of legal practices. In this too I take inspiration from Maitland, who preferred organic metaphors in his history of civil practice. In a memorable passage on the early modern forms of action, Maitland wrote, "They are – we say without scruple – living things. Each of them lives its own life, has its own adventures, enjoys a longer or shorter day of vigour, usefulness and popularity, and then sinks perhaps into a decrepit and friendless old age. A few are still-born, some are sterile, others live to see their children and children's children in high places."⁸² Maitland

⁸¹ See John L. Tillinghast & Thomas G. Shearman, *Practice, Pleadings, and Forms in Civil Actions in Courts of Record in the State of New York* (2d. ed., 1865).

⁸² Pollock & Maitland, *The History of English Law Before the Time of Edward I*, 559.

might have added that if Field had had his way, all would have been euthanized in a drafting room in Albany in 1848.

Field, however, did not have his way, not entirely. And though his code would live to see its children seated in high places – most notably in the major federal codification of 1938 – the codifiers of the twentieth century commonly looked on Field’s efforts as quixotic.⁸³ That is one of the peculiarities of historiography on the code. The literature simultaneously treats the Field Code as an inevitable modernization and “rationalization” of obviously obsolete common law practices,⁸⁴ yet also recognizes that for all its inevitability, the code’s modernizing aims were not achieved if at all until the mid-twentieth century.⁸⁵ Lawyers and jurists continued to analogize cases to the forms of action the code had abolished, continued to recognize a distinction between law and equity the code said did not exist, continued to appeal to oaths the code had stripped of sacred significance. As Maitland summarized it in 1909, “The forms of action we have buried, but they still rule us from their graves.”⁸⁶

Here again the approach of ritual studies offers a better guide, I think, than critical legal history. The latter has been the main mode for understanding the limitations of the code, practically since the ink was dry on the session laws. The codifiers themselves certainly believed it to be simply an ongoing contest of political will. What common law lawyers had lost in the legislature the codifiers believed they were trying to usurp from the bench. When the codifiers and their successors sought to explode the “common sense” reasoning of jurists opposed to the code, they attributed it to the jurists’ old age, the natural reluctance of the elites to change, the years of training in common law writs that had closed their minds to reform.⁸⁷

⁸³ See, for instance, Clark, “Addresses on the Proposed Rules of Civil Procedure,” 787 (“Nevertheless, even Field was a lone worker, who carried through, by sheer force of his own intellectual strength, changes at best only half-heartedly supported, and often opposed even after their adoption, by his colleagues of the bench and bar.”).

⁸⁴ See Friedman, *A History of American Law*, 296–97.

⁸⁵ Friedman, *A History of American Law*, 299–301.

⁸⁶ Maitland, *Equity and the Forms of Action at Common Law*, 296.

⁸⁷ See especially *Third Report of the Commissioners on Pleading and Practice* (New York 1849), 4 (“That [the code] is a revolution in legal procedure is certain, and it is equally certain, that that is precisely what was required of the commissioners.” But “they who had mastered [the common law] in youth, had forgotten the distaste with which they

What they should have done, this volume argues, is look to themselves. Their own codes trafficked so much in inherited modes of thought purportedly abolished on the page that legal practice could not have but persisted in a somewhat altered but largely stable form. Despite the codifiers' aim at comprehension, the codes left enormous undefined gaps in the law of procedure and practice, incorporating by assumption a whole world of unarticulated legal practices to keep the codified system running. The difficulty is, as with craft practices generally, those practices with the most staying power were the ones whose logic and effects the lawyers could least articulate at the time.⁸⁸

One lawyer at the time made a fair attempt. A West Virginian common law lawyer named Connor Hall noted in a 1926 editorial that "legislatures have, from time immemorial, enacted statutes that causes should be decided according to the very substance of the right without regard to technical defects." What made such admonitions futile in practice, Hall observed, was practice itself. It was all well and good to speak of the substance of rights, but in actually vindicating a right some sequence had to be followed, some time had to be taken to determine the worthiness of the claim of right, and so technique remained the constant gatekeeper to substance. Hall expressed what for most common law lawyers never had to be articulated:

This is not to elevate practice before, or even to anything approximating equality with the substantive right of the cause. Practice is a mere tool, but in any system of government having anything like a guaranty of private rights and a judiciary of integrity and consistency, there must be a way to bring causes to the attention of the court; to adduce proof; to bear argument; to conclude the cause; to give the proper judgment; to take the proper steps for enforcing it; to seize the property which, perhaps, really belongs to the debtor and not to somebody else, yet at the same time not permit him to hide what he really owns; to grant certain exemptions for the relief or self respect of himself and family and yet not permit these to be abused.⁸⁹

then regarded it, and had come to consider it as something necessary and unalterable," facing "the harder necessity of measuring themselves at a disadvantage with others, having less to unlearn and more power to learn.").

⁸⁸ Cf. Taylor, "To Follow a Rule." See Chapters 4-6.

⁸⁹ As one indication of how out of step Hall's common law defense was in a world of increasingly codified law, the editorial was refused by the American Bar Association's journal of record multiple times. It can be found in the papers of Senator Thomas J. Walsh, Library of Congress Manuscript Division, Washington, D.C. Connor Hall, "Uniform Law Procedure in Federal Courts," unpublished editorial sent to the *ABA Journal*, dated October 15, 1926, pg. 5.

A guaranty of private rights, a consistent judiciary, power over property and judgment over fraud, these and so many other notions served as a bedrock so foundational it need not be named in a procedure code or in any code.

And on this bedrock rested the whole structure of “practice,” which as Hall described it was a “mere tool” that nevertheless contained galaxies within, from defining a cause to giving and enforcing a judgment on it. Despite conceding that procedure was a “mere tool,” Hall concluded his editorial by denouncing “the present scheme” of procedural codification for being too “typically American in its faith in machinery.”⁹⁰ By that Hall meant to condemn the codifiers’ hubris in thinking they could reduce the ineffable law of practice to a few volumes of a code. His metaphor was especially apt. From Field onward codifiers characterized procedure as the “mere machinery” of the law, a neutral, mechanical supplement to the real law that was both inoffensive enough for legislative reform yet technical enough that lawyers had to control it. The problem the codifiers faced was where to draw the line between the machine and the ghost within. The more they treated “procedure” as a synonym for “practice,” the more their codes threatened to swallow the whole of the law and belie their claims that procedure was a narrow and unimportant sub-department of the law. The more they narrowed, the more they tore open the gaps through which uncodified practices poured despite the words committed to the page. The Field Code became the lawyers’ code not just because lawyers controlled the code’s political fortunes and benefited professionally from its enactment, but also because its silences and inconsistencies could be filled only by the American bar’s inherited practices.

That lesson was quickly lost to history. When Frederic Maitland opened a series of lectures on the writ system in 1909, he parodied the typical response of his students: “Substantive law should come first—adjective law, procedural law, afterwards. The former may perhaps be studied in a university, the latter must be studied in chambers. As to obsolete procedure, a knowledge of it can be

⁹⁰ Hall, “Uniform Law Procedure in Federal Courts,” 6.

profitable to no man.”⁹¹ Already by the early twentieth century, the codifiers had largely won their gambit. “Procedure” had taken up its place in both lay and professional understandings as an apolitical, boring and technical sub-department of the law, useful enough for actual practitioners, but unworthy of serious scrutiny. The chapters that follow take inspiration from Maitland in retracing procedure’s steps, showing the politics of procedure’s creation in their contemporary vibrancy, and recounting the consequences for American legal practice and thought after a technical field of procedure became the peculiar preserve of the lawyers. The work is divided into three parts, each with a brief introduction specifically relating these themes to the chapters that follow. Part I surveys the political creation of procedure as the “mere machinery” of the law. Part II describes the background habits of thought and practice that broke through the code’s attempted prohibitions. Part III takes up Hall’s description of the code reforms as “typically American” and maps the features of the code that came to be associated with a distinctively American mode of legal practice.

* * *

Readers passingly familiar with legal history may hear in the subtitle of this study an echo of Morton Horwitz’s *The Transformation of American Law*, a seminal study that perhaps more than any other put legal history on the map of serious academic inquiry in the United States.⁹² But this study uses “transformation” differently than Horwitz did, in two ways. First, Horwitz meant “transformation” in its colloquial sense, as a deep and abiding change to the structure of law across the system. In his telling, nineteenth-century jurists (but mostly judges – lawyers rarely come into the story) refashioned the common law into an instrument of capitalist market development while simultaneously holding off democratic and especially legislative interference with this instrumentalist transformation. To give one example, in Horwitz’s telling, equity – a specialized jurisprudence meant to supplement for the inadequacies of common law remedies – essentially disappeared in the

⁹¹ Maitland, *Equity and the Forms of Action at Common Law*, 295.

⁹² Morton J. Horwitz, *The Transformation of American Law, 1780–1860* (Oxford 1977).

nineteenth century as formalistic common law doctrines of consideration stamped out all remaining trace of equitable regulation of just pricing.⁹³ Thus, and key to the second difference between our accounts, Horwitz meant to tell his story of transformation as a narrative of decline, and a catastrophic decline at that. The transformation of American law was a signal discontinuity of history, a breaking in of a legal modernity where conventional legal categories might remain but were uniformly mobilized in the service of unending market accumulation.⁹⁴

My account departs from Horwitz by using “transformation” in the more technical sense, meaning literally a change in form but not necessarily in essence. As chapter 6 recounts in more detail, equitable practices and pleadings underwent a dramatic change in form under the Field Code, but equity – and above all its conceptual distinction from “law” – remained hardwired in the practices of American lawyers, despite the code’s explicit commands to the contrary. The most significant “transformation” of the period, this study argues, involved the very idea of form itself: the idea that the form of legal action – “procedure” – was severable from the “real,” “substantive” law “itself.” But that transformation was significantly contested and never successfully realized during Field’s long career. The form of the law changed, but what did not change was the continuing power of form to organize and control substance at the core of lawyerly thought and practice.

That perspective does not necessarily make my story a sunny one. The lawyer’s code, in transferring unprecedented power to litigators to design and profit from their own craft unchecked by other forces spawned many dark stories in American history, some of them recounted in Chapters 5, 6, and 7. But a critical difference between this account and Horwitz’s, as well as other recent work on the Field Code,⁹⁵ is that there were lawyers on both sides, a continual refrain of this study. On both sides of every case, of course – sometimes turning newly developed powers under the Field Code

⁹³ Horwitz, *The Transformation of American Law, 1780–1850*, 160–201, 265–66.

⁹⁴ This reading is best captured by Charles Sellers, who relied on Horwitz to describe American lawyers and jurists as the “shock troops of capitalism.” Charles Sellers, *The Market Revolution: Jacksonian America, 1815–1846* (Oxford 1994), 47.

⁹⁵ See especially Kessler, *Inventing American Exceptionalism*, 333–46.

against the code's own author; but also on both sides of the codification debate, both sides of the question of fusing law and equity, both sides on the duties of the lawyer to the public and to the client. In the hands of some, like Field, equity diminished while equitable procedures become the formidable tools of corporate lawyers (and the corporatization of lawyers). But in the hands of others, like Tourgée, equity flourished (within its traditional bounds), and equitable procedures foreshadowed the coming of the powerful civil rights injunction of the mid-twentieth century.⁹⁶ The lawyer's code thus contained all the ambivalences, light and dark, of the United States' long equation of "access to justice" with "access to lawyers."⁹⁷

Numerous studies have challenged Horwitz's thesis on substantive law grounds.⁹⁸ But the studies of particular importance here are those that seek to rehabilitate the reputations of lawyers and legal practices that Horwitz described as "orthodox." The orthodoxy of Horwitz's transformation was above all a commitment to nineteenth-century laissez faire ideology anchored by a stout defense of property rights against the democratically redistributive efforts by legislatures. Recent work by Kunal Parker, David Rabban, and Lewis Grossman has confronted Horwitz while significantly deepening our understanding of nineteenth-century American common law thought. In these accounts, stalwart common law jurists like Thomas M. Cooley and James Coolidge Carter – chief targets of Horwitz – are recast as economic and political progressives who favored redistributive tax systems but who nevertheless maintained a coherent commitment to common law reasoning that often distrusted legislatures and sudden reform.⁹⁹

⁹⁶ See Owen M. Fiss, *The Civil Rights Injunction* (Indiana 1978).

⁹⁷ See Norman W. Spaulding, "The Codification Movement and the Right to Counsel," 73 *Fordham Law Review* 983 (2004); Deborah L. Rhode, *Access to Justice* (Oxford 2004).

⁹⁸ For syntheses, see Wyth Holt, "Morton Horwitz and the Transformation of American Legal History," 23 *William & Mary Law Review* 663 (1982); Laura Kalman, *Transformations*, 37 *Tulsa Law Review* 849 (2002); Robert W. Gordon, "Morton Horwitz and His Critics: A Conflict of Narratives," 37 *Tulsa Law Review* 915 (2002).

⁹⁹ David M. Rabban, *Law's History: American Legal Thought and the Transatlantic Turn to History* (Cambridge 2013), 322–77; Kunal M. Parker, *Common Law, History, and Democracy in America, 1790–1900: Legal Thought before Modernism* (Cambridge 2011), 230–41; Lewis A. Grossman, "James Coolidge Carter and Mugwump Jurisprudence," *Law & History Review* 20 (2002).

The problem with these debates about legal orthodoxy is that they leave the codifiers almost entirely out of the picture. The legal theory work of Cooley and Carter (especially the latter) was devoted to defending common law practice explicitly against the forces of codification,¹⁰⁰ yet these intellectual histories have given us a close reading of the rebuttals without relaying the opening arguments from the codifiers. In part the problem goes back to Horwitz's original schema of legal orthodoxy. Some of the most "orthodox" lawyers, as defined by adherence to laissez faire ideology and elite status among the bar, were codifiers like David Dudley Field and Albion Tourgée.¹⁰¹ But because the codifiers obviously did not share the common law lawyers' critique of legislation (at least not in the same terms), they were excluded from Horwitz's analysis, and from the subsequent intellectual histories provided by Parker and Rabban. This study intends to return the codifiers to their central place in the intellectual history of American common law, as the provocateurs and instigators of the debates that have so far been studied only from one side.

Though lay people appear throughout this volume, this study focuses on elite lawyers, which for the period means politically powerful attorneys residing in economic centers like New York City and various state and territorial capitals. With rare exceptions (such as experimental commissions in the Reconstruction South), those lawyers were white men who, whether training through apprenticeships or university law schools, received a similar education that cobbled together canonical texts with practical know-how passed down from experienced attorneys. The system the codifiers developed did not go unchallenged at any level of society, and in focusing on elite debates, I do not mean to suggest that those debates were the only or even the most important challenges to the codified system of practice. A main goal of this study is to understand the outlook of the codifiers, and (as part of that task) the outlook of those the codifiers understood to be their chief opponents.

¹⁰⁰ See Thomas M. Cooley, "Codification," 20 *American Law Review* 331-38; James Coolidge Carter, *Law: Its Origin, Growth and Function* (Putnam's 1907), iii-iv (arguing that Carter's jurisprudential ideas arose from his contest with Field over codification in New York).

¹⁰¹ See, e.g., Field, "Corruption in Politics," 494; Elliott, *Color-Blind Justice*, 102-28.

There is a great deal more to learn about, for instance, whether freedmen prospered relatively better under code systems, but the results of such study will reveal little about whether Field and the codifiers thought their system was operating successfully.

That brings us back to Albion Tourgée's puzzling indictment of his own codified system in *Bricks Without Straw* with the assertion that "law is the most uncertain thing in the world." Tourgée placed the words in the mouth of an antagonistic sheriff—a layman, technically, but one endowed with official power. The sheriff's claim that Radicals had "tinkered over the law" with the new code was certainly true and a way for Tourgée to compliment himself. As a state district judge, Tourgée was no doubt aware that the sheriff's description of former masters using civil litigation to harass their freed workers was also true.¹⁰² What then of the claim of the law's uncertainty—would Tourgée himself have agreed, or did he believe his code had made the law certain?

In a study of early modern codification, Roger Berkowitz argues that, rather than addressing the problem of legal uncertainty, codification is the original progenitor of that problem. "Lawyers and jurists have been well aware of the impossibility of true and certain interpretations of law since at least the time of ancient Rome," he writes, yet indeterminacy was not equated with injustice until codification redefined the very nature of law. "At the heart of the shift is law's transformation from an insightful knowing of justice into a product of scientific knowledge. As a product of science, law comes to be a justified rule that is knowable in advance and can be applied to particular cases. Only once law becomes a product of science . . . does the indeterminacy of law come to be such a forbidding problem."¹⁰³

Judge Tourgée seems not to have been particularly bothered by the law's uncertainty, and his use of the code pointed forward to the time when judges, rather than lawyers, would become both the

¹⁰² Tourgée, *Bricks Without Straw*, 266–73.

¹⁰³ Roger Berkowitz, *The Gift of Science: Leibniz and the Modern Legal Tradition* (Fordham 2010), xv.

political and professional masters of procedure.¹⁰⁴ A curious feature of a procedure code is that, standing alone, it leaves the law's indeterminacy in the air, as it were. That is why European codifiers saved their procedure codes for last, why Bentham argued procedure ought to be the one area of law left uncodified, and why Maitland's students assumed that procedure would be the last thing they should study rather than the first.¹⁰⁵ That is why major studies of codification debates in the nineteenth century have concluded that America lacked any real codification effort to speak of.¹⁰⁶ A procedure code on its own could not tell you how a case would come out on the merits; it lacked all the certainty that was supposed to be a leading virtue of codification. Perhaps that was its appeal to Judge Tourgée.¹⁰⁷ Planters could not get far in their litigiousness under Tourgée's watchful procedural eye. The writs issued out one day to annoy the freedmen might be re-issued another day to enjoin the nascent Klan. So also in a later century the injunctions that once restrained striking workers might then again integrate their children's schools.¹⁰⁸

When it came to a code of remedial practices, one never quite knew what one would get.

¹⁰⁴ See Judith Resnik, "Managerial Judges," 96 *Harvard Law Review* 374 (1982); Steven S. Gensler, "Judicial Case Management: Caught in the Crossfire," 60 *Duke Law Journal* 669 (2010). See also Chapter 8.

¹⁰⁵ See generally Rhee, ed., *European Traditions in Civil Procedure*; Jeremy Bentham, *Principles of Judicial Procedure with the Outline of a Procedure Code*, in John Bowring, ed., *Works of Jeremy Bentham* (2d. ed. 1843 [1839]), preface; Lobban, *The Common Law and English Jurisprudence*, 127-31 ("The corollary of the defined code would be an undefined procedure."); Maitland, *Equity and the Forms of Action at Common Law*, 295.

¹⁰⁶ R.C. Van Caenegem, *Judges, Legislators and Professors: Chapters in European Legal History* (Cambridge 1987).

¹⁰⁷ See Olsen, *Carpetbagger's Crusade*, 141-42, 180.

¹⁰⁸ See Peter Charles Hoffer, *The Law's Conscience: Equitable Constitutionalism in America* (UNC 1990); Fiss, *The Civil Rights Injunction*.

PART I

THE POSSIBILITIES OF POLITICS

“Who cares for the bar? Legislators alone can change this system, and men very different from those who are now sent must go to the legislature, before one is found, honest enough, or bold enough, to get up and tell the people they are not all fit to be trusted. No, no; this is not the way of the hour.”

—James Fenimore Cooper, *The Ways of the Hour: A Tale* (1850)

“I came near losing a case on a policy of insurance, by filing in *assumpsit*,” the elderly New York City lawyer David Dudley Field recalled in 1891. Reminiscing on his early days in the practice of law, he continued: “When the policy was produced at the trial, the defendant’s counsel insisted that it had a seal and so the action should have been *covenant*.” The faint lighting of the courtroom saved Field’s case, however, because “the judge looking at it without his glasses said he could see no seal and denied the motion for non-suit.” While Field chuckled about his misfiling in the courts of common law, the prominent abolitionist Henry Brewster Stanton spun his own anecdotes about New York’s court of chancery. He claimed to know of a case in which “one witness, coming from Troy, was sworn in.” During the length of the protracted trial, the witness “became acquainted with a young lady, married her, and was a father before he left the stand.”¹

Such reminiscences were common in late nineteenth-century New York as a passing generation of lawyers looked back and congratulated themselves on reforming the practice of law in the United States. Losing a suit for filing in *assumpsit* instead of *covenant*, gathering written testimony for years, bringing suits either “at common law” or “in chancery” — these notions seemed hardly imaginable anymore. Practice had changed in 1848, when New York enacted a code of civil procedure

¹ David Dudley Field, “Law Reform in the United States and Its Influence Abroad,” 25 *American Law Review* 515 (1891), 518. Henry B. Stanton, *Random Recollections* (1885), 142.

drafted in part by David Dudley Field. The code abolished pleading in assumpsit or covenant altogether, fused the systems of common law and chancery, and required oral testimony in open court to keep proceedings brief. By the time these men set down their recollections, procedure systems imitating New York's had been adopted in thirty other states and territories, including nearly every jurisdiction west of the Mississippi.

Scholars have rightly identified the New York Code of Procedure—known since the 1870s as the Field Code—as a major force in modern American litigation and statutory law, but their accounts skip over the focus of lawyers' recorded memories: the politics of law reform. In their less lighthearted moments, the reminiscences of Field and his colleagues about codification almost entirely concerned politics: running for office, currying favor with news media, lobbying law makers and compromising over legislation.² Yet more recent histories of the Field Code speak of a “procedural vision” or of “conceptions of ideal lawsuit structure” as though the codification and reform of legal practice was worked out in a self-contained world of philosopher-jurists.³

That the reform of civil justice in America took the form of a code meant it was accomplished through legislation, and legislation meant politics. Every jurisdiction that adapted code reforms did so through a series of votes that sometimes followed, sometimes crossed party lines. And the codes were enacted during some of the most politically divisive times in the country, among legislatures wrangling with vastly different priorities of governance. The same state legislatures that created the Compromise of 1850, the first instance of women's suffrage in the West, and the first mixed-race

² Major secondary sources on the code include Lawrence M. Friedman, *A History of American Law* (Simon & Schuster, 3d ed., 2005), 293–308; Charles M. Cook, *The American Codification Movement: A Study in Antebellum Legal Reform* (Greenwood 1983), 185–200; John H. Langbein et al., *History of the Common Law: The Development of Anglo-American Institutions* (Aspen 2009), 382–83. For lawyers' reminiscences, see David Dudley Field, *A Third of a Century Given to Law Reform* (1873); Arphaxad Loomis, *Historic Sketch of the New York System of Law Reform in Practice and Pleadings* (1879); William Allen Butler, *The Revision of the Statutes of the State of New York and the Revisers: An Address Delivered Before the Association of the Bar of the City of New York* (1889).

³ Stephen N. Subrin, “David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision,” *6 Law & Hist. Rev.* 311 (1988); Robert G. Bone, “Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules,” *89 Columbia Law Review* 1 (1989).

governments of the Carolinas were also legislatures that adopted Field's code from New York.⁴ By prescribing the design of the civil courts and the powers and remedies judges could administer, and by delineating who could be an officer, a lawyer, a litigant, or a witness, the code dealt with both mundane procedures as well as fundamental issues of constitutionalism and legal philosophy. Accordingly, its reforms were politically volatile and could be shaped by shifting party alliances in an era where those alliances were shifting dramatically.

For this reason, although most accounts of the Field Code prefer to focus on its interpretation in the courts, the first three chapters of this study follow the example of the pioneering American legal historian J. Willard Hurst by casting legislators and lawyers as the "law makers."⁵ Chapter 1 opens this study by considering how changes in legal practices and modes of legislation in New York helped to unite efforts for procedural reform with codification. Chapter 2 traces the political arguments and alignments that brought the procedure code partial success in New York, and Chapter 3 follows that story farther out and further along as other states and territories adopted the code by the end of Reconstruction.

In giving sustained attention to the way politics shaped the reform of the profession and the practice of law, the following chapters echo the arguments of Robert W. Gordon, who thirty years ago called for students of America's codification debates to account for "the immediate political controversies," and "the long-run ideological controversies out of which the codification debate arose." Gordon, however, believed that procedure codes such as Field's did not count as "real codification," for procedure dealt only with surface, "technical" forms. When procedure is changed, "no one calls the result 'law reform,'" he concluded. In Gordon's framework, procedural codification

⁴ See 1850 California Laws 428; 1870 Wyoming Laws 508; 1868 North Carolina Code of Civil Procedure; 1870 South Carolina Laws 2:433.

⁵ James Willard Hurst, *The Growth of American Law: The Law Makers* (Little Brown 1950). On the preference for judicial reception histories, see Friedman, *A History of American Law*, 295; Robert Wyness Millar, *Civil Procedure of the Trial Court in Historical Perspective* (NYU 1952).

served only as a tool for lawyers to hold off the masses with a type of “reform” that did not alter the law in the substantive ways that lay critics and the lower classes demanded.⁶

Similarly, Morton Horwitz has declared that “[t]he desire to separate law and politics has always been a central aspiration of the American legal profession” as jurists sought to protect elite interests against popular democracy.⁷ Horwitz identifies “orthodox legal thought” and “orthodox lawyers” with the elite of the American bar who sought to shield the law from political interference, which above all meant crusading against legislation and especially codification. The lawyers of Horwitz’s account understood that legislative politics were contingent, willful, and thus capable of undermining law as a stable, objective social force. Conveniently for elite lawyers, Horwitz argued, rule of law concerns coincided with the rule of wealth. If all law could be codified and all codes amended as easily as any other legislation, foundational principles of property and contract might be overturned in a rush of redistributive zeal among the electorate.⁸

The following chapters tell a story that is more complex and challenges central aspects of these accounts. Because procedural law controlled access to court-ordered remedies, calls for legal reform among the lay masses often were calls for procedural reform – not always radical change to the rights of property, but changes to the way those rights could be recognized, vindicated, and enforced. Gordon’s idea that procedural reform did not count as “real” reform was actually an idea the reformers themselves created. By drawing a line between procedure and substance, reformers hoped to open the former domain to greater political influence and legislative change.

Moreover, the lawyers involved in these politicized reforms to legal practice were every bit as “orthodox” as any Horwitz studied. David Dudley Field received elite training in New York City, led one of Manhattan’s most lucrative law practices, and became president of the American Bar

⁶ Robert W. Gordon, “The American Codification Movement,” 36 *Vanderbilt Law Review* 431 (1983), 436, 439–41.

⁷ Morton J. Horwitz, *The Transformation of American Law, 1780–1860* (Oxford 1977), 258–59.

⁸ Morton J. Horwitz, *The Transformation of American Law: The Crisis of Legal Orthodoxy, 1870–1960* (Oxford 1992), 117–21.

Association. When the code migrated to the rest of America, it was carried by eminent trial lawyers, future U.S. Supreme Court justices, law professors, and the founders and leaders of state and national bar associations. None of these lawyers avoided legislative politics, and many were much more protective of private property and laissez faire political economy than were the leaders of Horwitz's orthodoxy.⁹

Nevertheless, if the reforms of civil practice were more radical, politically risky and contingent than scholars have allowed, they were not the result of an unguided or unmediated democracy. Rather, in every jurisdiction and along every step in the political process, the implicit condition of reform was control by lawyers. As the lawyer-protagonist of James Fenimore Cooper's final novel complained, those who cared for the bar had "to get up and tell the people they are not all fit to be trusted."¹⁰ Lawyers engaged in legislative politics to reform their profession and practice, but they encouraged legislators to defer to their expertise by taking advantage of short sessions and appointive commissions. Quite apart from its contents, the very manner of its enactment ensured the legislation would become a lawyer's code.

⁹ Recent work has challenged Horwitz's account by showing how elite common law lawyers, particularly Horwitz's main target James Coolidge Carter, were actually political progressives who supported redistributive legislation such as the income tax. See, for instance, David M. Rabban, *Law's History: American Legal Thought and the Transatlantic Turn to History* (Cambridge 2013), 322-77; Kunal M. Parker, *Common Law, History, and Democracy in America, 1790-1900: Legal Thought before Modernism* (Cambridge 2011), 230-41; Lewis A. Grossman, "James Coolidge Carter and Mugwump Jurisprudence," *Law & History Review* 20 (2002). These accounts follow Horwitz, however, in focusing on the few outspoken opponents of codification, rather than the elite lawyers who sponsored the procedure codes. Among the latter group could be found some of the most devout theorists of laissez faire economics in nineteenth-century America, including David Dudley Field and his brother, the Supreme Court Justice Stephen Johnson Field. See Philip J. Bergan, "David Dudley Field: A Lawyer's Life" and Charles W. McCurdy, "Stephen J. Field and the American Judicial Tradition" in *The Fields and the Law: Essays* (Federal Bar Council 1986).

¹⁰ James Fenimore Cooper, *The Ways of the Hour: A Tale* (1850), 84. For an analysis of Cooper's philosophy of law and his critique of the New York law reform, see Charles Hansford Adams, *"The Guardian of the Law": Authority and Identity in James Fenimore Cooper* (Penn State 1990), 135-48.

Chapter 1

The Rule of Writs

Civil Justice Before the Code

In an 1854 essay, Charles Dickens compiled his favorite “legal and equitable jokes,” which, to his relish, were “all of a practical nature” – the pun uniting practical jokes with the practices of the law. In the guise of an English barrister, Dickens lamented that “the leveling spirit of the times has destroyed some of the finest practical jokes connected with the profession.” But despite mid-nineteenth century reforms to legal practice, which Dickens located in democratic politics, the narrator still found many “practical” jokes in the law:

A sea-captain ejected from his ship a noisy and drunken man, who misconducted himself; and at the same time turned out certain pot-companions of the drunken man, who were as troublesome as he. Bibo (so to call the drunken man) bringeth an action against the captain for assault and battery; to which the captain pleadeth in justification that he removed the plaintiff ‘and certain persons unknown,’ from his ship, for that they did misbehave themselves. ‘Aye,’ quoth the learned counsel for Bibo, at the trial, ‘but there be seventeen objections to that plea, whereof the main one is that it appeareth that the certain persons are *known* and not *unknown* as by thee set forth.’ ‘Marry,’ crieth the court, ‘but that is fatal, Gentlemen of the Jury!’ Verdict accordingly.

Dickens admitted that “with great delay and expense” the sea-captain eventually “got judgment in his favour. But, no man to this hour hath been able to make him comprehend how he got it, or why; or wherefore the suit was not decided on the merits when first tried.” The joke, commented the narrator, put “the density, obstinacy, and confusion of the sea-captain in a richly absurd light.” Of course, the real professional target of Dicken’s joke was not the mariner but the lawyer, the bitter irony being that Dickens described an actual case at common law.¹

¹ Charles Dickens, “Legal and Equitable Jokes” (1854) in *The Works of Charles Dickens: Miscellaneous Papers* (Chapman & Hall 1911), 14:477, 480–81. Dickens embellished the details of a case reported by Graham Willmore, the counsel for the

Dickens's joke conveyed the central concerns of mid-nineteenth-century law reform both in England and America. Suits, reformers complained, were too often determined on "technicalities" – like the wording of an immaterial part of the pleadings – instead of on "the merits." Even when ordinary litigants like the sea captain obtained justice, they failed to understand the language of the courts that provided it. Such, at least, were the complaints about the courts of common law. The Court of Chancery inspired its own "equitable" jokes that frequently focused on the extreme costs and delays of equity suits. Dickens offered one that repeated the plot of his 1853 novel *Bleak House*: Creditors brought suit against a decedent's estate and won their decree. "But, the property realizing seven hundred pounds, and the suit costing seven hundred and fifty, these creditors brought their pigs to a fine market, and made much amusement for the Chancery Bar."² Similar jokes – whether purporting to relate actual cases or rhetorical exaggerations – abounded among the American bar as well.³

Although such humor at the expense of the legal system may reveal the perceptions of contemporaries, American legal historians have tended to take the jokes too seriously. They often tell the story of the practice and profession of law as one of relatively smooth and inevitable modernization. Inherited technical rules were obviously absurd, but they remained entrenched within a professional bar that could deny access to any who refused to play the game by its medieval rules. The rules changed only when they encountered equal and opposite forces of commerce. Business demanded certainty, it is said. The "slow ritual dance" of common law practice thus had to give way to a system where law was clearly and systematically codified and where remedies would not be snared in technical traps.⁴

steamer captain. See *First Report of the Commissioners Appointed to Inquire into the State of the County Courts and the Course of Practice Therein*, No. 1914, *House of Commons Sessional Papers* (1855), 18:162.

² Dickens, "Legal and Equitable Jokes," 478.

³ For two particularly rich sources of anecdotes and jokes about the New York bar, see Henry B. Stanton, *Random Recollections* (1885); Charles Edwards, *Pleasantries about Courts and Lawyers of the State of New York* (1867).

⁴ Lawrence M. Friedman, *A History of American Law* (Simon & Schuster, 3d. ed., 2005), 294–97; Alison Reppy, "The Field Codification Concept," in Alison Reppy, ed., *David Dudley Field Centenary Essays* (1949), 17, 34–36; Charles M. Cook, *The American Codification Movement: A Study in Antebellum Legal Reform* (Greenwood 1983), 187–88.

The following account offers a different perspective. It takes the jokes literally without taking them too seriously. By the nineteenth century, the practice of law had created a complex system of civil justice that, unlike histories juxtaposing static views of “pre-modern” with “modern” practice, was constantly evolving. Small changes in one department of practice might create unexpected chaos across the system, those unforeseen turns highlighted by lawyer jokes. But, as it had for centuries, Anglo-American civil practice found ways to work, as even critics at the time had to admit. The ardent Jacksonian lawyer Charles O’Conor roundly criticized technicalities and fictions in the common law, in which “almost throughout, the allegations in [a legal] declaration are false to every common and ordinary intent.” Nevertheless, he conceded, “the relation between the fiction in the pleadings, and the truth it represented, was well understood by lawyers and judges; and between them, they could instruct the jury to bring in such a verdict as worked out the ends of justice.”⁵ This chapter recovers some of the professional understanding that made the common law work, even as it traces growing anxieties among lawyers that the system was failing and in need of serious reform.

At the end of the nineteenth century, the English legal historian Frederic Maitland offered a sympathetic account of the early “technicality” of legal practice. Maitland cautioned modern lawyers inclined to sneer at the rigid adherence to common law forms that “formalism is the twin-born sister of liberty.” The technical limitations of pleading according to common law writs had checked royal judges from making law according to their own sense of fairness, a sense that Maitland reasonably believed was opposed to the interests of ordinary litigants. Over time, as it became clear that more discretionary authority could be “safely entrusted to judges whose impartiality is above suspicion and whose every act is exposed to public and professional criticism,” the writs could be “made to do work for which they were not originally intended, and that work they can only do by means of fiction.”

⁵ William G. Bishop & William H. Attree, eds., *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of New York* (1846), 562 (O’Conor). On the construction of a pre-modern legal order out of the anxieties of modern theorists, see Steven Wilf, “The Invention of Legal Primitivism,” 10 *Theoretical Inquiries in Law* 485 (2009).

Together, technical form and legal fiction struck a balance between judicial discretion and rule-bound jurisprudence. “We shall do well to remember,” Maitland concluded, “that the rule of law was the rule of writs.”⁶

This chapter describes New York under the rule of writs in and around the 1820s, a decade of feverish law reform in both England and America. Subtle changes in the practice of law coupled with industrialization and an expanding economy brought unprecedented strains on the daily work of practitioners. At the same time, jurists continued to pursue a century-long project to reformulate the common law as a system of principles and rules rather than a set of ad hoc practices and modes of reasoning about legal remedies – a movement, in Maitland’s phrasing, from a rule of writs to a rule of law. In both England and New York, prominent law reformers joined these concerns with practice and theory in a proposal for codification, a project that could elaborate and systematize legal rules while reforming traditional practices. New York’s experiment with codification in the 1820s failed to end the rule of writs, but it sharpened ideas about legislative supremacy and practical reform. It also provided the legislative strategy that legal reformers would later use to steer codification through the vicissitudes of politics.

The Science of the Attorneys: Common Law Practice and Principles

In 1847, “when alterations of a very extensive character in the body of practice itself, are generally anticipated,” a young law professor named David Graham Jr. (1809–1852) published the third edition of his popular treatise on common law practice in New York. Graham felt “much embarrassed” about advertising a treatise that might soon become obsolete, but he reasoned “that whatever may be the character of that system, it will not so wholly remove the ancient landmarks of the practice, as to render a work based upon the existing system wholly valueless.” After the first

⁶ Frederick Pollock & Frederic William Maitland, *The History of English Law Before the Time of Edward I* (Cambridge, 2d ed., 1898), 561–62.

volume was published, the legislature appointed Graham along with David Dudley Field and one other lawyer to a commission to revise New York's pleading and practice. Their efforts removed more ancient landmarks than Graham had anticipated, and a second volume never appeared.⁷ Nevertheless, Graham's partial treatise, covering ordinary proceedings from pleading to judgment, provides an invaluable examination of New York practice on the very eve of the Field Code.

The New York legal system described in the treatise closely mimicked English legal institutions, especially in the division between two separate and sophisticated court systems known as common law and equity. The distinctive feature of the common law courts was their reliance on trial by jury to resolve disputed "facts," while judges ruled on questions of "law." A jury might be charged to say whether a party had, in fact, expressed certain promises, but a judge would rule on what legal rights and remedies arose from such a promise.⁸ Many hailed jury trial as an essential right, one guaranteed by both the state and federal constitutions, but some lawyers – like Charles O'Connor – complained that common law practice had become burdensome because of the jury requirement. "Jurors were originally very ignorant," O'Connor explained, and many of the rules accommodating their ignorance remained fundamental features of practice. Common jurors were not expected to answer complex questions of intent, so the wording of an agreement was binding at common law. Jurors might be easily misled by the self-interested (and probably false) testimony of litigants, so all parties to litigation were forbidden from testifying. Cases had to be simplified for juries, and ideally this meant that only a single issue of fact should be presented to the jury, who could then weigh the proofs of one precise question and render a yes-or-no answer.⁹

⁷ David Graham, *A Treatise on the Practice of the Supreme Court of the State of New York* (3d. ed., 1847), v–vii. For a more concise introductory account of Graham's views on the common law, see David Graham Jr., "The Practice of the Law, As Illustrated in the Study of Pleading and Practice," in *Inaugural Addresses Delivered by the Professors of Law in the University of the City of New York at the Opening of the Law School of That Institution* (1838), 51.

⁸ The leading treatises on common law practice in pre-code New York include Alexander M. Burrill, *A Treatise on the Practice of the Supreme Court of the State of New York*, 2 vols. (1840; 2d. ed., 1846); David Graham, *A Treatise on the Practice of the Supreme Court of the State of New York* (1832; 2d. ed., 1836).

⁹ Bishop & Attree, *Report of the Debates*, 562–64 (O'Connor). See also Alexis de Tocqueville, *Democracy in America*, ed. J.P. Mayer, trans. George Lawrence (Fontana 1969 [1839]), 276 ("The jury system arose in the infancy of society, at a time

Yet even before the novelties introduced by the 1848 code, the system Graham described had been one of continual change and innovation. From the 1820s to the '40s, New York had undertaken significant reforms to the practice of law nearly every year. Equity courts had begun experimenting with jury trial, while the courts of common law were borrowing informal proceedings and investigative practices from equity. Only in 1845 had the state begun to standardize admissions to the bar.¹⁰ Nevertheless, Graham began his treatise where practice treatises commonly began, in the reign of Edward I (r. 1272–1302). Despite how much common law practice was changing in the nineteenth century, practical jurists like Graham continued to organize the subject around the medieval writ system.¹¹

As Graham explained it, the writ system developed out of the king's prerogative to grant remedies to his injured subjects. "When any one had received an injury, for which he wished to obtain redress, he made application or petition to the king himself, as the fountain of justice," and the king's chancellor "framed or selected a writ" to remedy the harm. The writ, Graham explained, "was nothing more than a letter" to a local sheriff explaining a plaintiff's injury and requiring the sheriff to exact a remedy from the defendant or else summon the defendant to explain himself before the king's officers, the royal judges sitting at the courts of common law. Over time the form of the writs became standardized. Rather than draft a new writ for each case, the chancellor's staff relied on previous writs as precedents to redress similar injuries and compel similar remedies. "But now," through that process of standardization, Graham wrote, the writs "had assumed a new character;— they were invested with

when only simple questions of fact were submitted to the courts; and it is no easy task to adapt it to the needs of a highly civilized nation, where the relations between men have multiplied exceedingly and have been thoughtfully elaborated in a learned manner.") On the ambivalent attitude of nineteenth-century lawyers towards the jury, see especially Renée Lettow Lerner, "The Failure of Originalism in Preserving Constitutional Rights to Civil Jury Trial," 22 *William & Mary Bill of Rights Journal* 811 (2014).

¹⁰ Graham, *A Treatise on the Practice of the Supreme Court*, 149–52, 408. See also David Graham, *A Treatise on the Organization and Jurisdiction of the Courts of Law and Equity in the State of New York* (1839), 364, 490–91, 556–75.

¹¹ See, for instance, Burrill, *A Treatise on the Practice of the Supreme Court*, 1:20; John Wentworth, *A Complete System of Pleading* (Dublin ed., 1791 [1677]); William Bohun, *The English Lawyer* (1732); George Crompton, *Practice Common-Placed* (1780).

the authority of precedents;—were considered as evidences of the law;—their form could not be changed;—and no *new* one could be framed but by the aid of parliament.” Instead of a guide to practice, the standard writs had become the law of practice. “The *register of writs*, instead of being a book of mere forms, . . . had now, without any express legislative sanction, become a *compendium of legal remedies*.”¹²

The number and nature of writs that made up this compendium varied over time; some fell out of use while others took on new significance when fictions stretched their reach over more cases. Graham counted fifty-one writs by the reign of Edward I but only fourteen in contemporary New York (others said ten).¹³ Each sought a particular remedy to a different type of harm. Covenant granted a plaintiff money damages for an unpaid contract, while *assumpsit* provided money damages for an unperformed contract. *Replevin* recovered personal goods, while *trover* recovered money damages for the value of those goods. Following form and guided by precedent, much of the writ might be fictional. For *trover*, a plaintiff claimed to have possessed goods, lost them, and then discovered that the defendant found the goods and converted them to his own use. “The conversion is the gist of the action, the remainder being a mere fiction,” Graham explained. So in cases where a defendant manufactured defective goods, stole personal property, or misdelivered on a contract, the plaintiff used the same fictional story of losing and finding in order to plead for the desired remedy: money damages for the value of the (damaged, missing, or stolen) property.¹⁴

With this background, one can appreciate the argument of the English legal historian Michael Lobban that “historians cannot understand the common law of the period unless they come to terms

¹² Graham, *A Treatise on the Practice of the Supreme Court*, 401–03.

¹³ Graham, *A Treatise on the Practice of the Supreme Court*, 402. David Dudley Field numbered the forms at ten, down from a high of fifty-nine. See *First Report of the Commissioners of Practice and Pleadings* (New York 1848), 139. See also, George van Santvoord, *A Treatise on the Principles of Pleading in Civil Actions under the New York Code of Procedure* (2d. ed. 1855), 24 (“At the adoption of the Code, in this State, there were but ten forms of personal actions.”).

¹⁴ The language quoted comes from Graham’s second edition (1836) at page 172. The later edition used more technical language. Graham, *A Treatise on the Practice of the Supreme Court*, 451 (“It is founded on the supposition, that the chattel came into the defendant’s possession by finding, and that he afterwards converted it to his own use; but the allegation of finding is, in general, a mere fiction, and the conversion is the only thing material or traversable.”).

with its intrinsic nature as a system of remedies, and see the importance of the practitioners' view." Practicing lawyers, Lobban writes, saw the common law not so much as a system of rules as "a form of reasoning working within a set of remedies." And from the sixteenth through the nineteenth centuries, the sources of this remedial reasoning were quite varied. Lord Edward Coke (1552-1634) listed twenty such sources, ranging from moral theology to the formulaic precedents in the register of writs.¹⁵ Lawyers at the time were much less inclined than their modern counterparts to speak of "rights," and much more likely to speak of "wrongs" and their "remedies." "The essence of common law pleading was to show the court that one had suffered a wrong for which the defendant was to blame," Lobban summarizes.¹⁶ On this account, trover was not a clumsy device for safeguarding a coherent set of legal rights. Rather, trover was a remedy—the payment of money for the value of goods. Over time, judges and lawyers had reasoned their way towards a set of wrongs in which a defendant's blame could be clearly proved, goods could be easily valued, and thus the harm could be remedied by transferring payment for those goods. The fiction of finding and losing operated as an analogy: The harm of a particular case was like the harm suffered when a defendant failed to return lost goods, and thus it deserved the same remedy.¹⁷

By the turn of the nineteenth century, a number of English and American jurists had become dissatisfied with the haphazard remedial basis of the common law and sought to reformulate the law as a rule-based system. William Blackstone's *Commentaries* (pub. 1765-1769) made the first attempt to present the common law as a set of principles derived from an autonomous science of jurisprudence

¹⁵ See *The First Part of the Institutes of the Laws of England; Or a Commentary on Littleton*, ed. Francis Hargrave & Charles Butler (17th ed., 1817), 1:11. See also Thomas Reeve, *Lord Chief Justice Reeve's Instructions to His Nephew Concerning the Study of Law* (1791); Frederick Ritso, *An Introduction to the Science of Law* (1815).

¹⁶ Michael Lobban, *The Common Law and English Jurisprudence 1760-1850* (Clarendon Press 1991), 6-9, 53-55.

¹⁷ As Lobban has more recently written, through fictions judges could tentatively propose and "test" adjustments to their remedial powers without engaging in legislation, the domain of Parliament. While fictions might mean the reality was the very opposite of what was stated in the pleadings, fictions nevertheless followed rules of their own. They worked within existing legal practices and strictures to offer "a method used by lawyers who wanted to reform the law, without offending those who wished to see the old law preserved." Michael Lobban, "Legal Fictions before the Age of Reform," in *Legal Fictions in Theory and Practice* (Springer 2015), 217.

rather than ad hoc remedial reasoning drawn from a variety of sources. While practitioners appreciated Blackstone's organization for an elementary study of the law, they found his jurisprudence nearly worthless as a description of how common law cases were actually decided in practice. After Blackstone, treatise literature tended to divide between works of theory, which like Blackstone tried to discern the principles and rules operative in the common law, and works more suitable for actual practice, which tended to follow the outline of the writ system and advised on the proper framing of the pleadings.¹⁸

Those who sought to re-describe the common law as a system of rules faced a longstanding challenge in intensified form: the problem of the oracular judge. Blackstone divided the sources of common law rules into the "written" statutory law of Parliament and "unwritten" customs that judges decreed as "the living oracles" of English law and custom; but a number of eighteenth-century constitutionalists disputed the authority of judges to promulgate law. Critics of the royal judges argued that judges lacked the representative capacity to create general legislation, and without a definite and certain set of rules, their oracular decrees could descend into arbitrary despotism.¹⁹ After the age of Blackstone, common law theorists struggled to describe what judges actually did in a way that legitimized their apparent role as law-makers.²⁰

In 1824, the English serjeant Henry John Stephen took a novel approach to the problem by theorizing the most practical department of the law, the law of pleadings. Stephen claimed his treatise was the first to be "intended for the use rather of those who are exploring the principles, than of those

¹⁸ See Lobban, *The Common Law and English Jurisprudence*, 26–46 (listing treatises of each kind).

¹⁹ Lobban, *The Common Law and English Jurisprudence*, 123–51. At the turn of the nineteenth century, Jeremy Bentham had become one of the most trenchant critics of "judicial legislation." See Jeremy Bentham, *Of Laws in General* (ed. H.L.A. Hart 1970 [1782]), 158–68. See also David Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth-century Britain* (Cambridge 1989), 219–40.

²⁰ Blackstone supposed common law cases acted as precedents to create definite and certain rules, but as Lobban notes, his "discussion of the role of judges and judicial precedents was confusing and allusive . . . largely because he placed this discussion in the context of a treatise seeking to define law as a system of rules, and because he therefore spent very little time discussing the process of legal reasoning by judges." Lobban, *The Common Law and English Jurisprudence*, 33. In the same chapter Blackstone treated custom both as a definite set of certain rules but also as an ineffable practice of judicial reasoning. 1 *Blackstone's Commentaries* 68–70.

who are engaged in the practice” of pleading, and the attempt became especially popular among American lawyers and codifiers. Rather than summarizing the case law on pleading writ by writ, as practical treatises did, Stephen presented a systematic set of “rules” for pleading, such as “a pleading which is bad in part, is bad altogether.”²¹ Most of Stephen’s rules focused on “singleness of issue,” which he thought dodged the problem of judicial lawmaking. In the theory of single-issue pleading, the goal of common law pleading was for parties to agree among themselves upon one and only one question that divided them. This single question could then be resolved by the judge if the question turned on a point of law, or by the jury if it turned on the facts. Stephen argued that this process created a “public adjustment” of “the precise question for decision,” and against this “public adjustment” Stephen posed the “private discretion” of oracular judges.²²

Alone among the world’s legal systems, Stephen argued, common law pleading gave judges no discretion in framing a dispute and thereby influencing it by pre-judging a case or creating openings for their own legal innovations. “In almost every plan of judicature,” he wrote, pleadings were made “at large.” Each party told his own story at length and “indulge[d] in such amplification . . . [to] put the case of the particular party in the fullest and most advantageous light, and to propound the facts in such form as may be thought most impressive or convenient, though at the expense of clearness or precision.” Every such pleading could follow a different organization centering on different theories of right. Defendants’ answers did not necessarily mirror plaintiffs’ allegations, and so “it will always be in some measure doubtful . . . in what exact sense, the allegations on one side, are disputed on the other.” A judge in such a system necessarily had to exercise his own discretion to say

²¹ Henry John Stephen, *A Treatise on the Principles of Pleading in Civil Actions* (2d. ed. 1827 [1824]), vi, 448. Francis J. Troubat edited and produced an American edition of Stephen on pleading approximately every five years from 1831 to 1857, and American editions continued to appear until the end of the nineteenth century. The Field commission cited Stephen as “one of the ablest commentators” on pleading, and other commissions spoke just as highly of Stephen’s authority. *First Report of the Commissioners on Practice and Pleadings* (New York 1848), 81–82; *The First Report of the Commissioners to Revise the Rules of Practice and Pleadings* (Maryland 1855), 79; *Report of the Commissioners on Practice and Pleadings* (Ohio 1853), 3, 50–53; Report of W.F. Cooper, in *Journal of the Senate of the State of Tennessee* (Tennessee 1857), 189.

²² Stephen, *A Treatise on the Principles of Pleading*, 498.

precisely what a dispute was about, which points should be proved at trial, and whether new rules of law were required. The common law, on the other hand, aimed “to preclude the exercise of any discretion, in extracting from [the parties] the true question in controversy.” Fictional pleadings aided this enterprise. Parties could not organize their pleadings to tell a good tale or shade the facts if all they could plead was the traditional story of casually losing their goods. The half-fictional forms of action thus comprised a limited set of propositions with which an adversary could take issue, and a party took issue by precisely denying one of those propositions. Stephen analogized such pleading to

that analytical process, by which the mind, even in the private consideration of any controversy, arrives at the development of the question in dispute. For this purpose, it is always necessary to distribute the mass of matter, into detached contending propositions, and to set them consecutively in array against each other, till, by this logical conflict, the state of the question is ultimately ascertained.

The difference was that the common law required this process to be performed on the record, in writing, thus creating a “public adjustment” of the dispute. European procedure purportedly allowed this process to unfold in the private mind of the judge.²³

In practice, maneuvering a case towards a single issue could be one of the most technical and cumbersome aspects of the law. In almost every dispute, parties had multiple disagreements about the facts or the legal theories that supported their claims. If a party believed he had multiple defenses—say, that the statute of limitations had run on a contract claim and that the contract was illegal and void—he had to choose one defense on which to stake his case. That, however, was the virtue of the system to Stephen. The parties, and not the judge, chose the dispositive issue. Whether that issue was a trivial argument about the pleadings themselves or a material disagreement about possession of goods, the parties consented to a trial on that single ground, the judge convened the trial on the parties’ terms, and the parties had to live with the consequences of their own choices.²⁴ This, to Stephen, was the rule of writs. It granted that oracular judges might indeed make law, but it

²³ Stephen, *A Treatise on the Principles of Pleading*, 86 n.29, 498–502.

²⁴ See, e.g., Stephen, *A Treatise on the Principles of Pleading*, 78–87.

minimized their reach. Judicial officers had to decide a limited question within a particular case, and adjustments to the rules had to be demanded by litigants in properly pleaded arguments that left no room for judges to make law from their own discretion.

Coming from a seasoned practitioner with a bent towards theory, Stephen's *Treatise* helpfully articulated what most practicing lawyers took for granted. The oracular judge was mostly a problem for those who sought to describe the common law in the abstract, as a set of rules apart from the practices that produced those rules. When David Graham wrote his practitioner's treatises in New York a decade later, he, like most practitioners, ignored concerns about the sources of law and instead provided the exacting details for proper pleading. He did, however, add one refinement to Stephen's account. Graham believed the development of the writ system "completed an entire revolution," not because it constrained the judges but because it turned the system over to the lawyers. Once the writs "were granted by the proper officers of the court, as a matter of course, without inquiry or examination, upon payment of the established fees," then "the selection or application of them, in practice, had become the science, if such it could be called, of the attorneys." From then on, "when a party had sustained an injury, which required redress, he applied to his attorney, who determined upon the proper form of writ, and sued it out accordingly."²⁵ Thus, to speak more precisely than Stephen had, it was not the parties that crafted single issues or consented to trial, it was their counsel. In common law practice, the rule of writs was the rule of lawyers. Attorneys became the agents of legal change as they bent and amended the forms to provide a remedy in a case that did not quite fit the precedents. Only after lawyers for both sides had adequately framed the dispute and offered plausible arguments was a judge called upon to accede to or deny the remedy.²⁶

²⁵ Graham, *A Treatise on the Practice of the Supreme Court*, 404.

²⁶ See also Lobban, *The Common Law and English Jurisprudence*, 53–54 ("The law was therefore no core set of principles, but developed in a haphazard way as lawyers attempted to solve daily problems for their clients. It was fashioned by the ingenuity of lawyers often trying to evade problematic rules.").

Equity Follows the Law: Practice in Chancery and Principles of Equity

Both in England and New York, a separate court of chancery administered an equity jurisdiction which was supposed to ameliorate the jury-based limitations of common law practice in order to “do equity” between the litigants. A single judge—the chancellor or his representative—presided over equity cases and, unlike a jury, could rule on complicated questions of intent, fraud, and abuse of common law procedures that resulted in injustice. In time, chancery gained exclusive jurisdiction over bodies of law deemed too complex for jury trial, such as the law of mortgages, trusts, and guardianships. Although parties were still barred from directly testifying, a procedure known as discovery could put a party under oath to provide factual information through the written pleadings.²⁷

By the nineteenth century, equity had a substantial literature of both practical and theoretical treatments. In 1843, the prominent New York case reporter Oliver Barbour (1811–1889) produced yet another practical treatise on equity. He observed that unlike common law treatises, which were almost universally organized according to the writ system, “no two [equity treatises] are alike, or even similar, in the general plan or the arrangement.” Barbour attempted to organize the field according to the chronology of a case, from pleading to decree, followed by enforcement, but he admitted the third section of the work had to be “a sort of omnium gatherum” of topics that did not fit easily in the first two sections. The organization illustrates what struck many practitioners as the distinctive feature of equity: its abandonment of the writ system. Charles O’Conor summarized equity practice this way: “There was literally no form about it. The party stated his case, and asked the relief he desired, and the court, if he proved his case, gave him the relief.”²⁸ That is, O’Conor described equity’s forms of proceeding in order to prove equity did not have forms of proceeding.

²⁷ The leading treatises on common law practice in pre-code New York include Joseph W. Moulton, *The Chancery Practice of the State of New York*, 2 vols. (1829); Joseph Parkes, *The Statutes and Orders of the Court of Chancery and the State Law of Real Property of the State of New York* (1830); John Sidney Smith, *A Treatise on the Practice of the Court of Chancery: With an Appendix of Forms and Precedents*, ed. David Graham Jr. (2d. American ed., 1842); Oliver Barbour, *A Treatise on the Practice of the Court of Chancery* (1843).

²⁸ Barbour, *A Treatise on the Practice of the Court of Chancery*, iv–vi; Bishop & Attree, *Report of the Debates*, 562 (O’Conor).

What O'Connor meant was that equity did not have forms of action in the same way that common law did. Equity did, however, have standard forms of practice and pleading, and Barbour devoted hundreds of pages of commentary to these forms. Equity did not generally allow fictions in pleading, but in the same way that fictions illustrated the historical development of a common law writ (like the origin of trover in cases of losing and finding property), the typical equity plea recapitulated the development of chancery as an ancillary jurisdiction to the courts of common law.

As a matter of course, a litigant at chancery pleaded that "your orator is remediless in the premises at and by the strict rules of the common law." An equity court, that is, was asked to intervene when strict adherence to common law practices caused a failure of remedy, perhaps because money damages were an insufficient remedy or perhaps because only the defendant had knowledge of the relevant facts but could not be called to testify. It also implied that if common law processes and remedies were sufficient, no claim could be supported in equity.²⁹ Whereas common law courts awarded money damages or title to land, equity petitions frequently prayed for a remedy against a defendant "personally." Chancery could order a party to give evidence under oath, turn over property, or refrain from acting (including a restraint against litigating at common law) on penalty of imprisonment of the defendant's person (a procedure known as contempt). Pleadings routinely concluded with a request for a decree "as shall be agreeable to equity and good conscience." That concluding prayer made a virtue of the type of judicial discretion the common law writ system sought to avoid. Instead of precluding a judge from framing the case and constructing new rules of law at his own initiative, the equity petition specifically invited such behavior.³⁰

²⁹ See, e.g., Barbour, *A Treatise on the Practice of the Court of Chancery*, 567.

³⁰ See, e.g., Barbour, *A Treatise on the Practice of the Court of Chancery*, 37. On the maxim that equity acts in personam, or "on the person," see Joseph Story, *Commentaries on Equity Pleadings and the Incidents Thereto* (1838), 315; William Wait, *A Treatise upon Some of the General Principles of the Law* (1885), 1:20-21; Walter Ashburner, *Principles of Equity* (1902), 59-97.

The problem of the oracular judge was therefore more acute in the chancery system, and when critics attacked judicial lawmaking, the chancellor was often their main target.³¹ The most well-known American theorist to answer the challenge was the Harvard professor and Supreme Court justice Joseph Story (1779–1845). In his 1834 *Commentaries on Equity Jurisprudence*, Story by his very title joined the enterprise of Blackstone and Stephen in describing the law in terms of rules rather than practices. If equity followed a jurisprudence it was not the creature of “discretion” and “conscience” that so many previous commentators had described. Story lamented that “many persons are misled into the false notion” that equity’s “real and peculiar duty” was “correcting, mitigating, or interpreting the law.” His treatise was dedicated to the opposite proposition, the maxim “that Equity follows the law.” Story purposely chose to make that ambiguous maxim central to his treatise. By it he meant not just the practitioner’s explanation that equitable remedies were available only after common law remedies had failed – that a successful suit in chancery had to follow an unsuccessful one at common law – but also that chancery “seeks out and guides itself by the analogies of the law.” By adhering to precedent, statute, and even form, Story insisted that equity was as limited and law-bound as the common law.³²

Story began his treatise by surveying what he believed were false notions of equity that continued to be perpetuated by commentators. “In the most general sense, we are accustomed to call that Equity, which, in human transactions, is founded in natural justice, in honesty and right,” but, Story cautioned, “it would be a great mistake to suppose that Equity, as administered in England and America, embraced a jurisdiction so wide and extensive, as that.” Various jurists were making that exact mistake, Story contended. They wrote of equity “in contradistinction to strict law” as though chancery were concerned only with just outcomes and not with rules and process. He observed that such commentators frequently cited Aristotle’s definition of equity as “the correction of law, wherein

³¹ Critics were fond of repeating the complaint of John Selden that rulings according to “conscience” in Chancery could be as variable as the size of “a Chancellor’s foot.” *Table Talk of John Selden*, ed. Frederick Pollock (Quaritch 1927), 43.

³² Joseph Story, *Commentaries on Equity Jurisprudence as Administered in England and America* (1836), 1:10, 22. Equity was, Story contended, “part of jurisprudence, [and] built upon precedents” and “quite as regular and exact in its principles and rules, as the Common Law.” *Ibid.*, 11–12.

it is defective by reason of its universality.” On this view, prescriptive human laws – whether those prescriptions sprang from legislation or forms of proceeding – inevitably failed to render justice in particular, unforeseen cases. An equitable jurisdiction, grounded in natural justice or right conscience could accordingly set aside the unjust rigors of the law to fix a more appropriate outcome.³³

That was precisely what equity did not do, Story argued. Story saw himself engaged in the same enterprise as Blackstone, who likewise contended that visions of equity’s flexible processes and juristic discretion had been overwrought. If such visions were true, Blackstone had written, a chancellor would “be a most arbitrary legislator in every case.” Story agreed with the diagnosis and approvingly cited an English chancery case for the principle that “discretion is a science, not to act arbitrarily, according to men’s wills and private affections; [but] to be governed by the rules of law.”³⁴ Courts were not to be legislatures, willfully prescribing rules according to their own policies. They were to be legal institutions, following legal rules and processes in their decisionmaking.

In a central passage, Story summarized the legal processes that equity followed:

Every system of laws must necessarily be defective; and cases must occur, to which the antecedent rules cannot be applied without injustice It is the office, therefore, of a judge to consider, whether the antecedent rule does apply, or ought, according to the intention of the lawgiver, to apply to a given case; . . . and if there exists no rule, applicable to all the circumstances, whether the party should be remediless, or whether the rule furnishing the closest analogy ought to be followed.³⁵

Story thus agreed with the Aristotelian premise that human foresight could not legislate for every eventuality, but he disagreed with the conclusion that an extraordinary jurisdiction automatically vested upon judges to remedy the shortcomings of the law. Importantly, leaving a party “remediless” appeared a legitimate alternative to Story. Just as the common law writ system gave no satisfactory

³³ Story, *Commentaries on Equity*, 1:1-2, 4-7 (citing Aristotle, *Nicomachean Ethics*, bk. 5 ch. 10). Story was particularly aggrieved by the supposed maxim that equity construed statutes “not according to the letter, but to the reason and spirit of them.”

³⁴ Story, *Commentaries on Equity*, 1:22 (quoting 3 *Blackstone’s Commentaries* 433, 440-442); 15-16 (quoting *Cowper v. Cowper*, 2 P. Will. 753 (1735)).

³⁵ Story, *Commentaries on Equity*, 1:8.

resolution in some cases, neither did chancery. Blackstone listed legal rules whose logic, “arising from feudal principles, has long since ceased,” but no chancellor dared to overturn those principles. Story agreed that similar illustrations “may be found in every state of the Union.” By the common law, a husband for instance, might be enriched through his wife’s dowry but then “by his own act, or will, strip her of every farthing, and leave her a beggar.” The injustice of the rule was supposed to be obvious to Story’s audience, and yet no court of equity would use its personal remedies to enjoin a husband from acting against “natural justice” in this situation.³⁶

The occasional unjust outcome, even in equity, was tolerable to Story because it proved equity was in fact rule-bound. As much as commentators might speak of equity searching out “the spirit of the law,” Story insisted that chancellors did not have the power to rewrite a statute entirely and were “often compelled to stop, where the letter of the law stops.” The eighteenth-century jurist Richard Francis had opined that “Equity is so extensive and various, that every particular case in Equity may be truly said to stand upon its own particular circumstances; and . . . I apprehend precedents not of that great use in Equity.” Story condemned such ideas as a danger to legal stability. “It would literally place the whole rights and property of the community under the arbitrary will of the Judge, . . . acting with a despotic and sovereign authority,” he argued.³⁷ Although equitable remedies “are flexible, and may be suited to the different postures of cases,” Story insisted that equity cases too “have prescribed forms of proceeding.” Even in equity, the rule of law was the rule of writs. Although equity did not use the particular forms of action like trover and covenant, Story argued that equitable remedies were granted only where common law writs already recognized a right. “Where the principles of law, by which the ordinary courts are guided, give a right, but the powers of those courts are not sufficient to afford a complete remedy,” equitable remedies could make up the deficiency. By this theory, equity

³⁶ Story, *Commentaries on Equity*, 1:15 (quoting 3 *Blackstone’s Commentaries* 430); 1:16 (“There are many cases against natural justice, which are left wholly to the conscience of the party, and are without any redress, equitable or legal.”)

³⁷ Story, *Commentaries on Equity*, 1:16, 11–12 (quoting Richard Francis, *Maxims of Equity* (1728), 5–6), 21, 32–33 n.3.

never made its own rules; it never legislated. It provided a particular set of remedies where “a plain, adequate, and complete remedy does not exist in any other Court,” but the rights were already “acknowledged in the Municipal Jurisprudence.” Equity followed the law, the law followed the writs, and the oracular judge was constrained to providing remedies only where statutes or common law had previously identified a remediable harm.³⁸

As at common law, the theoretical treatises on equity underemphasized the role of lawyers. When the New York merchant Philip Hone “passed a couple hours . . . in the Chancellor’s Court” purely for amusement, the number and activity of the solicitors impressed him. Although court was held “in a small office in a wing” of Chancellor Reuben Walworth’s home, Hone counted “about twenty lawyers, seated without order, some at a green table, but the greater number on chairs with their backs against the wall, and their legs cocked up.” He likened the scene to an unruly classroom with the chancellor as a nominal schoolmaster. Lawyers from around the room intervened in the discussion “on points as they arise in the case” and freely cracked jokes at the parties’ expense (the case that day sought an injunction “to prevent a man named Lance from selling a famous nostrum called ‘Brandreth’s Pills’”). Although Hone complimented Chancery as “this great court of little form,” Hone had unwittingly described the “form” that constrained the oracles of Chancellor Walworth. It was the lawyers who pushed and pulled at the margins of the rules, agreeing on expansions here, checking one another there. No less than at common law, the development of equity was a lawyer’s enterprise.³⁹

If, then, common law and chancery followed the same rules while granting different remedies could they be integrated into a single system of courts and remedies? Story hedged his answer, but essentially agreed that they could. “The union of Equity and Law in the same Court,” Story wrote, “must be a mixed question of public policy and private convenience; and never can be susceptible of

³⁸ Story, *Commentaries on Equity*, 1:27, 31, 53, 60, 94.

³⁹ Philip Hone, *The Diary of Philip Hone, 1828–1851* (1889), July 23, 1840, 2:36–38.

any universal solution, applicable to all times, and all nations, and all changes in jurisprudence.” Nothing inherent in the nature of jurisprudence demanded their institutional separation, but Story reasoned there might be political reasons for preserving the traditional distinction. Story noted that many features of the law “were the result of accidental, political, or other circumstances; of ignorance, or perversity, or mistake in the Judges.” Nevertheless, not every “arbitrary” or “irrational” rule needed to be purged. The legal system was large and complex, with rules interweaving with one another in multiple and sometimes unexpected places. Jurists might be unwise to remove even a clear “deformity in the general system,” because often such deformities “cannot be removed, without endangering the existence of other portions of the fabric, or interfering with the proportions of other principles, which have been moulded and adjusted with reference to them.” Remedies were tricky things, and remedies to a remedial system trickier still. “The new remedy, to be applied, may otherwise be as mischievous, as the wrong to be redressed,” Story warned.⁴⁰

Mere Drudgery: The Practitioners’ Crisis of Craft

While Story was writing his *Commentaries*, New York lawyers were experiencing first hand the mischief remedial measures could work in the practice of law. According to Stephen and Story, form and precedent were the bulwarks not just of legal practice, but of the law itself. Form and precedent separated legality from policy, justice from willfulness. But for New York lawyers, new developments of form and precedent were combining to make the practice of law intolerable.

As to form, developments from the eighteenth century were upending the system of “public adjustment” Stephen idealized in his treatise. While single-issue pleading helped to clarify a dispute for trial, it could also cause a defendant with several valid defenses to lose a case by resting solely on a single defense that turned out to be weaker than the others. In the early eighteenth century, Parliament sought to remedy this situation by allowing defendants to plead as many defenses as they

⁴⁰ Story, *Commentaries on Equity*, 1:35, 61.

validly had. Around the same time, royal justices were relaxing other defensive requirements, Stephen believed, “in consequence of a prevalent opinion, that the rules of this science were somewhat more strict and subtle than is consistent with the objects of justice.”⁴¹

The result was an expanded use of the defensive plea known as “the general issue.” In pleading the general issue, a defendant denied “the whole, or the principal part” of the plaintiff’s allegations, Stephen explained. Effectively, it answered “not guilty,” whether the complaint concerned a debt, a trespass, or an assault. But “not guilty” was more ambiguous than single-issue pleading typically permitted. A defendant might be “not guilty” on a debt because he never made the promise in the first place, or because he did make the promise but already repaid the balance, or because the debt had been released in consideration of some other obligation. In practice, pleading the general issue allowed a defendant to go to trial on multiple issues. For that reason, Stephen found it “a great deviation from principle.”⁴²

Relaxed rules did not just run in defendants’ favor. Plaintiffs, too, could plead several complaints at once, so long as they all sought the same remedy under the same writ. Each separate complaint was known as a “count” within the pleading. Stephen argued “the use of several counts, when applied to *distinct causes of action*” was quite consistent with single-issue pleading. If a plaintiff had been assaulted multiple times, each assault was its own cause of action on which the parties could dispute a single issue and go to trial. “But it happens more frequently than otherwise,” Stephen observed, “that, when various counts are introduced, they do *not* really relate to distinct claims, but are adopted merely *as so many different forms of propounding the same cause of action*; and are, therefore, a mere evasion of the rule” that pleas be single. Several species of this tactic had become so common

⁴¹ See An Act for the Amendment of the Law and the Better Advancement of Justice, 4 Anne c. 16 (Statutes of the Realm, 4 & 5 Anne c. 3), § 4 (1705); Stephen, *A Treatise on the Principles of Pleading*, 199.

⁴² Stephen, *A Treatise on the Principles of Pleading*, 186–202. By statute, New York required a defendant to provide “notice” as to which defenses would be raised at trial under the general issue. Notice procedure was supposed to be less formal than special pleading (that is, parties should have been able to amend with less risk of losing the suit or having costs assessed against them), but in Graham’s experience, notices were being held to nearly the same rigor as formal pleading by the 1840s. See Graham, *A Treatise on the Practice of the Supreme Court*, 655–65.

they had their own names. Using the “money counts” a plaintiff suing on a debt claimed the same debt under at least four different theories of recovery (basically: contract, restitution, unjust enrichment, and bailment), but the pleadings spoke as if there really were at least four different debts between the parties. (See Figure 1.) The overall strategy became known as pleading the “common counts.”⁴³

To use Story’s metaphor, these remedial stitches created tension elsewhere in the fabric of common law practice. Instead of pleading towards a single clear issue for trial, plaintiffs’ lawyers in nineteenth-century New York frequently pleaded common counts, while defense attorneys answered with the ambiguous general issue.⁴⁴ In order to avoid having their cases decided on the technical rigors of pleading, pleadings had become so vague they rarely disclosed necessary information about a dispute. A New York common law judge wrote in 1846 that “it has been very seldom, when presiding at *Nisi Prius* [jury trial], that I have taken occasion to examine the pleadings, though the party was obliged to furnish me with a copy, and simply because it was so frequently useless to look there for a statement of the issue or of the facts on which it was sought to ground either the action or the defense.”⁴⁵ Instead of the written, “public adjustment” of a suit that Stephen admired for its preclusion of judicial discretion, parties used common counts and general issues to keep the boundaries of a dispute as broad as possible until trial, when their counsel and the judge together orally negotiated a

⁴³ Stephen, *A Treatise on the Principles of Pleading*, 309–19. See also Graham, *A Treatise on the Practice of the Supreme Court*, 464–66.

⁴⁴ Even where both parties pleaded more specifically, Stephen observed that defendants were always tactically better served by including a general issue plea “because the effect of this, is to put the plaintiff to the proof of his declaration, before it can become necessary for the defendant to establish his special plea.” That is, affirmative defenses could shift the burden of proof, so a general issue defense became a mechanism for ensuring a plaintiff first made out a *prima facie* case. Stephen, *A Treatise on the Principles of Pleading*, 323. On the prevalence of general issue pleading in New York, see especially D. D. Field, Letter to Representative John O’Sullivan, in *Documents of the Assembly of the State of New York*, 65th Sess., No. 81, (1842) 5:42–43; M., “Reform in Remedial Law in New-York,” 31 *The Knickerbocker* 377 (1848), 381–82. Codifiers in other states expressed similar complaints about general issue pleading. See, for instance, *Report of the Commissioners* (Ohio 1853), 9, 50–55; *Report of the Code Commissioners to the Eighth General Assembly of the State of Iowa* (Iowa 1859), 184–85 (“this privilege of ambushade was so far extended to the defendant that under this general denial, which got the name of general issue, the defendant might prove, not only any negative fact, but many affirmative ones . . . this, too, occurred in the most frequent of actions”).

⁴⁵ John W. Edmonds, *An Address on the Constitution and the Code of Procedure* (1848), 14.

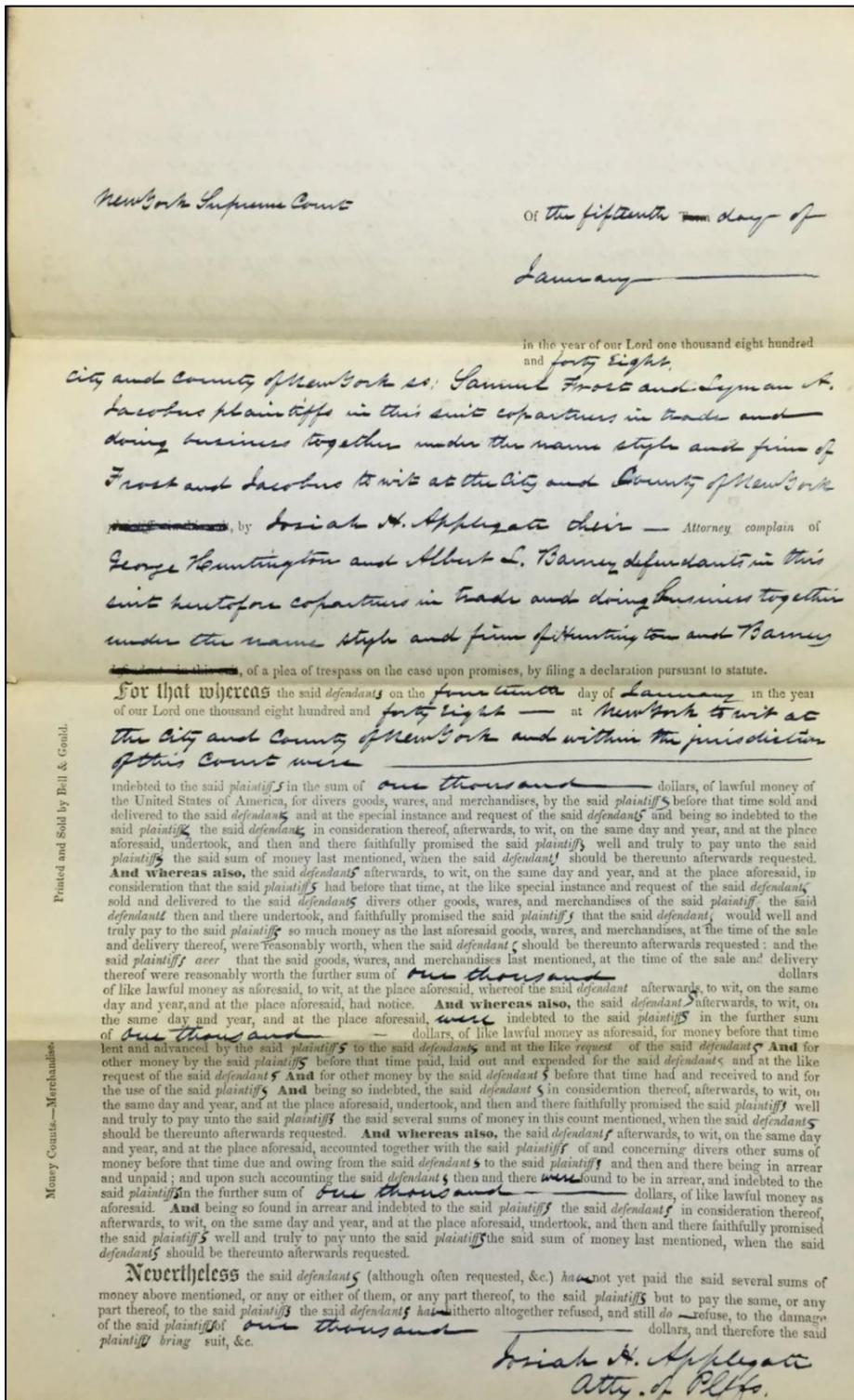


Figure 1.

This pleading filed in the supreme court in Manhattan alleges four different liabilities, or “counts,” against the defendants, and each time the lawyer has filled in the round sum of \$1,000. In this case, the suit was based on a promissory note made out for \$225.91. After judgment, the total obligation with interest, costs, and fees was assessed at \$483.42.

The pleading is from early in 1848, before the new code took effect. By then, the “money counts” had become so common booksellers printed standardized forms known as “law blanks.”

With the rise of printing, a “folio” for purposes of costs and fees was redefined from an actual folio page to a segment of one hundred words (then later reduced to seventy-five). Although this blank is only one sheet, it would have been charged as eight to ten folios.

New York City Municipal Archives, Office of the County Clerk, 31 Chambers St., Manhattan. Pleadings of the Supreme Court of Judicature Collection, PL-1848-F-21, Frost & Jacobus v. Huntington & Barney. Judgment recorded in Indices of Judgments Docketed in the City and County of New York, 1844-1855 (1857), New York City Municipal Archives, Volume H, 242-243. Photo by author.

case down to a set of issues that could be resolved by the judge or jury.⁴⁶ That situation created the additional problem that parties had to assemble more witnesses than they would actually need at trial. Uncertain of their adversary's real theory of the case, or defense, or even—in cases between longtime associates—which of many transactions were being litigated, parties had to prepare for multiple contingencies, each of which might require a different slate of witnesses.⁴⁷

As for precedent, even as Joseph Story praised New York for publishing the case reports that proved equity's adherence to precedent, New York lawyers were increasingly complaining that the volume of precedents was becoming too great for daily practitioners to use.⁴⁸ At the turn of the nineteenth century, New York case decisions remained almost entirely unpublished. Practitioners drew their arguments either from published English reports or from oral traditions learned over a course of practice before particular judges in the same courts. Chancellor James Kent (1763–1847) first established official reporters for both the common law and chancery courts. In his own reported decisions, Kent showed lawyers how to cite and argue from written precedent rather than oral practices, drawing upon a whole library of legal literature for his reasoned decisions.⁴⁹

But following Kent's methods, lawyers soon complained not that they had too little literature, but too much. One practitioner in 1846 observed that a minimally adequate law library should contain 800 to 1,000 volumes; a good library would have upwards of 5,000 volumes. Although only New York decisions were binding as precedent, judges might be persuaded by recent decisions in England or those of prominent states like Virginia or Massachusetts. In David Dudley Field's experience, "the

⁴⁶ Such, for instance, was David Dudley Field's experience. See *Law Reform Tracts No. 5: A Short Manual on Pleading under the Code* (1856), 28–29.

⁴⁷ See, for instance, the testimony of Field's co-codifier: Arphaxad Loomis, *A Historic Sketch of the New York System of Law Reform in Practice and Pleadings* (1879), 6; *Report in Part of the Committee on the Judiciary in Relation to the Administration of Justice*, in *Documents of the Assembly of the State of New York*, 65th sess., no. 81 (1842), 5:6.

⁴⁸ Story, *Commentaries on Equity*, 1:63.

⁴⁹ On the oral culture of the common law system, see Lobban, *The Common Law and English Jurisprudence*, 17. On Kent and the founding New York law reporters, see John H. Langbein, "Chancellor Kent and the History of Legal Literature," 93 *Columbia Law Review* 547 (1993). On Kent's sources for adjudication, see Daniel J. Hulsebosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664–1830* (UNC 2005), 283–87.

lawyer's library had become a collection of books from the Old World and the new, reports of all the courts in England and in all our States, and treatises from every legal authority in America or Europe." As counsel drew on all these disparate sources for their arguments, one lawyer despondently wrote, "Who can guess what he may have to meet in a law suit, as no lawyer can afford to buy or read all the books in the world?" Graham's treatise observed that every decade saw the number of printed case report rise exponentially.⁵⁰ (See Figure 2.)

The compensation structure of New York attorneys exacerbated the problems of vague forms and innumerable precedents. Like most Anglo-American jurisdictions, New York law required the loser in a legal controversy to pay the winner's costs and attorney's fees. Since the colonial era, New York had precisely regulated the fees a lawyer could collect from the adversarial party, usually by tagging it to the number of pages in a court filing—whether a pleading, affidavit, deposition transcript, or appellate brief.⁵¹ Lawyers and their clients could agree to "counsel fees" above these prescribed rates, but New York's fee statute decreed that "no officer" shall "take or receive any other or greater fee or reward" than that prescribed by statute. Until 1840, it was unclear whether attorneys counted as "officers" for purposes of that provision, and New York tacitly followed the European tradition that "professionals" such as lawyers and physicians practiced for the sake of honor: any fee payment by a client was a voluntary gratuity. That meant professionals could not sue to collect on their fee agreements whether they charged only the prescribed rates or not. Ironically, the operators of the remedial system were themselves remediless if clients could not or would not pay.⁵²

⁵⁰ Michael Hoffman, "Letter on Reforms Necessary in the Body of Law, in the Written Pleadings, and in the Practice of the Courts" (Mar. 21, 1846), in Thomas Prentice Kettle, ed., *Constitutional Reform in a Series of Articles Contributed to the Democratic Review* (1846), 63–64; David Dudley Field, *Legal Reform: An Address to the Graduating Class of the Law School of the University of Albany* (1855), 21; Hiram P. Hastings, *An Essay on Constitutional Reform* (1846), 27; Graham, *A Treatise on the Practice of the Supreme Court*, vii–viii.

⁵¹ See, for instance, *Revised Statutes of the State of New York* (1829), 2:630–33 §§ 15 & 18.

⁵² See the discussion in *Stevens & Cagger v. Adams*, 23 Wend. 57 (New York Supreme Court 1840), *affirmed*, *Adams v. Stevens & Cagger*, 26 Wend. 451 (New York Court for the Correction of Errors 1841). See also Chapter 7.

NEW LAW BOOKS.

VOL. 7—Hill's Reports, Supreme Court, New York.

Vol. 1—Denio's Reports, New York.

Vol. 2—Sandford's Chancery Reports, New York.

Vol. 4—Howard's U. S. Reports, Supreme Court.

Vol. 9—Metcal's Reports, Massachusetts.

Vol. 50—English Common Law Reports, entire.

Vol. 14—Meeson and Welsby's Exchequer Reports.

Vol. 18—English Chancery Reports, now published verbatim, with notes and references to English and American Decisions, by John A. Dunlap, Counsellor at Law : each American contains two entire English volumes ; vol. 18 contains Mylne and Craig's Chancery Reports, vol. 4, and Craig & Phillip's Chancery Reports, vol. 1.

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Vol. 2—Richardson's Equity Reports, South Carolina.

Vol. 17—Connecticut Reports.

Vol. 1—Kaufman's Mackeldy's Civil Law.

Vol. 2—Greenleaf's Evidence.

Vol. 3—Story's Circuit Court Reports.

Vol. 6—Humphrey's Reports, Tennessee.

Vol. 5—Arkansas Reports, by A. Pike.

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Wharton's American Law, Criminal.

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Wheaton's History of the Law of Nations in Europe and America to 1845.

Wheaton's International Law, third edition, revised and corrected.

Abbott on Shipping, fifth American, from the seventh English edition, with the notes of Judge Story and J. C. Perkins, Esq., 1846.

Saunders' Reports, 3 vols, sixth edition ; much enlarged and improved, by Edward V. Williams, Esq. 1846.

Hilliard on real property, second edition, revised corrected and enlarged, 2 vols, 1846.

Conklings Treatise on the practice of the Supreme District and Circuit Courts of the United States second edition, much enlarged and improved by the author.

American Military Laws and the Practice of Courts Martial, by John O'Brien, Lieutenant in the United States' Army.

Barbour's Chancery Practice, 2 vols, with a collection of precedents.

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English Common Law Index, vol. 1 to 47 inclusive

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Figure 2.

This advertisement from Banks, Gould & Co., the leading seller of law books and law blanks in New York City, ran through the summer of 1847. It shows that even young states on the American periphery like Arkansas had produced a half dozen volumes of precedents consulted in New York. Graham's *Practice* is included among the newly released treatise literature.

In practice, “the lawyer never fails in his capacity as counsel to add fees,” wrote the New York lawyer Theodore Sedgwick, but as “this charge of counsel fees is not recoverable by law,” lawyers often settled with their clients to accept only the prescribed rates that were shifted from a losing adversary.⁵³ The economic boom following the opening of the Erie Canal created a buyer’s market for legal services. Although merchants engaged in more litigation than ever before, the number of attorneys remained abundant enough to keep fees low. When merchants, artisans, and farmers lobbied for “law reform,” the typical reform consisted of lowering the rates in the statutes, and thus the rates charged in practice. Significant reforms of this sort were carried out at the turn of the nineteenth century and again in 1828 and 1840.⁵⁴

When lawyers like Sedgwick surveyed their plight, they turned from the language of the professions—with their gratuitous fees—and instead likened themselves to artisans who were likewise undergoing what lawyers perceived to be a similar crisis of overabundant labor, falling prices, and degraded working conditions. “A boy is now made an attorney and grows up into a counsellor with habits that would dishonor the profession of a tailor and with talents which certainly would shed no luster upon the shopboard,” wrote the *National Advocate* in 1825. “Is not a Lawyer a laborer—a workman?” Sedgwick asked. Yet “no other workman is paid according to statute.” At the same time that artisans across the city complained that low prices from metropolitan industrialization had “bastardized” journeymen, preventing them from earning the competence of a master, Sedgwick and other lawyers complained the same was happening in the practice of law. At least skilled artisans could still demand top market rates, Sedgwick argued, but lawyers had it worse, for “no other class

⁵³ Theodore Sedgwick, *How Shall the Lawyers Be Paid?* (1840), 9–10.

⁵⁴ See *Laws of the State of New York* (Kent & Radcliffe 1802), 2:69–70; *Revised Statutes of the State of New York*, 2:630–33, §§ 15 & 18; 1840 New York Laws 327–36, ch. 386. Field estimated from returns filed in 1838 that chancery in a single year adjudicated about \$9.2 million in claims at a cost of over \$920,000. During the same year common law courts adjudicated \$28.8 million in claims at a cost of \$1.9 million. The average common law case was for debt and damages in the amount of \$996.75, with costs of \$35.97. Considering costs were taxed for court personnel, witnesses expenses, and lawyers’ fees, a lawyer might expect about \$5 per case to be paid by the adverse party (\$125 in 2015 value). See Field, Letter to Representative John O’Sullivan, 28–29.

of workmen is paid without any reference to the individual qualification of talent, industry or integrity of the members composing it." Thus, "the present system of costs is degrading to the profession," Sedgwick concluded, turning "lawyers and gentlemen into pettifoggers and knaves."⁵⁵

That use of the word "pettifogger" well illustrates the perceived decline of legal practice into yet another of New York's bastardized crafts. In the eighteenth century, "pettifogger" was a derisive label for those untrained in legal advocacy, but nineteenth-century lawyers increasingly applied the term to members of their profession who excelled at legal work they found degrading, such as filing frivolous motions and bloating the pleadings with an eye to their fees. No longer an interloper among a closed guild, the pettifogger was a craftsman who had neither the skill nor the desire to attain the level of master – the perpetual journeyman, content with his own degradation.⁵⁶

In practice, lawyers maintained their income by increasing the length (and number) of their court filings. Using common counts to restate the same claim and adding in legalistic "aforesaid" and redundancies ("paid out, laid out, and expended by the plaintiff"), even the simplest of common law claims could fill a dozen pages or more, while the written examinations of chancery pleading could fill more pages with facts of questionable relevance.⁵⁷ For lawyers like Field, the useless multiplication of form and fiction to earn a competence had transformed daily employment into "mere drudgery." A lawyer's "labor is thrown away," Field lamented, "and so many fine heads and strong hands are condemned to the servile, the belittling employment of writing out old jingles of words, invented somewhere about the times of the Edwards." Whereas the legal profession should have been "first of

⁵⁵ "Codal Revision of State Laws," *National Advocate* (New York, N.Y.), April 8, 1825. Sedgwick, *How Shall the Lawyers Be Paid*, 7, 9. For the sources of Sedgwick's language of craft dignity and degradation, see Sean Wilentz, *Chants Democratic: New York City and the American Working Class, 1788-1850* (Oxford, 2d. ed., 2004), 61-144.

⁵⁶ On the older use of "pettifogger" as an interloping amateur, see John E. Douglass, "Between Pettifoggers and Professionals: Pleadings and Practitioners and the Beginnings of the Legal Profession in Colonial Maryland 1634-1731," 39 *American Journal of Legal History* 359 (1995). For examples of pettifoggers as degraded lawyers, see, for instance, the satirical "Natural History of the New York Bar," *New York Herald*, November 29, 1844; *National Advocate* (New York, N.Y.), April 9, 1825.

⁵⁷ Graham, *Practice of the Supreme Court*, 172. See Burrill, *Treatise on the Practice of the Supreme Court*, 2:268-72. In chancery, each page of interrogatories and answers had its corresponding court and lawyer's fee – in 1830, 28 cents a folio to the solicitor drawing up the questions and 20 cents a folio for the court examiner recording the answers (in addition, of course, to other costs). *Revised Statutes of the State of New York*, 2:626-30, ch. 10, tit. 3, §§ 9 & 15.

professions, and its employments the noblest which the citizen can exercise in a free state," the increasing labor of the bar meant that only "a feverish restlessness, and an overtasked mind, are the present concomitants of a leading position in the profession."⁵⁸

If, as one New York lawyer wrote, "books are to a lawyer or a judge what tools are to a mechanic," then innovations in legal publishing brought the problems of mass production to the craft of the law.⁵⁹ Seeking convenience in pleading, innovative printers began marketing "law blanks." Since pleadings were fictitious anyway, the same fictions could be used repeatedly while lawyers filled in blank lines the few times specific information was required (mostly the date and the names of parties). Printers thus produced reams of common pleadings styled in their lengthiest possible formulations to save lawyers the trouble of reproducing the forms by hand. (See Figure 1, above.) But to lawyers pursuing a craftsman ideal, these conveniences did nothing to reverse the degradation of legal profession. One supreme court judge complained that law blanks destroyed the educational value of apprenticeships, teaching students "no more of actual pleading than how properly to fill out blanks." To Field, blanks promoted "a vicious system of procedure" and made "pecuniary emolument disproportionate to intellectual exertion."⁶⁰

By the 1840s, other common law practitioners shared Field's views about disproportionate exertion. According to these lawyers, what made legal practice fulfilling was high-minded reasoning about principle, cultivating one's mind in a "liberal science." But form and precedent were now crowding out principle from the lawyer's life. The proliferation of case reports required a rapid mechanical search for favorable rulings rather than a leisurely appreciation for the reasoning that produced those rulings. "Those who have the best practice," remarked Field, "are tasked almost beyond endurance. The multiplication of law-books . . . have quadrupled their labors." And for what?

⁵⁸ Field, "Study and Practice of the Law," 345-47.

⁵⁹ Report of Mr. Elisha Crosby on Civil and Common Law, *Journal of the Senate of the State of California* (1850), 478.

⁶⁰ For example forms and catalog listings of Law Blanks, see M. H. Hoeflich, "Law Blanks and Form Books: A Chapter in the Early History of Document Production," 11 *Green Bag* 2d 189 (2008). Edmonds, *An Address on the Constitution and the Code of Procedure*, 16. Field, "Study and Practice of the Law," 347.

Lawyers had to know their precedents to win their cases, but they were rarely compensated for the time and effort expended in their research. Rather it was the routine drudgery of stuffing pleadings and examinations that in many cases supplied the lawyer's income. One practitioner complained that instead of spending his time "in the study of the law as a most extensive, enlightened and liberal science, and in the acquisition of general literature and arts and sciences," to collect his fee he was instead "compelled to spend one half of the best seventeen years of my life in the study of special pleading and the distinctions and niceties with which it is connected."⁶¹

Thus the crisis of legal craft that spanned from the 1820s to the 1840s in New York grew out of the entangled and evolving attempts at the reform of legal practice. Ameliorating the rigors of pleading had introduced so much flexibility that the system was failing to produce the information it was designed to elicit from the parties. A growing body of published precedents, meant to make the law more certain and orderly, had grown so vast that practitioners complained they could not master it all and were consequently uncertain what citations and arguments awaited them at trial. Fee reform tagged a lawyer's compensation to the most tedious and mechanical aspects of legal practice and then continually lowered that compensation. Yet overall costs did not decline, because vague pleadings required the attendance of more witnesses and their concomitant fees.⁶² For some lawyers in Jacksonian New York, the whole mottled fabric had to be torn apart and re sewn, and codification appeared to be the tool to do it.

The Creature of Their Power: The Allure of Codification

"Codification" was a word coined by the English law reformer Jeremy Bentham (1748-1832) around the 1770s, just when debates about the underlying idea were arising after the American

⁶¹ Field, "Study and Practice of the Law," 345; R.W. Wells, *Law of the State of Missouri Regulating Pleadings and Practice* (Missouri 1849), 112-14. (It was as though a lawyer "is almost compelled by the system, to degenerate into a pettifogging caviler about words and phrases and forms, which diminish his intelligence and usefulness; and by the injustice of which he is the instrument, he becomes odious and his profession disreputable.")

⁶² See [Arphaxad Loomis], Report in Part of the Committee of the Judiciary, in Relation to the Administration of Justice, in *Documents of the Assembly of the State of New York*, 65th Sess., No. 81 (1842), 5:6.

Revolution. The connection to English sovereignty irrevocably sundered, most legal rules seemed suddenly without foundation in 1776. Codification presented one way to re-establish the authority of the law by re-enacting each rule one by one in a comprehensive and systematically arranged statute. Bentham offered his services to President James Madison to draft an American code; but Madison declined, reasoning that the Revolution had sufficiently “lopped off” a significant portion of the unwritten common law, and a code would only complicate matters with “complex technical terms” requiring “resort for definition and explanation to the volumes containing that description of law” – that is, no code was likely to be comprehensive enough to abrogate the volumes of common law precedent already used by practitioners.⁶³ Indeed, outside of criminal penalties, which many jurists argued had to be legislatively prescribed in order to be binding, no American jurisdiction undertook complete codification. Most followed the model of Jefferson’s Virginia, which pronounced the excellence of the codification ideal but then settled for organizing and re-printing colonial statutes while declaring that English common law would continue in force in the courts.⁶⁴

Codification remained a major interest of the American bar across the nineteenth century. When the intellectual historian Perry Miller developed a reader surveying *The Legal Mind in America*, codification was its central theme, as Miller argued it was the only intellectual topic that attracted lawyers away from their practices long enough to debate.⁶⁵ Napoleonic France promulgated a series of codes in the early nineteenth century, Germans debated the wisdom of codification after

⁶³ See generally Cook, *The American Codification Movement*; Jeremy Bentham to James Madison, October 30, 1811, in *The Papers of James Madison, Presidential Series, vol. 3, 3 November 1810–4 November 1811*, ed. J. C. A. Stagg et al. (UVA 1996), 505–35; James Madison to Jeremy Bentham, May 8, 1816. The basic idea of codification had a much longer history than Bentham’s terminology. Barbara Shapiro argues that if codification fundamentally consists of an effort at systemization, comprehension, and sovereign promulgation of the law, serious English efforts at codification arose at least as early as the sixteenth century. Barbara Shapiro, “Codification of the Laws in Seventeenth Century England,” 1974 *Wisconsin Law Review* 428 (1974).

⁶⁴ See Christopher Michael Curtis, *Jefferson’s Freeholders and the Politics of Ownership in the Old Dominion* (Cambridge 2012), 69–70. Several states followed New Jersey in adopting the English common law but forbidding citation to English cases decided after July 1, 1776. See Anton-Hermann Chroust, *Rise of the Legal Profession in America* (Oklahoma 1965), 2:54. On New York’s “reception” of the common law, see New York Constitution of 1777, art. 35; William B. Stoebuck, “Reception of English Common Law in the American Colonies,” 10 *William and Mary Law Review* 393 (1968); Hulsebosch, *Constituting Empire*, 181–82.

⁶⁵ Perry Miller, ed., *The Legal Mind in America: From Independence to the Civil War* (Anchor 1962), 11.

Napoleon's fall, and in the 1860s the British imposed codes on their colonies in India and Singapore.⁶⁶ Many American lawyers followed the international development of these codes with interest, viewing codification as the leading edge of modern legal science.⁶⁷

In 1823, the New York lawyer William Sampson (1764–1836) became one of the most prominent advocates of American codification when he argued that codification could resolve the dissatisfactions both the theorists and the practitioners had with the common law system. Sampson had been a lawyer in Ireland before his participation in the Irish Rebellion of 1798 had driven him into exile. He was journeying through France when Napoleon promulgated his civil code in 1804, and a number of Napoleon's staff remained friends and clients of Sampson when they immigrated to New York. In America, Sampson gained national renown as one of Manhattan's leading attorneys even as he undertook unpopular cases on behalf of working-class Catholic immigrants and labor radicals. When the New-York Historical Society invited Sampson to deliver an address at the organization's twentieth anniversary, Sampson took as his nominal topic "The Origin, Progress, Antiquities, Curiosities, and Nature of the Common Law." The benign title cloaked Sampson's polemical hatred for English legal institutions. After condemning English jurisprudence for its "disingenuous mystery, its language a barbarous jargon, its root in savage antiquity," Sampson concluded that American law must go its own way. "It is time we should assert our own independent judgment, and act and think for ourselves."⁶⁸ And to Sampson, thinking "for ourselves" meant creating a code.

⁶⁶ See James Q. Whitman, *The Legacy of Roman Law in the German Romantic Era: Historical Vision and Legal Change* (Princeton 1990); Jean-Louis Halperin, *The French Civil Code* (Texas 2006); Robert B. Holtman, *The Napoleonic Revolution* (Louisiana State 1981); R. H. Kilbourne, *A History of the Louisiana Civil Code* (Paul M. Herbert Law Center 1987); Brian Young, *The Politics of Codification: The Lower Canadian Civil Code of 1866* (Osgoode Society 1994); John W. Cairns, *Codification, Transplants, and History: Law Reform in Louisiana (1808) and Quebec (1866)* (Talbot 2015). On common theories of codification that transcended jurisdictional boundaries, see Csaba Varga, *Codification as a Socio-Historical Phenomenon* (Budapest, 2d. ed., 2011 [1991]); Roger Berkowitz, *The Gift of Science: Leibniz and the Modern Legal Tradition* (Fordham 2010).

⁶⁷ Gunther A. Weiss, "The Enchantment of Codification in the Common-Law World," 25 *Yale Journal of International Law* 435 (2000); Maurice Eugen Lang, *Codification in the British Empire and America* (Lawbook Exchange 1924); Roscoe Pound, "The French Civil Code and the Spirit of Nineteenth Century Law," 35 *Boston Law Review* 79 (1955).

⁶⁸ See Maxwell Bloomfield, "William Sampson and the Codifiers: The Roots of American Legal Reform," 11 *American Journal of Legal History* 234 (1967); Walter J. Walsh, "William Sampson, a Republican Constitution, and the Conundrum of Orangeism on American Soil, 1824–1831," 5/7 *Radharc* 1 (2006); William Sampson, *Memoirs* (2d. ed., 1817). William

Central to Sampson's critique of the common law was the theorists' problem of the oracular judge. In Ireland, Sampson had complained that the jury system was pointless, because jurors had "to hear with the *law's ear*, see with the *law's eye*, speak with the *law's voice*, of which law the court are alone to judge." In his New York address, Sampson further criticized a system "that has obliged judges to legislation *pro re nata* [as each case arises], upon every new point."⁶⁹ It was not just that judges were oracular in the sense that they promulgated new law. Sampson argued the chief fault of the common law system was that it treated judges literally as oracles, divinely inspired lawmakers whose rulings went unquestioned by "superstitious votaries." Codification would solve both sides of the problem at once. Lawmaking power would rest properly with legislators as agents of the sovereign populace, and the spell of common law authority would be broken when "the People know that their law is the creature of their power; the work of their own hands; and that, if it is not good, it is to their own shame; and that canting and ranting will never make it better." Under a fully codified system, sober political deliberation would change the law, not the "mummery" of common law development. Though concerned with the same problem as Story and Stephen, Sampson held out codification as a more solid foundation for the law. Instead of form and precedent, the "plain and intelligible language" of a statute would cabin the discretion of judges. "Particular cases will not then be resorted to, instead of general law. The law will govern the decisions of judges, and not the decisions the law."⁷⁰ The positive decrees of a democratically representative legislature would replace the rule of writs.

Sampson reasoned that the abandonment of case law would then solve the problems currently distressing practitioners. Worthwhile precedents "require little more than regulation and systematic order," he argued. A code could provide that order and "by positive enactments" settle "all doubts that hang upon them." Practitioners would no longer need to consult thousands of volumes of

Sampson, "Anniversary Discourse on the Origin, Progress, Antiquities, Curiosities, and Nature of the Common Law, Delivered Before the New York Historical Society, December 6, 1823," in Pishey Thompson, ed., *Sampson's Discourse and Correspondence with Various Learned Jurists Upon the History of the Law* (1826), 5.

⁶⁹ William Sampson, *A Faithful Report of the Trial of Hurdy Gurdy* (1807), 10.

⁷⁰ Sampson, "Anniversary Discourse," 10-12; 37-38.

precedents “with fear and trembling.” Instead of these “overwhelming showers” of precedents they would have the few volumes of a code.⁷¹

Sampson did not provide detail on what form pleadings and courtroom practice might take under a code. He expressed an ideal that a litigant could “tell his case, according to the simple and honest truth” without failing on technical grounds, and he argued that the straightforward language of a code would do away with “those fictions, which give [jurisprudence] the air of occult magic, [and] those queer and awkward contrivances” inherited from the writ system.⁷² The lack of specificity about procedure was not unusual among codifiers at the time. Bentham, the leading proponent of codification in England, argued that procedure was the one department of the law that ought to remain *uncodified*. So long as the law of civil and criminal obligations and the law of property were sufficiently codified, a “natural procedure” arising from judicial discretion and flexibility would be superior to “technical” written rules. Later in his career Bentham produced the “Outlines of a Procedure Code” as a “provisional” remedy, but he insisted that a procedure code on its own could not be “invested with the form of law” without “reference to the codes of law, penal and non-penal, to which it has for its object and purpose the giving execution and effect.” Although it spanned nearly 200 pages, Bentham’s code favored general moral maxims over precise details, for instance: “On each occasion, have constant regard for all the several ends of justice; that is to say, minimize the sum, or the balance of evil.”⁷³ Sampson similarly favored generality in procedure. English common lawyers (including Serjeant Stephen) hoped to curtail the use of general issue in favor of special pleading, but Sampson feared to revive “the odious volumes of special pleading, which cannot be used without degrading and lowering the tone of moral sentiment.”⁷⁴ Although he did not propose a clear

⁷¹ Sampson, “Anniversary Discourse,” 33, 38.

⁷² Sampson, “Anniversary Discourse,” 38.

⁷³ Jeremy Bentham, *Principles of Judicial Procedure with the Outline of a Procedure Code*, in John Bowring, ed., *Works of Jeremy Bentham* (2d. ed. 1843 [1839]), 1-189, preface and 28, ch. 7 § 1. See Lobban, *The Common Law and English Jurisprudence*, 127-31 (“The corollary of the defined code would be an undefined procedure.”).

⁷⁴ Sampson, “Anniversary Discourse,” 38. On special pleading, see Lobban, *The Common Law and English Jurisprudence*, 207-19.

alternative, Sampson at least understood that too specific a requirement for pleading would invite judges to again build up precedents of form and restore the rule of writs.

“Sampson’s Discourse,” as it became known, attracted widespread attention within the American bar. Lawyers from Massachusetts to South Carolina wrote Sampson expressing both praise and criticism. One of Sampson’s enthusiastic supporters was Henry Dwight Sedgwick (1785–1831), a New York City attorney and mentor to the young David Dudley Field. Field later recalled that Sampson’s Discourse introduced him to the idea of codification and remained a lifelong influence. Field repeated Sampson’s arguments about codes as a labor-saving device that would free lawyers from the drudgeries of practice. “A code will lessen the labor of Judges and lawyers in the investigation of legal questions,” Field wrote. “Instead of searching, as now, through large libraries . . . it will be sufficient to examine the articles of the Code relating to the subject.”⁷⁵

Despite that agreement, Field differed with Sampson on the crucial point of whether codification could completely displace the common law’s precedential system. Favoring the French model, Sampson expected it would. Judges would decide cases according to the code without producing long, reasoned decisions either through oral tradition or published reports. If judges encountered a novel question or an ambiguous regulation, they were to certify the question to the legislature for a general law that would cover future cases.⁷⁶ But among many lawyers who wrote to Sampson, the complete subjugation of judges to a code seemed unthinkable, or at least undesirable. Even the most cursory decision would indicate some interpretation of the statutory text and a view as to which cases it covered. Those interpretations would inevitably be challenged, and, as one South Carolina judge argued, “there would be nothing certain in any one principle laid down until its true meaning had been explained by the Court of Appeals.” Precedent would continue to accumulate, and

⁷⁵ See [Henry Sedgwick], “The Common Law,” 19 *North American Review* 411 (1824); Miller, *The Legal Mind in America*, 135–36. David Dudley Field, *A Third of a Century Given to Law Reform* (1873), 1; David Dudley Field, “Reasons for the Adoption of the Codes” (1873), in *Speeches, Arguments, and Miscellaneous Papers of David Dudley Field* (A. P. Sprague ed., 1884), 1:361, 371.

⁷⁶ William Sampson to Thomas Cooper, President of Columbia College, August, 1823, in *Sampson’s Discourse*, 61–62.

a fresh codification would have to be attempted every twenty or thirty years.⁷⁷ For some, that was argument enough against “the experiment” of codification. Other lawyers, including Field, agreed with the assessment but not the conclusion. Field expected that “glosses and comments” on the text of the code might accumulate, requiring a further codification “at certain intervals.” But Field argued the benefits of consolidation and systematic reform made the effort worthwhile even if it would have to be periodically repeated.⁷⁸

Thus, by the mid-1820s “codification” had multiple meanings. In the strong view, held by Sampson and by some English reformers such as Jeremy Bentham, it indicated a total abrogation of the common law system of precedent and case-by-case adjustments to the law, an overthrow of the rule of writs. For other lawyers, it meant something less disruptive—a growth in the importance, scope, and legitimacy of legislation, certainly, but a more or less stable continuity in practice. Lawyers would continue to bring cases under the traditional forms, at times arguing for adjustments to the law of remedies, and judges would continue to grant those adjustments in reasonable conformity to precedents, whether those precedents appeared in case books or statutes. Field represented a third position. He agreed with Sampson that under the writ system, “judges, instead of interpreting, are making law” in violation of “the entire separation and independence of the different departments of government.” Yet Field approached the question foremost as a harried practitioner. His chief aim in codification was to see “the numerous collections of law-books upon the shelves of our libraries superseded by a single work.” As much as he decried “judicial legislation,” he was prepared to allow a more robust exercise of judicial interpretation and comment, so long as practitioners and judges were focusing their interpretations on a more limited set of sources: the slender volumes of a code.⁷⁹

⁷⁷ Thomas Cooper to William Sampson, July 28, 1823, in *Sampson's Discourse*, 58–59.

⁷⁸ Field, *Legal Reform*, 29 (“This, if it were true, would only prove that the process of codification must be repeated at certain intervals—an objection of no great force, especially as it assumes that, until the accumulation of glosses and comments, the code would prove an advantage.”).

⁷⁹ Field, *Legal Reform*, 28–30.

In the years following Sampson's address, New York began a concerted effort to codify, but the resulting "code" formed a deliberate compromise between these visions.

Not Merely a Consolidation: The "Revised Statutes" of New York

If New York's legislators desired to follow Sampson's advice and pursue codification, they had two models of promulgation from which to draw. The first came from the French. Napoleon had appointed four- or five-member commissions to codify and reform the law of revolutionary France under several headings, including civil law, criminal law, civil procedure, and commercial law. When Sampson delivered his discourse, one of the members of the French civil procedure commission, Count Pierre François Réal (1757–1834), was living in exile in upstate New York and wrote enthusiastically to Sampson to advise him on the mechanics of codification:

Courage; persevere in the support of written reason against precedents and vague traditions. . . . Do as we did, but do it better, profiting by our mistakes. Let four or five good heads be united in a commission, to frame in silence the project of a code. It is not so difficult a task. It is only to consult together, and to select. Do so with your best authors as we did with ours, and principally with Pothier's treatise on Obligations, which we simply converted into articles of our code.

Tellingly, Count Réal assumed the commission's code would automatically be promulgated as law, as the French codes had been.⁸⁰

At the same time as this correspondence, a commission in Louisiana was preparing a codification of the civil law and civil procedure. The lead commissioners Moreau Lislet and the New York-trained Edward Livingston both admired French law and adapted as much of the French codes as they could while engrafting in common law novelties like the jury trial. (In addition to Sampson's Discourse, Field cited Livingston's codes as a chief influence in his early career.⁸¹) In 1825 the Louisiana legislature decreed that the code would become law when the commissioners published it. Although the commissioners reported to the legislature, they did not submit the actual text of the code

⁸⁰ Count Pierre François Réal to William Sampson, October 27, 1824, in *Sampson's Discourse*, 191.

⁸¹ Field, *A Third of a Century Given to Law Reform*, 1.

in their reports, and the legislature had no opportunity to amend or revise the text until after promulgation.⁸²

The other model came from England. Royal commissions had been employed since before the Revolution of 1688 to advise on a variety of matters. After the Revolution, royal commissions became disfavored while Parliament undertook many of the same functions through “committees of enquiry” to which only members of Parliament were appointed. By the nineteenth century, royal commissions revived. Unlike committees of enquiry, royal commissioners usually were not legislators. That was both a virtue and a deficiency. Commissioners were not bound to the rhythms of Parliament’s schedule—they could continue their focused work even as Parliament adjourned or turned its attention to other matters—but without authority to make law, their advised legislation had to pass through the normal politicking, drafting, and revising processes of Parliament.⁸³

The three previous times New York had compiled its statutory law, it had imperfectly adhered to the English model of royal commissioners.⁸⁴ New York’s Revolutionary legislature, like most the other former colonies, decreed that “such parts of the common law of England, and of the statute law of England” in force in 1775 continued to be the law of the state “except such parts thereof as are by the . . . constitution abrogated.” Even if one looked only at the “statute law” side of the equation, that included an immense amount of material from diverse sources dating back over a century. The 1786

⁸² See generally George Dargo, *Jefferson’s Louisiana: Politics and the Clash of Legal Traditions* (Harvard 1975); on Livingston’s contributions to Louisiana procedure in particular, see Kent. A. Lambert, “An Abridged History of the Absorption of American Civil Procedure and Evidence in Louisiana,” in Vernon Valentine Palmer, ed., *Louisiana: Microcosm of a Mixed Jurisdiction* (UNC 1999), 105–15. This mode of promulgation in 1825 differed somewhat from that of Louisiana’s 1808 Digest, drafts of which were submitted to the legislature for enactment. For the argument that the Digest should be considered a modern code, see Cairns, *Codification, Transplants, and History*, 427–76.

⁸³ See Thomas J. Lockwood, “A History of Royal Commissions,” 5 *Osgoode Hall Law Journal* 172 (1967); Barbara Lauriat, “‘The Examination of Everything’: Royal Commissions in British Legal History,” 31 *Statute Law Review* 24 (2010); Joanna Innes, *Inferior Politics: Social Problems and Social Policies in Eighteenth-century Britain* (Oxford 2009).

⁸⁴ English proposals to consolidate and modernize the nation’s body of statute law received significant support from Francis Bacon (1561–1626). Bacon insisted, as Shapiro writes, “that parliamentary participation was essential; commissioners should be appointed by both houses to prepare the necessary legislation,” but “the newly modeled body of laws then required confirmation by the legislative body, ‘lest, under pretence of digesting old laws, new laws, be secretly imposed.’” Shapiro, “Codification,” 443, 447; see also Lieberman, *The Province of Legislation Determined*, ch. 9.

legislature thus commissioned two lawyers “to collect and reduce into proper form . . . all the said statutes and lay the same bills before the legislature of this State from time to time as they shall prepare the same.” The task amounted to a glorified printer’s commission. The lawyers were to compile only previously enacted statutes, update the spelling and typescript, and give the collected statutes some logical order “under certain heads or titles of bills.” Those instructions regarded only the former English statutes, however. The next section instructed the commissioners to “collect revise and digest” the laws passed by the Revolutionary legislature since 1775 and promulgate them – without first submitting them for legislative review. Like royal commissioners, the lawyers were commissioned to work even when the legislature was not in session, and they presented their final drafts to a different legislature than the one that had appointed them.⁸⁵

A dozen years later, New York’s statutory law had grown by as many volumes, and a new commission was created to re-compile the state’s statutes into two manageable volumes. That commission included the young James Kent, who would go on to a celebrated career in the state’s court of chancery. This time the legislature requested that Kent note “contradictions, omissions, or imperfections” of the law in his reports so the legislature could correct them. Kent often proposed such corrections in the margins of his reported bills, but he also changed the text itself as he saw fit, usually with a note to the legislature that he had done so. Another twelve years saw yet another compilation, carried out in the same manner as Kent had done. As one scholar notes, “What Kent did when he revised the statutes was quintessentially legislative, and he did it with the legislature’s permission and gratitude.” Legislators reviewed the drafts and on rare occasions overruled a commissioner’s suggestion, but clear lines of legislative prerogative were neither drawn nor guarded in these statutory revisions. What bound the lawmaking powers of the commissioners was the subject

⁸⁵ “An Act for revising and digesting the laws of this State,” passed April 15, 1786, reprinted in *Laws of the State of New York Passed at the Sessions of the Legislature Held in the Years 1785, 1786, 1787, 1788, Inclusive* (1886), 2:247–48. See generally “Statute Law in New York from 1609 to 1901,” in *Report of the Joint Committee on Statutory Revision*, in *Documents of the Assembly of the State of New York*, 124th Sess., No. 72 (1901) 25:45–116.

matter itself: The commissioners were revising previously enacted legislation; they were not venturing into a codification of the “rules” of the common law. Within the domain of prior legislation, however, they followed their practical sense of which laws worked and which needed to be updated to conform to republican theory and practical utility.⁸⁶

By the mid-1820s, another twelve years had passed since the last compilation, and New Yorkers had enacted a new constitution in 1821 that, like the Revolutionary constitution, restructured the court system and made a number of prior legislative acts unenforceable. Though a new commission was created in 1824, after Sampson’s acerbic demand for codification, the nature of the commission’s work changed. In his opening message to the legislature, Governor DeWitt Clinton called for “a complete code founded on the salutary principles of the common law, adapted to the interests of commerce and the useful arts.” Clinton’s approbative mention of the common law may have sounded like a repudiation of Sampson, but Clinton made it clear that his intended code would “utterly destroy judicial legislation, which is fundamentally at war with the genius of representative government.”⁸⁷ Like Sampson, Clinton hoped to replace the foundations of law with the positive decrees of a democratic legislature.

The fourth revision of New York statutes thus became much more politically charged than previous revisions. While codifiers promoted their theories as those most compatible with democratically representative government, opponents decried codification on the same grounds. “The leveling principles of Counselor Sampson,” one paper wrote, took democracy to a dangerous extreme. The very reason for representative government, the *Evening Post* explained, was that most people were not capable legislators, and even many representatives lacked the requisite skill. Judicial lawmaking often arose because the statutes that did exist were poorly drafted, contradictory, and vague. A

⁸⁶ “An Act making provision for the revision of the laws of this State,” passed March 28, 1800, reprinted in *Laws of the State of New York Passed at the Sessions of the Legislature Held in the Years 1797, 1798, 1799 and 1800, Inclusive* (1887), 4:519–20; Farah Peterson, *Statutory Interpretation and Judicial Authority, 1776–1860* (Ph.D. dissertation, Princeton University, September 2015), 107–13.

⁸⁷ “Governor Clinton’s Message,” *National Advocate* (New York, N.Y.), January 8, 1825.

desultory statutory system was unsurprising, the *Post* added, given that legislatures were “subject to caprice, to the power of eloquence, to party feeling, and even to worse influences.” Of the branches of government, only the judiciary had proven to have the sufficient “dignity and responsibility” to be entrusted with the “discretionary power” to declare the law.⁸⁸ Defenders of the common law pressed the new commission not to go beyond the bounds of previous revisers, and in making this appeal, critics retold the history of New York’s statutory revisions with much clearer lines drawn between legislating and compiling than had actually been the case. Kent’s revision, one article wrote, “did not profess to be more than a collection of general laws, with such modifications as they had received from legislative acts.” Gone from this account were Kent’s many alterations to the law made at his own discretion and reflecting his sense of sound policy.⁸⁹

Both the legislature and the revising commission attempted to navigate between the two positions on codification. The legislature permitted the revisers to “complete the said revision in such manner as to them shall seem most useful and proper.” One important limitation was placed on this discretion, however. The revisers were not to alter “any statute that has been the subject of judicial decision.” Legislation that had been judicially interpreted had to maintain its same “phraseology” so as not to disturb judicial precedents, including precedents of statutory construction.⁹⁰ The legislature then appointed three revisers that balanced the state’s partisan divisions: the Clintonian John C. Spencer, the Van Burenite Democrat Benjamin F. Butler, and the nonpartisan marine lawyer John Duer.⁹¹ When the revisers set to work, they modeled their efforts on the commissions of France and

⁸⁸ *Commercial Advertiser*, May 22, 1826; *New York Evening Post*, August 28, 1824.

⁸⁹ *Chautauqua Phoenix* (Westfield, N.Y.), January 14, 1829.

⁹⁰ 1825 New York Laws 446–47.

⁹¹ The original appointments included the old federalist and Clintonian James Kent and the agrarian Democrat Erastus Root. Both declined the commission implying an unwillingness to work with Butler. They were replaced by Duer and Henry Wheaton, a well-known Supreme Court reporter. Wheaton left the project in 1827 with a diplomatic appointment to Denmark, and was then replaced by Spencer. See “Statute Law in New York,” 76–79; William Allen Butler, *The Revision of the Statutes of the State of New York and the Revisers* (1889). On the partisan affiliation of the commissioners, see Thomas D. Morris, *Free Men All: The Personal Liberty Laws of the North, 1780–1861* (Lawbook Exchange 2001), 54–55.

Louisiana, providing the legislature a “project” of their proposed revision. The project loosely tracked Blackstone’s division of the law into four parts: statutes regarding public institutions and jurisdiction, the law of property and domestic relations (Blackstone’s persons and things), civil proceedings (private wrongs), and penal law (public wrongs).⁹² Unlike the French-style commissions, though, they submitted reports to the legislature, inviting that body to omit any proposed sections “at their pleasure.”⁹³

After the approval of their project, the revisers’ first major report detailed their working arrangement. Agreeing at least in part with the defenders of the common law, they found New York’s statutes a mess. “Many of these statutes have not only been drawn up carelessly and immethodically,” they reported, “but in all of them, numerous propositions are crowded together in the same section, and words multiplied without motive or necessity.” They proposed instead “to adopt the most simple arrangement; to confine the sections to short propositions; to omit unnecessary words; and to avoid, as far as practicable, all ambiguities of expression.” They admitted that such an effort went beyond a mere compilation of statutory law and “carried to their full extent, the powers given us by the legislature.” They defended the move only with an appeal to their own expertise and careful procedures. They promised to make “no changes or additions” to the law, but then qualified the statement by adding “[if] there did not appear sufficient reasons to our minds.” Although it would have been more efficient, they did not think it “consistent with the great importance of the trust confided to us, to leave to any one of our number exclusively, the completion of any part of the work.” Rather, after each had drawn up his allotted portion, the three committed “the drafts prepared by each

⁹² For the project, see *Journal of the Assembly of the State of New York* (1825), Appendix D, elaborated again the next year at *Assembly Journal* (New York 1826), 885–94; *American* (New York, N.Y.), March 27, 1826; May 5, 1827. Other reports to the legislature can be found at *Assembly Journal* (New York 1826), 912; *Journal of the Senate of the State of New York* (1827), 31–33, 49, 105–06, 123, 157–58, 356, 517–19; *Assembly Journal* (New York 1827), 125–26, 476, 641–42, 692–93, 803; *Assembly Journal, Special Session* (New York 1827), 4–5, 23–24, 63–65 (“The general distribution of the subjects of the whole revision, it will have been perceived, has been made conformably to the admirable system of judge Blackstone’s commentaries.”), 98, 108.

⁹³ *Assembly Journal* (New York 1826), 891.

to the separate and critical revisal of the others; and then [subjected] them to the joint examination of all." Expertise and process were all that were offered. Unlike Kent's revision, subsequent reports provided very little commentary justifying new or altered rules, the commissioners explaining that they "supposed that the propriety of such alterations would best be explained and understood, by an actual exhibition of the text, as it would stand, after the proposed changes had been made."⁹⁴ The revisers thus supplied a new oracle: the very text of the statute would speak for itself.

The work of revision lasted three years, and during that period the commissioners continually directed attention to the unclear boundary between compilation, revision, and codification. In compiling and systematizing New York's statutes, they were "surprised" at how many legislative gaps were uncovered. There was a dearth of "necessary details to carry out a principle, or to provide for its enforcement, which we had never suspected until the effort was made to arrange the statutes upon the plan prescribed." In such cases a coherent revision necessarily required new legislation to supply the details.⁹⁵ At times, they pushed against the boundaries of their commission, complaining that they "have not been able to understand why the language of the written law should defy all attempt at improvement," merely because judges had happened to construe a particular statute. At other times, they resented the efforts of legislators to shift politically controversial reforms over to the commissioners. When the senate judiciary committee referred a petition to reform the penal system so that it could be "adapted to the genius of our government, and the enlightened policy of the age," the revisers refused to act on it "until the intentions of the legislature shall have been more distinctly and fully expressed."⁹⁶ At least on criminal reform, the revisers were not prepared to substitute their own policy proposals for that of actual legislators.

⁹⁴ *Assembly Journal* (New York 1826), 889-92.

⁹⁵ *Assembly Journal, Second Session* (New York 1827), 63.

⁹⁶ *Assembly Journal, Second Session* (New York 1827), 63; *Assembly Journal* (New York 1826), 892.

Another petition received a different response. An 1826 petition to the senate complained “that our present system of law, together with the rules and regulations of our courts of record, have been copied from the English practice” and argued it should be replaced by a system “formed on the plain and simple principles of common sense.” The senate judiciary committee derived two questions from this petition: “1. Whether the whole body of our laws may not be reduced to a written code or text, and comprised within a moderate compass? and 2. Whether the existing practice of our courts of law, (which is substantially the English practice with some amendments,) ought not to be reformed and simplified?” The revisers dodged the first question as beyond the scope of their mandate, but they reasoned the second “comes more properly within the range of our inquiries; many parts of the practice being regulated by statutory provisions.” They agreed that practice deserved serious reform, and they promised when they reached that part of their project they “would extend the statutes already passed” to address complaints over civil proceedings.⁹⁷

First, however, they had to address the law of property and obligations in their Blackstonian division of the law. The regulation of contracts posed particular problems. “Almost every statute embraced” under that heading had been the subject of judicial interpretation, yet these statutes were just as poorly drawn up as any they had encountered. “Parts of sections have been repealed or qualified, and an amendment has again been amended. . . . In other cases it became necessary to break up sections containing provisions on distinct subjects, or containing complicated and voluminous details and provisos.” In such conditions, they explained, “this unavoidably produced a change in the language” of the revision. They assured the legislature, however, that “in expressing the supposed meaning of various statutes, we have been guided by the decisions of the chancellors and judges of our state.” For the law of contracts, then, they proposed a true Sampsonite codification: the transformation of judicial practices and understandings into legislative rules.⁹⁸ The legislature,

⁹⁷ *Assembly Journal* (New York 1826), 892.

⁹⁸ *Assembly Journal, Second Session* (New York 1827), 63–64.

however, rejected the proposed report. Only after the revisers replaced their attempted codification with a mere compilation that left the “complicated and voluminous” statutes intact did the legislature give its approval. Defenders of the common law cheered that the revisers had been kept from taking “the broad-axe and cleaver” to the legal system.⁹⁹

Thus when the revisers reached Part III on civil proceedings, they adhered closely to their original explanation that, in this area at least, they were “extending” statutes without attempting to codify the unwritten law. The report included an abundance of sections that were purportedly “new” but defended as “necessary to carry out” statutes already in force. As the revisers had noted, the state had enacted many statutes over the decades making small adjustments to civil practice, and many of the more detailed regulations had not become subject to extensive judicial commentary the way statutes regulating property and contracts had. Moreover, by the time the revisers submitted their work on Part III, Butler had been elected to the state assembly and Spencer to the state senate, providing the commissioners actual legislative authority to defend their more striking innovations as sound policies worthy of enactment whether or not they reflected prior practice or statutory regulation. Butler, for instance, took up multiple daily sessions in the assembly fending off objections to the revisers’ proposal to extend powers of documentary discovery and witness examination from chancery to courts of common law.¹⁰⁰ With the commissioners debating and voting within their numbers, legislators defeated fewer of the proposed changes to legal practices appearing in the Revised Statutes. But if the line between compilation, revision, and outright legislation had been blurry from the start, it became impossible to discern as the revisers entered the later stages of their work.¹⁰¹

⁹⁹ *Spectator* (New York, N.Y.), November 23, 1827.

¹⁰⁰ See *Assembly Journal* (New York 1826), 892; *Report of the Commissioners Appointed to Revise the Statute Laws of this State* (New York 1828), passim; “State Legislature,” *New York Commercial Advertiser* (New York, N.Y.), January 22, 1828.

¹⁰¹ See *Report of the Commissioners Appointed to Revise the Statute Laws of this State* (New York 1828), 5. The revisers wrote that “exertions have been made, to prevent multiplicity of suits; to avoid fictitious, useless, and protracted forms; and to save unnecessary expense,” and it urged the legislature not to reject the material “merely because it is new.” On the many adjustments made to practice, see generally Graham, *A Treatise on the Practice of the Supreme Court*.

When the *North American Review* studied the resulting legislation, it misinterpreted politics as principle. The author approvingly observed that the revisers had taken a different approach to statutes regulating “modes of public proceeding, [from] those which concern private rights more nearly, regulating the distribution of property and the domestic relations. With the former they have felt themselves at greater liberty to fill up what was wholly unprovided for by the existing letter of the Statute Book.” Modes of proceeding seemed more amenable to legislative change and even experimentation. The settled law of property, however, could at best be arranged, not revised, lest “too much of substance may be sacrificed to mere method; or rather too much new law may be suddenly introduced, from the great temptation of filling out a noble outline and erecting a perfect system; in short, there is some reason to fear lest systematizing should degenerate into absolute codification.” Modes of public proceedings, however, could aim more directly at “practical convenience,” and in this domain, it was appropriate that the revisers had produced “not merely a consolidation” but “provisions wholly new, to supply and remedy what are in their judgment palpable omissions and imperfections.”¹⁰² The *Review* thus extracted a legal philosophy from circumstances that had largely been produced by political happenstance. The revisers had altered legal practice not because they saw it as jurisprudentially severable from the law of property but because in that area they already had more statutory texts with which to work, and because, as a matter of timing, they were better able to influence the legislative reception of the later stages of their work after they themselves had become legislators. From a certain distance, however, the Revised Statutes appeared to demonstrate that matters of procedure and practice were peculiarly suited to legislative modification, an idea that would last long after the political contingencies of the 1820s were forgotten.

¹⁰² “Revision of the Laws of New York,” 24 *North American Review* 193 (1827), 207–08. A local New York paper came to a similar conclusion. It reasoned that in the law of property “peculiar caution will be requisite in the revision of these statutes” inasmuch “as the consequences, even of partial innovation, are not easily foreseen.” It attributed the quotation to the revisers themselves, but no such material appears in the cited report. *American* (New York, N.Y.), May 5, 1827.

Conclusion

In the world of New York legal practice that David Dudley Field and his contemporaries inherited, practitioners continued to produce manuals that taught younger lawyers how to plead for remedies within a traditional structure of form and fiction. An increasing number of theoretical works, however, were turning attention away from common law remedies and modes of reasoning towards a system of rules “made” by judges. While seasoned practitioners like Henry John Stephen and Joseph Story could discern how forms and precedents constrained the discretion of a rulemaking, oracular judge, critics and codifiers like William Sampson denied that “judicial legislation” had any legitimacy in a democratic republic that institutionally separated the making of law from the application of law to particular cases. Field admired Sampson, but his own call for codification had a practitioner’s inflection, focusing on its promises for aggregating and reforming the law to rescue lawyer-artisans from their debased positions of overwork and underpay. Field began his Manhattan trial career just as the Revised Statutes were being worked out by the legislative commission in Albany, a commission that united practitioners’ calls for reform with popular ideas about codification.

Although some worried that the Revised Statutes had carried codification too far and gave too much lawmaking authority to legislators who were shortsighted amateurs at best, the resulting work hardly satisfied the codifiers. What codifiers regarded as the largest and most important areas of “unwritten law” remained beyond the scope of New York’s statutes (now compiled into three volumes).¹⁰³ At the same time, the “modes of proceeding” which most codifiers ignored had actually received the most thorough treatment and innovative reform. Indeed, a purported treatise on “practice in civil actions” in 1830 was little more than a re-printing of the recently published statutes.¹⁰⁴ In the following decades, this peculiarity would become the defining feature of American codification. Codes, American lawyers would suggest, ought to begin with procedure and work out from there.

¹⁰³ See *Revised Statutes of New York (1828–1829)*, 3 vols.

¹⁰⁴ See Elijah Paine, *The Practice in Civil Actions and Proceedings at Law in the State of New York*, 2 vols. (1830).

The growing priority of procedural codification occurred alongside another shift in the codification debates. With all the political attention paid to the New York revisers and their method of working, debates about institutional competence in lawmaking focused less on the courts and more on commissions. When the District of Columbia contemplated a revision along the lines of New York in 1830, an editorial complained that hiring “some three or four lawyers . . . to make laws for the people” undermined fundamental principles of “REPUBLICANISM.”¹⁰⁵ If the oracles of an unelected judge were an illegitimate source of lawmaking, what were the oracles of an unelected commissioner? When state politics continually derailed subsequent efforts of law reformers, the Revised Statutes appeared to offer a model for achieving codification and reform both within, but also apart from, the normal operations of a legislature. But to be successful, codifiers would have to find a way to justify lawmaking by an extra-legislative commission. If the rule of writs were to end, it would have to be replaced by something more sophisticated than Sampsonite slogans of legislative supremacy. Lawyers would have to become supreme even over legislators.

¹⁰⁵ *Daily National Intelligencer* (Washington, D.C.), March 26, 1830.

Chapter 2

Mere Machinery

The Political Shape of Civil Procedure

Not yet forty years old in 1847, David Graham had already proven himself a master practitioner. Besides his well-known work on common law practice appearing in its third edition, Graham had also prepared a volume on civil jurisdiction in New York and had edited for American lawyers John Sidney Smith's two-volume treatise on English equity practice. The inaugural professor of common law pleading at New York University, Graham was also a well-compensated solicitor in the court of chancery. He was thus an ideal choice for appointment to a legislative commission to revise practice and pleadings in the state.¹

But Graham was not chosen. At a party caucus meeting on the evening of February 4, 1847, Graham received 30 votes to join the commission, while Theodore C. Peters (1805–1876), a farmer from the distant western County of Genesee received 35.² Peters sounded like a quintessential Jacksonian agrarian. "I grant you that we farmers are about as great a set of asses as could well be," he wrote in 1846, "for we bear all the burdens of the whole community, but yet have no proportionate share in the law making." Peters had run for the state constitutional convention that year, breaking with customary politeness by openly campaigning in the papers as "a stump candidate . . . in relation to reform." He lost, reportedly after having to withdraw to attend to a family illness, but that did not

¹ David Graham, *A Treatise on the Practice of the Supreme Court of the State of New York* (3d. ed., 1847); David Graham, *A Treatise on the Organization and Jurisdiction of the Courts of Law and Equity in the State of New York* (1839); John Sidney Smith, *A Treatise on the Practice of the Court of Chancery*, ed. David Graham Jr. (2d. American ed., 1842). Graham was the chief counselor to the municipal corporation of New York City and frequently appeared in chancery on the corporation's behalf. See, for instance, judgments recorded against the City in *Indices of Judgments Docketed in the City and County of New York, 1844–1855* (1857), New York City Municipal Archives, Office of the County Clerk, 31 Chambers St., Manhattan.

² See "Speech of Mr. Upham," *Albany Evening Journal*, March 30, 1847. "Democratic Caucus," *New York Evening Post*, February 6, 1847, gives the date for the Whig and Democratic caucuses.

dampen his invectives against the state's system of law and legislative policy. Even when farmers did enter the legislature, he grouched, they were "led by the nose by the gentlemen of a certain other trade or profession" – that is, the lawyers.³

Yet despite his complaints about popular representation and his pitting "farmers" against "gentlemen" lawyers, Peters was no Jacksonian. The caucus that nominated him to the commission was a Whig Party caucus, and Peters remained devoted to the Whigs until their collapse the following decade. When the Whigs formally nominated Peters in the state senate, a flabbergasted Democratic lawyer suspected the Whigs must be setting a trap. Surely they were nominating someone so unqualified to regulate the practice of law just to force the Democrats to defeat this parody of their typical constituent. The lawyer told the Whigs to stop playing politics. He "thought each party should assume the responsibility of selecting their own men for these commissions" and he "wanted them certainly to bring forward their best men." Ultimately, twenty-six Democrats in the state assembly voted down Peters's nomination and replaced him with Graham.⁴

Peters's Whig supporters were not playing at politics, however, and their earnest backing of a class-conscious farmer for the state's commission on law reform disrupts two basic stories told about the politics of the Field Code, both recounted by Lawrence Friedman. First, because Field himself was a Jacksonian, it is often said that the code was a product of Jacksonian Democracy, a bold if naïve attempt to make civil practice "so simple and rational that the average citizen could do it on her own." The second story is that the code or something like it was by nature inevitable for "commercial states" like New York. "Business likes its legal process to be rational and predictable," Friedman writes. "Business likes swift, nontechnical decisions, based on facts, not writs and forms of action."⁵

³ T. C. Peters to the Chairman of the Genesee Agricultural Association, July 10, 1846, in 7 *Genesee Farmer* 181 (1846); "Taking the Stump," *New York Daily Tribune*, March 12, 1846.

⁴ *Albany Argus*, March 11, 1847; *Journal of the Assembly of the State of New York* (1847), 628–29. Party affiliations derived from *Albany Evening Journal*, December 31, 1846.

⁵ Lawrence M. Friedman, *A History of American Law* (Simon & Schuster, 3d. ed., 2005), 296–97. For other assertions of the code's Jacksonian production, see Geoffrey Hazard & Michele Taruffo, *American Civil Procedure: An Introduction* (Yale 1995), 24; Peter Charles Hoffer, *The Law's Conscience: Equitable Constitutionalism in America* (UNC 1990), 91–92;

Both accounts obscure the actual political history of New York law reform. Appearing in 1848, the purportedly Jacksonian legislation had to be passed by a legislature dominated by Whigs, the anti-Jacksonian party. And as Peters's nomination suggests, the code was not the product of a straightforward "rationalization" or "modernization" of practice, nor a smooth implementation of what "business likes." Rather, the contingencies of partisan loyalty, political horsetrading, and the short-term horizons of a legislative session shaped the code, and with it, the boundaries of a new legal domain known as "civil procedure."

This chapter tells the story of the code as a piece of legislation produced in one of the most politically tumultuous eras of the New York legislature. When the Democratic Party splintered in the late 1840s, codification and practice reform became the project of a Whig coalition made up of lawyers, merchant creditors, and a largely rural "anti-lawyer" class who demanded open access to the practice and profession of law. Although leading critical histories argue that the conservative bar used technical procedure to thwart real social change, it was New York's reformers and anti-lawyers who first deployed the idea of procedure's superficiality in order to make their reforms politically viable. As the "mere machinery" of the law, procedure invited legislative experiment while dodging concerns that "substantial" justice would be affected. But procedure as machinery also gave expert lawyers an argument why they should control the reforms. The contradictions of the mere machinery idea became the code's enduring legacy. Passing under that metaphor, "procedure" in the United States came to encompass many departments of the law other nations considered paradigmatically substantive. As the most technical subfield of the law, expert lawyers were indispensable to its reform, but deference to lawyer-commissioners became difficult to square with popular sovereignty in the Age of Jackson. Instead of rational certainty and predictability, "Business" received a partial code of unclear

Charles M. Cook, *The American Codification Movement: A Study of Antebellum Legal Reform* (Greenwood 1981), 158-63; Charles E. Clark, "Code Pleading and Practice Today," in Alison Reppy, ed., *David Dudley Field: Centenary Essays* (NYU 1949), 55-57.

application, while legislators were left to wonder how much of their authority could be delegated without abdicating their responsibilities.

The Hap-Hazard Patching Up of a System: Troubles Under the Revised Statutes

Although the Revised Statutes of 1828 significantly altered the practice of law in New York, lawyers' complaints about the overwhelming bulk of precedents, vague pleadings, or the degrading fee system continued. Graham wrote in his 1847 treatise that in the past decade "there have been published more than twenty volumes of the reports of the Supreme Court, besides ten volumes of statutes, embracing a greater amount of *practical* law [than] during any portion of the former history of the practice in this state." Volumes of precedent continued to pile up, and treatise writers struggled to digest it all for the profession.⁶ Lawyers continued to compare themselves with degraded artisans unable to earn a competence through their work.

One such lawyer was Gulian C. Verplanck (1786–1870), a writer and legislator who held to the old ideal of the lawyer as worldly-wise man of letters.⁷ In an 1839 address to the state assembly in which he sat, Verplanck complained that "there is an unaccountable reluctance" to compensate "any sort of public labor, on the same scale and with the same object which any large merchant, manufacturer, or any wealthy corporation establishes the salaries of persons whom he or they may employ."⁸ Even the great jurists of the bench and bar, Verplanck lamented, were compensated like journeymen because they were public officers rather than private contractors.

Verplanck accused the Revised Statutes of exacerbating the two problems they were designed to alleviate: the cost and delay of civil suits. The revisers' attempted solution had sought to merge

⁶ Graham, *Treatise on the Practice of the Supreme Court*, vii–viii.

⁷ On the transition of lawyers from men of letters to professional tradesmen, see especially Michael Grossberg, "Institutionalizing Masculinity: The Bar as a Man's Profession," in Mark Carnes and Clyde Griffen, eds., *Meanings for Manhood: Masculinity in Victorian America* (Chicago 1990), 133–51. In literary circles, Verplanck was a lesser light among the famed Knickerbocker Group that included Washington Irving, James Fenimore Cooper, William Cullen Bryant, and Lydia Marie Child.

⁸ Gulian C. Verplanck, *Speech When in Committee of the Whole in the Senate of New-York on the Several Bills and Resolutions for the Amendment of the Law and the Reform of the Judiciary System* (1839), 18.

practices of common law and equity, mostly by sharing certain powers of the chancery court with common law judges. Common law courts were empowered to order the “discovery” of documents between parties and the deposition of certain witnesses, a type of pretrial investigation of evidence formerly available only in equity.⁹ These reforms were expected to reduce the number of cases filed in both court systems. The most common occasion for double filing – seeking an equitable discovery to support a remedy at common law – could now be handled in one court with only one bill of cost. Further, the eight common law circuit judges were invested as vice chancellors, and an additional full-time vice chancellor was appointed to busy New York City.¹⁰ Thus, chancery’s investigative processes were transferred to common law while the workforce of chancery expanded to resolve controversies under equity’s jurisdiction.

The problem, Verplanck pointed out in his address, was that on a fair reading of the state’s constitution, all “equitable” decisions could be appealed up “to be decided by a single Chancellor, sitting alone.”¹¹ By expanding the number of officers rendering equitable decisions, the Revised Statutes had multiplied the occasions for appeal to the chancellor a hundredfold. This problem was exacerbated by New York’s abolition of imprisonment for debt, another novel remedy unforeseen by the 1828 statutory revisers. Jurists then and now have celebrated New York for being among the first American states to free insolvent debtors from imprisonment in 1831, but no study has given serious attention to a problem of civil remedies that followed this humanitarian reform: the concealment of

⁹ For citation to the relevant statutes as well as explanations of the practical details, see Graham, *Treatise on the Organization and Jurisdiction of the Courts*, 364 (noting the Revised Statutes “greatly relaxed the strictness of their [common law courts’] proceedings, by assimilating them to those of equity”). They could also administer equitable remedies for real property such as partition and waste, and the pleadings for these remedies took the form of equitable petitions and answers rather than the writ system’s forms of actions. Graham, *Treatise on the Organization and Jurisdiction of the Courts*, 564–68 (partition); 573–75 (waste); 556–57 (dower); 490–91 (document discovery). On the pre-code merger of examination practices in common law and equity, see Amalia D. Kessler, *Inventing American Exceptionalism: The Origins of American Adversarial Legal Culture, 1800–1877* (Yale 2017), 96–111.

¹⁰ Graham, *Treatise on the Organization and Jurisdiction*, 348. Two additional vice chancellors were commissioned in the early 1840s. By 1846, the chancery bench included the chancellor, three vice chancellors, and seven circuit judges who exercised chancery jurisdiction. See “Civil Officers,” *New York Evening Post*, 13 July 1846 (on file with the Beinecke Rare Book and Manuscript Library, Yale University).

¹¹ Verplanck, *Speech When in Committee*, 6–7.

assets.¹² As Bruce Mann demonstrates, conditions at Manhattan's New Gaol where debtors were held until they worked off or refinanced their loans were unwelcoming.¹³ If debtors could pay to avoid the Gaol, they usually did. But once the threat of imprisonment had been statutorily abolished, creditors increasingly turned to the investigative powers of chancery to discover whether debtors were truly insolvent or merely hiding assets while avoiding their obligations.

The process worked out by lawyers across the 1830s became known as the "creditor's bill." By the 1820s, chancery had permitted creditors to file a bill to disgorge a debtor's fraudulent transfers of property from a colluding third party. In the landmark *Hadden v. Spader*, for instance, the indebted merchant John Davis made a "confidential debt" to his friend Lot Hadden. Instead of making payments on his original debts, Davis "paid" Hadden his entire stock of goods and accounts, but Hadden permitted Davis to run the business as a sort of trustee. Davis continued his merchant operations but "owned" nothing that his creditors could collect. The chancellor, sustained by New York's highest appellate court, ruled that equitable remedies of discovery, injunction, and imprisonment for contempt were available to assist the defrauded creditors, so long as those creditors had won a judgment on the debt at common law. Equity, that is, would follow the law. If the common law courts ruled that creditors were owed a collection, they could then make out a bill in chancery to assist the execution with equity's more searching and more personal remedies.¹⁴

The state's abolition of imprisonment for debt applied to chancery proceedings on contracts as well as to common law, but the statute made an explicit exception for "fraudulent" debtors. Accordingly, lawyers pressed for the expansion of the creditor's bill to cover not just cases of

¹² See especially Peter J. Coleman, *Debtors and Creditors in America: Insolvency, Imprisonment for Debt, and Bankruptcy, 1607-1900* (Wisconsin 1974); Edward J. Balleisen, *Navigating Failure: Bankruptcy and Commercial Society in Antebellum America* (UNC 2001); Bruce H. Mann, *Republic of Debtors: Bankruptcy in the Age of American Independence* (Harvard 2002). For contemporary figures on the numbers and relative indebtedness of New York prisoners on the eve of abolition, see "Imprisonment for Debt," 32 *North American Review* 490 (1831), 490-508.

¹³ Mann, *Republic of Debtors*, 86-88; 96-102.

¹⁴ *Hadden v. Spader*, 20 Johns. 554 (1822). The expansion of the remedy to "fraudulent debtors" was affirmed in *Gleason v. Gage*, 7 Paige 121 (1838). See also Alexander M. Burrill, *A Treatise on the Practice of the Supreme Court of the State of New York* (2d. ed. 1846), 2:290-303.

fraudulent transfer to third parties but cases of concealment as well, and the equity courts obliged. “After the right to coerce the debtor by imprisonment of his body was abolished, something of the kind was necessary,” Oliver Barbour’s treatise explained. “While it is the policy of the non-imprisonment act, therefore, to relieve the unfortunate debtor from imprisonment, it is the design of . . . creditors’ bills, to compel him to surrender all his property and effects” or face imprisonment once again.¹⁵ Creditors could therefore put debtors under oath to make admissions about their assets, and imprisonment for contempt could punish evasions of common law remedies.

Verplanck blamed “the imperfections of the law of [1831] *abolishing imprisonment for debt*” for putting the profession in “the habit of collecting commercial debts by what are called creditors’ bills.” In Verplanck’s experience, execution of common law judgments routinely required the supplemental remedies of chancery, including its most costly action, the bill of discovery, whose written question-and-answer format racked up fees by the page-count besides costs for the interrogating lawyers and recording examiner.¹⁶ Thus, many actions continued to require two lawsuits. By 1838, creditors’ bills had so flooded the system that equity courts in the busiest circuits were hearing few other cases. Theodore Sedgwick observed that in New York City’s chancery circuit, the number of filed bills had grown from 45 per month in 1831 to 112 per month in 1838 with the rise of creditors’ bills. The current docket contained 130 other causes ready for trial, 104 of which had been sitting without a hearing for more than three years. During the three terms held so far in 1838, Sedgwick tallied, none of these cases had been heard at the January or July terms, and only six had been tried in April. The rest were held over to the next term, while new causes continued to accumulate.¹⁷ Graham commented that the delays of chancery and the cumbersome proceedings of creditors’ bills led some creditors to seek their remedy through criminal procedure. Since New York still permitted private prosecutions before a

¹⁵ Oliver Barbour, *A Treatise on the Practice of the Court of Chancery* (1844), 149; see also *id.* at 150–157; David Graham, *A Treatise on the Practice of the Supreme Court of the State of New York* (3d. ed. 1847), 506–508; 568.

¹⁶ Verplanck, *Speech When in Committee*, 21–22.

¹⁷ Theodore Sedgwick, *A Statement of Facts in Relation to the Delays and Arrears of Business in the Court of Chancery of the State of New York* (1838), 30–35.

grand jury, creditors could resort to criminal indictments of a debtor or a colluding third party. Graham concluded that “the just legislation, which has abolished the imprisonment of the debtor in a civil action, has led to an unexampled number of complaints” within the criminal system.¹⁸ Despite its “abolition,” the risk of imprisonment for debt lurked everywhere in 1830s New York.

Legislators considered further reforms in the sessions from 1836 to 1839, but Verplanck thought most suggestions were futile, for “they are all the mere hap-hazard patching up of a system which needs a much more thorough and radical reform.” If hasty statutory changes to legal practice had brought on these unforeseen problems, Verplanck wondered, what would further legislative “remedies” do?¹⁹ Inspired by an English royal commission that had sat from 1829 to 1831 and proposed reforms to common law pleading, the 1837 legislature called on the governor to appoint a similar commission of three lawyers.²⁰ Verplanck was unimpressed with the New York commissioners, the majority of whom were old Federalist lawyers. He complained that, unlike the English commission that had produced multiple volumes of research and proposed legislation, New York’s commissioners “reported very briefly their theory of legal reform, with few reasons for it and little external evidence.” Their thirteen-page report concluded that “questions of practice, pleadings and costs” ought to be left “principally to the regulation of the higher courts of the State.” The commissioners proposed a constitutional amendment to expand the chancellor’s office to include up to six chancellors, but the rest of their legislation limited itself to vesting lawmaking authority among

¹⁸ *Fourth Report of the Commission on Practice and Pleadings* (New York 1849), xxxvi. The commission’s Fourth Report included a code of criminal procedure that was reputed to be primarily the work of Graham. See, for instance, *People v. Willis*, 23 N.Y.S. 808, 809 (N.Y. Supreme Court 1898). In addition to being a chancery solicitor and professor of common law pleading, Graham earned renown as a criminal defense attorney. His brother John became one of the most famous criminal defense attorneys of the postbellum era.

¹⁹ Verplanck, *Speech When in Committee*, 3.

²⁰ On the English commission, see Michael Lobban, *The Common Law and English Jurisprudence, 1760–1850* (Oxford 1991), 211–15. From 1829 to 1833, the commission produced six volumes of reports that contained extensive interview transcripts and collections of data from across the realm. The New York legislature authorized the governor to appoint the commissioners. 1837 New York Laws 502. Governor William Marcy (1786–1857) appointed Daniel Cady (1773–1859), a former Federalist member of the state assembly, Thomas Oakley (1783–1857), a former Federalist congressman and New York assemblyman, and Jacob Sutherland (1787–1845), a Democratic-Republican delegate to the 1821 state convention and an associate justice of the Supreme Court of Judicature.

the appellate judges, who “may, in their discretion, prescribe the forms of all process, pleadings, records and proceedings.”²¹

Verplanck thought the commission had gotten the English imitation all wrong. It was true, he conceded, that English royal commissions mostly comprised reformist judges, but the main purpose had not been “mere judicial legislation” but rather judicial examination. The commission sat for three years and made inquiries of “Chancellors and Ex-Chancellors, equity and common lawyers, and civilians, attorneys and bankers, money-borrowers and money-lenders, philosophers and brokers, every one who had knowledge or experience, or even ingenious theory to communicate.” Rather than legislate, in Verplanck’s telling the judge-commissioners merely organized the data into “clear and intelligible rules” for Parliament to consider. “This is a very different thing from authorizing the Chancellor and the three Judges to revolutionize the whole system of practice and pleading next August.” According to Verplanck, what was needed was not a brief report and a quick delegation of lawmaking power to the judiciary. Rather, law reform required expertise, time, and a set of legislators who could think through the system holistically, taking care that reforms in one department of remedies did not work against another.²²

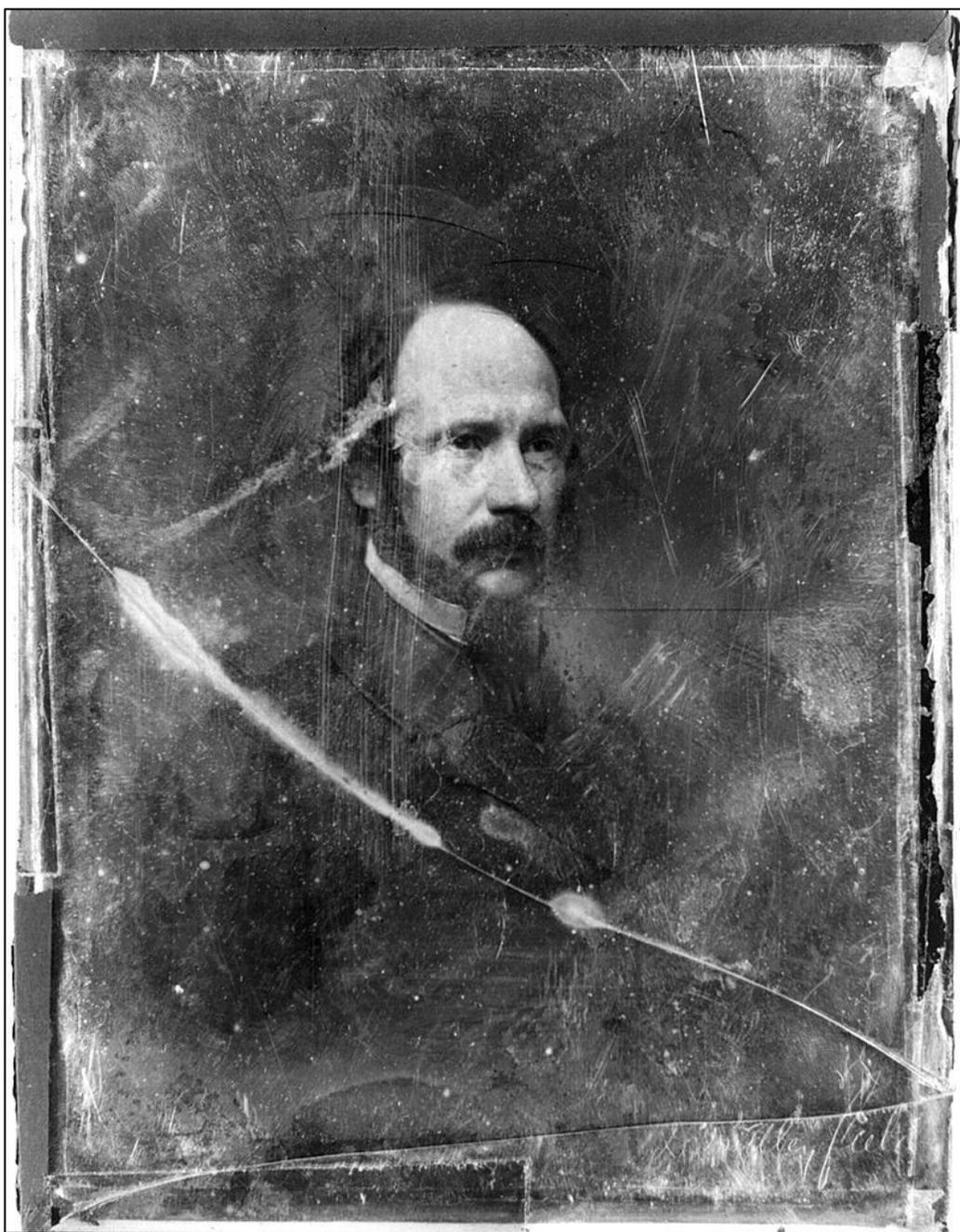
Verplanck’s address garnered the admiration of the thirty-five-year-old Manhattan trial lawyer David Dudley Field (see Figure 3), who wrote an enthusiastic letter of support that he later published as an anonymous tract. Field agreed the recent commission report had “been prepared in haste, upon insufficient information. As unlike as possible the reports of the English Commissioners on the same subject.” And he further approved of Verplanck’s stance against judicial lawmaking. In addition to breaching the separation of powers, it was unlikely to be effective because judges would be reluctant to admit “any vice inherent in the system in which they were the chief officers.”²³

²¹ Verplanck, *Speech When in Committee*, 3–4; Report of the Commissioners Appointed under the Act of the 15th of May, 1837, in *Documents of the Senate of the State of New York*, 61st Sess., No. 2 (1838), 2:11, 15–19.

²² Verplanck, *Speech When in Committee*, 3, 19–20.

²³ [David Dudley Field], *A Letter to Gulian C. Verplanck, on the Reform of the Judicial System of this State* (1840), 4–7.

Figure 3.



Daguerreotype of David Dudley Field II (1805–1894), most likely produced in the mid to late 1840s, around the time Field produced the New York Code of Civil Procedure.
Library of Congress Prints and Photographs Division, Daguerreotype Collection, Film Reproduction No. LC-USZ62-28267.

Most importantly, Field agreed on the need for a holistic reform by a legislator who had an eye for detailed interconnections. Field likened the legal system of remedies to complicated yet noiseless “machinery”; “and the eye, except of the attentive and practiced observer, fails to perceive how it works, how complicated it is, what delicate adjustment it requires, what nice adaptation of parts, at once the most complex and the most potent of all the engines by which society is regulated and moved.”²⁴ The consummate law reformer, therefore, had to be a master craftsman, one who understood complicated machinery so well he could avoid introducing defects among attempted corrections. By elaborating on Verplanck’s concern for expertise, Field subtly hinted that he just might be the expert Verplanck was looking for.

In part because of Verplanck’s opposition, the proposed constitutional amendments failed to pass the legislature.²⁵ Hoping to provide a more systematic and durable reform from within the legislature, Field secured the Democratic nomination for a seat in New York’s 1842 assembly, but he was defeated when the Roman Catholic Archbishop John Hughes (1797–1864) withheld support on account of Field’s Protestant-leaning views on public education.²⁶ Field nevertheless drafted a proposed reform bill and sent it to the assembly judiciary committee, whose chair, the retired probate judge Arphaxad Loomis (1798–1885), had prepared a reform bill of his own. Though Field’s was more extensive—both in length and degree of innovation—the two bills were similar in many respects. Both exhibited a code-like style, taking the form of systematic, multi-provisioned statutes that could be

²⁴ Field, *A Letter to Gulian C. Verplanck*, 4–7.

²⁵ The commissioners’ recommendations were divided by the Assembly into a series of bills and proposed constitutional amendments. See Report of the Committee on the Judiciary, Relative to a Judicial and Equity System for the State, in *Documents of the Assembly of the State of New York*, 61st Sess., No. 238 (1838) 5:1. The constitutional amendments failed to pass one or the other chamber over the next couple sessions. The legislature did pass a bill that permitted either party to request a trial by jury or to examine witness testimony orally before the fact-finder, but in both cases the parties’ choices were subject to the “discretion” and “judgment” of the chancellor and vice-chancellors. 1838 New York Laws 244–45; 1839 New York Laws 292–93.

²⁶ See Henry Martyn Field, *The Life of David Dudley Field* (1898), 46.

inserted into the Revised Statutes, and both replaced lawyers' fee assessments based on page counts with "costs in gross" based on the amount in controversy.²⁷

More significantly, the reform bills attempted a fusion of common law and equity practice to fix the major problems in both systems. Both required common law pleadings to adopt the factual recitations of equitable pleadings, while Field's legislation allowed parties to testify at common law, thus obviating the need for discovery and creditors' bills at equity. These reforms cut to the essence of Field's complaints about legal craftsmanship, eliminating much of the paperwork filed in pursuit of a case and moving more of the action into the trial courtroom. Neither bill made it to a vote, however, as many assembly delegates thought the 1821 constitution clearly barred such reforms. Outside of the chancery court, the constitution required tribunals to "proceed according to the course of the common law," which implied the continuance of pleading the forms of action. All "equity powers," on the other hand, were "subject to the appellate jurisdiction of the chancellor," implicitly, a lone officer able to review any dispute about equitable discovery or execution. Practical reform seemed blocked by the constitution, and a portion of the New York City bar accordingly demanded amendments to the constitutional structure of the courts in an 1840 memorial to the legislature.²⁸

Lawyers were not the only ones seeking to amend the constitution in the 1840s. Although Loomis, the judiciary chairman, shared Field's professional concerns, they were not his top priority in the 1842 session. Instead, Loomis and his co-delegate from Herkimer County, Michael Hoffman (1787-1848), had joined together to oppose Whig Party spending on state infrastructure by drafting a "People's Resolution" that would constitutionally require all major public expenditures to be submitted to popular referendum before taking effect. By the legislative session of 1844, the Democrats

²⁷ Report in Part of the Committee of the Judiciary, in Relation to the Administration of Justice, and Appendix: A Letter from D. D. Field, Esq. of New York, on Law Reform, to Representatives John O'Sullivan in *Documents of the Assembly of the State of New York*, 65th Sess., No. 81 (1842), 5:1.

²⁸ Field, Letter to Representative John O'Sullivan, 21-22. New York Constitution of 1821, art. 5. See "Memorial of the New York Bar for a Reform in the Judicial System of the State," in *Documents of the Senate of the State of New York*, 63d. Sess., No. 16 (1840), 1:1.

had proposed not one, but five anti-spending amendments. The Whigs, who were seeking their own constitutional amendment expanding the state's eminent domain power, prevented any of them from passing. In the deadlocked debates no other amendment could be reported out of committee. Law reformers gained an opening in 1845, when a faction of Democrats called for a constitutional convention to break the deadlock. Expecting the Democrats to factionalize further and give them an electoral advantage, the Whigs gambled and joined the call for a convention, a move approved by the state's voters in 1845 and scheduled for the summer of 1846.²⁹ With the state's fundamental law facing imminent revision, fusionists, codifiers, and reformers of all types now had their opportunity. They would need a political coalition and a theory of reform to take advantage of it.

Hunkers, Barnburners, Whigs, and Anti-Renters: The Politics of New York Law Reform

By the mid-1840s, lingering economic hardship from the Panic of 1837, rancorous debates over the annexation of Texas, and a looming war with Mexico put immense strains on the major political parties in New York. Typically a minority in New York, the Whigs continually sought out ways to broaden their coalition, but by the 1840s these efforts created rifts in the party. Liberal Whigs such as William Seward hoped to appeal to newly arrived Irish immigrants, while others sought electoral success through nativism. The Democrats, meanwhile, engaged in what one historian has called "political fratricide." On the one side, "Hunkers" – those who "hunkered" after the spoils of James K. Polk's victorious presidential campaign – often aligned with the Whigs on matters of state spending. Like Polk, they favored territorial expansion even at the risk of war with Mexico. "Barnburners," on the other hand, remained committed to rooting out special corporate and banking interests, so much so that they were likened to a farmer who burned down his own barn to destroy the rats. Barnburners counted among their ranks a number of antislavery activists unwilling to see territorial expansion lead

²⁹ See Charles Z. Lincoln, *The Constitutional History of New York from the Beginning of the Colonial Period to the Year 1905* (Lawyers' Cooperative 1905), 2:10-101.

to the spread of the slavery. Antislavery politics would ultimately push many Barnburners out of the Democratic Party into the Free Soil Party in 1848.³⁰

Science talk became the glue that connected these fractured parties to the lawyers' professional concerns. "Political science," "legal science," "constitutional science," even the "science of pleading" – nearly every argument in the codification debates entered politics as the professed result of universal and methodologically sound reasoning. Morton Horwitz has written that "every defense of the common law system [against codification] was based on some assertion of the objective, apolitical, and scientific character of common law adjudication." The law as science, Horwitz contends, provided the discourse by which the judiciary maintained a regressive system of property and contract rights against legislative interference. Common law lawyers instructed legislators that scientific laws could not be altered and were best left to judicial specialists.³¹ This argument, however, fails to account for the fact that conservators of the common law tradition were not the only ones deploying the language of legal science. Fusionists, codifiers, and other legal reformers claimed that legal science was precisely why electoral parties and legislative politics had to be engaged rather than avoided. To understand the political coalition that produced the Field Code, one must understand the ways codification and the reform of legal science appealed to the emerging political factions in mid-century New York.

Here again their self-conscious comparison to artisans spurred lawyers towards the sort of political activism undertaken by New York tradesmen. The mass production of printed precedents, the backlog of chancery cases, the depressed wages of fees by the folio – these affected both private interests and public goods, and like the craftsmen who suffered under metropolitan industrialization,

³⁰ See Charles McCurdy, *The Anti-Rent Era in New York Law and Politics, 1839–1865* (UNC 2001), 5–7, 240–42, 264; Michael Holt, *The Rise and Fall of the American Whig Party: Jacksonian Politics and the Onset of the Civil War* (Oxford 1999), 238–43; James Henretta, "The Birth of American Liberalism: New York, 1820–1860" in *Republicanism and Liberalism in America and the German States, 1750–1850* (Cambridge 2002), 165–86; Jonathan H. Earle, *Jacksonian Antislavery and the Politics of Free Soil, 1824–1854* (2004); Herbert Donovan, *The Barnburners* (Porcupine 1925).

³¹ Morton J. Horwitz, *The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy* (Oxford 1992), 119.

lawyers turned to the legislature for aid, careful to articulate their appeals not as self-seeking “class legislation” but as publicly minded reforms that would harmonize political interests in the young republic.³² Speaking of the craft of law as a science aided this foray into politics.

As Horwitz notes, the law as science allowed lawyers to assert their authority and expertise, but to reformers, law—like any artisan craft—involved an applied science, an inductive enterprise open to evaluation by outside observers. Lawyers could assert their authority through legal science, but they also had to make their concerns sound in “political science” to build partisan coalitions. Wherever one came down on the codification question, most tended to agree with the writer for the *Democratic Review* who surmised that “for the past half century the national mind of this country has been storing up a vast amount of political wisdom, which is sure to make itself heard and felt in our legislation and in the administration of our public affairs, but which has never been formally incorporated into the body of our political science.”³³ The nation was now in its fiftieth year of experiment with freedom under law. But what could one scientifically conclude from this experiment?

For Professor Graham, common law practice was, as Lord Coke had written of it, “the perfection of human reason,” the cumulative science of a thousand years. It was, in Graham’s craft metaphor, “the cornerstone, upon which is built the proudest superstructure which the wisdom or ingenuity of man has devised.” In its absence, all other experiments in rendering justice had failed, “the spirit of innovation and reform has been compelled to shrink from the vain and hopeless task of substituting another system in its stead, which should, with any thing like equal efficacy, contribute to the advancement of justice, or to the development of truth and right.”³⁴ Starting fresh with a new code, argued the *North American Review*, was not the application of legal science, but the abandonment

³² On the political activities of New York artisans undergoing “metropolitan industrialization,” see Sean Wilentz, *Chants Democratic: New York City and the American Working Class, 1788–1850* (Oxford, 2d. ed., 2004), 61–144.

³³ “The Progress of Constitutional Reform in the United States,” 18 *Democratic Review* 243 (1846).

³⁴ David Graham Jr., “The Practice of the Law, As Illustrated in the Study of Pleading and Practice,” in *Inaugural Addresses Delivered by the Professors of Law in the University of the City of New York at the Opening of the Law School of That Institution* (1838), 60–62.

of it. The multi-faceted complexity of common law practice, informed by years of experience and volumes of precedents, was all the proof one needed. “Instead of wondering, therefore, that the science of law should be so extensive and complex,” the *Review* urged, “we ought rather to admire that human assiduity and patience should ever be capable of mastering its provisions.”³⁵

Against this view of the common law as the pinnacle of legal science, codifiers scoffed. Appropriating the craft metaphor, the *Democratic Review* taunted that “he who should predicate the highest skill in the mechanical efforts of the early ages – who should say that they were the wisest and greatest of human art and science, would be laughed at for his foolish credulity.”³⁶ The long continuity of the common law was in this case proof against its responsiveness to scientific breakthroughs. Critics of New York’s legal practice took special aim at the primitive state constitution of 1821. “The present Constitution of the State of New-York was adopted at a time when the subject of Constitutional Science was very imperfectly understood,” argued one lawyer, “and when but few of our public men had sufficient confidence in the theory of popular sovereignty to abandon themselves freely to the policy which it dictated.” Surveying four other state constitutions crafted in the early 1840s, the author summed up the scientific principles on which all agreed: “They all limit the official term of the Judiciary. All provide for biennial sessions of the Legislature, and all impose civil disabilities upon the clergy.” The first two represented the leading edge of political science, but the lawyer disagreed with the last point, writing it off as an error of “political faith” – faith, not science, had produced that illiberal provision.³⁷

The rhetoric of legal and political science helped to link codification to partisan politics. Whig Party political science imagined harmonious class relations in America predicated upon a system of state-sponsored development, or “internal improvement.” Whig views on governance generally

³⁵ “The Independence of the Judiciary,” 57 *North American Review* 400 (1843), 405.

³⁶ “The Code of Procedure,” 29 *Democratic Review* 481 (1851), 482.

³⁷ “Progress of Constitutional Reform,” 253.

trusted neither the executive (marred forever by the memory of Andrew Jackson) nor common voters (who had put Jackson in office), but were more at ease with a hierarchical elite expertly deploying resources to maximize commercial production. Democratic Party political science, on the contrary, opposed “class-based” legislation that appeared to favor special interests—especially banks or commercial corporations—or that centralized government administration.³⁸

Both Democrats and Whigs found reasons in their science to support and resist codification. Some Whigs saw codification as one of the major “questions of internal improvement.” The codifiers’ claims to represent the best modern legal science fitted them, in the eyes of these Whigs, to aid “the immense extension of commerce . . . [and] great public schemes of internal improvement” with “new laws, adapted to the improved condition and modern exigencies of society.”³⁹ And if a new code could shorten the delay and cut the expense of debt collections without the trouble of creditors’ bills, it would be favored by the creditor class of bankers, merchants, and cash crop farmers who made up the bulk of Whig support in New York.⁴⁰

Although they rejected the language of public internal improvement and drew strength from perennially indebted farmers and laborers, the Democrats found their own reasons to favor codification. Simply because the common law originated in feudal England, many Democrats found it an affront to popular sovereignty. Field’s mentor Henry Sedgwick was adamant on this point. Whereas Blackstone had thought the early common law possessed a “pristine vigor,” Sedgwick saw early common law as “a feeble, tottering, unstable thing, till the reason, wisdom, humanity, and experience of more modern times [developed] civilized and settled governments.”⁴¹

³⁸ The literature on Jacksonian era politics is, of course, vast. For general works that give particular attention to New York, I have relied principally on Holt, *The Rise and Fall of the American Whig Party*; John Lauritz Larson, *Internal Improvement: National Public Works and the Promise of Popular Government in the Early United States* (UNC 2001); Sean Wilentz, *The Rise of American Democracy: Jefferson to Lincoln* (Norton 2006); Marvin Meyers, *The Jacksonian Persuasion: Politics and Belief* (Stanford 1957). For a marvelously detailed analysis of New York’s political factions across the 1840s, see McCurdy, *The Anti-Rent Era*.

³⁹ “Revision of the Laws of New York,” 24 *North American Review* 193 (1827), 193–99.

⁴⁰ See Holt, *The Rise and Fall of the American Whig Party*, 83–87; Coleman, *Debtors and Creditors in America*, 23–25.

⁴¹ [Henry Sedgwick], “The Common Law,” 19 *North American Review* 411 (1824), 411–23.

Democrats also viewed codification as a way to combat “special legislation” that favored individual corporations or discrete classes of society. “By a very cursory examination of the New-York session laws for the last ten years,” observed the *Democratic Review*, “it will appear that the great mass of them concern private and local interests, with which government, properly restricted, would have nothing whatever to do.” A code necessarily addressed itself to the general rules governing all society. For this reason, some Democrats who favored biennial meetings of the legislature likewise favored codification, expecting the two to go hand-in-hand. Codification would set the pattern for general legislation; short and infrequent legislative sessions would hold legislators to that pattern.⁴²

Both parties likewise had reasons to resist codification, often stemming from an outspoken distrust of civilian Europe, the heartland of codification. Although equity’s juryless proceedings and modes of investigation appeared to draw directly upon civilian traditions or at least operated like them in effect, civilian law was widely unpopular in the Early Republic.⁴³ Many lawyers and laymen alike tended to associate it with the abuses of European autocracy. A sort of racial determinism often underlay many of these sentiments, as it did for one lawyer who declared, “The common law, with all its imperfections, comes to us richly laden with the free spirit and indomitable hostility to oppression, of our sturdy Saxon ancestors.” The civil law, on the other hand, “with its written codes, and its necessarily enlarged discretion in the judges, has ever prevailed only in countries where arbitrary power had full sway.” Habeas corpus, trial by jury, open court testimony—these were common law hallmarks against arbitrary power that were supposedly unknown to the code systems of Europe. Democrats hailed popular sovereignty in the jury system, and Whigs admired the way habeas corpus could thwart a despotic executive. Arrayed as these rights were in common

⁴² “History of Constitutional Reform,” 408.

⁴³ See Thomas McSweeney, “English Judges and Roman Jurists: The Civilian Learning Behind England’s First Case Law,” 84 *Temple L. Rev.* 827 (2012); Stanley N. Katz, “The Politics of Law in Colonial America: Controversies over Chancery Courts and Equity Law in the Eighteenth Century,” in Donald Fleming & Bernard Bailyn, eds. *Perspectives in American History* (Little, Brown & Co., 1971), 5:257–84, 265; see also Daniel J. Hulsebosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664–1830* (UNC 2008), 60.

imaginings against a tyrannical hierarchy, the threat that codification and law reform might overturn them along with the entire writ system could turn either party ideologically against codification. Habeas corpus, after all, was one of the writs.⁴⁴

As the constitutional convention neared, two other factions became especially important to the development of a New York code: Young America Democrats and Anti-Rent Whigs. More famous as a loose confederation of artists and writers seeking to craft a distinctively American art and literature, the “Young America” movement also formed a distinctive political faction within Democratic politics. The movement’s best known adherents typically combined literary pursuits with political activism, including John O’Sullivan, a New York assemblyman and editor of the *Democratic Review*, and Nathaniel Hawthorne, the Romantic novelist and Franklin Pierce’s consul to Liverpool.⁴⁵ David Dudley Field considered himself among their number. Field contributed travelogues to O’Sullivan’s *Review* and first introduced Hawthorne to the aspiring author Herman Melville. When Field’s run for the assembly failed in 1842, he sent his reform bills not to the judiciary committee’s chair but to O’Sullivan, who made sure to print them with the chairman’s report.⁴⁶

Politically, Young America adhered to the Jacksonian rhetoric of limited government and general legislation. “The best government is that which governs least,” O’Sullivan’s *Review* declared on its front page, while Field denounced “agrarian measure[s] to divide property among those who have not earned it.”⁴⁷ Practically, however, Young America Democrats had made their peace with banks and railroads. New technologies and means of capitalization were necessary to achieve Young America’s vision of territorial expansion and national influence on the world stage. It was O’Sullivan’s

⁴⁴ Juvenus Alumnus, *The Crudities of the Code and the Codifiers* (1850), 9–10.

⁴⁵ Edward L. Widmer, *Young America: The Flowering of Democracy in New York City* (Oxford, rev. ed. 2000); Yonatan Eyal, *The Young America Movement and the Transformation of the Democratic Party 1828–1861* (Cambridge 2007).

⁴⁶ See Field, Letter to Representative John O’Sullivan. The details of the Field-Hawthorne-Melville “Berkshire picnic” are compiled in Bernard A. Drew, *Literary Luminaries of the Berkshires: From Herman Melville to Patricia Highsmith* (Arcadia 2015), 41–44. Field’s travelogues appear in the *United States Democratic Review* under the title “Sketches over the Sea” from October to May, 1839–1840.

⁴⁷ “Front Pages,” *Democratic Review*, 1:1 (Oct. 1837), i. David Dudley Field, “Corruption in Politics,” (1877) in A. P. Sprague, ed., *Speeches, Arguments, and Miscellaneous Papers of David Dudley Field* (1884), 2:494.

Review that had coined the term “Manifest Destiny” as a slogan for the United States’ continental aspirations, and many followed O’Sullivan in the belief that Jackson’s old feuds with soft money and corporate capital would have to be laid aside to realize those aspirations. Thus one study concludes that in their views of federal power, constitutional interpretation, and the means of commercial growth, “Young America Democrats could claim to be as welcoming of the modern economic world and its possibilities as their Whig opponents.”⁴⁸

As much as they favored expansion and nationalism, many Young America Democrats, including O’Sullivan and Field, counted themselves Barnburners who opposed slavery and Polk’s seeming capitulation to the “Slave Power.” In this regard as well, Young America appeared more Whiggish than Democratic, although their antislavery principles relied less on evangelical religion than did those of the Whigs and more on the political empowerment of laboring classes.⁴⁹ For Young Americans such as Field, codification could unite all these concerns with expansion, nationalism, free labor, and a uniquely American literature. Altogether, Field wrote, the triumph of democratic reform would produce “a CODE AMERICAN, not insular but continental . . . ; it will march with the language, it will move with every emigration, and make itself a home in the farthest portion of our own continent.”⁵⁰ Democrats like Field thus turned on its head the criticism of codification as a tool of imperialism. European empires might use codes to exercise arbitrary power, but an American code would be well-suited for America’s empire of liberty.⁵¹

⁴⁸ Eyal, *The Young America Movement*, 233.

⁴⁹ See Sean Wilentz, “Slavery, Antislavery, and Jacksonian Democracy” in Melvyn Stokes and Stephen Conway, *The Market Revolution in America: Social, Political, and Religious Expressions, 1800–1880* (UVA 1996), 202–23; Eyal, *The Young America Movement*, 147.

⁵⁰ David Dudley Field, *Legal Reform: An Address to the Graduating Class of the Law School of the University of Albany* (1855), 32.

⁵¹ On the Jeffersonian idea of America as an empire of liberty, see Drew McCoy, *The Elusive Republic: Political Economy in Jeffersonian America* (UNC 1980), 185–208; Robert W. Tucker and David C. Hendrickson, *Empire of Liberty: The Statecraft of Thomas Jefferson* (Oxford 1990). For the deployment of the term in the *Democratic Review*, see “Trained and Improvised Diplomats,” 43 *Democratic Review* 186 (1859), 186.

If Young America Democrats appeared barely distinguishable from the Whigs, the Anti-Rent Whigs appeared more like Democrats. The anti-rent movement arose among Hudson Valley farmers whose lands remained under feudalistic land tenures held over from colonial days. These feudal dues required annual rents paid to the descendants of the van Rensselaers and severely limited farmers' ability to sell their land if they sought to move on to more productive acres in the west. A band of laboring farmers too poor to pay dues to a privileged elite ought to have fit into the Democratic coalition, but state Democrats struggled to find a solution that would not violate their stance against class legislation – any reform would have divested a secure right of property from the van Rensselaers and transferred it to a discrete class of agrarians. Moreover, when the anti-renters' ritualized violence caused the death of a sheriff during the tenure of a Democratic governor, the Democrats had to face the quandary of either prosecuting the anti-renters or losing elections to Whigs who argued that Democrats would sacrifice the rule of law for pet constituents.⁵²

By the mid-1840s, William Seward's efforts to expand the Whig Party were reaping gains among the anti-renters, who reasoned that if Democrats would not help them, perhaps the Whigs' looser construction of eminent domain principles in service of commercial development could. The anti-renters had no discernable position on codification or the reform of civil remedies, but it was anti-rent strength in the legislature that deadlocked debates over constitutional amendments. Thus any road towards the reform of chancery practice or common law pleading would have to run through the party of anti-rent.⁵³ The anti-rent allegiance to the Whigs further defined the late 1840s as a peculiar moment in New York politics. While Democrats divided over Polk's expansionist war, the Whigs gained sweeping majorities from an unusual coalition, the same coalition that would create the New York code: urban merchants and their legal counsel united with rural smallholders seeking particular reforms. The latter became known at the convention not as anti-renters but "anti-lawyers." The anti-

⁵² McCurdy, *The Anti-Rent Era*, 128–81.

⁵³ McCurdy, *The Anti-Rent Era*, 83–87, 162–63, 200–04.

lawyers' demands for simplified proceedings in plain language would give the code its Jacksonian reputation, but the votes of pro-creditor Whigs and the draftsmanship of Young America Democrats would prove equally critical.

1846: The People's Constitution

In a grand compromise between New York's political factions, the 1845 legislature summoned the constitutional convention of 1846. Barnburners hoped to rein in state spending, anti-renters expected to abolish feudal tenures, and fusionists and codifiers anticipated remaking New York's system of civil remedies. During the spring of 1846, around forty-five lawyers won election to the convention, making them the best represented profession except for the forty-seven who called themselves farmers (some of whom were also lawyers). Field ran for a delegate's seat, but his strident opposition to the invasion of Mexico kept from him the Democratic nomination in New York City.⁵⁴ The legal profession did not unite behind a single party, of course, but even lawyers within the same party rarely advocated the same set of reforms. On the organization of the courts and the reform of legal practice, party lines and party discipline were non-existent, making the convention both a visionary and chaotic scramble as lawyers brought their professional practices into political conversation.

Two weeks after the delegates convened on June 1, the first reform proposed for the legal profession was its abolition, or at least its privatization. Enoch Strong, a Whig farmer from Monroe, urged the convention to "inquire into the expediency of reserving to the people their dormant right of freely choosing their counsel and attorneys in all courts of law, with the like freedom from state interference that they now enjoy in the selection of their spiritual advisers." Strong objected to the prerogative of state judges to certify courtroom advocates, and he offered his resolution "so that the

⁵⁴ Field, *Third of a Century*, 2; H. M. Field, *Life of David Dudley Field*, 110–13. For occupational identifications, see William G. Bishop & William H. Attree, *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of New York* (1846), 3–6.

anti-republican usage by means of which a close and gainful monopoly of the legal practice has hitherto been secured . . . may speedily cease.”⁵⁵ A publication by a fellow Whig accused Strong of trying to out-Democrat the Democrats by declaring “every man a lawyer (even as he is a ‘democrat’) by right of birth.” The writer likened the sentiment to “the vulgar error respecting the non-productiveness of mercantile classes.” Just as those of only “common intelligence” raised a cry against merchants for contributing nothing to society, Strong and his associates were missing a basic fact of political economy “as ancient as the practice of law for pay,” that lawyers ultimately were the “*makers of law*” through their arguments, decisions, and legislation, and thus they acquired an expertise that deserved to be certified, distinguishing true craftsmen from fraudulent hucksters.⁵⁶

Strong withdrew his motion the next day, to the disgust of his supporters. One of them, a Whig writing in the *Daily Tribune* on behalf of “the millions” interested “in the removal of this odious taxing monopoly,” argued that the convention had given up its best chance to simplify legal practice by keeping its reform in the hands of “practicing lawyers.”⁵⁷ Later in the convention, Strong tried again, proposing a clause that entitled “any citizen . . . of good moral character” to practice law in the state. Barnburner merchant Campbell White sarcastically asked if advocates could at least be required to read and write.⁵⁸ Strong countered with a more restrictive clause, admitting to practice “any male citizen of the age of 21 years, of good moral character, and who possesses the requisite qualifications of learning and ability.” That clause passed, but Strong clumsily appended it to the article specifying the powers of the judiciary, implicitly leaving it to judges to determine who was “of good moral character” and what “requisite qualifications of learning” would be.⁵⁹

⁵⁵ Sherman Crowell & R. Sutton, *Debates and Proceedings of the New York State Convention for the Revision of the Constitution* (1846), 72-73.

⁵⁶ “The Legal Profession, Ancient and Modern,” 4 *American Whig Review* 242 (1846).

⁵⁷ Roger Sherman, “Allow Me to Choose My Lawyer,” *New York Daily Tribune* (Sep. 3, 1846).

⁵⁸ Crowell & Sutton, *Proceedings of the Convention*, 575-77.

⁵⁹ N.Y. Constitution of 1846, art. 4, § 7.

Although Strong identified himself in the convention journal as a farmer, he was also, in fact, a licensed lawyer and former legislator. In 1843, Strong had had the delicate task of chairing a committee and reporting on a petition from his county “praying for the repeal of all laws for the collection of debts.” Strong rebuked his own constituents, claiming they had “perhaps, unconsciously to themselves” been deluded by the Democratic tactics of class warfare in which “the prejudices of the poor were sought to be excited against the rich.” Credit, he argued, “occupied an important position in the machinery of commerce,” and in New York, the “poor man” was just as likely to be a creditor as a debtor, and he therefore needed “to collect his honest due.” What was needed, Strong said, was enforcement and protection of the law, not its abrogation.⁶⁰ Strong thus illustrates the cautionary principle that anti-lawyers at the time were not necessarily anti-legalists pursuing a radical politics towards the rights of property and the distribution of wealth. Strong’s anti-lawyer proposals arose from a retired lawyer-farmer seeking to make his former profession more accessible to those who did not inherit connections from their fathers or could not afford long training in the technicalities of assumpsit, trover, and the creditor’s bill.⁶¹

Although Strong’s anti-lawyer provision failed to open access to the profession through constitutional mandate, anti-lawyers would have other chances to achieve similar aims. Throughout the summer, agreement among lawyers on a package of reforms remained elusive. To the end of the convention, lawyers engaged in widespread pamphleteering; but no two law reform tracts agreed in their essentials. Hiram Hastings, a Barnburner lawyer from New York City, argued for a total

⁶⁰ *Assembly Journal* (New York 1843), 450–52.

⁶¹ Crosswell & Sutton, *Proceedings of the Convention*, 575–77. A careful quantitative study of “anti-lawyer sentiment” in Massachusetts by Gerard Gawalt makes much the same point. Lawyers commanded majorities within legislative bodies and much of the commercial business of chartering, contracting, and collecting of payments could only be accomplished with the assistance of a licensed counselor. A well-organized bar association restricted licensing to the sons and associates of current members only, provoking the ire of anti-monopoly Jacksonians. In 1835, Massachusetts’s Revised Statutes finally destroyed the power of the bar association to recommend admissions and instead made admissions automatic upon a course of study in any law office in the state or examination by any judge. With that single reform to admissions, Gawalt notes, anti-lawyering swiftly faded. Gerard W. Gawalt, “Sources of Anti-Lawyer Sentiment in Massachusetts, 1740–1840,” 14 *Journal of American Legal History* 283 (1970), 283–307. Cf. Robert W. Gordon, “The American Codification Movement,” 36 *Vanderbilt Law Review* 431 (1983), 437–38. For more on Gordon’s arguments about the American tradition of law reform and antilegalism, see the conclusion below.

reorganization of the courts, complete with a salaried, elective judiciary as the best means of improving civil practice. Michael Hoffman urged that only a code produced—like the Revised Statutes—by a skilled commission could simplify legal practice. Courts were to be constituted so that judges would travel among the people and sit with juries, but Hoffman refrained from calling for an elective judiciary. Field, meanwhile, continued to advocate the fusing of common law and equity while counseling against an elective judiciary and ignoring the question of codification.⁶²

The variety of proposals continued well on into August, even after the judiciary committee reported its proposed article. Of the thirteen delegates on the judiciary committee, three filed minority reports, while two others, not wishing to embarrass the committee further, filed no report but nevertheless voiced their dissent against multiple provisions in the majority bill. The majority report abolished the court of chancery but provided no further details as to whether equitable proceedings and jurisdiction would be retained by the common law courts. One minority report, submitted by Charles O'Connor, followed Hoffman's advice and provided that "a code of procedure in civil suits shall be enacted within two years, subject to alteration by law." The majority report was ambivalent about judicial elections, offering two alternative texts for the convention to choose between. One minority report pressed for an elective judiciary, another disavowed it.⁶³

In the final month of the convention, political calculation determined the shape that law reform and codification would take in subsequent decades and in other states, although the delegates could not have suspected how political expediency would later be interpreted as legal principle. Those in favor of codification feared that the judiciary committee, staffed mostly by older common law lawyers, would prove resistant. They accordingly maneuvered a codification resolution to a select

⁶² Hiram P. Hastings, *An Essay on Constitutional Reform* (1846); Michael Hoffman, "Letter on Reforms Necessary in the Body of Law, in the Written Pleadings, and in the Practice of the Courts" (Mar. 21, 1846), in Thomas Prentice Kettle, ed., *Constitutional Reform in a Series of Articles Contributed to the Democratic Review* (1846), 63; David Dudley Field, *Re-Organization of the Judiciary: Five Articles Originally Published in the Evening Post on That Subject* (1846).

⁶³ Crosswell & Sutton, *Proceedings of the Convention*, 369–84. For the list of judiciary committee members, see *Documents of the Convention of the State of New York* (Carroll & Cook 1846), 1:70.

committee headed by Campbell White, a pro-codification merchant from New York City. A separate resolution, concerning an open-ended “reform of practice and pleadings” was shunted off to the judiciary committee, and only O’Conor’s minority report suggested that reform should be carried out through a code. Through an extended series of votes, the convention delegates adopted the bulk of the majority report, including the provision for an elected judiciary.⁶⁴

By the time reformers moved for a constitutional entrenchment of procedural reform, it was mid-August and many delegates had already returned to their farms, businesses, and law practices. On August 12, White’s committee reported out a codification article, specifying that five commissioners “shall provide for the abolition of the distinct forms of actions now in use, and that justice be administered in all civil cases in an uniform mode of pleading, without reference to the distinction between law and equity.” Debate on the article revealed that White had overreached, for too few delegates favored both codification and the fusion of law and equity.⁶⁵

Lawyers proposed two alternative amendments. Since White seemed likely enough to win acceptance for a codification commission, Levi Chatfield, a Barnburner lawyer, dropped codification from procedural reform and resolved only that

The legislature, at its first session after the adoption of this Constitution, shall provide by law for the appointment of three commissions, whose duty it shall be to revise, reform, simplify and abridge the rules of practice, pleadings, forms and proceedings of the courts of record of this state, and to report thereon to the legislature.

Finding Chatfield’s language too weak, New York City lawyer Henry Nicoll proposed more specific reforms:

The commissioners, if practicable, shall provide for the abolition of the various forms of action at law now in use, and that justice be administered in all civil cases in a uniform mode of pleading without reference to the distinction of law and equity.⁶⁶

⁶⁴ Bishop & Attree, *Debates and Proceedings of the Convention*, 109–11.

⁶⁵ Croswell & Sutton, *Proceedings of the Convention*, 642.

⁶⁶ Bishop & Attree, *Debates and Proceedings of the Convention*, 839.

The votes on the practice amendments came in reverse order, with Nicoll's more specific provision failing by a 35–51 vote. Chatfield's vague language—which could have supported either extensive reform with fusion and codification or a minor tinkering with the forms of action—passed 64–18. Democrats supported any type of reform more strongly than Whigs, but votes hardly followed party lines. Many Whigs supported Nicoll's reforms, while some Barnburners opposed them.⁶⁷

Measuring the votes by occupation and geography reveals much more about the politics of practice reform. Only a third of the lawyers and farmers still present at the convention voted in favor of Nicoll's specific reforms, while three-fourths of the merchants did so. Adding a geographic dimension makes the divide even starker: 100% of both New York City merchants and lawyers (of any party) supported both amendments, while lawyers opposed to both provisions came from outlying border counties to the west and north of the state, counties less affected by the booming business of the Erie Canal. That is, those most involved in extending and collecting on credit were those most in favor of fusion and ending the rule of common law writs.

Forming an alliance across the political spectrum, delegates worked out a judiciary article that provided for both the practice commission and a commission to inquire into codification (now reduced to three members). An elective judiciary was the more famous reform to emerge from these debates, but many saw the reform of pleading and practice as closely related. In his judiciary committee report proposing judicial elections, the Hunker Charles Ruggles had surmised that popularly elected judges who lacked legal training would help keep lawyers from falling “into the track of technical rules.”⁶⁸ The Barnburner Michael Hoffman, too, argued that fusion of law and equity

⁶⁷ Bishop & Attree, *Debates and Proceedings of the Convention*, 838–40. These votes did not operate as a perfect litmus test to measure support for radical reform (Hoffman voted against Nicoll's amendment, while Loomis voted favorably on both), but they do help to reveal the messy political coalitions revolving around law reform. Whigs voted 12–21 against Nicoll's text but 21–11 in favor of Chatfield's. Democrats split on Nicoll 23–28 but supported Chatfield 43–7. Hunkers (5–13) more strongly opposed Nicoll than Barnburners (16–15). On Chatfield, Hunkers were 12–2 and Barnburners 31–5. Party affiliation based on Philip L. Merkel, “Party and Constitution Making: An Examination of Selected Role Calls from the New York Constitutional Convention of 1846,” (May 2, 1983) (unpublished graduate seminar paper, University of Virginia; on file with author), app. 1; with corrections from the *New York Herald*, April 18, 1846.

⁶⁸ Croswell & Sutton, *Proceedings of the Convention*, 371–72.

would force judges to simplify equitable proceedings so that they could be understood by lay jurors in the course of a few hours.⁶⁹

It was the Whigs, however, who united these Democrats with pro-creditor merchants as well as anti-lawyers under a theory of “independence” in the judiciary. From its inception, the Whig Party had been a stalwart defender of an independent judiciary, especially, as the name implied, against the overreaching of a central executive. Toward the middle of the 1840s, some Whigs extended their arguments to defend the independence of the judiciary from partisan politics. One writer argued that the independence of the judiciary was actually more important for partisan America than it was for monarchical England, “to guard the property, the interests, and even the life of a citizen, not against the arbitrary will of a single despot, but against the violence and recklessness of a more formidable enemy, an excited political party.” For these Whigs, the chief danger to the rule of law was the direct link between a majority faction that both made the laws and appointed the judges, that made “the same party . . . not only the prosecutor but the judge.”⁷⁰

The Whigs’ aversion to partisan politics might seem to contradict their support of an elective judiciary. But in a close study of the debates over judicial elections at the convention, Jed Shugerman demonstrates that Whigs believed partisanship had strong influence in gubernatorial and legislative appointments yet was virtually absent in local elections. An independent judiciary therefore had to be independent of, above all, patronage appointments in Albany.⁷¹ The other reforms of the judiciary article followed a similar logic. As the judiciary became independent of the other branches, so Whigs reasoned the bar ought to be independent of the judiciary to prevent patronage appointments. The anti-lawyer Strong favored a provision that barred judges from exercising “any power of appointment

⁶⁹ Bishop & Attree, *Debates and Proceedings of the Convention*, 677–82.

⁷⁰ “The Independence of the Judiciary,” 419–20.

⁷¹ Jed Handelsman Shugerman, “Economic Crisis and the Rise of Judicial Elections and Judicial Review,” 123 *Harvard Law Review* 1061 (2010), 1088–92. Shugerman further argues that some Whigs compromised with Democrats on judicial elections in order to save a clause preserving the right to jury trial. Others pragmatically reasoned that Democrats were likely to regain their statewide majority soon, and election by judicial district would at least allow Whigs to retain certain judicial offices.

to public office.” Democrats like O’Conor and Nicoll pointed out the futility of the clause, noting that attorney admissions and remedial uses of receivers and referees were not considered “appointments to public office” in any conventional sense. Strong’s amendment was adopted anyway.⁷² Even if the bar could not be made completely independent of the judiciary, some Whigs argued that the simplification of practice could at least make the judiciary independent of the bar by permitting access to court remedies without the payment of fees and costs to lawyer-mediators.⁷³

Institutional independence also informed the choice for law reform by commission. The use of legislative commissions might have seemed natural given the precedents of the 1828 Revised Statutes commission and the 1837 law reform commission, but convention Democrats suggested several alternatives. Lorenzo Shepard, a lawyer from New York County, proposed the “establishment of practice courts . . . for the adjudication of all questions of practice, in the first instance, that may arise.” O’Conor offered a constitutional text providing that the “Supreme Court, subject to control by law, shall establish uniform rules of practice for all civil courts in this state.” Writing for the majority of the judiciary committee, Ruggles favored doing nothing and letting the evolution of case law “gradually by the action and practice of the court” unify the disparate procedure systems. The Anti-Rent lawyer Ira Harris proposed the establishment of a chief justice to regulate procedure. All these choices gave effective control over the practice of law to the judiciary but also would have invited the problem of judicial legislation. By August, delegates had largely agreed that fundamental reforms to legal practice would have to be the product of “cautious and gradual legislation.” Because the Democrats were intent on limiting legislative sessions to ninety days, one argued, “this work if done at all should be done by a commission” which could continue its efforts beyond the session.⁷⁴

⁷² Bishop & Attree, *Debates and Proceedings of the Convention*, 575–77. Further stretching the incoherence of the prohibition of judicial appointments, the clause was attached to Strong’s other amendment that implicitly assigned attorney admissions to the judiciary. See N.Y. Constitution of 1846, art. 4, § 7.

⁷³ See, for instance, Roger Sherman, “Allow Me to Choose My Lawyer,” *New York Daily Tribune*, September 3, 1846.

⁷⁴ See Croswell & Sutton, *Proceedings of the Convention*, 74, 372–74, 643; Bishop & Attree, *Debates and Proceedings of the Convention*, 785 (Tilden and Crooker).

New York's Constitution of 1846 ultimately marked an unusual compromise between Whigs and Barnburner Democrats, formerly two poles of the state's political system. Out of a concern for state credit, Whigs cooperated with Barnburners to pass restrictions on state spending, and the same coalition produced the compromises of the judiciary article, including the elective judiciary; the abolition of chancery; and the establishment of separate commissions to codify the law and to reform legal practice. Whig contributions to these measures and the Whig philosophy that underlay them were swiftly effaced in the partisan press after the convention. Newspapers interpreted the reforms to be mainly the work of Barnburners like Loomis and Hoffman, who had succeeded in transforming their "People's Resolution" into a "People's Constitution."⁷⁵ That autumn, New Yorkers voted two-to-one in favor of the new constitution.⁷⁶

1847: Mere Machinery

Despite his own misgivings about an elected judiciary, Field was pleased with the new constitution, especially the mandate for procedural reform. Early in 1847, he dashed off a pamphlet titled "What Shall Be Done with the Practice of the Courts? Shall It Be Wholly Reformed?" The answer, of course, was yes. "Great changes in legal proceedings are now inevitable," he declared, "and . . . in making them it is as easy to build anew from the foundation, as to add to and repair what is old." Field's plea to his fellow members of the bar to embrace change slipped into vaguely threatening language: "None can reform so well as we, as none would be benefited so much. We cannot remain motionless. We must either take part in the changes, or set ourselves in opposition, and then, as I think, be overwhelmed by them." Field concluded his tract by reiterating his basic reform of fusion: "nothing less than a uniform course of proceeding, in all cases, legal and equitable."⁷⁷

⁷⁵ See Shugerman, "Economic Crisis and the Rise of Judicial Elections," 1086; Peter J. Galie, *Ordered Liberty: A Constitutional History of New York* (Fordham 1996), 110; *Evening Post*, April 25, 1849.

⁷⁶ Lincoln, *The Constitutional History of New York*, 2:213.

⁷⁷ David Dudley Field, *What Shall Be Done with the Practice of the Courts? Shall It Be Wholly Reformed?* (1847), 6-7, 37.

Turning from the bar to the legislature, Field drafted a memorial urging the legislature to give the practice commission more precise—and more radical—instructions than the vague text of the constitution. “Declare,” advised Field, “that it shall be their duty to provide for the abolition of the present forms of action and pleadings in cases at common law, for a uniform course of proceeding in all cases, whether of legal or equitable cognizance, and for the abandonment of every form of proceeding not necessary to ascertain or preserve the rights of the parties.” Field thus hoped a mandate that had failed to pass at the convention might be given force by the legislature. Gracing Field’s lobbying effort were the signatures of fifty prominent New York lawyers—including those of former vice chancellors, congressional representatives, and leading trial attorneys.⁷⁸

The 1847 legislative session continued the debates and compromises of the constitutional convention that had been under Whig control. Whigs had a substantial majority in the 1847 assembly but were outnumbered in the senate. When the Democracy disintegrated with the departure of Free Soilers in 1848, Whigs gained large majorities in both chambers through the 1848 and 1849 sessions.⁷⁹ Because the constitution required the legislature to establish both a commission to reform legal practice and a commission to inquire into codifying the entire common law, the legislature needed to fill six total seats on two commissions. Although one senator “did not wish to make this a party question,” the parties appear to have reached an agreement that a Whig majority would sit on the codification commission and a Democratic majority on the practice commission. The Democrats split their votes on the practice commission between their two leading factions, nominating the Barnburner Arphaxad Loomis and the Hunker Nicholas Hill, a member of the elite appellate bar in Albany. A

⁷⁸ “Memorial of Members of the Bar in the City of New York Relative to Legal Reform,” in *Documents of the Assembly of the State of New York*, 70th Sess., No. 48 (1847), 2:1.

⁷⁹ The Senate and Assembly partisan compositions by years were: 1847 Senate—21 Democrats to 11 Whigs; 1847 Assembly—54 Democrats to 74 Whigs; 1848 Senate—8 Democrats to 24 Whigs; 1848 Assembly—32 Democrats to 96 Whigs; 1849 Senate—15 Democrats to 17 Whigs; 1849 Assembly—21 Democrats to 107 Whigs. Party affiliation derived from *Albany Evening Journal*, December 31, 1846; “Election Returns,” *Commercial Advertiser* (New York, N.Y.), November 3, 1847; “Election Returns,” *New York Evening Post*, November 3, 1847; “The Whig Victory!” *Albany Evening Journal*, November 4, 1847; *Cabinet* (Schenectady, N.Y.), November 28, 1848; *New York Weekly Herald*, October 28, 1848.

Whig newspaper complained that the commission “has been drawn into the party vortex.” Instead of talent or skill being the leading qualification, “they were selected on party grounds and as party men.” Nevertheless, the Whigs too held a caucus and, as recounted above, nominated the anti-lawyering farmer Theodore C. Peters to the practice commission.⁸⁰

With Whig support, the senate voted to adopt Field’s memorial as the mandate to the practice commission. Democrats—and lawyers—split their votes evenly on the matter. So while the constitution required the revision and simplification of forms of proceeding, the legislature specified the abolition of “the present forms of action” and the fusion of law and equity.⁸¹ On March 5, Democrats secured the appointment of Hill and Loomis as planned by their caucus. Several Whig senators thought better of nominating Peters, however. Frederick Backus suggested that, unlike the Democrats, the Whigs did not treat their legislative caucuses as binding—their “caucus” had been “nothing more than a meeting to compare opinions upon the different names which had been suggested.” Backus favored the appointment of David Graham, since “no man is better acquainted with the present rules, he must be best able to ascertain in what respect they required amendment.” Carlos Emmons, Backus’s co-Whig delegate from the Eighth District, agreed on the need for expertise. “If this was a commission for the revision of agriculture,” he commented, “no better man, perhaps could be selected” than Peters. Peters was a well-known advocate of scientific progress in agriculture. He ran and contributed to journals that produced careful studies of all aspects of crop rotation, seeding, and fertilizing, and Peters tirelessly lobbied for funds to build up an agricultural library in his county. If Peters’s scientific expertise fitted him to preside over the agricultural society and instruct

⁸⁰ See, for instance, the statements of Senator Spencer in “Legislative Acts and Proceedings,” *Albany Evening Journal*, Mar. 5, 1847. *Commercial Advertiser* (New York, N.Y.), Feb. 8, 1847. See notes 1–3 above and accompanying text.

⁸¹ See *Journal of the Senate of the State of New York* (1847), 239–42. A move to strike the instructions was defeated 7–13, with 6 Democrats and 1 Whig supporting the motion and 6 Democrats and 7 Whigs opposing it; 6 lawyers supported the motion and 5 resisted it.

others in proper techniques, Emmons argued, surely he could see why scientific experts of the law deserved appointment to this commission.⁸²

During the debate it became known that, like the anti-lawyering farmer Enoch Strong, Peters too was actually a lawyer. He had been admitted to the bar in his youth and practiced for ten years before retiring to his farm. William van Schoonhoven, a Whig lawyer, therefore concluded that Peters had the best combination of professional experience: he had practiced law but was not “attached to the complicated system of practice now existing.” Peters was knowledgeable without being interested. Van Schoonhoven urged his colleagues not to forget “that this movement [for law reform] came from the laymen. It was they who originated it, and not the lawyers,” and Peters’s appointment “would have an effect to quiet the popular feeling now prevalent against the legal profession.” Abraham Gridley, the lone Whig from the Seventh District, retorted that Peters’s one-time association with the law made him an even worse choice. A novice “layman who knew nothing of the law” was preferable to a dilettante “quack lawyer.” Richard Williams, a Democrat, inserted himself into the Whig debate to express his admiration of Peters and to note that what went against the interests of professional lawyers might well lie within the interests of the “People.” If Peters was unacceptable as a layman, however, Williams suggested the senate consider David Dudley Field, a lawyer who Williams believed would make the same reforms as Peters. As the Democrats had already filled their seats on the commission, no one took the suggestion seriously at the time. Instead, senate Whigs met behind closed doors after the debate and agreed to replace Peters with Graham the next day.⁸³

The senate’s decision provoked a fierce anti-lawyer debate in the assembly. Herman Blodgett, the Whig representative of Peters’s Genesee County, railed against the “mummeries and complications” of legal practice and asserted that Peters’ only flaw was “that he was not acceptable to

⁸² Parallel accounts, with slightly different reports in wording and expression in the Senate speeches appear at *Albany Evening Journal*, March 10, 1847; *Albany Argus*, March 11, 1847.

⁸³ *Albany Evening Journal*, March 10, 1847; *Albany Argus*, March 11, 1847; *Albany Evening Journal*, March 11, 1847.

that *professional* [senate] judiciary committee," even though Peters had provided "more substantial benefit to the producing classes than all the speeches of" the Whig lawyers. Blodgett produced letters of recommendation from the bench and bar of Genesee, one judge suggesting that "if it should so happen that a majority of the commissioners should report a mere change of the practice without a reform, [Peters] would be able to submit a minority report, which would give the Legislature an opportunity of contrasting the two and making a selection." Blodgett further argued that the Whigs in each chamber had no discretion to set aside the vote of their caucus, a position supported by his fellow Whig lawyer Ansel Bascom, who insisted "the true whig doctrine [is] that a majority in caucus should govern."⁸⁴

Blodgett was countered by the other Whig from Genesee, Alonzo Upham. Against his colleagues' charges that lawyers sought to control reform for the benefit of their own class, Upham appealed to Whig Party ideology that presumed essentially harmonious class relations in republican society. Law reformers – both from the legal profession and lay society – "wage war against no class of men as such," nor could they "be fooled or blinded by the senseless cry of lawyer or anti lawyer." Upham produced his own correspondence from citizens of Genesee County, "not one of whom is a lawyer." One remonstrance stated simply, "Had the choice of said Commissioner been up to us, we should not, from any knowledge we have of the qualifications for so important a trust, have selected Mr. Peters." Peters, Upham concluded, "has not the talent necessary for the station," and on that ground alone had to be rejected. Professional identity was otherwise irrelevant. "I am a mechanic, and am neither proud nor ashamed of it. I am for sound, wholesome, legal reform," Upham declared. "I am opposed to all efforts to set up one class of men against another."⁸⁵

⁸⁴ "Legislative Acts and Proceedings," *Albany Evening Journal*, March 25, 1847. "Speech of Mr. Blodgett," *Albany Evening Journal*, April 3, 1847.

⁸⁵ "Speech of Mr. Upham," *Albany Evening Journal*, April 4, 1847.

Blodgett denied the charge that he was stooping to Democratic tactics of class warfare. Rather, “the violent opposition that this modest proposition receives from certain legal gentlemen, appears to me more like a war coming from them upon the class to which I belong, than anything else.” Like Field’s reform tract, Blodgett threatened that if anti-lawyers remained unheeded until “it is too late,” even more drastic reforms would arise from the populace and lawyers would wish “they had better in the beginning respected public opinion.” Blodgett concluded by predicting that with Graham and Hill, the commission would have “a majority of Old Hunkers in law” and “we are to have no reform whatever.” Nevertheless, when debate concluded, the Whigs voted 34-12 to concur with the senate on appointing the undisputed expert Graham to the commission.⁸⁶

Loomis, Hill, and Graham accepted their appointments and met over the summer to commence their work. In the midst of the anti-lawyer debate in the senate, Graham had written to the old Jacksonian Senator Samuel Young, promising that if appointed to the commission, he would give his full effort to simplifying and reforming practice.⁸⁷ Representative Blodgett doubted the sincerity of those “who never was heard to lisp a word in favor of reform until their names have been mentioned in connection with this commission,” but under Field’s specific instructions, Graham abandoned his popular treatise to obsolescence and joined Loomis in drafting a reform statute.⁸⁸ In September the legislature convened an extra session and requested an update from the commissioners. After reading the others’ drafts, Nicolas Hill concluded that the fusion of law and equity and the abolition of the forms of action would be undesirable if not impossible. Instead of filing a minority report, Hill resigned his commission, refusing to participate in “so purely experimental” a

⁸⁶ “Speech of Mr. Blodgett,” *Albany Evening Journal*, Apr. 3, 1847; *Assembly Journal* (New York 1847), 628-30.

⁸⁷ See statements of Senator Young, *Albany Evening Journal*, March 10, 1847.

⁸⁸ “Speech of Mr. Blodgett,” *Albany Evening Journal*, April 3, 1847; Arphaxad Loomis, *Historic Sketch of the New York System of Law Reform in Practice and Pleadings* (1879), 15-16. Loomis’s reprinted diary shows that by August he had prepared a working bill with 80 sections, while Graham had prepared an additional 30 articles.

project. Loomis later recorded his impression that “a high judicial source” had counseled Hill to keep his name unassociated with whatever reforms came out of the commission.⁸⁹

Hill’s resignation put Loomis and Graham in the predicament of having to defend the legitimacy of their activities. In their report, the two remaining commissioners expressed their regret that they could not come to an agreement with Hill; but they remained adamant that if their proposed procedural system “should incur the reproach of being radical, it should possess the redeeming merit of being neither superficial nor inadequate.” In making their defense, Loomis and Graham turned Hill’s accusation into a compliment. Of course their system was “experimental” – all sciences were, and once again, craft rhetoric pervaded the arguments of law reformers. Surely, argued the report, legal practice could not be “the only exception to the progressive power of the human mind in the improvement of every art and science upon which its energies are employed.”⁹⁰

Although science talk as the basis of reform was common, what ultimately proved persuasive was the mixture of science with craft in a theory that made legal practice and procedure uniquely amenable to political reform. Conceiving of “procedure” as a distinct field, the commissioners reasoned that it possessed an essential difference from the rest of a common law system composed of substantive rules and principles. “The system of procedure by which law is administered, differs from the law itself in this,” the commissioners explained: “the latter is a body of elementary rules founded in the immutable principles of justice, drawing their origin from the obligations which divine wisdom has imposed . . . ; while the former consists, in its very nature, but of a body of prescribed rules, having no source but the will of those by whom they are laid down.” Substantive law was universal, natural, grounded in divine justice, and therefore politically immutable. But God apparently cared nothing of the “mere prescribed and arbitrary regulation” of the courts which adjudicated the substantive law,

⁸⁹ See “Report of the Commissioners on Practice and Pleadings,” in *Documents of the Assembly of the State of New York*, 70th Sess., No. 202 (1847), 7:3. N. Hill, “Letter to Albert Lester, President of the Senate, Sep. 20, 1847,” in *Senate Journal* (New York 1847), 679. Loomis, *Historic Sketch of the New York System of Law Reform in Practice and Pleadings*, 15.

⁹⁰ “Report of the Commissioners,” 4-5.

the “the mere machinery by which law is to be administered.”⁹¹ On this theory, substantive law functioned as the natural materials upon which artisans labored. Carpenters and smiths could not change the fundamental nature of wood or metal, nor could mere legislation redefine the rights of property or contract. Machinery, however, could be more or less improved to skillfully manipulate natural materials, even as nature itself remained unchanged.

The report of Loomis and Graham marked a striking departure in common law thought. The division of law into substance and procedure was not wholly new, but it was largely foreign to common law jurisprudence. Civilian systems made such a distinction, and the French produced a *code de procédure civile* two years after their civil code. The problem was that the common law writ system made no such distinction, and it was rarely clear where the “procedural” aspects of a writ ended and a substantive law of rights began. William Blackstone ran headlong into the difficulty in his attempt to re-describe common law practice using the systematic structure of civil law principles. Since Roman times the civil law had been divided into persons, things, and actions. Blackstone had persons and things, but in place of actions (or procedures) his third book was titled “wrongs” and included what would today be known as the substantive law of contract, torts, and personal property. The “excellence of our English laws,” he explained, was that they “adapt their redress exactly to the circumstances of the injury, and do not furnish one and the same action for different wrongs, which are impossible to be brought within one and the same description.”⁹² By abolishing the forms of action, fusing law and equity, and crafting a code of “procedure,” New York law reformers aimed to fundamentally change the definition of law and how it operated in American society. From statutes and precedents the commissioners expected a substantive law of rights and rules would emerge, while

⁹¹ “Report of the Commissioners,” 4.

⁹² 3 *Blackstone’s Commentaries* 266; see Lobban, *The Common Law and English Jurisprudence*, 31–46.

a neutral, transubstantive procedure would vindicate those rights with remedies drawn from former common law and equity practice.⁹³

The commissioners' "mere machinery" report satisfied the legislature and received acclaim from a Whig convention in Monroe County – home to the anti-lawyer supporters of Enoch Strong.⁹⁴ When a senator requested Loomis's advice on Hill's replacement, Loomis recommended Field, his fellow Barnburner Democrat. Field's nomination thus did nothing to disturb the party balance of the commission, and Field moreover solved the Whigs' dilemma that had arisen over Peters's nomination. Field was well regarded as an expert trial attorney and "one of the best lawyers in the State," according to one Whig Senator. Field was also popular among the reformist anti-lawyers, who had already signaled their willingness to consider Field if they could not seat a layman on the commission. Field's nomination thus received unanimous assent in both houses of the legislature.⁹⁵

1848: The Conquerors Took All

When Field met with the commissioners early in 1848, he came prepared with a draft code that the three lawyers then read through, amending as they went. Even in his later efforts to downplay Field's role, Loomis had to admit that "more of Mr. Field's manuscripts than those of either of the other Commissioners were used as the basis of the action of the board from day to day." Field would propose a chapter, and each commissioner would then recommend amendments and vote on each section, the votes recorded informally in Loomis's diary. By March the commission had a draft of 391 sections ready for the legislature. The code did not cover the entirety of civil proceedings, and the

⁹³ The nineteenth-century English legal historian Sir Henry Maine made a similar point in his famous aphorism: "So great is the ascendancy of the Law of Actions in the infancy of Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure." Henry Sumner Maine, *On Early Law and Custom* (1890), 389. On other early American efforts to distinguish procedure from substantive categories, see William E. Nelson, *Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760–1830* (Georgia 1994 [1975]), 69–88; Langbein et al., *History of the Common Law: The Development of Anglo-American Legal Institutions* (Aspen 2009), 148, 248–56; Daniel J. Hulsebosch, "Writs to Rights: 'Navigability' and the Transformation of the Common Law in the Nineteenth Century," *23 Cardozo Law Review* 1049 (2002).

⁹⁴ "The Right Spirit," *Albany Evening Journal*, Oct. 6, 1847.

⁹⁵ Remarks of Senator Folsom, "Legislative Acts and Proceedings," *Albany Evening Journal*, Feb. 12, 1847. *Assembly Journal* (New York 1847), 1551–52; *Senate Journal* (New York 1847), 713–14.

commissioners emphasized that they were making “but a report in part.” It nevertheless included the major reforms dictating the fusion of legal and equitable procedures, simplified common law pleading, and speedier creditor remedies. Finding themselves near the end of the session with a statute the constitution arguably required them to adopt, legislators enacted the code without significant amendment in less than two weeks, the senate voting 23–3, the assembly, 74–9. Although some objected to “this hurried mode of disposing of this important subject,” most concluded that taking the time fully to read and amend the code might prevent its passage and thus violate the constitution.⁹⁶

The terse, systematically organized sections of the code reworked nearly every touchstone of New York practice. The code “abolished” common law pleading and required all pleas to be factually accurate, verified by oath, and expressed “in such a manner as to enable a person of common understanding to know what is intended.” It made jury trial available in all cases, subject to the choice of the litigants. And it required all testimony to be taken orally in court, even, in most cases, the testimony of the parties themselves. With regard to fees, the code flatly declared that “all existing rules . . . restricting or controlling the right of a party to agree with an attorney, solicitor, or counsel, for his compensation, are repealed,” ushering the legal profession into the world of free labor.⁹⁷ (For the details on each reform, see Chapters 4–7.)

The commissioners made sure to demonstrate how these reforms served commercial credit. Fusion eliminated the possibility of double-filing a suit. “Every bill that is filed in aid or defense of a suit at law, and every creditor’s bill is a witness against our legal establishment,” a note explained. Instead of summoning debtors to respond with fictitious pleadings in court, the code permitted creditors to file process with court clerks. Debtors had to have a factually based defense verified on

⁹⁶ Loomis, *Historic Sketch of the New York System of Law Reform in Practice and Pleadings*, 17–22. *First Report of the Commission on Practice and Pleadings* (New York 1848), iv. *Senate Journal* (New York 1848), 457; *Assembly Journal* (New York 1848), 1019. See the remarks of Assemblymen Walsh, Myers, and Coe, “Legislative Acts and Proceedings,” *Albany Evening Journal*, March 31, 1848.

⁹⁷ 1848 N.Y. Laws 521, 544.

oath, or clerks would automatically issue default judgments. The code thus made the rhythms of New York's court terms irrelevant. Under prior practice, a debtor did not have to answer a complaint until the court was in session, and fictitious defenses were allowed to ensure a plaintiff carried his burden of proof. If time was insufficient, the trial might be held over to a subsequent session, and then the process began again in chancery with a creditor's bill to actually collect judgment.⁹⁸ Where collections under prior practice could take at least six to nine months—sufficient time for a bumper harvest to allow renegotiation of a debt—the code aimed to allow collection in twenty days. The rhythms of agriculture were traded for the rhythms of merchant finance. As one country lawyer noted, “the cities, and particularly that of New-York, appear to suffer much less from the incongruities of the code, than the country.” The commissioners, however, assured their readers that the code “cannot injure the substantial rights of any party. No rule of law, by which rights and wrongs are measured, will be touched.”⁹⁹

When the code took effect in the summer of 1848, political opinion sharply divided. Some thought the commissioners’ “industry and zeal worthy of the highest commendation”; others reported the code a “great dissatisfaction to the legal profession and to the public generally.” The law on the books certainly had an effect on the law in action. New law blanks and form books shrank simple pleadings for the recovery of a debt from fourteen pages to a couple of paragraphs or even a few lines. (See Figure 17, in Chapter 4.) Several judges reported similar savings to cost and delay in equity cases. One judge wrote to Field, “Under the old mode, several days would have been spent in the Examiner’s

⁹⁸ *First Report* (New York 1848), 146. On the use of fictitious defenses to maintain the burden of proof, see the discussion of Stephen’s *Treatise* in Chapter 1.

⁹⁹ *Albany Evening Journal*, March 27, 1849; *First Report* (New York 1848), 146. No single section of the code announced its preference for creditors’ rights; rather, the acceleration of creditors’ remedies resulted from the combination of several sections. In the original enacted code, § 107 required a defendant to answer the complaint within twenty days, regardless of whether the court was in session (see § 622 in the final draft); § 202 provided for default judgment as a matter of course, issued by a clerk without a judicial order if no answer was received within the twenty days (final draft § 755); the requirement that answers state true facts verified by a defendant’s oath were intended to prevent sham pleadings from requiring the delay of trial for uncontested obligation (§§ 128–133 in the 1848 Code, §§ 645–652 in the 1850 draft; see also Chapter 5 on the verification requirement); finally, the code abolished a traditional thirty-day waiting period between issue of judgment and commencement of execution (see *First Report* (New York 1848), 197).

office, taking testimony in writing, at an expense equal to half the costs of the suit; and the hearing would have occupied quite as long as the trial did before me, which was less than a day."¹⁰⁰

Nevertheless, the political coalition that had supported the commission began to express misgivings. While the constitution had at first appeared to be the work of a radical Barnburner plurality, the legislative sessions of 1847 and 1848 revealed how fully Whigs were cooperating with Barnburners and advancing the policies of anti-lawyers. At the convention, Whigs had followed a principle of independent institutions in government – the judiciary would be independent of the other branches for its appointments, the bar would be independent of the judiciary for its admissions, and law reform would be carried out by independent commission. But outside the convention, the elective judiciary, a more open bar, and law reform by legislative commission provoked the complaint that Whigs had debased all legal institutions and subjected them to partisan politics. "I was surprised," wrote a stunned New York City lawyer named Joshua Van Cott, "I blushed for Whiggism; I blushed for the legal profession; that no voice of Whig or of Lawyer was raised in denunciation of this new and foul political heresy." All the pretentious offense at the political patronage of "Hunker" Democrats was hypocritical, Van Cott argued, for the only thing that really irked Whigs and Barnburners about patronage is that they did not control it. Handing legal institutions over to partisan politics would now grant these "the NEW SHUFFLEITES . . . a new deal of the cards in the game of politics."¹⁰¹

Others wrote that opening the judiciary to amateurs and setting the standard of pleading "such . . . as to enable a person of common understanding to know what is intended" would destroy the craft of the law. "With such a bench as we're likely soon to have," wryly commented the lawyer

¹⁰⁰ "The Code of Procedure," *Albany Evening Journal*, January 8, 1850; "The New Code of Practice," *New York Weekly Herald*, February 3, 1849. Compare, for instance, the form pleading in Alexander M. Burrill, *Treatise on the Practice of the Supreme Court of the State of New York* (1846), 2:268–72; with Henry Whittaker, *Practice and Pleading Under the Code, Original and Amended, With Appendix of Forms* (2d. ed., 1854), 772. Letter of Lewis Sandford to David Dudley Field, in David Dudley Field, *The Completion of the Code* (1850), 6–7.

¹⁰¹ Joshua Marsden Van Cott, *Strictures on the Judiciary System of the Proposed Constitution* (1848), 7–19.

George Templeton Strong in his diary, “this reduction of legal practice to a Hottentot standard of simplicity and dispatch is indispensable.” The Roman Catholic intellectual Orestes Brownson pursued a similar line: “The radical movement of the country exerts all its force to destroy the independence of the courts, and to make them, like every thing else, mere agencies for executing whatever may be the popular will, caprice, or prejudice for the moment.” Resorting to an artisan analogy, Brownson goaded Whigs to take “law reform” further: “Every man should be free to make hats or coats without ever having served an apprenticeship, or learned the mysteries of the craft; and if he cannot do it, then you have no business to have hats or coats.”¹⁰²

In his last novel, *The Ways of the Hour*, the ambivalent Jacksonian James Fenimore Cooper likewise argued that the Whigs had left no check on the degrading influences of popular sovereignty. The people who ruled through the legislature were now to rule through the law courts too, “making the law as well as interpreting it.” Cooper’s lawyer-protagonist Thomas Dunscomb was “emphatically” a common law lawyer who bragged he had never married because “I fell in love, early in life, with a certain my lord Coke, and have remained true to my first attachment.” Dunscomb lamented of the new constitution that “there is no compromise about it; . . . the conquerors took all” – extremist democrats had destabilized law and order with their “constitutions, codes, and elective judges.” Although Cooper griped about the code of procedure in nearly every chapter, his solution accorded remarkably with the views of the codifiers:

Who cares for the bar? Legislators alone can change this system, and men very different from those who are now sent must go to the legislature, before one is found, honest enough, or bold enough, to get up and tell the people they are not all fit to be trusted. No, no; this is not the way of the hour.

Lawyers needed legislation to improve their practice, but proper legislation required convincing the people’s representatives that they were too inexpert to make good law and had better defer to master

¹⁰² *Diary of George Templeton Strong*, ed. Allan Nevins, Sept. 28, 1848 (Macmillan 1952), 1:301. Orestes Brownson, “Cooper’s *Ways of the Hour*,” 5 *Brownson’s Quarterly Review* 273 (1851), 285.

lawyers. The repair of the common law would have to work through partisan politics while simultaneously transcending it.¹⁰³

Among the other subset of the Whig coalition, anti-lawyers were finding that the code failed their expectations for unmediated access to legal remedies. In part, this was because the state legislature had opened greater access to the profession before the code took effect. The 1847 legislature abolished the requirement of a seven-year clerkship before a lawyer could be considered to have “requisite qualifications of learning and ability.” The second session of the legislature attempted to make “good moral character” the sole standard of bar admissions, but when one A. W. Goff attempted to practice under this statute, courts struck the measure down for contradicting the constitution’s requirement of “learning and ability.” Nevertheless, without the clerkship requirement, Goff gained admittance to the bar as a certified attorney less than four months after initially being turned away.¹⁰⁴

On the other hand, the code’s 400 regulations with a promise of more to come was not what many anti-lawyers were expecting from the “simplification” of practice. One anti-lawyer, writing under the name Anti Humbug, sarcastically noted that the code had “‘simplified’ with a vengeance.” Anti Humbug objected particularly to the code’s declaration that it applied not only to the regular civil courts but to justices of the peace as well. Justices’ courts typically resolved small, local disputes through informal processes and more than a little neighborly influence. By bringing them under the rules for formal written pleadings, trials, and motions practice, Anti Humbug found practice in the justices’ courts “delayed by a thousand new embarrassments never heard of before.”¹⁰⁵ Thus, while

¹⁰³ James Fenimore Cooper, *The Ways of the Hour: A Tale* (1850), 84. On Cooper’s ambivalent Jacksonianism, see Meyers, *Jacksonian Persuasion*, 57–100; Charles Hansford Adams, *The Guardian of the Law: Authority and Identity in James Fenimore Cooper* (Penn. State 1990), 135–48.

¹⁰⁴ 1847 New York Laws 1:343, 2:647; 1847 Rules of the Supreme Court of the State of New York, 3–4, Rule 2; *Devries v. McKoan*, 1 Code Reporter 6 (N.Y. Supreme Court 1848). For Goff’s admission, see 1 Code Reporter 47 (1848).

¹⁰⁵ “To the Commissioners on Practice and Pleadings,” *Albany Evening Journal*, February 3, 1849. On the general history of justices of the peace (with an emphasis on criminal jurisdiction), see Langbein, *History of the Common Law*, 229–38, 578–587, 628–634; on New York practice in justices’ courts, see Sung Yup Kim, *Justices of the Peace, Lawyers, and the People: Local Courts and Contested Professionalization of Law in Late Colonial New York* (Ph.D. dissertation, Stony Brook University, 2016).

the legislature made it easier to enter the profession, the code made it harder to actually practice. Anti-lawyer editorials and calls for extending codification waned after 1848.

Whigs thus faced increasing criticism that they had out-democratized the Democrats and plunged the nation's leading legal system into amateurism and disorder. At the same time, their deference to the legislative commission raised concerns about the influence of overly technical lawyers. Whigs thus faced the double-edged criticism of being at the same time too deferential towards the popular masses *and* towards the patricians of the bar. Although Whigs increased their majority in the 1849 session, only 16 of 107 Whigs returned from the previous session. Several commentators attributed this turnover to the '48 Whigs' inept handling of codification.¹⁰⁶

1849-1850: The Poor Compliment of a Perusal

The commissioners continued their work through the end of 1848, drafting amendments and codifying specialized procedures in equity and prerogative writs like habeas corpus. Largely under Graham's direction, they also prepared a code of criminal procedure. A brother who lived with Field during this time recalled that Field would work on the civil procedure code two or three hours in the morning (probably meeting his fellow commissioners during this time), counsel clients and try cases the rest of the workday, then return to the code from after dinner until midnight or later. The commissioners were compensated \$2,000 a year – not a trivial sum for a state that had just passed a constitution to rein in spending, but not enough to replace the annual compensation of a Manhattan attorney.¹⁰⁷

By February 1849 – when their commission was set to expire – the commissioners submitted their reports of “a code of procedure which should comprehend the whole law of the State concerning

¹⁰⁶ See, for instance, Statements of Thomas Clark, “Practice and Pleadings,” *Albany Evening Journal*, February 1, 1849. Such turnover was extraordinarily high, even by standards of nineteenth-century legislatures. Cf. Rosemarie Zagari, “The Family Factor: Congressmen, Turnover, and the Burden of Public Service in the Early American Republic,” 33 *Journal of the Early Republic* 283 (2013).

¹⁰⁷ H. M. Field, *The Life of Field*, 50-52; 1847 New York Laws 67-68.

remedies.”¹⁰⁸ This time they encountered stiff political resistance. When one representative moved to extend the practice commission an additional year so the drafters could consolidate the amendments and new material into one final, complete code, the Whigs on the assembly judiciary committee returned a negative report.

Among the myriad objections to the code, the committee raised two constitutional complaints. First, the committee had become uneasy with the idea of legislating by commission. They regarded it a “solemn mockery” that the previous legislature had passed the code “without even reading it.” The committee claimed no ill will towards the commissioners personally, but wondered, “Responsible as the Commissioners undoubtedly are, should we place in them a blind and implicit confidence that shall commit to their discretion the peace and property, the personal liberty and the lives of those who sent *us* here to make laws for them?”¹⁰⁹

Second, committee members were alarmed at how much material the commissioners included in a code of “procedure,” and they directly disputed the commissioners’ claims that procedure was merely the machinery of the law. They wrote that “provisions for rights and for the mode of pursuing remedies, insensibly run into each other,” and distinctions between substance and procedure were difficult to draw in practice. In the common law system, “the ‘practice, pleadings, forms and proceedings of courts’ are the means and include the remedies for vindicating a right and obtaining redress for a wrong.” The attempt to codify the law of remedies in a “procedure” code involved a serious effort to codify the law itself. Even the partial code of procedure was found “full of provisions affecting rights,” and this showed that “the parts of a system of law are more dependent on each other, and run into and affect each other, infinitely more than any machine of human contrivance.”

¹⁰⁸ *Second Report of the Commission on Practice and Pleadings* (1849) (amendments to the first report); *Third Report of the Commission on Practice and Pleadings* (1849) (extension of the civil procedure code); *Fourth Report of the Commission on Practice and Pleadings* (1849) (criminal procedure code) (on file with the Rare Books Collection, Lillian Goldman Law Library, Yale University). “Practice and Pleadings,” *Albany Evening Journal*, January 19, 1849.

¹⁰⁹ Report of the Committee on the Judiciary on the Bill to Continue in Office the Commissioners on Practice and Pleadings, in *Documents of the Assembly of the State of New York*, 72d Sess., No. 47 (1849), 3:15.

Procedure, at least in the common law tradition, was no mere machinery – it involved the entire legal apparatus.¹¹⁰

Indeed, although New York's was not the world's first code of civil procedure, its inclusion of the "law of remedies" made its scope unique. Neither Jeremy Bentham's ideal codification system nor the French or Louisiana codes included remedies under the heading of procedure. In those systems, remedies appeared self-evidently substantive. Substantive rights were by definition the rules that demanded particular remedies, while civilian "procedure" dealt only with the technical sequence of pleadings and proofs at trial.¹¹¹ In the common law tradition, the legitimacy of court-ordered remedies had developed not out of a law of rights but by the evolution of lawyers' procedures. While the inclusion of remedies in a procedure code thus seemed appropriate within a common law context, it was difficult to see where such a code ought to stop. Field's final draft included seemingly substantive issues of contract formation, such as what meaning a seal had when applied to written promises.¹¹² The assembly committee complained that the code included constitutional regulations concerning "the organization and jurisdiction of [courts of record]" as well as the law of evidence and witness proofs, which it denied ought to be included in a code of "practice and pleadings" only. They suspected the commissioners' forthcoming code of criminal procedure would include all of the criminal law as well, "as they seem to understand practice and pleadings to include all the law upon a given subject."¹¹³

In defense of the commission, James Elwood, the lone Free Soiler on the committee, filed a minority report, trotting out the anti-lawyer line that his colleagues formed "a committee composed entirely of men belonging to the legal profession" who filed a report "so flattering to themselves and

¹¹⁰ Report of the Committee on the Judiciary . . . on Practice and Pleadings, 2.

¹¹¹ See *Code de Procédure Civile: Édition Originale et Seule Officielle* (1806); Jeremy Bentham, *Principles of Judicial Procedure with the Outline of a Procedure Code*, in John Bowring, ed., *Works of Jeremy Bentham* (2d. ed., 1843 [1839]), 1–189.

¹¹² *Final Report of the Commissioners on Practice and Pleadings*, in *Documents of the Assembly of the State of New York*, 73d sess., No. 16 (1850), 2:740.

¹¹³ Report of the Committee on Judiciary . . . on Practice and Pleadings, 12–14.

their profession, and so derogatory to the intelligence and judgment of others." Elwood claimed the revision of pleadings and practice was the most "eagerly desired" and "imperiously demanded" reform of the "People" represented in the convention, though he had no answer for why pleading and practice involved all the topics the code actually covered. Instead Elwood counseled that "the work of preparing a plan to regulate the practice of the courts of record is not the task of an hour or a day," and the legislature would have to trust the "high legal attainments and ability" of the commissioners who had been working for two years on the project.¹¹⁴ The *Albany Evening Journal*, the state's leading Whig organ, sided with Elwood. It criticized the judiciary committee for believing "LAW AND PRACTICE are necessarily united." Law, it argued, "consists of the great principles and rules which govern the morals, the conduct, and the business of the citizen in their infinite variety" while "Practice or the course of Procedure embraces only that system of means or contrivances . . . provided by the Legislature to enforce the law." Procedure, that is, was mere machinery, and, continued the *Journal*, "all new machinery works with some friction and jar, when complete, but who can safely condemn what is but half done?" Thus the *Journal* encouraged the legislature to enact the new reports.¹¹⁵

The legislature focused on the concerns of the judiciary committee, however. One Whig noted the reports coming in totaled 406 pages of 1393 additional regulations, and he wondered if there was "time for deliberation; or is it expected that it will be passed through the House on the run, as it was the last year, without receiving even the poor compliment of a perusal?" In the assembly, another Whig asked lay supporters of the code "if there be one of them who pretends to have read this code, or having read it understand it?" The same challenge resounded in the senate, where one Whig declared that, given the code's length and intricacy, "there were not 20 members who knew what they were doing, any more than they did about the language of the Koran or the hieroglyphics of the

¹¹⁴ Minority Report of the Committee on Judiciary, in *Documents of the Assembly of the State of New York*, 72d. sess., No. 51 (1849), 2:7-10.

¹¹⁵ "The New Code and the Legislature," *Albany Evening Journal*, February 9, 1849.

Chinese.” Both representatives argued it would be irresponsible for a legislature to pass a law they did not understand, another senator concluding “it was not the province of the servants of the people to try experiments on such important matters as this was. They were bound to know and understand how laws would work before they passed them.”¹¹⁶

Given that the constitution required practice reform, the 1849 legislature reluctantly agreed to adopt the commissioners’ short report of amendments, but the reports that would have completed the codification never came to a vote. Whig lawyers in the senate succeeded in cajoling their colleagues into extending the commission through the end of the year, allowing Field, Loomis, and Graham one more effort to amend their work and lobby for its passage.¹¹⁷

Compiling and editing their reports, the commissioners finished their work on the last day of their commission, December 31, 1849. The final report included a code of 1,884 sections in addition to a statute repealing all previous legislation and overriding all prior judicial rulings on practice and procedure. Coupled with lengthy explanatory notes, the final work – now christened a “Code of Civil Procedure” – ran to over 800 pages.¹¹⁸

The 1850 session went even worse for the commissioners. The Democrats had finally reconciled; Barnburners and Free Soilers returned to the fold, and the Whigs lost their majority. Whereas the bulk of the 1848 code, the constitutional mandate, and a short legislative session had all worked in favor of the first draft’s enactment, this time a select committee on the code complacently reported little progress on reading through the lengthy report by the end of the session, and no vote

¹¹⁶ “Legislative Acts and Proceedings,” *Albany Evening Journal*, January 31, 1849; “Practice and Pleadings,” *Albany Evening Journal*, February 3, 1849.

¹¹⁷ By the end of the session, the code commission had finally offered a report on highway regulation that was immensely popular with the Whigs. In order to extend the code commission, however, Senate Whigs insisted that the Assembly had to extend the practice commission as well. See *Senate Journal* (New York 1849), 583, 592, 622–23, 652; *Assembly Journal* (New York 1849), 1454–55; *New York Herald*, April 14, 1849.

¹¹⁸ *Final Report* (New York 1850); David Dudley Field, “Special Acts Reported in Connection with the Codes of Civil and Criminal Procedure,” in *Documents of the Assembly of the State of New York*, 73d Sess., No. 19 (1850), 3:28–29.

was ever called. Faced with the choice of blindly enacting the entire code, as the 1848 legislature had done, or doing nothing, legislators decided to do nothing.¹¹⁹

Even had the 1850 report made it to a vote, passage was by no means assured. David Graham filed a minority report, dissenting against Field's codification of the law of evidence. Although Graham agreed that the law of evidence more properly belonged to "remedies" than to "rights," he pointed out that the constitution and the legislative mandate gave the commissioners authority only to revise practice, not to codify the unwritten law. Most of the reported code, Graham believed, amended the Revised Statutes to some degree, but going out into the case law to define every rule of evidence "would have required at least the time originally allotted to the commission, and . . . even then, he would hardly have hoped to complete" it. Moreover, Graham, the Whigs' representative on the commission, did not believe the code went far enough to provide opportunities for arbitration without lawyers and without the formal rules of pleading and practice. Finally, he objected to the code's attempt to change the name of habeas corpus to "writ of deliverance from imprisonment." While he was not "disposed to attach much importance, either to the retention or change of name of a particular proceeding," Graham believed habeas corpus was too well known a remedy, and too important, for any interference. Critics widely repeated the three points of Graham's dissent, which also made it into Cooper's novel when one character joked "it was proposed to call the old process of '*ne exeat*' a writ of '*no go*.'"¹²⁰

With the closing of the 1850 legislative session, the last chance to complete procedural codification slipped away, though the commissioners did not know it at the time. Confident that the legislature would resume its reading in 1851, Graham and Field departed for vacations in Europe, the latter to be feted by members of the English bar interested in fusing law and equity for their own

¹¹⁹ "Report of the Committee on the Code," in *Documents of the Assembly of the State of New York*, 73d Sess., No. 149, (1850), 6:6.

¹²⁰ "Dissent of Mr. Graham from Certain Portions of the Code of Civil Procedure," in *Documents of the Assembly of the State of New York*, 73d Sess., No. 149, (1850), 2:4-6, 23; *A Brief Review of the Latest Production*, 18-20; *Alumnus, Crudities of the Codifiers*, 6-7. Cooper, *Ways of the Hour*, 183.

practice. *Hunt's Merchant Magazine* enthusiastically reviewed the draft code, writing that "the commercial bearings of this great reform are important." The final draft attempted to shorten creditor collections from twenty days to five, and *Hunt's* judged the provisions "well adapted to the circumstances of an enterprising and commercial State like New York." The *Democratic Weekly Herald* reported that "a number of whig journals and others are coming out in favor of the new code, and are endeavoring to make a great noise about its defeat," but it assured its readers that "all systems of legal practice are the natural growth of time and experience; and it is supreme folly to demolish them for the sake of a few inconsiderable improvements."¹²¹ Actually, time defeated the code. The short legislative sessions that had aided the first partial draft and its amendments doomed the final, completed draft.

Conclusion

This chapter has recounted a number of political ironies surrounding the creation of the New York Code of Civil Procedure. Largely the work of a Young America Democrat, codification and procedural reform became centerpieces of a Whig legislative agenda during the few years that the party held a majority in New York. But while Whig legislators favored independent legal institutions and deferred to expert lawyers on creditors' remedies, fellow Whigs outside the legislature denounced them for capitulating to the "levelers" and extremist democrats who sought to plunge the institutions of law and natural justice into the maelstrom of willful, short-sighted partisan politics. The vagaries of partisan factions nearly put a farmer on the commission while leaving Field off, and since convention compromises had separated procedural reform from codification, Field and the legislature had to stretch the bounds of constitutional interpretation to produce a "code of procedure." As legislation, the length and sophistication of the code made it impossible for legislators to review it in

¹²¹ See Michael Lobban, "Preparing for Fusion: Reforming the Nineteenth-Century Court of Chancery," 22 *Law & Hist. Rev.* pts. I & II, 389, 565 (2004), 584; H. M. Field, *The Life of Field*, 53-55. "The Codes of Procedure, Civil and Criminal, in the State of New York," 23 *Hunt's Merchants' Magazine & Commercial Review* 67 (1850), 67-79; "The New Code of Legal Practice," *Weekly Herald* (New York, N.Y.), April 14, 1849.

a single session, raising serious constitutional concerns about the delegation of political authority to unelected commissioners. The code defied the normal workings of partisan politics, to the benefit of the first draft in 1848, but to the ultimate repudiation of the final draft in 1850. Thus the Field Code, a signal victory of nineteenth-century positivism, never became positive law in its home state in finished form.

The result of partisan compromise and political contingency, the code was neither a triumph of Jacksonian rhetoric nor a straightforward modernization of commercial remedies. Although the code relied on anti-lawyer support early on, Field was no anti-lawyer and never intended the code to make everyman his own lawyer. He believed “justice is attainable only through lawyers.” Practice and pleadings were the domain of “only a few men, set apart for that particular calling, and devoting to it the best part of their lives.”¹²² And although the code obliged its merchant sponsors with a speedier route to debt collection, the summary proceedings of the final code were never enacted. Rather than certainty and predictability, the commercial classes received a partial code with no clear direction as to which of the Revised Statutes or uncodified practices of equity remained in force, nor what pleading “such . . . as to enable a person of common understanding to know what is intended” actually required.¹²³

Perhaps the greatest irony lies in the deeply political origins of the field of civil procedure, a domain lawyers were supposed to use to avoid politics and stifle reform, according to the leading histories. Robert W. Gordon and Lawrence Friedman contend that across the antebellum era, elite lawyers “transmute[d] programs for substantive social change into professionally controlled proposals for technical changes in procedures or forms.” On that basis, Gordon dismisses the production of the New York procedure code as “nothing that contemporaries would have called a real codification.” Because reformers had such fractured interests, Gordon and Friedman maintain,

¹²² Field, *Legal Reform*, 11-12.

¹²³ 1848 N.Y. Laws 521. See also Chapter 4.

procedural changes mollified some while wasting enough time that reform coalitions inevitably crumbled through their own dissensions. Although reformers emerged within the legal profession, “conservative lawyers easily defeat[ed] anything genuinely innovative in the ideas of their moderately reformist brethren and agree[d] to only unexceptionable technical reform.”¹²⁴

One irony is that the reformers on which Gordon concentrates were in fact adamant about procedural reform, while staid lawyers and their political allies felt they had suffered a total defeat with the promulgation of Field’s code. New York assemblyman Herman Blodgett’s description of the law as “a system that has afforded to those who understood its arts [a] means of wrenching from the hardy laborer his means and his money” sounds very much like what Gordon has described as an American tradition of “antilegalism,” but it did not appear in the context in which Gordon’s expectations would place it.¹²⁵ Blodgett was not demanding civil codification or “real social change,” as Gordon puts it. He was trying to staff the commission on practice and pleadings with someone like Field. Whether or not self-proclaimed anti-lawyers expected or desired to change the substantive law of property and obligation, they absolutely demanded the reform of property and contract remedies. And as the common law was hardly anything more than a remedial system, good common law lawyers understood what was at stake in the proposal. Respectable lawyers like Nicolas Hill distanced themselves from “radical” and “experimental” legislation, and when the assembly judiciary

¹²⁴ Gordon, “American Codification Movement,” 434–439; Lawrence M. Friedman, “Law Reform in Historical Perspective,” 13 *St. Louis University Law Journal* 351 (1969).

¹²⁵ “Speech of Mr. Blodgett,” *Albany Evening Journal*, Apr. 3, 1847. Gordon identifies an Anglo-American “tradition of antilegalism and law reform” running from at least the seventeenth century through the Jacksonian era. Yet Gordon’s own account of this tradition describes not so much *antilegalism* as what New Yorkers in the 1840s were calling *antilawyerism*. Gordon includes in this tradition demands for “publication of legal rules in a form accessible to the ordinary person’s understanding, abolition of lawyers, curtailment of judicial discretion, . . . and reform of the processes for handling defaulting debtors.” Gordon then argues that lawyers used “technical changes in procedures or forms” to stifle or subvert these “interests for real social change.”¹²⁵ It is difficult to imagine, however, how a common law lawyer or even a lay critic in the 1840s would distinguish between these “real” reforms and matters of “procedure and form” (indeed, “form” and “process” are two of the items on Gordon’s list of radical reforms). The list of reforms Gordon itemizes might be summarized together as the lawyer’s craft, and anti-lawyers sought to admit anyone to the craft, just as—in Eoch Strong’s analogy at the state convention—anyone in the Early Republic could become a minister of religion. Strong summed up in one person the factions that Gordon’s political vision tends to keep apart: anti-lawyering farmers and pro-creditor lawmakers, incidentally the essence of the Whig coalition at this time. Gordon, “The American Codification Movement,” 437–38.

committee reviewed the code of procedure, it recognized that procedural reform could extend to any corner of the common law. If the Field Code does not ultimately appear to the critics to be “real codification,” it should not be assumed the “antilegalist” calls for substantive reform were necessarily defeated.

Indeed, the politics of the Field Code helped to create the very concept of “civil procedure” in American law and imbue it with such remarkably “substantive” features. As Amalia Kessler notes, *Bouvier’s Law Dictionary* did not even define “civil procedure” until its 1897 edition, describing the term as “rather a modern one.” Before 1848, the term was largely restricted to French usage, and American remedial law had carried the typical designation—as it did both in Graham’s treatise and professorial title—of “practice and pleadings,” the name likewise given to the reform commission. When the commission designated its final draft a “Code of Civil Procedure,” it marked the first American attempt to give content to this category.¹²⁶

As codes of civil procedure were enacted around the United States, the exact boundaries of this new field remained unclear. Many states followed Field by including the structure and jurisdiction of the courts, the powers and liabilities of public officers, the details of practice and pleading, and the entire law of remedies, evidence, and enforcement. Most code states made provisions for justices of the peace and various forms of arbitration, thus making even “informal” civil proceedings a matter of formal statute. Other states added legal subfields that had specialized procedures or fields in which procedure seemed particularly important, such as probate (the process of testamentary succession) and the law of mortgages (where the process of foreclosure was a dominant feature). And after all, argued procedural codifiers in Iowa, what did the famed Married Women’s Property Acts (coming into force at the same time as the procedure codes) offer besides

¹²⁶ Amalia Kessler, “Deciding Against Conciliation: The Nineteenth-Century Rejection of a European Transplant and the Rise of a Distinctively American Ideal of Adversarial Adjudication,” 10 *Theoretical Inquiries in Law* 423 (2009), 481–82; *Bouvier’s Law Dictionary* (1897), 2:764.

procedural reform? These acts gave women standing to litigate in their own name and seek remedies in claims of property and contract, and they abolished mandatory rules of joinder (of husbands). Standing, remedies, and joinder were, in the codifiers' scheme, the stuff of procedure. Thus, one of the most significant changes to the law of property and domestic relations in the century went into the state's code of civil procedure.¹²⁷

A second irony undermining the critics' view of the Field Code is that the conception of procedure as a superficial, technical field unworthy of "real" reform or codification was an idea invented by the law reformers themselves in order to give their proposals a chance of political success. As the "mere machinery" of the law, procedure could become a domain where legislative reform could not be politically resisted merely because it was innovative. Critical accounts are correct to note that procedure became a crucial tool for keeping lawyers in control of law reform, but here again the machinery metaphor did much of the work. Loomis and Graham's report echoed Field's use of the machinery image in his letter to Verplanck. Where Loomis and Graham, for their purposes, used it to emphasize the triviality of procedure, Field deployed it to note its complexity and "what delicate adjustment it requires" in the hands of a skilled mechanic. As the machinery of the law, procedure was therefore complicated enough to require expert lawyerly mechanics but superfluous enough to be re-crafted by de-politicized legislation.¹²⁸

This argument was not limited to lawyers, as most of the Whigs who had opposed Peters's nomination had been fellow farmers and mechanics convinced that law reform required legal expertise. But as the threatening anti-lawyers made clear, the legal mechanics were expected to keep faith by producing the reforms they were commissioned for: the abolition of chancery, the simplification of form and process, the fair collection of debts, and the restructuring of the fee system.

¹²⁷ See Appendix C for an overview of the other code states. *Report of the Code Commissioners to the Eighth General Assembly of the State of Iowa* (Iowa 1859), 296, note to § 172 ("The right to sue, follows necessarily from the right of property.") On the significance of the Married Women's Property Acts, see, e.g., Hendrik Hartog, *Man and Wife in America: A History* (Harvard 2000), 111-13, 187-92, 290-92.

¹²⁸ Field, *A Letter to Gulian C. Verplanck*, 4-7; "Report of the Commissioners," 4.

The “mere machinery” claim was acceded to by many non-lawyers who were unwilling to trust the fundamental restructuring of civil justice to neophytes working at a rush. But its success was limited in New York, where legislators ultimately refused to hand over their lawmaking authority to expert lawyers. With its political capital exhausted at home, the code, like many New Yorkers at the close of the 1840s, would have to seek its fortunes in the West.

Chapter 3

An Empire in Itself

The Migration of the New York Code

At the opening of the first Nevada legislature in 1861, Territorial Governor James W. Nye, a former New York lawyer, instructed the assembly that they would have to forsake the Mormon statutes of Utah Territory out of which Nevada was carved. Those laws were ill adapted to “the mining interests” of the new territory, but “happily for us, a neighboring State whose interests are similar to ours, has established a code of laws” that could attract “capital from abroad.”¹ That neighbor was California, and Nye urged that California’s “Practice Code” (the only code in the state at the time) be adopted in Nevada, as far as it could “be made applicable.” Territorial Senator William Morris Stewart, the famed mining lawyer who would become a leading U.S. Senator of Reconstruction, followed the instructions perhaps too well. The senator literally cut and pasted the latest *Wood’s Digest* of the California Practice Act into the session bill, crossing out “state” and “California” and substituting “territory” and “Nevada” where necessary. (See Figure 4.) Amidst all the work organizing the territory in one brief session, the bill did not gain passage until late in the session, when it was sent to Nye for his signature.

Nye wrote back in disgust. The bill—of 715 sections—had reached him along with other legislation late the night before the legislature was to adjourn. Even in the brief period he had to read it, Nye counted “many errors in the enrolling of it, numbering probably more than three hundred.” Some errors were severe. Nevada’s Organic Act specified the jurisdiction of the district courts and justices of the peace, but the code overwrote these by copying California’s arrangements. Error-

¹ Message of the Governor, in *Journal of the Council for the Territory of Nevada* (1862), 21.

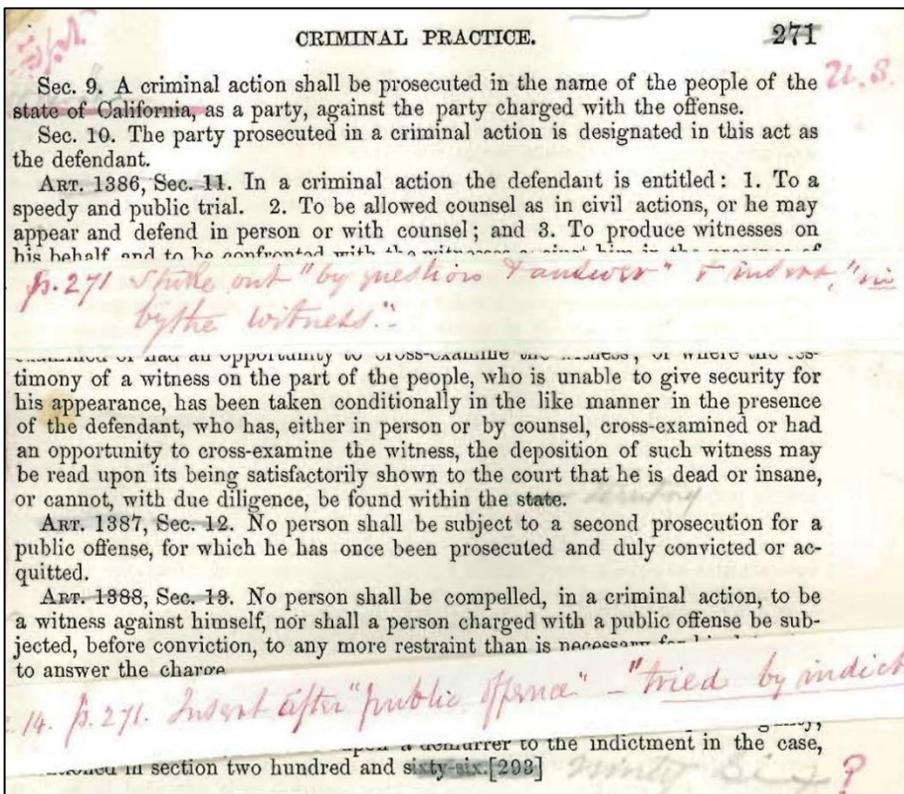
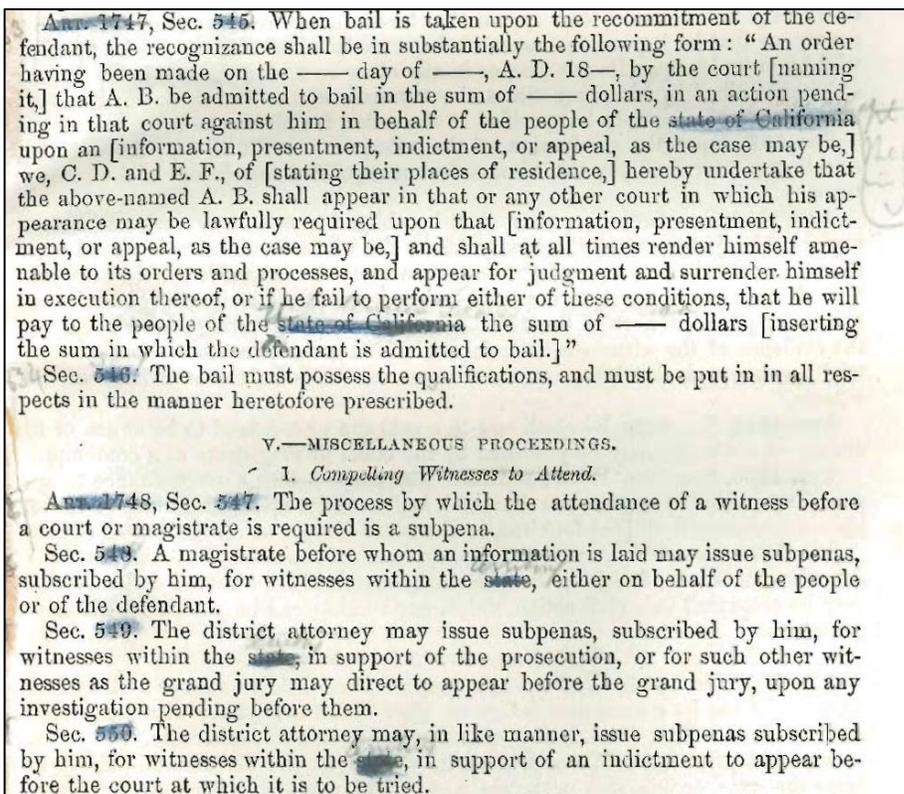


Figure 4.

The session bill for Nevada's procedure acts consisted of actual pages from *Wood's Digest of California Law*, 1857 edition. Stewart would have had to use two copies in order to paste the front and back of each sheet into the bill.

The sections have been renumbered by hand, with references to California replaced with Nevada and some emendations added to scattered sections.



Detail from Council Bill 21, First Territorial Legislative Session (1861), Nevada State Library, Archives and Public Records, Carson City, Nev. Photo by author.

riddled and unconstitutional as the bill was, Nye nevertheless persisted in the conviction that a civil practice code—something that had not even existed when Nye began his legal career—was a “universal necessity and public need,” concluding that “without some legislation in providing a code of procedure in civil cases, it may be a matter of grave question whether your courts would be able to fulfill the purpose of their creation.”² Nye signed the code into law.

At least Stewart had made an effort at adaptation. When Nebraska Territory organized in 1855, its legislature simply put the procedural portions of the code of Iowa in force, leaving its officers to figure out for themselves when “state of Iowa” meant “territory of Nebraska.”³ “The scissors and paste-pot we had heretofore confidently believed were implements peculiar to the newspaper sanctum,” wrote a Colorado journalist, mocking codification efforts in his state.⁴ Oregon legislators, however, made their paste-pot a mark of honor, advertising that their procedural code was “taken, word for word, from the New York Code.” Readers could rely on the New York case reports, “acknowledged to be superior in legal erudition” to understand the new code.⁵

Most histories of the Field Code pass quickly over the fact that its text received such remarkably widespread adoption. By the end of the century, procedure codes and the Field reforms spread across the United States and its territories. (See Figure 5.) Depending on how one counts territories that later divided, around thirty jurisdictions adopted some version of the code. Reciting the litany of states that adapted the code or its reforms to some degree, most accounts then focus on the interpretation of the code in the courts.⁶

² *Council Journal* (Nevada 1862), 261.

³ 1855 Nebraska Laws 41.

⁴ “Olla-Podrida,” *Rocky Mountain News* (Denver, Colo.), January 20, 1877.

⁵ 1854 Oregon Laws iii.

⁶ See Lawrence Friedman, *A History of American Law* (Simon & Schuster, 2d. ed., 1985), 394; Robert Wyness Millar, *Civil Procedure of the Trial Court in Historical Perspective* (NYU 1952), 54–55. The usual litany is Missouri (1849), California (1850), Iowa (1851), Kentucky (1851), Minnesota (1851), Indiana (1852), Ohio (1853), Oregon (1854), Washington, (1854), Nebraska (1855), Wisconsin (1856), Kansas (1859), Nevada (1861), Dakota Territory (1862), Arizona (1864), Idaho (1864), Montana (1865), Arkansas (1868), North Carolina (1868), Wyoming (1869), Florida (1870), South Carolina (1870), Utah (1870), Colorado (1877), Oklahoma (1890), New Mexico (1897), Alaska (1900). Tennessee in 1858 adopted a Code that, while much of it was original, borrowed nearly 300 sections from other states, combining Field Code provisions from Iowa and Nebraska with the Civil Code of Alabama. In 1850, Mississippi incorporated about fifty sections of the code’s

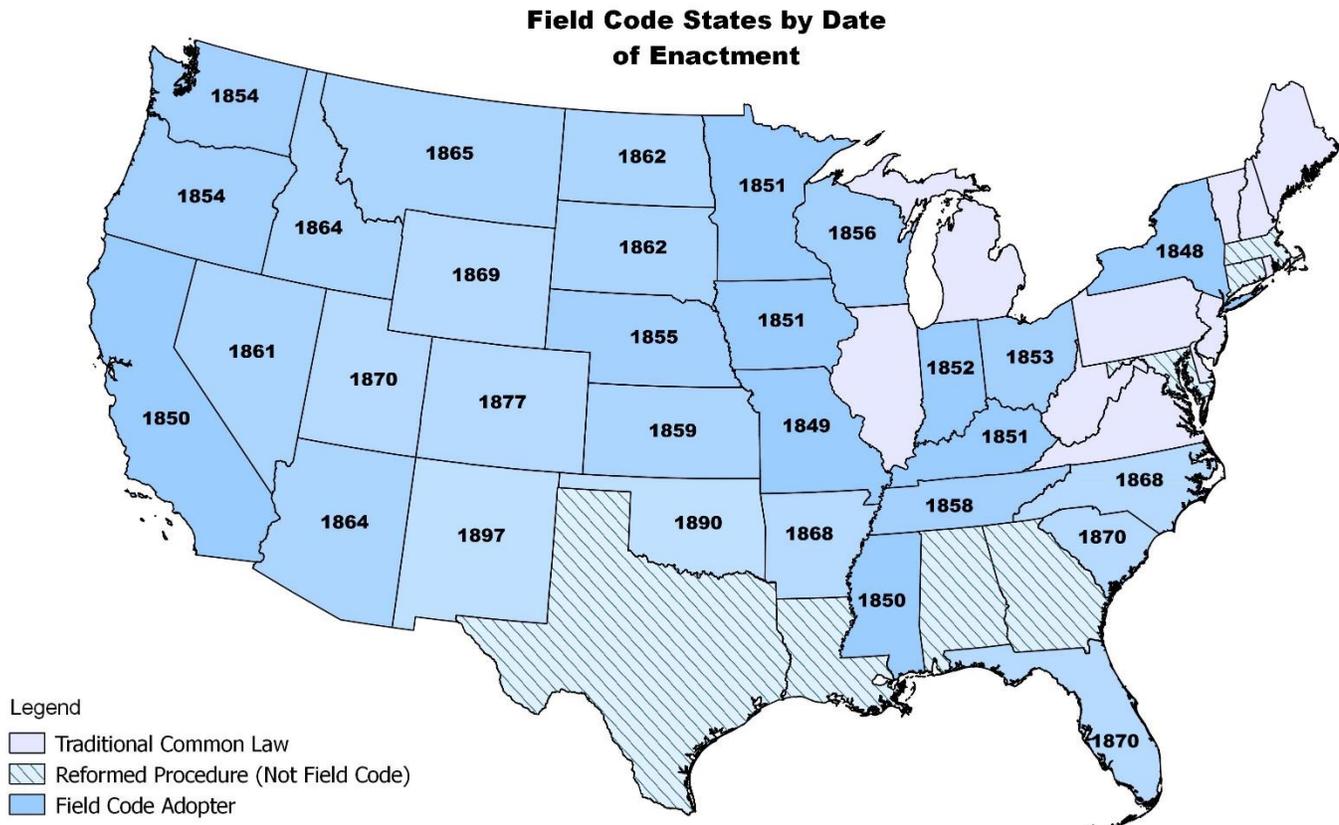
The legislative reception of the code demands more scrutiny, however. Although codification debates are typically characterized as a power struggle between judges and legislators, the circumstances of the Field Code's migration provoked far more concern over the problem of commissioners as the source of law. Pressed by political demands within the short time horizons of legislative sessions, codifiers faced the dilemma of having to square lawmaking commissions and borrowed legislation with ideals of popular sovereignty and democratic representation. The New York theory of the superficiality of "mere" procedure coupled with the imagined expectations of New York capitalists helped to overcome arguments against importing the code. The migration of Field's code thus forms a central chapter in the constitutional politics of administrative lawmaking in America and in the new history of capitalism more generally.

The legislative reception of the code was not a matter of obvious convenience for states looking to modernize their law, as most accounts portray it. Jurists may blithely speak of an innovative statute being "soon copied in other jurisdictions," but that phrase papers over a world of labor, patronage, and politics. In every jurisdiction, the code had to be sent out by elite lawyers back in New York, physically imported and reproduced in a jurisdiction where quality printing could be quite costly, and then enacted by a legislature riven by the partisan battles of the day that ranged from secession to suffrage to silver.

This chapter explores controversies over the Field Code as it migrated around the United States. Digital text analysis reveals that codes that appeared during the Civil War and Reconstruction, such as Stewart's Nevada legislation, adhered most closely to Field's finished New York draft. Opponents in many of these jurisdictions complained about an imperial imposition of New York law

provisions on pleading into its broader civil code. In 1855, Congress reviewed a Code for the District of Columbia that borrowed heavily from Field Codes. Two states that prepared a code without ultimately adopting them were Utah in 1859 (the state would borrow Nevada's Field Code in 1870) and Texas in 1855. See Utah Territory Legislative Assembly Papers, 1851-1872, MS 2919, Box 3, Folder 17, LDS Church History Library, Salt Lake City, Utah; *The Code of Civil Procedure of the State of Texas*, Rare Books Collection, Tarlton Law Library, University of Texas, Austin, Texas. For an impressive comparison of the nineteenth-century codes, perhaps the best that could be done without statistical computing, see Charles McGuffey Hepburn, *The Historical Development of Code Pleading in America and England* (1897).

Figure 5.



Data adapted from Charles McGuffey Hepburn, *The Historical Development of Code Pleading in America and England* (1897). For specific citations to each statute in the corpus of American procedural legislation, see Appendix C. Map rendered by author using QGIS.

overriding their local sovereignty and undermining democratic representation. However, the anxiety that New York capital would follow only New York remedies assisted the code's passage in the western and southern states that made up America's Greater Reconstruction. By copying the exact text of Field's code, codifiers made an idiosyncratic New York law the uniform practice of a nation.

The Subservience of Slaves: Codification and the Imperial State

By November 1851, the *Sacramento Daily Union* could report that life was settling down in the golden hills of northern California. The booming gold rush population and national compromises with slavery had rushed California from a distant Mexican province to American statehood in less than two years. The editor took heart that civilization had taken root, as evidenced by professional specialization. Early migrants of all vocations washed their own clothes, crafted their own tools, and engaged in the mining frenzy, at least on the side. But now ministers were back to ministering, journalists were printing, and "the accomplished lawyer, now delver and digger in the mines, now trading, now cooking, is again assuming his legitimate place at the bar, re-perusing the huge works of the old guides to the principles and practice of law."⁷ What the news failed to note was that, in 1851, those huge works of practice were not at all old.

By late 1851 California had already enacted the Field Code twice. Both adaptations came from the sort of multi-vocational lawyers the *Daily Union* described, men who came at the height of the gold rush to practice law while mining for gold, speculating for land, and running for office. Both codifiers were young New York lawyers, trained in Wall Street law firms, but, having departed New York in 1848, neither had much experience with practice under the code. Both were elected to the state senate and appointed to the judiciary committee, from whence they guided their versions of the code through

⁷ *Sacramento Daily Union*, November 20, 1851. On the mixed labor regime in San Francisco, especially its gendered dimensions with an absence of white women, see Susan Lee Johnson, *Roaring Camp: The Social World of the California Gold Rush* (Norton 2000).

the legislature without resorting to a commission as New York had. The first to arrive in 1849 was Elisha Crosby; the second, in late 1850, was Stephen Field, younger brother of David Dudley.⁸

Proud to think of himself as a Jeffersonian agrarian, Crosby would become famous as a passionate defender of Mexican land claims. In his later career, he argued over a hundred cases on behalf of Mexican-descended land claimants at the congressionally established Land Commission and on appeal in the U.S. federal courts. Crosby criticized the slow and expensive legal proceedings instituted to confirm land titles, proceedings that frequently enabled well-funded Anglo land speculators to win claims despite the merits of a case.⁹ In the first session of the state legislature, however, Crosby counted it his finest achievement to defend the common law against the request of California's Hispanic bar – and the directive of the state's governor – to adopt European-style civilian codes as the law of the state.¹⁰

In his first address to the legislature, Governor Peter Burnett, formerly a lawyer from Tennessee, urged the legislature to adopt the civil code of Louisiana and the Louisiana code of practice, both of which remained substantially as Edward Livingston had drafted them twenty years earlier. Treading carefully, the governor argued that civil law was “a system of the most refined, enlarged, and enlightened principles of equity and justice” so long as it “assumes to regulate” only the commercial “intercourse of men with each other” and “aside from its mere political maxims.” English law could otherwise provide the basis for criminal and constitutional law. Reinforcing the point with expediency, Burnett added that “so great a portion of the cases that will arise in our courts, for some years to come, must be decided by the principles of the civil law” – implicitly, from Mexican litigants or rights stemming from Mexican grants – “that the study of its leading features will be forced

⁸ See Elisha Oscar Crosby, *Reminiscences of California and Guatemala from 1849 to 1864*, ed. Charles Albro Barker (Huntington Library 1945); Stephen J. Field, *Personal Reminiscences of Early Days in California* (1893).

⁹ See Crosby, *Reminiscences of California*, 67–71.

¹⁰ Crosby, *Reminiscences of California*, 58 (His report on the common law “is one of the things I take some pride in. I was very much complimented on the work at that time and my law friends in New York to whom I sent a copy were so much pleased with it that they sent me out a little testimonial, a handsome seal with my family crest engraved upon it.”).

upon our judges and members of the bar." Following the governor's message, a memorial arrived signed by eighteen lawyers from San Francisco, the majority of Spanish or Mexican descent, urging the legislature to retain civilian law in the state.¹¹

In a long report that would be celebrated by the state bar for decades to come, Crosby explained why the state could not retain the civil law system or even adopt the more mixed system of Louisiana. Countering the governor's argument from expediency, Crosby offered practical reasoning of his own: "More than twenty-nine thirtieths of the emigration to this country is from Common Law States; and an equal proportion of the business of our people is now and will continue to be, carried on by Common Law men." Moreover, most emigrating lawyers read only English; "substitute the Civil for the Common Law, and it will be with great delay and expense, in limited supplies, and in strange tongues, that books can be procured which will be found absolutely necessary for the lawyer and the judge in the intelligent administration of the system." (Never mind that the daily papers advertised Louisiana's English procedure code in the local book shops.)¹²

The heart of the argument was civilizational. It was the works of Mansfield and Marshall, Kent and Story, that forged a "chain of memory which, stretching across the Sierra Nevada, binds [the lawyer] to the land and institutions of his fathers." The common law sprang from "the reformed religion and enlightened philosophy and literature of England." Civil law was "based upon the crude laws of a rough, fierce people, whose passion was war" but who had nevertheless descended into "luxurious and effeminate refinement." Some might argue the common law favored "the landed interest," but, Crosby pointed out, it was in England and America where the landless laborer, merchant, and artisan contracted for the highest wages. Thus it was in the common law world where one found "the activity, the throng, the tumult of business life" and "the strength in freshness of

¹¹ *Journal of the Senate of the State of California* (1850), 33-35. Oscar Tully Shuck, "Adoption of the Common Law," in Oscar Tully Shuck, ed., *History of the Bench and Bar of California* (Commercial Printing House 1901), 47-53.

¹² Report of Mr. Crosby on Civil and Common Law, *Senate Journal* (California 1850), 459-80, 477. Shuck, *History of the Bench and Bar*, 48-49. For the advertised codes and treatises on Louisiana law, see for instance, advertisements on October 1 and 2, 1850, of the *Daily Alta California*.

manhood." Civilian countries exhibited only "feebleness of intellect, timidity of spirit, and the crouching subservience of slaves."¹³

Stark as Crosby's contrast was, it was not unique. In debates over procedure codes, the comparison of civil law and common law frequently arose (regarding the merits of the civilian-like chancery system, the use of codes, the need for a jury, etc.), usually on the premise, as an 1855 Maryland commission put it, that "as far as their administrative principles and forms of procedure are concerned," the two systems were "the opposites of each other." Substantive legal differences were rarely elaborated, perhaps supporting Governor Burnett's premise that practitioners knew few details about one another's system. Instead, themes of manliness and civilizational destiny abounded. The same Maryland commission argued that adopting civilian law "would rend the spiritual chain which connects us with our forefathers, and would reduce us from a mighty original race . . . to one developing its energies in the obsolete forms of a past civilization, produced by a people inferior to ourselves, and standing behind us in the providential order of history."¹⁴

According to common law defenders, the history of a civilization's legal institutions affected its present liberty and prosperity. To the Maryland commissioners, the common law supported the rule of law through its institutional organization (a limited executive and an independent judiciary) and by its regard for history (the binding force of precedent among the latter branch). The civil law supported only the rule of will through legislative supremacy and unfettered judicial discretion. But, argued the Maryland commissioners, "the notion that human institutions can be created anew for an

¹³ Report of Mr. Crosby, 465, 469, 471.

¹⁴ *The First Report of the Commissioners to Revise the Rules of Practice and Pleadings* (Maryland 1855), 7, 76. For a sample of other instances of comparison, see William G. Bishop & William H. Attree, eds., *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of New York* (1846), 572 (Jordan: "the common law — a system . . . venerable for its antiquity, and admirable for its wisdom, and its adaptation to the condition of a free people."); *Journal of the House of Representatives of the State of Minnesota* (1858), 517 ("The Common Law is the result of the wisdom and learning of successive ages; it is the great embodiment of the great principles of human rights and remedies, and is adapted to the wants of man in every department in human life."), 562 ("these barbarisms which had been grafted upon it by the Normans and Monks"); *Rocky Mountain News*, January 24, 1877 ("the broad and beaten way to the goal of right and justice which the Anglo-Saxon-Norman race has trod for over eight centuries").

improved state of society, upon what are called principles of social science, without regard to old organizations, is a doctrine of sheer despotism. The notion is founded upon an entirely false philosophy of history. The organic character of social progress is wholly ignored by it." Because of its respect for historical arrangements, the common law had most effectively remedied its historical flaws—"the feudal system"—and had advanced towards commercial prosperity more quickly than had continental Europe.¹⁵

Underlying these civilizational claims, especially in the political context of the 1850s, was a lurking fear that legal institutions might reduce even white men to effeminacy and servility. In ranking historical determinants, the Maryland report gave priority to legal systems even over race, arguing that a people's civilization "is not determined more by peculiarity of race, than it is by the character of the institutions under which a people are developed." In that case, all Americans of whatever origin were "the Anglo-Saxon race on a grander theatre," a nation that spread Anglo-American common law over more places and peoples than even England had.¹⁶ In this regard, Crosby's report to the California legislature was somewhat unusual in the way it discussed actual policy differences between common law and civilian law. Each example illustrated the difference between manly independence and the subordination deemed appropriate to women, children, and slaves. Civil law did not emancipate minor boys until the age of twenty-five (and it committed the opposite sin by failing to regard a wife's legal identity subsumed by her husband's). Further, the "Common Law allows parties to make their own bargains, and when they are made, holds them to a strict compliance; whilst the Civil Law looks upon man as incapable of judging for himself, [and] assumes the guardianship over him." The civil law was overrun with implied warranties; the common law expected contractors to act grown up under the maxim "caveat emptor."¹⁷

¹⁵ *First Report* (Maryland 1855), 62–69, 75.

¹⁶ *First Report* (Maryland 1855), 70, 72.

¹⁷ Report of Mr. Crosby, 467–68.

Marxist and critical legal historians have tended to describe American codification debates in terms of redistributionist politics. In their reading, the defense of the common law was designed to safeguard the power of judges to protect property from popular schemes of equalization and distribution.¹⁸ Recent work on common law thought in America has muddied this thesis by illustrating how some of the most outspoken proponents of the common law were also leading progressives who advocated redistributive economic policies and labored on behalf of marginalized populations, much as Elisha Crosby did.¹⁹

The abundant civilizational arguments in the codification reports indicate that the focus on redistribution can be too reductive. The abhorrence of civil law was not, in many cases, a thin disguise for upholding status quo property rights. Common law lawyers like Crosby were not so worried about their own property as they were concerned that they could *become* property, reduced to servile dependency on a guardian state. Codification, rather than a narrow debate over institutional protection of property, squarely raised the broader problem of what Daniel Ernst calls “Tocqueville’s nightmare.” Alexis de Tocqueville, the French visitor of Jacksonian America, warned that American liberalism might degenerate into a dependency on an administrative “central power” to the point that Americans would lose “little by little the faculty of thinking, feeling, and acting by themselves, and thus . . . gradually falling below the level of humanity.” In Tocqueville’s stark dichotomy, a legal system could establish either emancipation or empire; there was “no other alternative than democratic liberty, or the tyranny of the Caesars.”²⁰ This was the specter raised by codification. If all law became merely the positivist decree of a legislature, a civilization’s history could be effaced in an instant, its

¹⁸ Morton J. Horwitz, *The Transformation of American Law: The Crisis of Legal Orthodoxy, 1870–1960* (Oxford 1992), 117–21; Charles Sellers, *The Market Revolution: Jacksonian America, 1815–1846* (Oxford 1991), 48–61; see also Robert W. Gordon, “The American Codification Movement,” 36 *Vanderbilt Law Review* 431 (1983).

¹⁹ Kunal Parker, *Common Law, History, and Democracy in America, 1790–1900: Legal Thought Before Modernism* (Cambridge 2011); David M. Rabban, *Law’s History: American Legal Thought and the Transatlantic Turn to History* (Cambridge 2013); Lewis A. Grossman, “James Coolidge Carter and Mugwump Jurisprudence,” 20 *Law & History Review* 577 (2002).

²⁰ Daniel Ernst, *Tocqueville’s Nightmare: The Administrative State Emerges in America, 1900–1940* (Oxford 2014); Alexis de Tocqueville, *Democracy in America*, trans. Harvey C. Mansfield & Delba Winthrop (Chicago 2000), 301, 665.

development arrested, its people micromanaged by centralized statutes rather than permitted to develop according to local customs.

The threat of imperial subjugation that generally permeated codification debates could sometimes be avoided if the code under discussion was a “mere” procedure code. In Crosby’s case, after the legislature accepted his anti-civilian report and drew up an act adopting the common law, Crosby submitted an adapted version of New York’s 1849 amended Field Code without any further comment or report. (See Figure 6.) It passed by a voice vote, presumably on the understanding that this code, unlike Louisiana’s, was not antithetical to the common law. When Crosby wrote back to New York to announce the code’s success, he spoke only of the code regulating “practice” and “proceedings,” never the law itself.²¹ The Maryland commission was warier of Field’s Code and its “impulses of innovation.” Instead it adopted English reform statutes, borrowing a text from across the Atlantic to mimic the reforms of a neighboring state.²² (See Figure 6.)

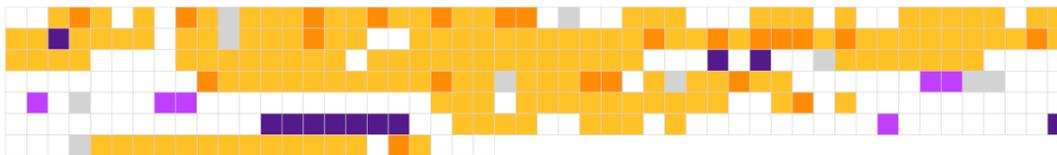
Elsewhere, codifiers hailed the civilian affinity of Field’s Code as its leading virtue, on the same grounds of civilizational pedigree. A committee of Minnesota legislators in 1858 celebrated the code for being “closely analogous in its pleadings and practice to the celebrated civil code of Justinian, the leading principles of which prevail in all the enlightened commercial countries of Europe, except England.” Like California’s Governor Burnett, the committee was careful to distinguish Europe’s dangerously autocratic political and criminal law from the commercial attainments of its civilization, for which “no wiser or better code ever existed.” The civilian-like procedures of chancery courts, admiralty courts, and the courts of Louisiana and Texas proved that civilian commercial remedies could be distinguished from the arbitrary positivism of civilian systems. Hedging its arguments, the committee also reaffirmed the idea that a merely procedural code was neither really civilian nor

²¹ 1850 California Laws 219 (act adopting the common law); 428 (act regulating proceedings in civil cases). *Troy Daily Whig*, October 20, 1849.

²² *First Report* (Maryland 1855); 1859 Revised Laws of Maryland 513.

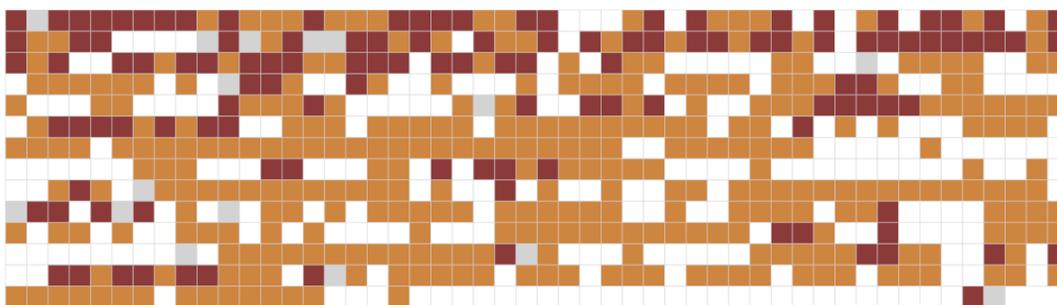
Figure 6.

Borrowed sections in CA1850



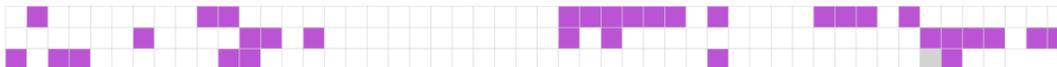
Section borrowed from LA1844 NY1829 NY1848 NY1849 Other

Borrowed sections in CA1851



Section borrowed from CA1850 NY1850 Other

Borrowed sections in MD1855



Section borrowed from GB1852 Other

These visualizations function as a map to a text where the sections of a code are laid out left-to-right in rows. Thus, similar shaded borrowings across the same row indicate longer runs of borrowed text. For the digital methods used to derive this data, see Appendix B. As that appendix notes, these graphs likely underrepresent the amount of borrowing, but they render a fair approximation.

Crosby's California practice act in 1850 derived largely from the New York commissioners' amended code from 1849, but Crosby did lift one significant set of sections from the mixed civilian-common law code of Louisiana regulating when a judge could order a new trial. New trials were not provided for in the New York Code until the finished draft in 1850. Stephen Field's code, on the other hand, used the latest draft from the New York commissioners, combining it with material from Crosby's act.

Maryland left much more of its practice uncodified, and when that commission borrowed legislation, they imported it from England's Common Law Procedure Act 1852, 15 & 16 Vict., c. 72.

common law, since it did not alter real law at all. “We respectfully contend that by showing our preference for . . . the New York Code, we in no manner show disrespect to the ‘Common Law.’ The code does not derogate one ‘jot or tittle’ from the common law.”²³

The code could thus pass as an uncontroversial revision of common law practice or as a total repudiation of that practice in favor of civilian procedure. For those who favored the latter viewpoint, it was critically important that it was only civilian procedure that was being engrafted and that the institutionalized servility of Europe would not follow. Until the end of the century, the code would so pass in a remarkable number of jurisdictions, formerly common law, civilian, or the supposed legal wildernesses of the American Far West.

Rival Mechanics: The Extent of Borrowing

One reason a detailed legislative history of the code has not been undertaken is that the task is extremely arduous. The shortest version of the New York code was nearly 400 sections, while the complete and final draft was 1,885 sections compiled in 800 pages. Most American procedure codes averaged nearly 750 sections spanning 200 pages. The thirty or so jurisdictions that adapted the Field Code then re-adapted or undertook significant revisions in subsequent years, bringing an adequately comparative project up to 180,000 distinct rules and regulations spread across 50,000 pages. Fortunately, methods from digital humanities scholarship can shortcut comparative calculations and

²³ *House Journal* (Minnesota 1858), 559, 563. See also R.W. Wells, *Law of the State of Missouri Regulating Pleadings and Practice* (1849), 23 (“This is substantially the practice in the courts in Scotland, and in Louisiana and Texas, and in the Chancery and Admiralty Courts in England and in the U. States.”); and at the end of the century, *Minutes of the New Mexico Bar Association* (1894), 34 (“The old system . . . singularly enough, is retained to any great extent only in New Mexico, where the civil law came with its European civilization. Every where else the English race has entirely, or almost entirely, discarded this relic of the feudal age, but here we have repudiated the principles of the civil law utilized by our brethren elsewhere in drafting their new codes, and enacted the antiquated system by statute.”). For other civilian-favoring comparisons of civilization, see Bishop & Attree, *Report of the Debates and Proceedings*, 662 (Simmons: “Thus it appears that equity had its birth in free states, and enlightened ages—not in monarchies or barbarism. It originated in Greece, and was transplanted to Rome—the two states of antiquity distinguished for liberty and civilization.”); *Denver Daily Tribune*, January 10, 1877 (“This civil code was in existence before the birth of the common law, among the breech-clouted savages of Britain.”).

offer a useful picture of legislative borrowings in the American practice codes. (For methodological details, see Appendix B.)

Though useful, the method of course is not perfect. Because each code drew the line between substance and procedure in a different place, the length and coverage of “procedure codes” could vary enormously even when they borrowed the same central text. Add to that the problems of digital transcription required by a project of this scope, it becomes impossible to make perfectly accurate judgments of the form “California borrowed 80% of its text from New York.” Nevertheless, the methods developed for this project make it possible to say with confidence “this number of sections in the California code have such high similarity to sections in the New York Code they were likely borrowed from there.”

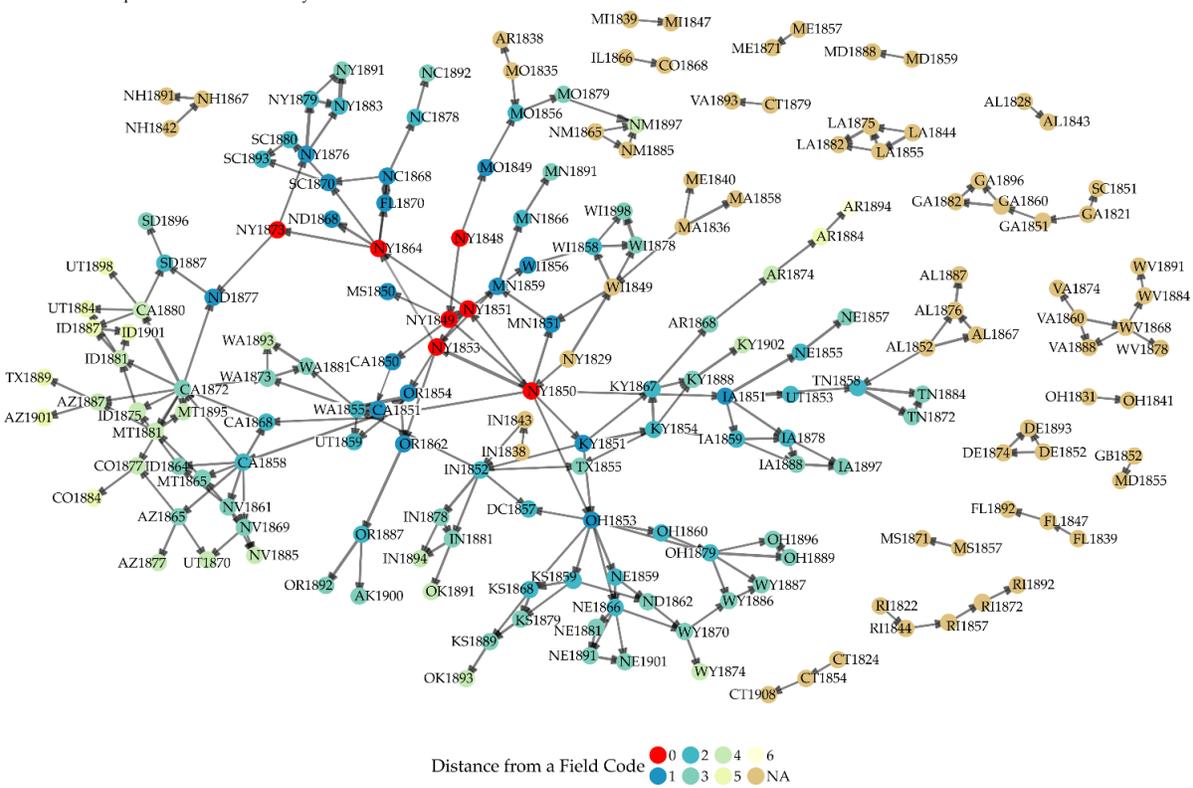
One virtue of this analysis is that it is able to do these pairwise, state-to-state comparisons across the entire corpus and generate relative comparisons within the whole family of codes. Such analysis can confirm what the archives already tell about Senator Stewart’s paste-pot: that although the Nevada text was substantially similar to the New York code, it was more similar to—because directly borrowed from—California’s version of the code. These connections can now be illustrated where session bills no longer survive to confirm them, as the following figure shows. (Figure 7.)

I have drawn this network graph from a corpus that includes 222 major procedural statutes during the nineteenth century—both codes and ordinary legislation—around the United States as well as from France, Canada, and the British Empire. (For details on the corpus, see Appendix C.) The main cluster represents the Field family of codes, while the periphery illustrates other significant textual borrowings, such as the previously mentioned Maryland commission that relied on English reforms. Many states appear to borrow from multiple sources, often a Field code mixed with prior state legislation, sometimes combinations of Field codes. New York, as one would expect, sits in the center of the code universe, but not all satellites revolve around it. Rather, there are a few regional text

Figure 7.

The migration of the Field Code

Codes of civil procedure connected by borrowed sections

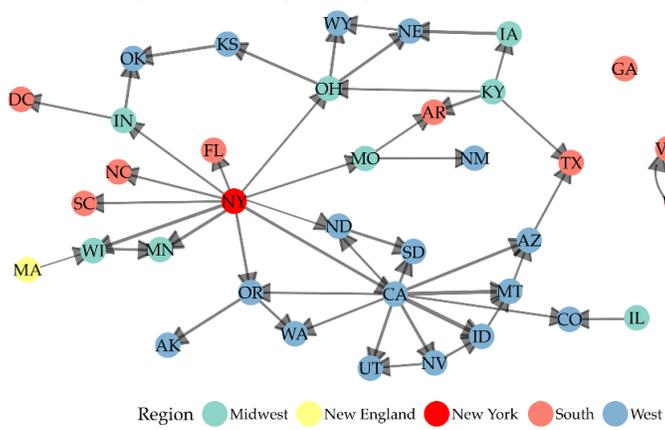


This network graph displays a connection whenever there are at least fifty borrowings between pieces of legislation, for a maximum of two sources, the heavier line indicating the more influential source.

A simplified version below displays borrowings by state rather than individual piece of legislation.

The migration of the Field Code

States connected by legislative borrowings of civil procedure



families, a couple stemming from midwestern states, and one stemming from California into other states of the Far West.

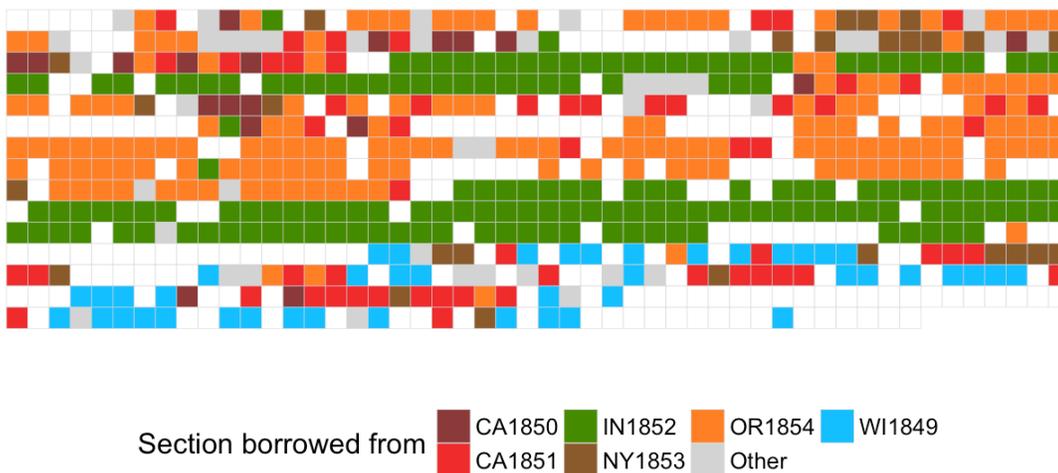
A network visualization can best illustrate the lines of influence but not the degree. Other kinds of visualizations can function as a “heat map” to reveal more about the extent of textual borrowing for any given code. (See Figure 6, above, and Figure 8.) Such visualizations for Washington, for instance, show more work of the scissors than the paste-pot, as large contiguous chunks came from two separate codes, those of Oregon and Indiana. Instead of looking for the highest degrees of similarity across all codes, one could measure similarity between just two codes. Doing so for Stewart’s Nevada code shows that although Nevada was two removes from New York in the network visualization, its text was highly similar to the Field Code. Iowa, also two removes away, mimicked far less of the New York text. (See Figure 9.)

Choropleth maps can aggregate these individual spectrograms along both dimensions, showing either the strength of borrowings among regional families or in reference to a single state like New York. (See Figure 10.) It may be unsurprising that legislators would borrow from a nearer neighbor, but it is important to note cases that break this rule. Midwestern states drew directly from New York in the early 1850s, when there were few other codes from which to borrow, but that was not the case with the Reconstruction South. There was no southern code family—only direct borrowings from New York. Likewise, although western states drew their texts from California, the strong similarity between California and New York basically renders the states of the Far West and the Coastal South one big text family, as commentators noticed at the time. The *Boise News*, for instance, predicted the legislature would “report substantially the Nevada code, which is the California code, which is the New York code.”²⁴ The Lower Midwest and Upper South adopted some New York reforms while dispensing with others, and their reliance on the New York text was

²⁴ *Boise News*, February 13, 1864.

Figure 8.

Borrowed sections in WA1855



A heat map of borrowings in Washington Territory's Act to Regulate the Practice and Proceedings in Civil Actions, drafted in 1854 and enacted in 1855, shows large contiguous portions of text lifted from the codes of Indiana and Oregon Territory. There were enough verbal differences between the codes to confidently assign one or the other as the source, but those distinctions were merely verbal, not substantive.

One of the commissioners, Edward Lander (1816–1907) had been a prosecuting attorney in Indiana in the 1840s and was elevated to the state's appellate bench for the three years immediately preceding his appointment to the Supreme Court of Washington Territory. William Strong (1817–1887), another commissioner, practiced law in Ohio until his appointment to the Oregon Supreme Court in 1850, a position he held for three years before relocating further north. The likelihood is that each commissioner was assigned to draw up a portion of Washington's procedure code, and each drew from the code that had become familiar in another territory.

In contrast, the spectrogram below shows Stewart's cut-and-paste job with the California practice act. Only a few emendations were penciled in along the way. (Cf. Figure 4 above.)

Borrowed sections in NV1861

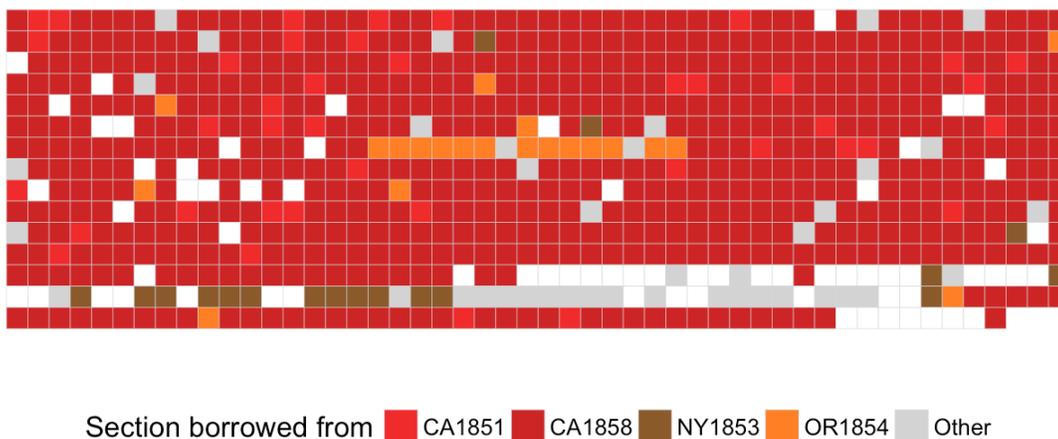
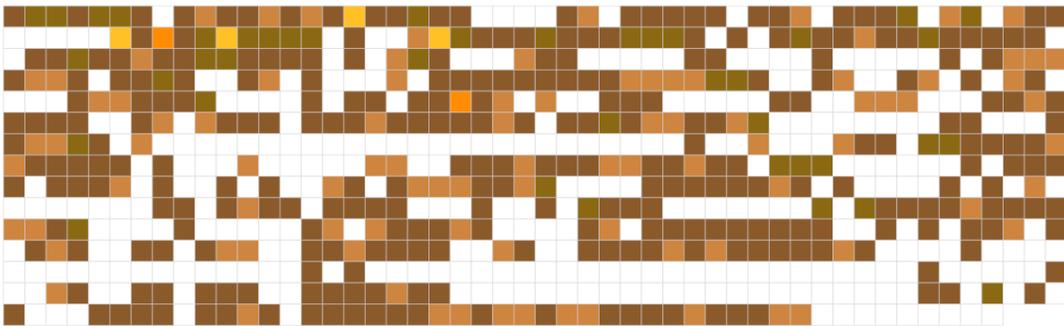


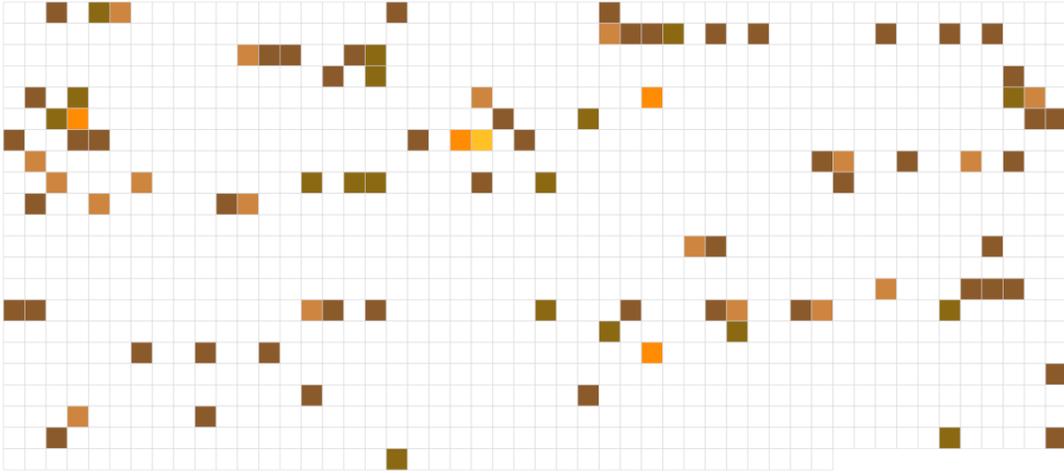
Figure 9.

Sections in NV1861 with high similarity to NY codes



Section borrowed from NY1848 NY1849 NY1850 NY1851 NY1853

Sections in IA1859 with matches to NY codes

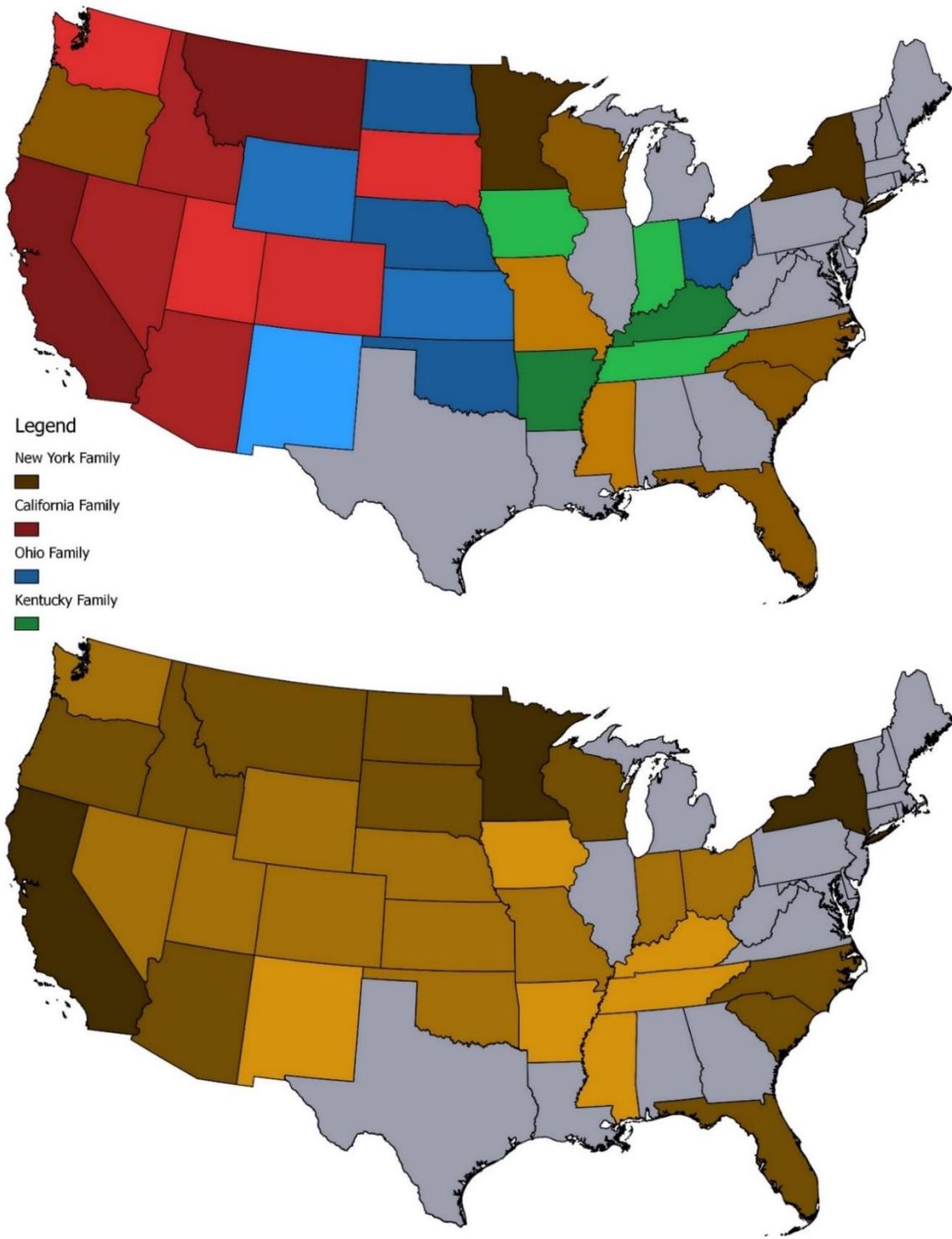


Section borrowed from NY1848 NY1849 NY1850 NY1851 NY1853

Although Nevada’s draftsman literally cut and paste the code from California, most of the code bears a high similarity to New York legislation, particularly Field’s completed drafts of the code.

Despite incorporating many of the Field reforms, including simplified common law pleading, the fusion of law and equity, and the expansion of party testimony, the Code of Iowa relied far less on the actual text of New York, drawing more from earlier state legislation and adapting it as necessary to conform to New York’s practice.

Figure 10.



These maps are shaded based on equally weighting the number of sections borrowed (extent) and average similarity score of borrowed sections (degree). Although jurisdictions tended to borrow legislation from near neighbors, creating regional families (top map), all procedural codes were closely related to New York's, especially around the American periphery (bottom map).

relatively slighter. But all along the American periphery, the law of each state conformed more closely to the law of New York.

Digital analysis is also useful for drawing out rules that did not originate in the Field Code but nevertheless influenced more than one jurisdiction. Subsequent chapters will detail these evolving traditions within the spread of the code. For now, it is important to note how extensively the New York code influenced American practice. In most cases even states that borrowed less of the text borrowed at least 100 sections, more than enough to incorporate the main features of the Field reforms.

American jurists have fondly celebrated the equality of the states under American federalism, which can render each state a “laboratory” for regulative experimentation. But the pervasive replication of a code that was, after all, contrived to address the idiosyncratic issues of New York practice challenges this fundamental equality and innovative ability of the states. Instead, as one observer of American legislation lamented, “the states are mere copyists of each other. And like rival mechanics, they seem more ready to appropriate each other’s inventions, than to be at the expense of making improvements for themselves.”²⁵

Off the Rack? The Costs of Codification

“Why the West?” Lawrence Friedman has asked about the nearly universal adoption of the Field Code on the western side of the Mississippi. (The only state not to adopt the Field Code by 1900 was Texas, which retained civilian procedures.) Summarizing the various attempts to answer the question, Friedman writes, “In none of the Western states did the bar have a strong vested interest in the continuance of old rules, especially rules of pleading. Codes were a handy way to acquire new law, a way of buying clothes off the rack, so to speak.”²⁶ The accounts on which Friedman relies make

²⁵ “Criminal Code of Maine,” 27 *American Jurist & Law Magazine* (1842), 148. The states-as-laboratories idea emerged from a 1932 dissent by Justice Louis Brandeis. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). On the widespread use of the idea, see James A. Gardner, “The ‘States-as-Laboratories’ Metaphor in State Constitutional Law,” 30 *Valparaiso University Law Review* 475 (1996).

²⁶ Friedman, *History of American Law*, 394, 406. On Texas, see William V. Dorsaneo III, “The History of Texas Civil Procedure,” 65 *Baylor Law Review* 713 (2013), 717–18.

much of the fact that eleven jurisdictions adopted the code in their first year of organization (whether as a state or territory), while six more adopted it at some point in their territorial days.²⁷ These numbers obscure the fact that a majority of Field Code adopters actually had a long history (at least a decade or more) of common law practice before codification, and many of the early codifiers – such as California’s Elisha Crosby and Stephen Field – had no experience with code practice before introducing the legislation.²⁸ Taking account of nineteenth-century technologies for transmitting texts and nineteenth-century opposition to commissioner-lawmaking confirms that in the West, as in the South and Midwest, codification was anything but an off-the-rack convenience.

Consider first the drain of codification on state treasuries. Most states that employed commissioners compensated them well. An antebellum commissioner in Iowa was paid \$3,000 for revising and printing a code, the second-highest state salary next to the governor and significantly more than any public attorney. In the postbellum period, both of the Carolinas spent more than \$10,000 a year on commissioner compensation.²⁹ These could be significant sums, especially for territories that had not yet established stable revenue streams. As one Colorado newspaper complained, procedural code commissions ranked “in the same category with \$6,200 per year governors and \$3,500 secretaries of state, which in the course of time we may be able to afford, but which at present we can readily exist without.”³⁰

Commissioner salaries were minimal compared to the cost of printing the code. Legislatures commonly required 500 to 1,000 copies of proposed legislation, copies that would be amended in the

²⁷ In the first year of territorial organization: Washington (1854), Nebraska (1855), Nevada (1861), Dakota Territory (1862), Arizona (1864), Idaho (1864), Montana (1865), Wyoming (1869), Oklahoma (1890); in the first year of statehood: California (1850), Colorado (1877); during their territorial days: Missouri (1849), Minnesota (1851), Oregon (1854), Kansas (1859), Utah (1870), New Mexico (1897).

²⁸ Field Code states with more than a decade of common law experience include: Arkansas, Colorado, Florida, Indiana, Iowa, Kentucky, Missouri, New Mexico, New York, North Carolina, Ohio, Oklahoma, South Carolina, Utah, and Wisconsin, as well as partial adopters of the Field reforms Maryland, Mississippi, and Tennessee.

²⁹ 1859 Report of the Auditor of the State, in *Legislative Documents of the General Assembly of Iowa* (1860), 11. *Reports and Resolutions of the General Assembly of South Carolina* (1870), 60.

³⁰ *Rocky Mountain News*, January 27, 1877. Auditor’s Statement of the Public Revenue, in 1870 North Carolina Public Laws 405, 408, 418, 448.

course of the session and then destroyed.³¹ Legislators often convened evening or extra sessions to consider (or at least give the appearance of considering) the bulky bills, and critical journalists counted these expenses against a code as well.³²

Statutes that merely received the common law took up barely a page and then obligated private practitioners to see that their own libraries were well stocked with books of precedent. As public legislation, however, codes obligated a secretary of state to provide sufficient copies to practitioners for reference—and those copies had to be able to endure daily use. The Iowa legislature accordingly required its code to be “printed on good book paper . . . in one volume of royal octavo size, full bound in sheep.”³³ Codes that ran to several hundred pages were thus a major expense and could raise sharp disputes over political patronage. The Iowa commission had to outsource the task to Connecticut printers to fulfill its mandate (not the farthest example of outsourcing—Arizona had its code printed in New York). The commissioners were then accused of self-dealing with the printing contract, a scandal that occupied the legislature and political press through the next two sessions.³⁴

Of course, critics of codification never discounted when they balked at the cost of the code. Forty thousand dollars may have been an extreme liability for one session, but if a code lasted several decades, the annual expense per value could have been quite small. The problem was that few codes lasted so long. Not counting New York’s many revisions, seventeen code jurisdictions—a majority of them—recommissioned or re-adopted a substantial revision of the code less than a decade after its

³¹ See, for instance, the legislative history of the Iowa Code, of which 500 copies were distributed. Clifford Powell, “History of the Iowa Codes of Law,” 9–11 *Iowa Journal of History and Politics* 9:493, 10:3, 10:311, 11:166 (1913), 10:321. Wisconsin printed and distributed 1,000 copies. *Journal of the Assembly of the State of Wisconsin* (1856), 1186.

³² *Rocky Mountain News*, December 27, 1876 (“The expense of running the legislature is, say, five hundred dollars per day; six thousand dollars upon that bill; to which add printing, engrossing, etc., and it will cost the state between seven and eight thousand dollars.”).

³³ 1860 Iowa Laws 119–25. Wisconsin quickly exhausted its supply of 6,000 copies of the Code and had to appropriate more funds to the Secretary of State for printing and distribution. *Appendix to the Senate Journal for the State of Wisconsin* (1858), 93.

³⁴ See Powell, “History of the Iowa Codes,” parts II & III. The California legislature that printed Crosby’s Code designated printings costs the second-largest budget item for the state (behind only legislative salaries). Report of the State Comptroller, in *Assembly Journal* (California 1850), 1174.

initial enactment, incurring the same costs over again.³⁵ On this point, Iowa was again noteworthy. The state hired a commission for its code from 1848 to 1851, and then hired another commission to re-write the code for three years at the end of the 1850s.³⁶

The further west one traveled, the higher off-the-rack prices soared. Mark Twain could joke about the absurdities of carrying the U.S. Statutes at Large overland to Nevada, but his experience was common to the codifiers, who had to import physical copies of the bulky law to consult, copy, and distribute.³⁷ Nor did codification save practitioners from importing the many volumes of precedential law reports that a reception of the common law would have entailed. Instead, as in the Oregon advertisement above, practitioners were encouraged to consult the New York reports to understand what the code meant. As more states adopted the code, the volumes of reports and treatises interpreting it increased, and many of these volumes became necessary companions of code practice.³⁸ These costs of codification remain invisible to those looking only at the reception of the code in the courts.

Repugnant to the Idea of Democratic Republican Government

In 1851, Iowa, like a few other states, adapted the Field Code while consolidating its other legislation into a comprehensive state code.³⁹ While other states usually granted their commissions exceptional authority to revise the rules of pleading and practice, Iowa directed its commission to “prepare a complete and perfect code of laws, as nearly as may be, of a general nature only.” The three

³⁵ Those states were Arizona, California, Dakota Territory, Iowa, Kansas, Kentucky, Minnesota, Missouri, Nebraska, Nevada, North Carolina, Ohio, Oklahoma, Oregon, South Carolina, Wisconsin, and Wyoming. See Appendix C for details.

³⁶ See Powell, “History of the Iowa Codes,” parts II & III.

³⁷ Mark Twain, *Roughing It* (1872), 22, 30.

³⁸ Indeed, treatise literature sought to advertise its national scope through subtitles. See John L. Tillinghast & Thomas G. Shearman, *Practice, Pleadings, and Forms in Civil Actions in Courts of Record in the State of New York . . . Adapted Also to the Practice in California, Missouri, Indiana, Wisconsin, Kentucky, Ohio, Alabama, Minnesota, and Oregon* (1865); William Angus Sutherland, *A Treatise on Code Pleading and Practice: Also Containing 1900 Forms Adapted to Practice in California, Alaska, Arizona, Idaho, Montana, Nevada, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, Washington, and Other Code States* (1910).

³⁹ Including Arizona, Arkansas, Tennessee, New Mexico, North and South Carolina, Mississippi, and Montana. On Iowa, see Powell, “History of the Iowa Codes,” part II.

commissioners understood the command of generality to mean they should leave most private law uncodified to develop in the courts of common law. The 1851 Iowa code nevertheless represented one of the few times a statutory commission was granted broad authority to revise the prior law of a state. In place of the usual substantive limitations on revision and codification, the legislature placed strict procedural requirements on the commission. The commissioners were to meet in regular session, and elect a president who would rule on points of order and break tie votes between the other two commissioners. A journal had to be kept of all proceedings and votes, and no commissioner could be absent without leave. The legislature prescribed a special oath for the commissioners, which bound them to discharge their duties “with an eye single to the good of the people of the State of Iowa.”⁴⁰ The commissioners were not popularly elected, but in all these other regards the legislature had done its best to constitute the commission as a mini-legislature that promulgated laws for the public good through transparent, public processes.

Nevertheless, newspapers complained about the delegation. *The Miner’s Express* remarked that the commission operated against “the general idea of Democracy.” Despite its three year term, the commission cut corners and appropriated significant pieces of legislation—including the procedure code—from other states, but “to be governed by a foreign law, especially when that law is not preknown to the people whose conduct is to be regulated thereby . . . is something repugnant to the idea of Democratic Republican government.”⁴¹ When the legislature debated the printing contract for the code, the paper read more into the decision than mere financial patronage. Printing the code was at least a partial commitment that the legislature would actually examine it as any other bill, “whether they should, in this matter, be the Legislators in fact, or a mere approbatory assembly,

⁴⁰ 1848 Iowa Laws 42–44.

⁴¹ *The Miner’s Express* (Dubuque, Iowa), February 26, 1851.

convened to give a formal sanction to what had been done by a comparatively irresponsible Commission."⁴²

Against these complaints that Iowa's real legislating was being done "by this trio of Lawyers," pro-codification papers responded by making the commission's unrepresentativeness and lack of accountability its main virtue. The three lawyers "were presumed to be . . . familiar with the bearing of all our laws and practice under them" as well as "the wants and interests of our entire population," explained one. "Otherwise, they never could have been appointed."⁴³ The sound judgment and erudition of the commissioners, another argued, stood in stark contrast to the legislators themselves, who were asked to pass on their work. The paper satirically reported a legislative session amending the code: "The gentleman from 'Buncombe' approves of the general sense of the section, but some of the details are a little different from what 'they used to was' in the State of Kentucky . . . *whar* he was born, and he therefore moves to strike out the word 'quantity' and insert the words 'powerful sight' – the gentleman on his left seconds the motion, and suggests that the words 'or smart chance' be inserted after the words 'powerful sight.'⁴⁴ The representativeness of the legislature, when it came to Buncombe county, was the problem standing in the way of scientific legal progress. Therefore, another editor explained, "The devil is to get the legislature to let [the code] alone . . . without making ten thousand amendments." After all, "what was the utility of appointing Messrs. Woodward, Mason, and Hempstead to compile a code of laws if our Legislators possess legal talent so much superior?"⁴⁵

Thus perhaps the greatest cost of codification, one just as invisible in the case reports, was not to the public or professional fisc, but to American ideals of popular sovereignty. Historians have tended to reduce controversies over codification to a debate over the institutional competencies of

⁴² *The Miner's Express*, December 25, 1850.

⁴³ *The Miner's Express* (Dubuque), February 19, 1851; *Burlington Tri-Weekly Telegraph*, December 19, 1850.

⁴⁴ *Muscatine Journal* (Muscatine, Iowa), January 11, 1851.

⁴⁵ *Burlington Tri-Weekly Telegraph* (Burlington, Iowa), December 19, 1850.

courts versus legislatures.⁴⁶ As David Rabban has illustrated, this was indeed a primary concern for the “historical school” of American jurisprudence that largely resisted late-nineteenth-century efforts towards codification. While many of the adherents of that school were politically progressive, they feared that legislators were more liable to capture by corporate interests than they were receptive to democratic appeals from the poor and working classes. Independent judges, on the other hand, could better adapt the law on the books to evolving social customs of the law in practice.⁴⁷ But outside of this intellectual debate, carried on almost exclusively within the Northeast and centered at Harvard Law School, critics of codification were far less concerned that judges would lose authority or power to adapt the law to local conditions. They recognized that even the most perspicacious provisions of the code required judicial interpretation and application to real cases, which could significantly alter their meaning.⁴⁸ Many critics accordingly charged that codification undermined the lawmaking authority not of judges but of the very legislators who passed the codes. The length and technical sophistication of the Field Code meant that few legislators could actually give it any meaningful review, and thus it was the commissioners that adapted and recommended it that were truly the lawmakers. Even the more abstract thinkers in the historical school recognized as much and charged the codifiers with hypocrisy when they hailed codification as democratic legislation against aristocratic judge-made common law. “The complaint,” wrote the stalwart opponent of codification James Coolidge Carter, “really amounts to this, that *judges* make the law instead of *commissioners*.”⁴⁹

⁴⁶ In his study of the “Law Makers,” Willard Hurst wrote that “the enactment of the Field Code in New York in 1848 set a fashion which in the next generation overrode any theoretical allocation of power” between courts and legislatures. Statutory law became supreme with “the legislature’s ascendancy in public confidence.” James Willard Hurst, *The Growth of American Law: The Law Makers* (Little Brown 1950), 90–91. This has been the conventional view of the codification debates – that codifiers and common law lawyers struggled over the institutional allocation of power between legislators or judges, the former triumphing in the domain of procedure, the latter in substantive law. See Gordon, “American Codification Movement,” 445–46; Horwitz, *Transformation of American Law II*, 118–21.

⁴⁷ Rabban, *Law’s History*, especially 27–31, 356–61.

⁴⁸ See below, note 89 and accompanying text. See also John Pickering, “A Lecture on the Alleged Uncertainty of the Law,” 12 *American Jurist* 293–98 (1834); Joseph Hopkinson, *Considerations on the Abolition of the Common Law in the United States* (1809); James Coolidge Carter, *The Proposed Codification of Our Common Law: A Paper Prepared at the Request of the Committee of the Bar Association of the City of New York, Opposed to the Measure* (1884), 85–86.

⁴⁹ Carter, *The Proposed Codification of Our Common Law*, 42.

The length and innovation of the procedure codes presented a novel problem for American lawmaking. Even the shortest version of the Field Code was significantly longer than any other state statute before the progressive legislation of the twentieth century. Practice codes were far longer than the relatively simple criminal codes of the early republic or the regulatory laws on corporations or railroads passed after the Civil War. Although voluminous statutory compilations from the 1820s onward might be formally enacted as “revised statutes,” the revision was usually limited to choosing sides between two pieces of contradictory legislation. The commissioners who produced such compilations emphasized their authority only to compile already existing legislation and, whether with false modesty or not, disclaimed any lawmaking authority.⁵⁰ In contrast, the Field Code opened with a declaration of novelty, abolishing the hallmarks of prior practice and instituting “hereafter” a new form of action with significant revisions to civil remedies.⁵¹ In the states where it was imported, there could be no getting around the fact that the Field Code was new law.

Paired with a close reading of political commentaries on the Field Code, the macroscopic views of its migration rendered by digital analysis creates a puzzle. If codification of legal practice was not a natural convenience, if it provoked widespread complaints about the subversion of popular sovereignty, and if it invited the Tocquevillian nightmare of imperial servility to foreign law, why then did so many jurisdictions copy a text addressed to the idiosyncrasies of New York procedure and civil remedies? With legislative politics factored in, Friedman’s question intensifies: Why the West?

As in other areas of postbellum historiography, one may learn a lot about the American West by turning to the American South. In the last decade, scholars of Reconstruction have broadened the

⁵⁰ See, for instance, Report, *Appendix to the Journals of the Senate and Assembly of the State of Tennessee* (1857), 191 (“The digest presents the law substantially as it now exists in the State. I have neither felt at liberty nor deemed it advisable to innovate largely upon the established system.”); 1897 New Mexico Compiled Laws 9 (“The commissioners were given no authority to revise.”); 1866 Illinois Compiled Laws v (“We cannot change the text, but we can arrange and systematize the entire legislation of the state upon any given subject.”); 1849 Wisconsin Revised Statutes, “Advertisement” (commission “directed the subscriber to arrange the chapters into parts and titles as he thought proper, re-arranging the order of the sections or transposing them from one chapter to another, whenever it would not alter the meaning of the law.”).

⁵¹ 1848 New York Laws 510.

scope of their study to include both the American South and the American West as two sites in one “Greater Reconstruction.” These studies have illustrated the ways in which military conquest, rapid industrialization, and the resettlement and education of ethnic minorities developed similarly in each region, guided by economic elites in New York and political administrators in Washington.⁵² In tracing the legal aspects of this Greater Reconstruction, scholars have focused almost entirely on constitutional rights of citizenship and civil equality or the expansion of federal power.⁵³ While the 1860s and 1870s were of course a transformative period in the history of civil rights and the creation of a national state, they were also the decades in which many local legal institutions and practices were transformed not by federal power but by state codification. Naomi Lamoreaux and John Joseph Wallis have recently argued that in the creation of a modern American economy, “the federal government played *no* role in this process until the Civil War, and even then it played only a bit part.” The history of the Field Code’s migration helps to substantiate this claim. While Lamoreaux and Wallis focus on the development of banking, transportation, and incorporation at the state level, it was the procedure code that provided the structure of civil remedies that protected these state institutions. And procedure codes were the creatures of state governance.⁵⁴

Twelve of the states and territories that copied the Field Code mostly closely did so during the Civil War and Reconstruction era—four states in the former Confederacy and eight jurisdictions in

⁵² Elliott West, “Reconstructing Race,” 34 *Western Historical Quarterly* 6 (2003). See also Heather Cox Richardson, *West from Appomattox: The Reconstruction of America after the Civil War* (Yale 2007); Richard White, *The Republic for Which It Stands: The United States during Reconstruction and the Gilded Age, 1865–1896* (Oxford 2017); Sven Beckert, *Monied Metropolis: New York City and the Consolidation of the American Bourgeoisie, 1850–1896* (Harvard 2003); Mark Wahlgren Summers, *The Ordeal of the Reunion: A New History of Reconstruction* (UNC 2014). The major application of the Greater Reconstruction idea to legal history has been Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth-Century America* (UNC 2003).

⁵³ See, for instance, Rogers Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* (Yale 1999); Meg Jacobs, et al., eds., *The Democratic Experiment: New Directions in American Political History* (Princeton 2003); Edward Purcell, *Litigation and Inequality: Federal Diversity Jurisdiction in Industrial America, 1870–1958* (Oxford 1992).

⁵⁴ Naomi Lamoreaux and John Joseph Wallis, “States, Not Nation: The Sources of Political and Economic Development in the Early United States,” Paper Presented at the Economic History Workshop, Harvard University, March 4, 2016.

the Far West.⁵⁵ Complaints about imperialism and servility to foreign law intensified as the New York code appeared in the Reconstruction South, but in both the West and the South opposition to the code ran up against the threat that capital investments would flow only to the states that secured those investments with New York's civil remedies.

A Servile Copy of New York: The Code of North Carolina

As Reconstruction in North Carolina faltered in the late 1860s, and Democrats expected a chance to rewrite the constitution on more favorable terms, many counseled compromise on racial equality but stood fast against the new code of civil procedure. *"The conditions upon which the State was restored to the Union, however unjust those conditions were, should not be disturbed,"* one partisan paper announced, but *"the 'Civil Code of procedure' offends and oppresses all."*⁵⁶ The state's speaker of the assembly argued *"this child of the carpet baggers"* was among the worst impositions of Radical Reconstruction. He expected that *"when our people are again seated in that grand old temple of justice builded by our English ancestors and adorned by the great jurists of this country, one thinks that they will sing 'Home again from a foreign shore.'"*⁵⁷ As the partisan press prepared their wish lists for a new convention (one that, incidentally, would never come), the repeal of the procedure code and the abolition of the code commission topped the lists each time. *"One of the greatest curses inflicted upon North Carolina is the new system of laws that Judge Tourgée brought down here from New York,"* one such list concluded.⁵⁸

⁵⁵ Those jurisdictions were Nevada (1861), Dakota Territory – which retained the Code when split into North and South (1862), Idaho (1864), Arizona (1864), Montana (1865), Arkansas (1868), North Carolina (1868), Wyoming (1869), Florida (1870), South Carolina (1870), Utah (1870), and Colorado (1877).

⁵⁶ *"The Present Constitution," Weekly Standard (Raleigh),* October 5, 1870.

⁵⁷ *"Necessity for a Convention—Speaker Jarvis," Wilmington Journal,* July 14, 1871.

⁵⁸ *"The Future—Its Work—A Convention," Wilmington Journal,* September 30, 1870 (*"Let the Code Commission be also abolished at once. Let the Code of Civil Procedure be also abolished, and let us return to the Common Law, to which we owe those glorious, inestimable rights and privileges—trial by jury and the writ of habeas corpus—to which alone we owe it that Holden is not this day absolute monarch in North Carolina."*); *Tarboro Southerner,* February 16, 1870 (*"A Convention alone can rid us of this incubus and nuisance."*); *"Report of Senators Robbins and Murphy on the Convention Bill," Wilmington Journal,* February 25, 1870; *Tarboro Southerner,* November 24, 1870 (*"although the Commission claim for it great consideration, as taken from one of our most 'highly civilized' States, yet we hope it may be abolished"*); *"The Constitutional Amendments," Wilmington Journal,* August 1, 1873.

“Judge Tourgée” was Albion W. Tourgée (1838–1905), a New York lawyer and one of the nation’s leading racial egalitarians. Tourgée was a quintessential “carpetbagger,” a northern Republican of modest means (whose whole wealth could fit in a carpetbag, as the name implied) who relocated to the postbellum South hoping to prosper in a region awakening to developing markets and free labor.⁵⁹ Tourgée sat on a commission alongside Victor Barringer (1828–1896), a leading Democrat and close personal friend of the ex-Confederate President Jefferson Davis (who had hid in Barringer’s house on his unsuccessful flight to Georgia). Filling the third chair was William Rodman (1817–1893), a lawyer with a substantial practice in the eastern part of the state. Although Rodman served in the Confederate Army, he early on discerned the turn of the war and became a devoted Republican, a “scalawag” in the local parlance.⁶⁰ Seating an elite Democrat, a Radical Republican, and a southern scalawag, North Carolina’s commission was a near microcosm of the Reconstruction South. (See Figure 11.) (South Carolina’s commission, seating a free black lawyer, made the picture more complete.) And as with Reconstruction more broadly in 1868, the Radical had the most influence early on.

As a delegate to North Carolina’s constitutional convention, Tourgée had pressed to entrench procedural reform in the constitution’s text. Indeed, the first borrowing of the Field Code was in the constitution itself, which copied the opening provision that “the distinction between actions at law and suits in equity, and the forms of all such actions and suits shall be abolished, and there shall be in this State but one form of action.”⁶¹ Republicans thus ensured that even if they did not fare well at the forthcoming elections, the legislature would be constitutionally bound to adopt the Field Code, or

⁵⁹ Otto H. Olsen, *Carpetbagger’s Crusade: The Life of Albion Winegar Tourgée* (Johns Hopkins 1965), 131–41. See also Mark Elliott, *Color-blind Justice: Albion Tourgée and the Quest for Racial Equality* (Oxford 2006).

⁶⁰ On the tropes of the carpetbagger and scalawag, see Eric Foner, *Reconstruction: America’s Unfinished Revolution* (Harper & Row 1988), 294–326. See the biographies of Barringer and Rodman kept with their personal papers. Barringer Family Papers, Special Collections, University of Virginia Library; William Blount Rodman Papers, Special Collections, East Carolina University Library.

⁶¹ *Constitution of the State of North Carolina, Together with the Ordinances and Resolutions of the Constitutional Convention* (1868), 18–19, 79.

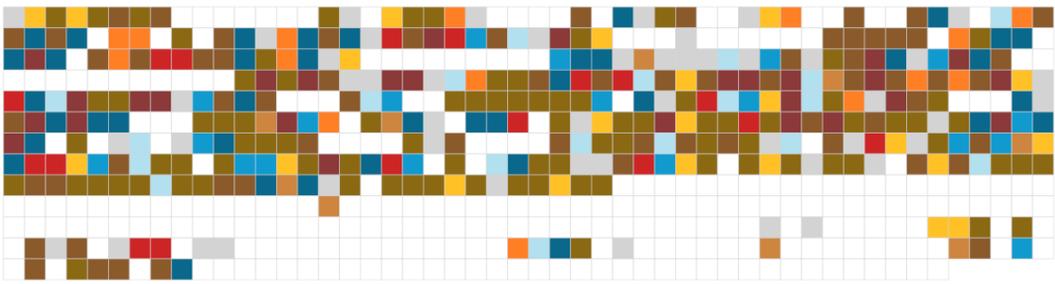
Figure 11.



Photographic reproduction of a portrait of the North Carolina Code Commission, with a manuscript code in the foreground, the only known photograph of a nineteenth-century code commission. From left to right: Victor C. Barringer, William Blount Rodman, Albion W. Tourgée. Tourgée Papers, Chataqua County Historical Society, Westfield, NY. Reprinted with permission.

Tourgée advised the commission to collect codes from every state that used code procedure. His eclectic borrowings show that he did indeed have a number of codes in hand.

Borrowed sections in NC1868



Section borrowed from	CA1850	NY1849	NY1853	WI1856
	CA1858	NY1850	OR1862	WI1858
	MN1859	NY1851	Other	

something very like it. Republicans did fare well in the election, however, as reflected in the composition of the commission. Democrats could complain about the “stranger boy” Tourgée and the traitor to his people Rodman, but they could not muster the votes to defeat their appointment.⁶² Likewise in South Carolina, where a codification provision was similarly entrenched in the state constitution, the legislature appointed the northern black lawyer J. William Whipper to the commission, Democratic protests over “our negro codifier” notwithstanding.⁶³

As soon as the North Carolina commission was formed, Tourgée sought to link it to the network of other code states and commissioners. He wrote to his colleagues that they must “organize immediately and communicate with the officials of the various states which are working under Code Procedure, and get copies of their codes.” Included among Tourgée’s correspondents was David Dudley Field, who had his carpetbagging nephew carry along “several volumes of my codes” to Tourgée. As with other commissions, the workload was divided, but Tourgée assigned the main work of civil procedure to himself. Rodman was responsible for sections on “special proceedings” and Barringer the code of criminal procedure. In correspondence between themselves, Rodman and Barringer called the civil procedure statute the “A.W. Tourgee code of procedure.”⁶⁴ Text analysis shows that Tourgée’s was one of the more eclectic codes, preferring slightly different phrasings from different versions of New York’s code as well as variants from the upper Midwest. The whole, however, closely accorded with Field’s 1850 report, and was drafted quickly. The printed code of 575 sections appeared less than two months after Tourgée’s first letter organizing the commission.⁶⁵

⁶² *Wilmington Journal*, April 3, 1868.

⁶³ “Our Negro Codifier,” *Charleston Daily News*, July 15, 1869.

⁶⁴ A.W. Tourgée to Wm. B. Rodman, June 8, 1868, Rodman Papers; D. Dudley Field to Hon. A.W. Tourgée, July 20, 1868, Field to Tourgée, July 30, 1868 (confirming receipt of codes sent with Field’s nephew Fisk Brewer “some weeks ago”), Albion Tourgée Papers, Chautauqua County Historical Society, Westfield, NY. V.C. Barringer to William Rodman, October 16, 1868. Barringer to Rodman, August 21, 1868; Barringer to Rodman, March 26, 1869; Barringer to Rodman, October 11, 1869; Barringer to Rodman, November 24, 1869, Rodman Papers.

⁶⁵ *The Code of Civil Procedure of North Carolina* (1868).

Secure with a constitutional mandate and sympathetic legislature, Tourgée's first report in 1868 boldly reminded the legislature of its constitutional duty to pass the code. Unlike most codifiers, Tourgée put no reliance on the argument that procedure was an exceptionally benign field open to reform and codification. Rather, he argued, procedure was the ground on which the constitutional reconstruction of race relations would be carried out:

The changes which the last eight years have wrought in the fundamental relations of society, blotting out entirely one of the great classes of personal relations – that of master and slave – opening the ears of justice to those who were before dumb in her presence, and giving parity of right, authority and remedy, to the highest and lowliest; breaking down the barriers of the jury-box, and permitting the landless citizen and the man of African descent to come within its bounds, opening the forum, the bar and the bench, to the honorable competition of the colored man – all these mighty changes in the relations of the great component elements of society, demand equivalent changes in the laws and render the work both of the Legislator and the codifier, one of extreme difficulty and delicacy.

Access to courts, to remedies, to juries, and to the profession – this was the scope Field had given civil procedure, and in Tourgée's handling, civil procedure would be the tool to upend the law of master and slave. Accordingly, Tourgée "did not hesitate to take the Code of New York as the basis of that to be prepared for this State."⁶⁶ In the following months as disgruntled Democrats insisted they could accept political racial equality but could not abide the code of procedure, they understood they were taking back with their left hand what they seemed to be offering with their right. As one complained, "Tourgée induced the late so-called Convention to do away with . . . pleading, and law and equity. . . . The Supreme Court is now a political, and not a judicial tribunal."⁶⁷ Political, because procedure had become the tool of Reconstruction policy.⁶⁸

⁶⁶ *First Report of the Code Commissioners*, x-xi; *Second Report of the Code Commissioners*, in *North Carolina Code of Civil Procedure* (1868) viii-ix, xvi.

⁶⁷ *Wilmington Journal*, April 3, 1868.

⁶⁸ Procedure could operate as a tool of Reconstruction policy at the level of the federal courts as well. See Edward A. Purcell, *Litigation and Inequality: Federal Diversity Jurisdiction in Industrial America, 1870-1958* (Oxford 1992).

Tourgée and his fellow commissioners took some steps to mitigate the sense of imposition. In their report they called for the bench and bar of the state to make the code their own and forward to the commission “such amendments as may occur to them, in practice under it, as necessary or valuable.” Even then, however, they made their authority clear. Significant alterations of the law were to run through them, not through ordinary legislation. They concluded their report by instructing the legislature to pass their code without amendment or any real consideration at all, pointing to the New York example: “We therefore invite your honorable body to pass it as it is, and leave to experience, to expose the places which require amendment. The Code of New York was adopted in 1848 as it come from the hands of the Commissioners.”⁶⁹ (The latter remark was not strictly true, since the New York legislature had at least taken two weeks to make some two dozen minor amendments.)

Although Republicans had the votes to pass the code without amendment, the native bench and bar were less willing to accommodate Tourgée’s code. “I don’t quite know whether the Code will go from beneath the dark waters or not,” Rodman wrote to Tourgée in the summer of 1869. “[Chief Justice] Pearson is against it and I fear the rest all are.” Recognizing the close textual borrowing of the New York code, two state senators complained that “our present Judicial system is a servile copy of New York, a State less like ours than almost any other in the Union.” Unlike the Californian defenders of the common law, North Carolinians readily conceded that civilian laws and practice codes were best suited for commercial empires, but North Carolina Democrats preferred rustic simplicity to being one more codified jurisdiction in New York’s network. “New York is full of large towns and cities, and her people are extensively engaged in commercial and maritime pursuits. North Carolina is an agricultural State, with a rural people,” the senate report continued. “The New York system was

⁶⁹ *Second Report* (North Carolina 1868), iv, xvi.

devised upon a model deemed suitable to a dense, commercial community.” But such a system was, as many Democratic newspapers complained, “unadapted to the wants of our people.”⁷⁰

Such criticisms endured to the end of the century. One 1891 commentary in the inaugural issue of the *Yale Law Journal* argued “the legal practice of the State was reconstructed by the adoption of the New York Code of Civil Procedure, with all its penalties and high-pressure machinery adapted to the conditions of an alert, eager, pushing commercial community.” Citing this report, Lawrence Friedman has expressed doubt “whether systems of procedure fit particular cultures so snugly” as North Carolinians “seemed to think.”⁷¹ That assessment overlooks the particular procedures that troubled North Carolina jurists, especially the acceleration of debt collection. Like pre-code New York, North Carolina summoned debtors to answer a complaint only when a court was in session, and in many parts of the state, a court sat only for one month out of the year, holding over trials to the next term if too much business had accumulated. By copying Field’s provisions for default judgment, issued within twenty days by clerks in and out of term time, the code dramatically accelerated creditor remedies from around two years to three weeks.⁷²

From the code’s accelerated remedies arose the frequent comparisons between “commercial” states like New York and “agricultural” states like North Carolina. Although proceduralists tend to think of a bias toward settlement as a twentieth-century phenomenon, common law lawyers frequently hailed the pressure for out-of-court settlements as a virtue of pre-codified procedure. While trover and assumpsit were creditor remedies, jurists wrote that common law process overall created a debtor’s remedy through the languid pace of enforcement. The length of proceedings encouraged

⁷⁰ “Report of Senators Robbins and Murphy on the Convention Bill,” *Wilmington Journal*, February 25, 1870; “The Work Before Us,” *Tarboro Southerner*, August 25, 1870. See also “What a New York Lawyer Thinks of the Code of Civil Procedure,” *Wilmington Journal*, September 26, 1873; *Tarboro Southerner*, February 16, 1870; “The Code Commission—Judge Pearson,” *Weekly Standard* (Raleigh), September 7, 1870.

⁷¹ Harry H. Ingersoll, “Some Anomalies of Practice,” 1 *Yale Law Journal* 89 (1891), 91–92; Friedman, *A History of American Law*, 395–96.

⁷² Olsen, *Carpetbagger’s Crusade*, 134–37; *McAdoo v. Benbow*, 63 N.C. 462 (1869) (quoting Tourgée’s ruling in the court below: “The provision making the Summons returnable only at term would close the Courts for this ‘business’ for eleven months in each year”).

negotiations and settlement among the parties, and settlement almost always favored debtors, who ended up paying less than their strictly legal liabilities, especially by avoiding the court costs and lawyers' fees that fell on a losing litigant.⁷³ When protracted proceedings extended beyond a year, they allowed a season or more of harvests to influence these negotiations. Thus, North Carolinians rightly recognized their remedial system had undergone a fundamental change of orientation towards creditors and a more liquid mercantile economy. That their arguments sounded "cultural" does not mean they were devoid of reasoned policy and jurisprudence.

Tourgée and other codifiers did not wish to deprive debtors entirely of their customary powers of negotiation and settlement, but they sought to locate these powers in substantive law rather than process. The substantive legislation became known as "homestead exemptions," which arose around the time states were abolishing imprisonment for debt. These laws set a minimum allowance of property—usually one's home and adjoining land, as well as subsistence farm animals or an artisan's tools—which creditors could not recover to satisfy a debt. Field was ambivalent about New York's exemptions. His code repeated New York's previous exemption of certain farm implements and mechanics' tools. Whether the exemption should extend to a whole homestead, Field—not usually deferential about reforms he favored—declared it "a high question of public policy, which it is for the legislature alone to entertain." New York did extend its homestead exemptions in 1850.⁷⁴

⁷³ On the twentieth-century shift to settlement, see John H. Langbein, "The Disappearance of Civil Trial in the United States," 122 *Yale Law Journal* 522 (2012). On the common law preference for settlement (or "compromise" as it was usually termed), see Wells, *Law of the State of Missouri*, 94; "The Code Again," *Pueblo Daily Chieftain* (Pueblo, Colo.), February 25, 1877 ("Litigants usually take all the exceptions to pleadings which can be devised, and carry their cases to the supreme court, when they are utterly hopeless of sustaining their points, in order to gain time, or effect a compromise with their opponents. This is done in states where the common law practice prevails and must always continue to be the case, from the very nature of practice itself."). Compromises were frequent and sophisticated enough that a whole body of law had developed for setting compromises aside when they appeared to be last-minute collusions to avoid lawyers' fees. See David Graham, *A Treatise on the Practice of the Supreme Court of the State of New York* (3d. ed., 1847), 285–96.

⁷⁴ Such exemptions were, in fact, a southern development. See James W. Ely, "Homestead Exemption and Southern Legal Culture," in Sally Hadden & Patricia Minter eds., *Signposts: New Directions in Southern Legal History* (Georgia 2013), 289–314; Paul Goodman, "The Emergence of Homestead Exemption in the United States: Accommodation and Resistance to the Market Revolution, 1840–1880," 80 *Journal of American History* 470 (1993); William B. Aycock, "Homestead Exemption in North Carolina," 29 *North Carolina Law Review* 145 (1950). *Final Report* (New York 1850), 354. For the New York exemption, see 1850 New York Laws 499–500.

Paired with homestead exemptions, the New York code seemed to strike the popular balance for a Radical Republican like Tourgée who sympathized with the plight of freedmen. The code would accelerate the determination of creditors' rights and remedies, but homestead laws would forbid enforcement against poor smallholders and sharecroppers. Freedmen could be protected while credit could again flow in the state, largely on collections from large landowners who overextended themselves—that is, the white plantation class. It was no coincidence, then, that Democratic lawmakers and journalists offered to trade black political equality for the repeal of the code. The two were vitally linked, and not just by a “cultural” association with the impositions of New York. Code remedies threatened to break up the source of planters' political power before they could stabilize their lines of credit and maintain control over the most productive land.⁷⁵

In reaction to the swift denunciation of code remedies, the same legislature that passed the code enacted a simple compromise later in the session: summonses to defendants would be “returnable to the regular term” of a court. Clerks, thereafter, could not issue swift default judgments out of term.⁷⁶ When a debtor tried to claim the statute's protection before Tourgée, who had become a superior court judge, Tourgée struck the statute down for violating the state's constitution. At the convention, Tourgée had tried to preclude this precise type of legislation, providing that only “issues of fact” could be “transferred to the Superior Courts” from a clerk's office. That is, only contested cases could be removed from the clerk's province, not uncontested claims of debt. On appeal, Chief Justice Pearson reversed Tourgée, writing that “his Honor fell into error, because, as it would seem, he did not fully comprehend the extent and the importance of the change made in the Code of Civil Procedure” by the legislature's more recent amendment. Properly understood, the effect was “to repeal so much of the Code as confers jurisdiction on the Clerk ‘to give judgments,’ and to restore the

⁷⁵ See Olsen, *Carpetbagger's Crusade*, 134–45 (noting Tourgée's “lack of sympathy for the ‘potentates of the South’ with their ‘ill gotten gains’ . . . increased by the fraudulent protection of property that he frequently encountered on the bench.”).

⁷⁶ 1868–1869 North Carolina Laws 179–82.

old mode of procedure, by which all judgments are rendered in term time." Pearson concluded that the legislature had put judicial powers back where they belonged. "The Clerk is no longer a subordinate Judge, but is divested of all judicial functions in civil actions, and is simply a Clerk."⁷⁷

Of course Tourgée fully comprehended the effects of the new law, which is why he had struck it down. Believing that the state's war-torn economy could recover only if credit began flowing again, Tourgée remained opposed to "any 'Stay-law,' 'Suspension Law,' 'Jurisdiction Law,' or any other legislative humbug" that slowed creditor remedies. Writing to Rodman, Tourgée confided, "I have not got over cursing about" Pearson's decision more than a month after it was handed down. Rodman, now serving as Pearson's associate justice on the supreme bench, issued a dissent that focused on the equitable principle that "statutes which oust delay, and are for expedition of justice, shall be benignly construed." In such a constitutionally doubtful case, Rodman counseled sticking to the original code of procedure and its accelerated remedies.⁷⁸

Although Tourgée hoped to see Pearson reversed by a future justice, the commissioners did not have to wait so long. The compromise that had produced the quasi stay law carried its own expiration clause. Despite Pearson's separation of clerks and judges as a constitutional principle, the original code went back into effect the first day of 1871, reviving complaints against the code and calls for a new constitutional convention.⁷⁹ Subsequent reports to the legislature from the code commission dropped the bold tone of the First Report. "For the changes made by the constitution the Commissioners are no wise responsible," they pleaded in an 1870 report. "We took them as accomplished facts; and our duty was as skillfully and as prudently as we could to bring the law of

⁷⁷ *Norwood v. Thorpe*, 64 N.C. 682 (1870), 683–84. *Norwood* was a follow-up case to *McAdoo v. Benbow*, 63 N.C. 461 (1869), the first reversal of Tourgée to which Rodman dissented. See also *Backalan v. Littlefield*, 64 N.C. 233 (1870). North Carolina Constitution of 1868, art. 4, § 17.

⁷⁸ Tourgée to G. W. Welker, February 26, 1869, Tourgée Papers; Tourgée to Rodman, August 5, 1869, Rodman Papers; *Norwood*, 63 N.C. at 471 (Rodman, dissenting).

⁷⁹ Tourgée to Rodman, August 5, 1869, Rodman Papers; 1868–1869 North Carolina Laws 182; *Tarboro Southerner*, November 24, 1870.

the State into harmony with them.”⁸⁰ The defense was somewhat disingenuous, as the two Republican commissioners, Tourgée and Rodman, had sat on the convention committee that wrote the mandate for codification and practice reform into the constitution’s text. The commissioners’ Second Report no longer argued that procedure would be the vessel through which freedman’s rights would be secured. Rather, it followed the original New York strategy of distinguishing procedure as “the machinery” of the law independent of the law’s “principles,” and it argued for the commissioners’ authority on the basis that “none but those whose profession makes them necessarily familiar” with practice were fit to reform it.⁸¹

Receiving innumerable letters complaining that under the code, “no one will be benefited, except perhaps some Northern Capitalists,” Rodman undertook an anonymous defense of the new code in *The North Carolina Standard*.⁸² He encouraged the bar to accommodate themselves to change, for “the New York system . . . bids fair to become national.” Putatively offering an overview of the code, Rodman’s articles were almost entirely about credit. “How can we create credit? By punctuality,” he wrote. “And how create punctuality? by law, and by law alone. Let the law enforce punctuality; let the people of North Carolina learn that the great law of business is, that ‘time is of the essence of the contract,’ and incur no debt that they do not expect to meet at maturity.” Under the old system, he argued, “the pleadings were most absurdly required to be made up in term time only,” but under the more certain and speedy remedies of the code, “we may expect that the secret hoards of the frugal among ourselves will be offered to loan, and even that the vaults of the banks of New-York . . . will be open to our industry.” Although they had to endure the sixteen-month stay law, Tourgée and

⁸⁰ *Report of the Code Commissioners*, in *Executive and Legislative Documents of the Assembly of North Carolina*, No. 28 (1870), 2.

⁸¹ *Second Report* (North Carolina 1868), xvi.

⁸² William A. Jenkins to Rodman, January 14, 1868, Rodman Papers. Rodman’s explication of the code appeared in three sequentially numbered articles in the *Standard* on August 14, 15, and 16, 1868, under the title “The Code of Civil Procedure.” Rodman disclosed his authorship in private correspondence with Barringer. See Barringer to Rodman, August 21, 1868, Rodman Papers.

Rodman ultimately secured the adoption of the code on that promise, that New York remedies would draw out New York capital.⁸³

The Want of Time to Do It Well: Colorado and the Far West

Like their southern counterparts, relatively longtime residents of the West claimed that agitation for the code had been stirred up by “the carpet-bag crew who came here a few months since” hoping their careers would rise along with the elevation of territories to statehood.⁸⁴ And they offered similar civilizational arguments against abandoning “the broad and beaten way to the goal of right and justice which the Anglo-Saxon-Norman race has trod for over eight centuries.”⁸⁵ Just as North Carolinians had complained the code was ill-adapted to local conditions, western attorneys warned that commissioners might be appointed who “had little or no knowledge of our statutes and practice” and would plunge into “inextricable confusion that which is already systematized, intelligible and well understood by lawyers deserving the dignity of that appellation.”⁸⁶ Thus, westerners, no less than southerners, might view the code as an imperial imposition.

Accordingly, codification in the West developed with the significant difference that most jurisdictions sought to bolster local political autonomy by avoiding the use of lawmaking commissions. California, Colorado, the Dakotas, Idaho, Montana, Nebraska, New Mexico, Nevada, Oklahoma, and Wyoming all adopted their procedure codes through judiciary committees without appointing extra-legislative commissions. Often, the choice was explicitly rooted in concerns over popular sovereignty. When a Wyoming judiciary committee reported against a resolution to appoint a code commission, its chairman remonstrated that “the people have selected the different members of this body from their number and have commissioned us to act for them.” If a procedure code served

⁸³ [Rodman], “The Code of Civil Procedure.”

⁸⁴ “Plain Talk,” *Rocky Mountain News*, January 21, 1877.

⁸⁵ “A Code Lawyer on the Code,” *Rocky Mountain News*, January 24, 1877.

⁸⁶ “A Miserable Fraud,” *Rocky Mountain News*, February 16, 1877.

the public good (and the legislature decided later that session that it did), “the duty” to craft it “is upon us and not upon others.”⁸⁷

The same logic militated against a procedure commission in Colorado, a state that especially casts doubt on the notion that codification was an off-the-rack convenience for the West. For seventeen years after its organization as a territory, lawyers in Colorado adhered to the old common law forms of practice—indeed, they did so through a legislative borrowing, importing the practice acts of the staunchly anti-code state of Illinois. (See Figure 12.) Although Colorado adopted the Field Code in its first year of statehood, its territorial history contradicts the notion that western states lacked an entrenched bar interested in maintaining traditional practices or that the Field Code was the only law available for importation.⁸⁸

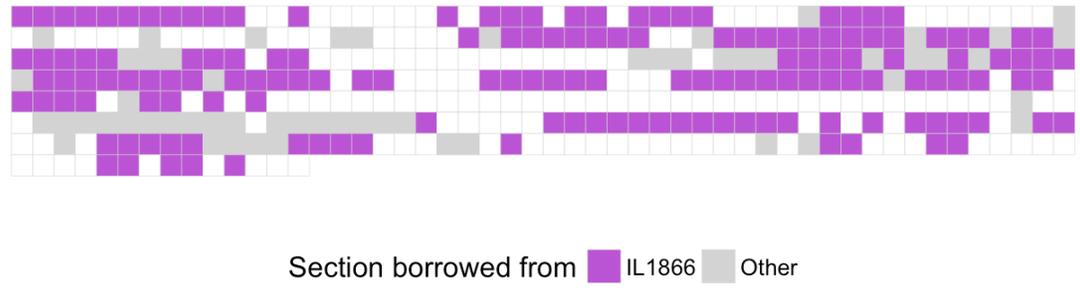
Both ideas were explicitly contradicted at the time. One lawyer wrote anonymously to the Denver papers that “I should regret very much to see the ‘*accumulated wisdom of the ages*’ thrown aside for that new fangled abortion of legal quacks, denominated a ‘code.’” If the state had to look elsewhere to update its practice laws, it could with more ease and less expense adopt the briefer and more moderate laws of Massachusetts and England. Although the rules of common law practice there were scattered across volumes of case reports, New York’s code was not a real alternative: “The reports in that state on questions of mere *practice alone*, amount to over *eighty-three* volumes. What constitutes a complaint in the New York code is contained in a definition, comprised in sixteen words. There are in the New York code reports *two thousand* decisions on these sixteen words. . . . So much for your code simplicity.” Perhaps with an eye to the South, the lawyer concluded that the code had “fastened itself

⁸⁷ Report of Chairman William S. Rockwell, *Journal of the Council of the Territory of Wyoming* (1870), 39.

⁸⁸ Contra Friedman, *History of American Law*, 406 (“In none of the Western states did the bar have a strong vested interest in the continuance of old rules, especially rules of pleading.”); Charles M. Cook, *The American Codification Movement: A Study in Antebellum Legal Reform* (Greenwood, 1981), 197 (“Being relatively new political unites, there was quite naturally no powerful emotional or practical attachment to an entrenched legal system.”).

Figure 12.

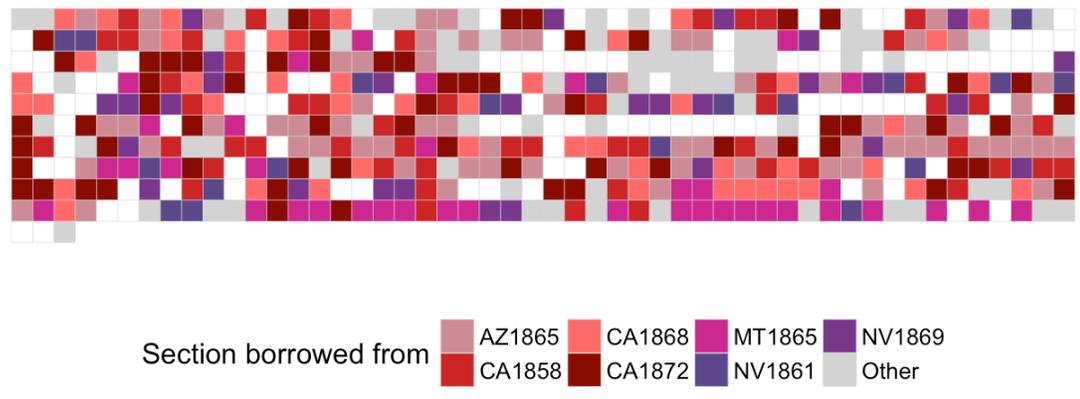
Borrowed sections in CO1868



Colorado's pre-code legislation proved that states could import statutes from common law jurisdictions like Illinois without "codifying" the law of practice or adopting the Field reforms, which Illinois would not do until 1933 (lawyers in the late nineteenth century liked to joke that Illinois was the Yellowstone Park of common law pleading).

When Colorado did adopt the Field Code, the state's judiciary committee adapted codes from other mining states, principally California, Arizona, and Montana.

Borrowed sections in CO1877



upon states which, were they now free to choose, would gladly go back to the so much deprecated common law practice.”⁸⁹

Code opponents argued that they did not oppose codification and reform entirely, but they were opposed to this particular code and the manner in which it was rushing through the legislature without due consideration. At a January 1877 meeting in Denver attended by most of the Colorado bar and legislative assembly, common law lawyers rallied behind J. Q. Charles, who concluded that “the strongest argument against the adoption of the code” during the present legislative session “is the want of time to do it well.”⁹⁰ Code proponents conceded that “it hardly seems to the common mind that an entirely new system of practice can be properly framed and rightly adjusted in the limited time allowed by a single session of the Legislature.” But, they argued, the expertise and experience of other states could mitigate the dangers of novel legislation—so long as the text of other states was followed closely. “The code proposed to be adopted,” noted a Colorado lawyer, “is the California code . . . , and that therefore every provision has received careful consideration and been subjected to the crucial test of experience. That is, the time and thought spent upon the code of California by lawyers of that State accrue to the benefit of people of Colorado.”⁹¹ In place of arguments about local concerns and state popular sovereignty, code proponents substituted something of a national popular sovereignty, one rooted in a mobile bar of lawyers whose rules of practice could travel with them and generate similar experiences in different locales.

In Denver, the argument that all due consideration for the code had essentially been outsourced to California did its required work. One of the most vocal legislative opponents of the code, Allison DeFrance, abandoned his criticisms after the code became identified with California law. Whereas earlier in the session, he had cited lack of time as a reason to defeat the code, he now reasoned

⁸⁹ “Shall We Have a Code?” *Pueblo Daily Chieftain*, January 13, 1877.

⁹⁰ “The Code: The Debate in the Legislative Hall Last Evening,” *Denver Daily Tribune*, January 10, 1877.

⁹¹ “The Code,” *Denver Daily Tribune*, January 31, 1877.

that “he did not consider that he, or any other member of the General Assembly, with the time he had to examine it, was competent to criticize it. He understood the bill was almost an exact copy of the code of California, which had been framed by some of the ablest men in the land, and he could not criticize their work.”⁹² Now that the architect of California’s code, Stephen J. Field, represented the West on the U.S. Supreme Court, it would hardly do to continue calling his code the law of “sciolists, agitators, and revolutionists.”⁹³ The argument that expert lawyers had crafted the proposed code dissuaded non-lawyers from engaging in intricate debates over topics such as law and equity, “for ‘who shall decide when doctors disagree’ is a trite proverb that applies peculiarly in this case,” explained one Denverite.⁹⁴ Sometimes constitutionally bound to put bills through three readings before passage, legislatures scheduled evening sessions for the reading. But in the satirized words of a “Granger” who sat in on one such session, “fifty fellers” were just “settin’ around, some of them smoking, with their heels cocked up on their desks, some of ‘em readin’ newspapers, some of ‘em talkin’ and laughin’,” but “not one of ‘em legislated a bit.”⁹⁵

Paradoxically, western states that refused to engage in commissioner lawmaking on grounds of popular sovereignty copied the text of New York lawyers even more slavishly than did the postbellum southern commissions. The main problem was the same that Iowa had confronted twenty-five years earlier: Legislators were busy amateurs, perceived to lack the training and time to re-craft long, sophisticated codes of legislation in order to suit local conditions. Indeed, time was barely

⁹² “The Legislature: The Senate Devotes Another Day to the Code,” *Denver Daily Tribune*, February 17, 1877.

⁹³ “A Code Lawyer on the Code.” See also “Codex Est Optimus,” *Pueblo Daily Chieftain*, February 25, 1877 (arguing that jurists like the Field brothers “stand upon the platform of right, progress, and expediency”).

⁹⁴ *Pueblo Daily Chieftain*, January 25, 1877.

⁹⁵ “Legislative Doings—The Code,” *Pueblo Daily Chieftain*, February 15, 1877. Less humorous papers stated the same position. See *Rocky Mountain News*, February 9, 1877 (“There is reason to believe that very few members of the house ever read the bill through themselves, or listened to its reading by the clerk. There is little reason to believe that many members of the house are lawyers enough to know whether it is a good bill for a code, or whether a code at best is better than the common law. The house has evidently concluded that because older states have codified their laws, Colorado must do the same, and that the work can be done as well in one way and at one time as in another way and at another time.”) See also *Journal of the Council of the Territory of Washington* (1854), 151 (“It is proper to note, that the ‘Civil Practice Act’ had informally been considered, by sections, in a committee of the whole, before it had been officially reported to the house, on Wednesday, April 26th, during the recess, in the afternoon session. This accounts for the three several readings under the suspension of the rules, and its seemingly hurried passage by the Council.”)

sufficient to take another state's code and eliminate provisions that were obviously irrelevant or unconstitutional given the borrowing state's particular configuration of judicial institutions. Critics doubted that these few excisions actually respected popular sovereignty. Colorado's legislators, complained the Denver press, "have clipped a section from one code and pasted it with a section from another, and so industriously have they labored that they have been enabled to present the work of their hands to the assembly in the limited space of fifteen or twenty days a complete code of procedure, which . . . has been 'assimilated,' as we are informed, 'to the character and requirements of our people,' whatever that may mean."⁹⁶

The code commissions of the Midwest and Upper South, whose commissions usually ran longer than one or two legislative sessions, tended to produce codes that adapted Field's reforms, sometimes incorporating the New York text, but frequently countermanding its more sweeping reforms. It was among these jurisdictions that distinctions between law and equity were preserved, party testimony continued to be disfavored, and debt collections could be issued only in term time. Nevertheless, commissions everywhere complained of a lack of time to give their subject full consideration and to adequately systematize procedural law. In Kentucky, "the Commissioners have not been able to perform all the duties assigned to them." In Ohio, "they have realized [their task] requires more time and research, than they have been able to bestow." In Kansas, "the time within which the commissioners were required to perform their labors was too short," and in Wisconsin "the limited time for completion of the work was very short." "Recognizing and regretting [the code's] deficiencies," the North Carolina commissioners "beg leave only to call attention to the very brief time" they had to craft it. Only "by constant labor, however, averaging sixteen hours out of each twenty-four" did the Arizona commission get its report to the printer.⁹⁷ Of course, states that declined

⁹⁶ "Olla-Podrida," *Rocky Mountain News*, January 20, 1877.

⁹⁷ *Report of the Commissioners Appointed to Prepare a Code of Practice for the Commonwealth of Kentucky* (1850), vi; *Report of the Commissioners on Practice and Pleadings* (Ohio 1853), iv; *Journal of the Senate of the State of Kansas* (1868), 71; *Revised Statutes of Wisconsin* (1858), iii; *The Code of Civil Procedure of the State of North Carolina* (1868), iii; *Revised Statutes of Arizona* (1887), 3.

to appoint a commission had even shorter time horizons during a single legislative session. “It is folly to undertake to pass a code in a sixty day session,” wrote the *Montana Post*, “and the best way would be for the Assembly to select one from a State or Territory which would come near meeting our wants, and slide it through with the fewest changes possible.”⁹⁸

Compared to Europe, the limited time horizons of American legislation could be quite short indeed. European commissions on civil procedure might sit for longer than a decade, even if they only produced what one scholar calls a “(bad) translation of the French Code.”⁹⁹ Iowa appointed one of the longest-sitting American code commissions for two and a half years, and that commission was tasked with codifying all the law of the state, not just civil procedure.¹⁰⁰ American legislatures were generally unwilling to extend the duration of commissions for so long. Legislative commissions fit uneasily in popular theories of democratic representation, because they implied that lawmaking was legitimated by expertise rather than representation of popular will. “Would not succeeding legislatures as well know what amendments were required as these Commissioners who were to sit here forever?” asked one New York senator. Surely the work of amending statutes was the sole job of a legislator, he insisted. If it could be delegated to commissioners, what was the use of having a legislature?¹⁰¹

A State Which Is an Empire in Itself

As digital analysis and Colorado’s legislative history reveals, enacting the code tended to be an all-or-nothing proposition. Once in a while that could work against the code, as it did in Texas, the only western state to reject the Field Code. When “the clerk then proceeded to read the code of civil procedure,” in the Texas Assembly, “there was a general *stampede*, and the House adjourned, there

⁹⁸ *Montana Post*, January 21, 1865.

⁹⁹ A.W. Jongbloed, “The Netherlands,” in C.H. van Rhee, *European Traditions in Civil Procedure* (Intersentia 2005), 69. The Dutch code of civil procedure took nearly fifteen years to prepare, while the French code went into effect five years after the commission was first issued. Later French commissions would sit for the entirety of the 1870s and from 1886 to 1892. The first German confederation code of procedure took four years to prepare and another seven years of drafting before it was transformed into Germany’s *Zivilprozessordnung*. See *ibid.*, 5, 30, 42, 111–13.

¹⁰⁰ Powell, “History of the Codes of Iowa,” part II.

¹⁰¹ “Practice and Pleadings,” *Albany Evening Journal*, Feb. 1, 1849.

not being a quorum to transact business.” The code was not taken up again before the session expired.¹⁰² Considering the universal complaints that time was too short and legislators too inexperienced to give the code due consideration, one might expect the code to have failed more often or at least to have faced more competition from other workable statutes. The Louisiana code that California’s governor wished to adopt remained a live option, as did the variety of southern codes that abandoned the common law forms of action.¹⁰³ If Euro-Americans believed law had to be imported into the West, Colorado immigrants proved that the common law of Illinois was just as amenable to statutory importation as New York code. (See Figure 12, above.)

What codifiers saw when they looked at New York, more so than Louisiana, Alabama, or Illinois, was the Empire State of commercial capital. And the putative fears, demands, and desires of a personified Capital continually wielded promises—and threats—in the debates over procedural codification. Early Mormon settlers of Utah avoided the mining frenzy, and they adapted a code from the more traditionalist Oregon, a state that made no particular provisions for miners and maintained a separation between law and equity. By 1870, however, the territory’s governor directed the legislature’s attention to the recent code of Nevada, a code “for a people whose interests in many respects are similar to our own.” Of course, standing behind the Nevada code was “the State of New York—a State which is an empire in itself and whose commercial transactions are far greater than those of any other State in the Union.” By copying its code, Utah too could be “rewarded by equal advantages.”¹⁰⁴ Code proponents in Colorado similarly parried arguments that a code would be a “new-fangled” contrivance by pointing to the fact that it had been “adopted twenty-nine years ago by

¹⁰² *Texas State Times* (Austin, Tex.), December 15, 1855.

¹⁰³ For instance, although Tennessee in 1858 adapted nearly 225 sections of its code from Field codes, the state also incorporated nearly 50 sections of the 1852 Code of Alabama, one of the largest borrowings of southern legislation within the corpus I have collected.

¹⁰⁴ *Journal of the Assembly of the Territory of Utah* (1870), 15. The governor employed the same argument of outsourcing legal expertise described above. “It is scarcely expected that at one session of the legislature a complete code can be originated, but fortunately you can avail yourselves of the labors of others, and adopt such portions of the codes of other States and Territories as are suitable for the wants of our own.”

the Empire state of the Union” as well as “the wealthy and populous states of Ohio, Indiana, Wisconsin and Missouri.” They hoped that the code of the nation’s uniquely commercial empire might bring wealth in its wake.¹⁰⁵

When a Colorado legislator scoffed at the idea that capitalists could possibly care about the difference between old common law and modern code remedies, his adversaries rebuked him. “Mr. Hamill replied that he knew of one California company of capitalists who were deterred from investing in mining property here wholly on account of the practice of the courts in mining cases. If we had had this code years ago, Colorado would now have a larger amount of California capital in her mines.”¹⁰⁶ Codifiers argued that, in attracting capital, procedure was at least as important as the substantive rules of property and contract, because procedure secured the remedies that actually protected investments. “Men of capital and enterprise will not make investments and devote their time and energies to those works of internal improvement so necessary for the speedy development of our natural resources, and for the settlement and building up the country,” Nebraska’s governor reasoned, “unless ample protection is afforded them, by legal enactment, for the capital invested and labor employed.” Therefore he urged swift passage of the Field Code.¹⁰⁷

As in postbellum North Carolina, establishing a flow of credit through the remedial system became a leading priority of western lawyers. While the so-called new western history has shed significant light on neglected topics of Native American dispossession and environmental management, it has often done so by obscuring matters of political economy, a staple of the old western history. As one work in that older tradition argued, “Debt collection was the central part of law practice for the [western] bar and remained a key part of private practice throughout the century.”¹⁰⁸ On that understanding, one western lawyer succinctly summarized the difference

¹⁰⁵ “The Code Again,” *Pueblo Daily Chieftain*, February 25, 1877.

¹⁰⁶ “The Legislature: The Senate Devotes Another Day to the Code,” *Denver Daily Tribune*, February 17, 1877.

¹⁰⁷ Governor’s Message, in *Journal of the House of Assembly of the Territory of Nebraska* (1857), 12.

¹⁰⁸ Gordon Morris Bakken, *Practicing Law in Frontier California* (Nebraska 1991), 51–54. The new western history ushered in by Patricia Nelson Limerick, *The Legacy of Conquest: The Unbroken Past of the American West* (Norton 1987) and Richard

between the code and the common law as “whether a merchant had better try to collect a \$500 note or burn it up.” Tiring of all the focus on creditors’ remedies, one legislator observed that he “never knew one of these professionals who undertook to write up the beauties of the New York code, . . . that he did not also break out somewhere with ‘take for instance the case of an action on a promissory note,’ as though the collection of notes was about all there could be any law needed for.”¹⁰⁹

The creditors’ remedies in the code gave the codifiers their leading argument against criticisms rooted in the ideology of popular sovereignty. “There is no doubt but the people are in favor of anything that promises to hurry up that proverbially slow and blind old female called Justice, and they will go for the old code,” one Colorado newspaper announced.¹¹⁰ New York’s “code practice is the best in excellence,” stated another, “and when I say *best* I do not mean best for lawyers only, but best for the people—the commonwealth.”¹¹¹ If the People favored economic progress, certainty of remedy, and efficiency in proceedings, then they favored the New York code, no matter whether they understood or cared about technical rules of pleading and joinder. Thus, in their arguments codifiers imagined themselves champions of popular sovereignty, for it was they who accomplished what the People actually desired. “Dodson and Fogg, Mr. Flight and the other lawyers engaged in the case of Jarndyce and Jarndyce are making a determined effort to defeat the code bill introduced by Mr. Helm,” a Colorado codifier wrote, “but if the people could have any direct voice in the matter they would soon put a quietus on red tapeism and the circumlocution office” of lawyers.¹¹² Since legislative commissions and committees sought the proper end of the People’s good, codifiers downplayed the legislative shortcuts they used, writing in yet another Colorado paper that “as long as the mass of the

White, *“It’s Your Misfortune and None of My Own”*: A History of the American West (Oklahoma 1991) is now returning to issues of political economy. See Patricia Nelson Limerick, *A Ditch in Time: The City, the West, and Water* (Fulcrum 2012); Richard White, *Railroaded: The Transcontinentals and the Making of Modern America* (Norton 2011).

¹⁰⁹ “The Code,” *Denver Daily Tribune*, January 10, 1877; “The Code,” *Denver Daily Times*, January 27, 1877.

¹¹⁰ “A Code of Civil Procedure,” *Denver Daily Times*, January 12, 1877.

¹¹¹ “The Code,” *Denver Daily Tribune*, January 31, 1877.

¹¹² *Pueblo Daily Chieftain*, January 9, 1877. The allusions are to Charles Dickens’s *Pickwick Papers* and *Bleak House*.

people represented by the non-legal portion of the legislature are in favor of a code, it matters little how much dust of ages the anti-code lawyers and their [newspaper] organs kick up.”¹¹³

A central irony in the migration of the New York code, premised on the demands of New York capital, was that the migrating code was not in fact the law of New York. The version of Field’s code that was copied the most was the 1850 draft—the one never enacted in New York. In 1876, just as Colorado was debating the code, New York replaced what remained of Field’s original draft with a new code framed by a commission under the leadership of Montgomery Throop. A count by a “friend” of Field’s found that only three sentences of the Field Code had carried over word-for-word into the Throop Code. (See Figure 13.) Hardly a line of the Throop Code appears in any of the post-1870s procedure codes or revisions of other states, however.¹¹⁴

Thus by the end of Reconstruction, New York’s domestic empire of capital and creditors’ remedies bore a remarkable resemblance to the international empire administered by the British. Both jurisdictions, while reforming the practice of law, largely rejected codification within their own borders but encouraged it among their economic dependents. The English Parliament commissioned a full codification of law for India and colonies in Singapore, while further codifications produced by Field in New York covering civil and penal law were adopted in California and other western jurisdictions but defeated in Field’s home state.¹¹⁵ In both places, leading arguments against codification were again civilizational: Advanced societies could not codify their law, for to do so would be to freeze the progress of legal science. What appeared to some to be a hopeless mass of confusion was to common law defenders the sign of true legal sophistication. Science was, after all,

¹¹³ *Pueblo Daily Chieftain*, January 25, 1877.

¹¹⁴ In the corpus prepared for this project (see Appendix C), only Montana’s revised procedure code in 1895 borrowed any material from the Throop Code—about two dozen sections on liens in a code of 3,484 sections.

¹¹⁵ See Gunther A. Weiss, “The Enchantment of Codification in the Common-Law World,” 25 *Yale Journal of International Law* 435 (2000). For a thorough study of the ideology of codification in India, see Robert A. Yelle, *The Language of Disenchantment: Protestant Literalism and Colonial Discourse in British India* (Oxford 2012).

Figure 13.

Borrowed sections in NY1876



Section borrowed from

■ NY1829	■ NY1849	■ NY1851	■ Other
■ NY1848	■ NY1850	■ NY1853	

Field's count of only three sentences carried over into the new Throop Code was somewhat exaggerated, but he was not wrong to see the effort as a near total repudiation of his own code.

Besides a couple dozen sections in Montana's 1895 revision of its code, no state or territory borrowed any legislation from the law of New York that was actually in force after 1875. Rather, they continued to borrow from the Field drafts—see Figure 14, below.

sophisticated.¹¹⁶ The Throop Code came in for censure, both in its first year and in following decades, precisely for trying to capture all the sophistication of the New York legal system within an unwieldy 3,300 rules.¹¹⁷ Codification, however, could help developing societies along law's frontier take a progressive leap forward. As India's chief codifier Thomas Macaulay explained, codification "cannot be well performed in an age of barbarism," but also "cannot without great difficulty be performed in an age of freedom." As India balanced between the two, however, "it is the work which especially belongs to a government like that of India – to an enlightened and paternal despotism."¹¹⁸

In the United States, Macaulay's tool of enlightened despotism spread with the anxiety that capital from the nation's economic center would remain scarce without a code of remedies that, if not in fact the law of New York, was at least prescribed by New York lawyers and their wealthy clients. In the two most populous and commercially advanced western states, Texas and Illinois, New York capital failed to move state legislators to adopt the code at the expense of popular sovereignty (although there were concerted efforts in both jurisdictions).¹¹⁹ Lacking the self-sufficiency of those two jurisdictions, the other states of Greater Reconstruction adopted a foreign code, at times through extra-legislative means; but lawyers, legislators, and their supporters claimed the endorsement of popular sovereignty in doing so. Even in North Carolina, whose Democratic newspapers daily called for the repeal of the code as an imperial imposition from New York, Republican editors proclaimed that "the movement" towards procedural codification "comes from the people, from the instinctive logic by which an unprejudiced mind grasps the advantages of the system."¹²⁰

¹¹⁶ See, for instance, James C. Carter's classic defense of the common law against codification, *The Ideal and the Actual in the Law, Address to the American Bar Association*, August 21, 1890, at 28 ("ascertaining and declaring existing customs . . . is the work of experts who can qualify themselves only by the devotion of their lives.").

¹¹⁷ See, for instance, "Notes," 29 *Albany Law Journal* 141, 142 (1884); Millar, *Civil Procedure of the Trial Court*, 55–56.

¹¹⁸ 19 *Hansard Parliamentary Debates* 531.

¹¹⁹ Texas commissioned the preparation of a code of civil procedure in 1855, and the legislature scheduled an extra session to consider it but ultimately never passed the law. 21 *Texas Reports* (Hartley) xi (1882); *Texas State Times*, December 15, 1855. Reformers in the 1869 convention in Illinois attempted to pass a provision similar to the one in New York's 1846 constitution, which would have required the legislature to appoint a commission to revise practice and pleadings along the lines of the Field Code. See *Debates and Proceedings of the Constitutional Convention of the State of Illinois* (1870), 1496–98.

¹²⁰ "The Code," *Weekly Standard* (Raleigh), May 26, 1869.

Conclusion

The notion that lawyers were trading in a false populism to serve their own interests frequently followed the Field Code during its cross-country migration. The claim of public good, one Colorado lawyer wrote, “comes from a half-dozen or less of lawyers, who demand in the name of the people, that which these lawyers want for themselves. In other words, these lawyers want a ‘code’ and forthwith they shout ‘*vox populi*.’” In the view of this common law lawyer, the People “do not pretend to understand the principles of practice and pleading at law, any more than they pretend to understand the principles of any other particular science.” Ordinary citizens did not understand code remedies, and they therefore could not be demanding what they did not understand.¹²¹ Although he may have been just as professionally interested in maintaining his accustomed practice, the lawyer’s criticism at least had the merit of accurate observation. Not once during the debates about Colorado’s codification did concerns over popular sovereignty and democratic representation receive a direct answer. Rather, codifiers transmuted democratic theory into support for a remedial code that elected legislators had neither the time nor inclination to read. Popular support for commercial development was taken to indicate popular support for New York’s civil remedies, especially the cheapened and accelerated collection of debts.

This chapter has drawn on a variety of approaches from the digital humanities as well as “new” and “old” western history to illuminate the expanding empire of New York law around a periphery of American jurisdictions. Digital tools can provide a handle on data that would overwhelm more traditional approaches. These tools reveal that the Greater Reconstruction tying South and West was not just a matter of federal policy but was also a state-level phenomenon with a political and

¹²¹ “The Practice of Law Made Easy,” *Rocky Mountain News*, February 2, 1877 (“And people, as a whole, are not versed in astronomy, nor geology, nor botany, nor physics, nor engineering; still they do not raise a popular howl for the legislature, by one sweeping ‘be it enacted’ to make them all first-class astronomers, geologists, botanists, physicians or engineers. No; this wailing, throughout the newspapers and before the legislature, for a ‘code’ is the plaintive wail of certain lawyers, who, wishing to give respectability to their bastard, parade it before the public as the child of the people.”)

economic center not in Washington, D.C., but in the monied metropolis of New York. To see the redefinition of the American economy around the swift movement of merchant capital instead of seasonal rhythms of agriculture, one must revive the old western history's interests in jurisdictional lines and matters of political economy and pair it with the new western history's emphasis on Euro-American colonization and the flattening out of legal pluralism.¹²²

This chapter's revisions to the history of law and capitalism depends on its digital methods. The account relies largely on commentary from Colorado in 1876 and North Carolina in 1868. But why look in those places, at those times? It is not because the sources were abundant or readily available. Colorado's legislative journals for 1876 are in fact lost, completely missing from the archives. North Carolina's are nearly as scarce. But refer back to the network graph showing the relationship between procedure codes. (See Figure 7.) It shows that Colorado from its very beginning borrowed its procedural law from Illinois, a common law state. Only well after a decade into its history as a territory did Colorado adopt a Field Code. Colorado's history runs contrary to the conventional account, which holds that western states adopted codes as a matter of convenience early in their history.¹²³ Another peculiarity of the graph is that most states borrow, naturally, it seems, from a near neighbor. But North Carolina, South Carolina, and Florida all borrowed directly from the latest New York code. Why is it that the center of the West was California, the center of the Midwest was evenly spread from Ohio to Kentucky to Iowa, yet the center of the South was New York? Answering these questions is what spurred the archival research undergirding this chapter.

The history of codification on the American periphery challenges cherished notions about American federalism. On the one hand, those suspicious of centralized power and critical of national governance since the New Deal have relied on narratives that tout the equality of sovereign states to

¹²² The diminishing of legal pluralism has more often been studied as a feature of overseas empires rather than colonial-like domestic relations. See generally Laura Benton & Richard Ross, eds., *Legal Pluralism and Empires, 1500-1850* (NYU 2013); Christopher L. Tomlins & Bruce H. Mann, eds., *The Many Legalities of Early America* (UNC 2001).

¹²³ See Friedman, *A History of American Law*, 394, 406.

set their own policies, foster local diversity, and “experiment” with legislative solutions to local issues.¹²⁴ But the history of legal practice and civil remedies is one in which the localism fostered by common law practice rapidly gave way to uniform regulations transmitted by a network of New York lawyers without the slightest interference of the federal government. On the other hand, scholars who support the legitimacy of New Deal governance have recently produced an abundant literature unearthing a long tradition of “administrative” law at the state level well before the twentieth century. These accounts have focused on administrative adjudication or discretionary regulation within a narrow domain, such as customs houses, but have so far neglected the most widespread and significant instance of nineteenth-century administrative lawmaking in America—the spread of the Field Code through extra-legislative commissions.¹²⁵ While these histories have sought to demonstrate that nineteenth-century Americans could be quite comfortable with administrative law, accepting it as a normal part of the constitutional order, this chapter has shown how lawmaking by commission generated significant political controversy and raised grave questions about popular sovereignty that over time were merely dodged rather than answered.

In the economically developing West and re-developing South, anxieties over the lack of capital—both among the bar as well as lay voters—joined with arguments of civilization and progress to spur many jurisdictions to copy the text of the code of New York, the Empire State of capital. The short time horizons of American lawmaking limited the options available for reimagining or recrafting what could become the law of remedies and legal practice. And in the economically underdeveloped parts of the country, time horizons could be short indeed. Capital might quickly pass over one region and favor another, and each month more lawyers arrived hoping to make a start in a jurisdiction where economic progress was just about to take off. Those migrations perpetuated their own time

¹²⁴ See, for instance, the summary of the states-as-laboratories literature in Brian Galle & Joseph Leahy, “Laboratories of Democracy? Policy Innovation in Decentralized Governments,” 58 *Emory Law Journal* 1333 (2009).

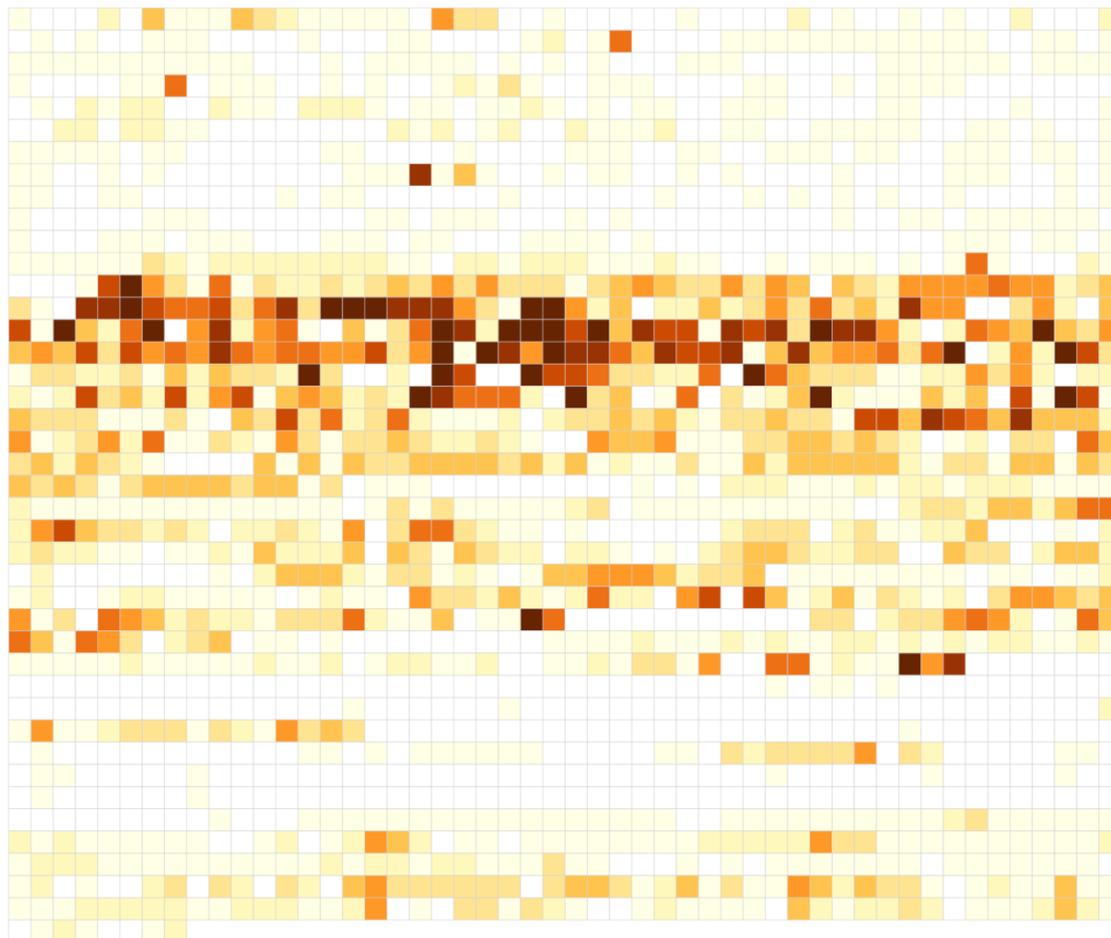
¹²⁵ See Ernst, *Tocqueville’s Nightmare*; Jerry L. Mashaw, *Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law* (Yale 2012); Gautham Rao, *National Duties: Custom Houses and the Making of the American State* (Chicago 2016).

constraints that helped to entrench the code. In the same North Carolina papers that hoped to overturn the code appeared a news item on December 16, 1870: The bar exam was coming up. The first day would cover real property; the second day, the code of civil procedure.¹²⁶

¹²⁶ *Wilmington Journal*, December 16, 1870.

Figure 14.

Most influential sections in NY1850



Number of similar sections
in subsequent codes

2-10	21-30	41-50	61-70	80+
11-20	31-40	51-60	71-80	

This graph is the reverse of those that appear above. Rather than illustrating the sources of Field's final draft of his code, this graph illustrates the number of times each section was borrowed across the nation, something like a heat map of popular sections from the Field Code.

The first third of the code organized the courts and regulated their jurisdiction. Few states copied this legislation directly as each did not have New York's city- and county-specific courts nor maritime tribunals. The densely copied portion in the center is the heart of the code, the fusion of law and equity, abolition of fee regulations, simplification of pleading, and provisions for trial and appeal. Following this portion are the "special proceedings" in procedurally complex cases often having to do with the foreclosure and partition of real property. Arphaxad Loomis largely copied New York's Revised Statutes for these procedures, and other states either drew from their own traditions or stuck to the code's general rules for all cases. The code concluded with the law of evidence. Few states copied the evidence code, but many adopted Field's changes to make parties competent to testify.

PART II

THE PATHS OF THE LAW

Even if, in all present events, men did act justly and legislate justly, still there would remain traces of the ancient order of things.
—William Whewell, *The Elements of Morality* (1845)

Upon returning from a celebratory trip to England in 1852, David Dudley Field established a Law-Reform Association in New York City. Probably inspired by Lord Brougham, whose Law Amendment Society had received significant press coverage for its reform proposals and model legislation, Field's Association republished some of Lord Brougham's material for a New York audience.¹ But the American Association never held a meeting, and no one ever claimed to be a member. The Association seems to have existed only to publish a half dozen "Law Reform Tracts" across the 1850s that were otherwise anonymous. At least, technically anonymous. Even if Field's brother had not revealed Field's authorship, his characteristically acerbic tone and intimate knowledge of New York's practice commission made the attribution obvious.²

Field's first tract in 1852 was his most trenchant. He wrote that "hostile judges" were "confounding, misconstruing, and denouncing" the code, "pervert[ing] an opinion upon its construction into a lecture upon its policy" and thus violating the separation of legislative and judicial powers that was "essential to all free government, and especially to our republican form." The tract attacked two judges by name and indicated that voters should not return them to the bench. Then, on

¹ On the Law Amendment Society, see Michael Lobban, "Preparing for Fusion: Reforming the Nineteenth-century Court of Chancery," 22 *Law & History Review* pt. II, 565 (2004). The tracts containing the re-published Lord Brougham's material were *Law Reforms Tracts No. 2: Evidence on the Operation of the Code* (1852) and *Law Reform Tracts No. 4: Competency of Parties as Witnesses for Themselves* (1855).

² Henry Martyn Field, *The Life of David Dudley Field* (1898), 69. In addition to the two tracts in the note above, the Association published *Law Reform Tracts No. 1: The Administration of the Code* (1852); *Law Reform Tracts No. 3: Codification of the Common Law* (1852); and *Law Reform Tracts No. 5: A Short Manual on Pleading Under the Code* (1856).

second thought, with elections so far in the future, the tract urged legislative impeachment as a “remedy justly to be applied to a willful perversion of the law, or neglect to study and apply it.”³

Field expended most of his criticism on John Worth Edmonds (1799–1874), a judge of the supreme court (lower trial court) in New York City. In an 1850 decision, Edmonds had declared that “the principles of pleading are left untouched” by the code reforms. “And as, before the Code, no party was obliged to use the forms then existing, it would seem to follow that the abolition of the forms, in reality, amounted to nothing.”⁴ Field marveled that “this could have been said by any rational and reflecting man.”⁵ Field considered the abolition of the medieval forms of pleading one of the central reforms of the code and counted Judge Edmonds’s decision a personal insult. The commission’s first report of the code had stated that “the abolition of the distinction between actions at law and suits in equity, and of the forms of such action and suits” comprised “the leading principles which lie at the foundation of the whole proposed system of legal procedure, and without which, in our judgment, very few, if any essential reforms can be effected in remedial law.”⁶ In his tract, Field returned Edmonds’s insult. Judges like Edmonds, he remarked, “are usually advanced beyond the middle period of life; trained from their majority in habits of subservience to precedent; reposing on other men’s studies; thinking the thoughts of their predecessors; looking only at the past, with their backs to the future.”⁷

As the code traveled to state after state, the conservatism of “old judges” and “elderly lawyers” became a byword of the codifiers. “In every state and country so far as we know [the code]

³ *Administration of the Code*, 6, 8, 9.

⁴ *Dollner v. Gibson*, 3 Code Rep. 153 (1850) is the typical citation for later treatises. I quote from Judge Edmonds’s hand-corrected copy published posthumously in *Reports of Selected Cases Decided in the Courts of New York* (1883), 2:253–57.

⁵ *Administration of the Code*, 18.

⁶ *First Report of the Commission on Practice and Pleadings* (New York 1848), 67–68.

⁷ *Administration of the Code*, 5. Despite the protest, Edmonds’s decision became widely cited precedent to the end of the century. See, for instance, *Abbot’s Digest of the New York Reports* (vol. 8 supplement) (New York: Baker, Voorhies, 1916), 21:505, 517. Henry Whittaker noted that *Dollner*, which had been decided at the special term in New York, may have been overruled at the general term, citing the *New York Herald*. The *Herald* reported that “the rule” in *Dollner* was reversed at the general term, but several points had been decided in the case, and no reasoned decision from the general term was reported. Henry Whittaker, *Practice and Pleading under the Codes of New York* (1852), 159–60; *New York Herald*, March 7, 1852.

has been violently opposed by some of the older members of the bar, and has received the cordial support of the younger members," wrote a proponent of codification in Michigan (one of the few midwestern states to resist the code). Among "the oldest and best lawyers, who were worked gray in the profession, there was a strong cleaving to the friendly old forms in the use of which they did, or were supposed to excel," one lawyer wrote to the Iowa commission. "They who had mastered [the common law practice] in youth," Field wrote, "had forgotten the distaste with which they then regarded it, and had come to consider it as something necessary and unalterable."⁸

Despite the nearly universal adoption of the Field reforms in America, historians from the time of the Legal Realists onward have largely considered the code symbolically influential but in practice a failure, and they have agreed with the codifiers' assessment that old conservative judges and lawyers were to blame. "Much of what is now accepted as a matter of course in legal procedure," wrote Roscoe Pound, Dean of the Harvard Law School, "could have been attained at least eighty years [earlier] if Field's Code of Civil Procedure had been developed and applied in its spirit instead of in the spirit of maintaining historical continuity."⁹ What is needed, according to this view, is a critical history of the code's reception in the courts. The codifiers were naïve to believe reform could be carried through a legislature alone, and the story of the Field Code is the story of how conservative judges used their powers to alter the statutes they received, turning texts towards the exact opposite result of what was intended.¹⁰

⁸ Samuel Maxwell, "Alfred Russell's Objections to a Code of Civil Procedure," 2 *Michigan Law Journal* 367 (1893), 374; *Report of the Code Commissioners to the Eighth General Assembly of the State of Iowa* (Iowa 1859), 294; *Third Report of the Commissioners on Pleading and Practice* (New York 1849), 4. Sometimes the codifiers disagreed among themselves in their ageist arguments. The Missouri codifier Judge R. W. Wells insisted it was young law students who naturally opposed the code. "The young lawyer has also devoted too much time and labor to the system of special pleading, to see it thrown away without reluctance," he wrote. R.W. Wells, *Law of the State of Missouri Regulating Pleadings and Practice* (Missouri 1849), 113.

⁹ Roscoe Pound, "David Dudley Field: An Appraisal," in Alison Reppy, ed., *David Dudley Field Centenary Essays: Celebrating One Hundred Years of Legal Reform* (NYU 1949), 14.

¹⁰ Alison Reppy, "The Field Codification Concept," and Charles E. Clark, "Code Pleading and Practice Today," in Reppy, ed., *David Dudley Field Centenary Essays*, 7, 55; Lawrence M. Friedman, *A History of American Law* (Simon & Schuster, 2d. ed., 1985), 393-94; Charles M. Cook, *The American Codification Movement: A Study in Antebellum Legal Reform* (Greenwood 1983), 210; Robert Wyness Millar, *Civil Procedure of the Trial Court in Historical Perspective* (NYU 1952), 53-54.

Rather than provide that reception history, the following chapters challenge its premise. They argue that the code must be taken seriously as a code before it can be understood as a product of judicial interpretation. The motive for this approach is simple: It turns out that some of the judges who most “misinterpreted” the code were not conservative adversaries of reform but some of its warmest supporters. Judge Edmonds, for instance, avidly supported the code and became the first sitting judge to publicly advocate its adoption in 1848. His remarks at the time show that he largely understood what Field was trying to accomplish and actively supported those goals. According to Edmonds, the code sought “the removal of the fictions which have encumbered the administration of justice; the abolition of useless and antiquated forms; the restoration to pleadings of their proper character of truthfulness” – all “which promise such great benefits, that I cannot persuade myself that we can soon return to the evils from which we are now so suddenly relieved.” Like Field, Edmonds worried that an elderly bar “who have fitted themselves by a long period of preparation for [legal] practice, should resist every change, and accept, slowly and with repugnance, every departure from the path in which, with so much labor, they have learned to tread.” But he urged on the profession “a ready and cheerful obedience” to the new legislation.¹¹

And in the next term, Field called for Edmonds’s impeachment. Did Edmonds have a sudden change of heart? If not, how could two good-faith readings of the code arrive at opposite conclusions about its central reform? The dispute demonstrates that legal historians can be too quick to seek a reception history in the courts, to assume the coherence of statutory intention and focus on a code as an artifact of judgment rather than an artifact of legislation. Across the 800 pages of the final report of the code, the commissioners attempted a variety of reforms whose systematic coherence was questionable at best. In order to understand what appeared to be judicial opposition to the code, one must have a better sense of how the code itself could speak at cross purposes, draw on disparate

¹¹ John W. Edmonds, *An Address on the Constitution and the Code of Procedure* (1848), 3–4, 6.

cultural assumptions, and—despite its aim at comprehensiveness—leave huge gaps in the law of practice.

The following three chapters of this study focus on the code reforms that Field and his fellow codifiers repeatedly emphasized as the chief benefits of a reformed procedure, if only they would be applied in “the spirit of reform and innovation which characterizes the age,” as Field expressed in his second report to the legislature.¹² Two chapters examine the code’s procedures for eliciting truth in the courtroom, requiring that pleadings state only true facts (Chapter 4), verified by oath with parties made to submit to cross-examination (Chapter 5). Chapter 6 assesses the code’s attempted fusion of law and equity by giving particular attention to the problems of administering equitable remedies under the code.

Previous chapters challenged the critical view of procedure as merely superficial, “technical” trappings of “real” law, a notion largely invented by the codifiers who sought political arguments to legitimate their reforms. Veteran practitioners who discerned that the structure of Anglo-American common law was almost entirely procedural resisted the codifiers’ argument, recognizing that changes to “procedure” could be fundamental alterations to the law itself. The following chapters continue to illuminate this point, at least in part. Through its definition of legal truth, of sufficient proof, and of the equitable nature of civil remedies, Field’s procedure code transformed American law and legal practice in significant and substantive ways, introducing many of the features that would distinguish modern American practice from other legal systems in the twentieth century.

But the story of the Field Code, like American legal history more generally, is also a story of limits, of reversals, and above all of bounded imagination. Even so talented and energetic a jurist as Field struggled to reimagine the basic structure of his inherited practices from the ground up, and his most sympathetic allies—his law partner Thomas Shearman, his brother Justice Stephen J. Field, the

¹² *Second Report of the Commission on Practice and Pleadings* (New York 1849), 7.

supportive Judge Edmonds – only further misconstrued the lawmaker’s intentions by trying to apply them in good faith. The first part of this study followed J. Willard Hurst’s insight to focus on lawyers and legislators – rather than judges alone – as America’s “law makers.” This second part echoes a key theme of Hurst’s work that, as he phrased it in a late-career interview, law makers “are limited. They don’t have endless stocks of energy to spend on anything. This is part of history.”¹³

Hurst’s colleague and interpreter Robert W. Gordon agreed that “the legal forms we use set limits on what we can imagine as practical options The forms thus condition not just our power to get what we want but what we want (or think we can get) itself.”¹⁴ Gordon, however, criticized Hurst for believing “the basic categories of [lawmakers’] political consciousness” had largely been fixed in place by the seventeenth century with little subsequent evolution. Gordon thus made it a centerpiece of his work on the American legal profession to contend that “no political consciousness can persist simply because of inertia; enormous energy and effort . . . must be poured into reproducing it and protecting it from competition and disintegration.” And for that reason, he argued, legal history must always be alive to the “multiple trajectories of possibility, the path actually chosen being chosen not because it had to be.”¹⁵

As a piece of legislation, the Field Code faced “multiple trajectories of possibility” in the contingencies of legislative politics, but it when it came time to apply the legislation in actual practice, inherited structures of remedies, proof, and legal mediation shaped how the code could be imagined in each jurisdiction, often in spite of the political contingencies that had introduced it there. Perpetuating a tradition may take an enormous amount of work, as Gordon argues, but so does

¹³ Quoted in Hendrik Hartog, “Snakes in Ireland: A Conversation with Willard Hurst,” 12 *Law and History Review* 370 (1994), 375. See also J. Willard Hurst, *Law and the Conditions of Freedom in the Nineteenth-Century United States* (Wisconsin 1964), ch. 3; James Willard Hurst, *Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin, 1836–1915* (Harvard 1964).

¹⁴ Robert W. Gordon, “Critical Legal Histories,” 36 *Stanford Law Review* 57 (1984), 111. The same principle is stated more positively by Oliver O’Donovan, *The Ways of Judgment* (Eerdmans 2005), 190 (“Law is not a brute fact to plot our path around; on the contrary, it is only under law and through law that we have a path to plot in the first place. Law is the all-comprising order to which we belong, and within which the idea of a path to plot makes sense.”).

¹⁵ Gordon, “Critical Legal Histories,” 111–12 & n.120.

altering a tradition. Even in their most influential reforms the codifiers were unable to apply their system consistently and coherently to the run of controversies it purported to resolve.

In a survey of legislative and equitable theory, the English polymath William Whewell warned law reformers in the 1840s that “the influence of the past Facts of History upon Law, though constantly wearing out, can never be quite obliterated.” Even if through sudden, perfect insight “men did act justly and legislate justly, still there would remain traces of the ancient order of things.”¹⁶ On that reasoning, lawyers in the anglophile state of Maryland became one of the rare codification commissions that did not attempt to borrow Field’s text, opting instead for a few rules that encouraged reforms towards factual pleadings without specifying details of oathtaking, examination, and trial. The defects of the old system, they explained, were “not inherent in the system, but result from the same cause as the defects in all other human inventions—the inability of man to make anything perfect.”¹⁷ In the reasoning of common law opponents to codification, the case-by-case accretion of practices might create a few rules that seemed absurd when viewed in isolation, but taken altogether the structures of lawyerly practice under the common law held together a legitimate system of rational justice. The Field Code—and the modern American practice it created—became the lawyers’ code, not just because lawyers controlled its political fortunes and benefited from its enactment, but also because its silences and inconsistencies could be filled only by many of these inherited practices.

¹⁶ William Whewell, *The Elements of Morality* (1845), 1:326–27.

¹⁷ *The First Report of the Commissioners to Revise the Rules of Practice and Pleadings* (Maryland 1855), 91–92.

Chapter 4

No Magic in Forms

Fact Pleading and the Forms of Action

Whether judges in the late 1840s thought the code reforms advisable or not, they generally kept their views to themselves. Two exceptions were both censured in David Dudley Field's tract that called for the impeachment of judges who misinterpreted his code. Ironically, the first, Judge John Worth Edmonds, had celebrated the code's arrival in a commencement address to the law school at Albany. "As language was once said to be the means of hiding the thoughts, so pleading had become, in many instances, the instrument of concealing the truth," Edmonds remarked. But with fictions abolished "all pleadings are now required to be true. This I regard as an improvement of exceeding value, which must commend itself to the favorable regards of the profession."¹ How Edmonds fell under Field's censure poses a mystery this chapter will seek to resolve.

How the second judge earned Field's scorn is no mystery at all. Seward Barculo (1808-1854) despised the code and in his decisions openly mocked the codifiers. "I am not prepared to deny, that the authors of the code may have supposed, that law and equity could be administered in precisely the same forms," he wrote in one opinion. "But every judge knows, and every lawyer should know, that, in practice, the thing is impossible." When counsel in the case argued that Barculo's interpretation overruled the code, the judge retorted, "It is said our construction repeals the Code. If this were true, I should deem it not an unpardonable offense."²

¹ See [David Dudley Field], *Law Reform Tracts No. 1: The Administration of the Code* (1852); John W. Edmonds, *An Address on the Constitution and the Code of Procedure* (1848), 12, 14.

² *Le Roy v. Marshall*, 8 Howard 373 (N.Y. Supreme Court 1853), 374, 376.

After losing a case on a point of law before Judge Barculo, one plaintiff hired Field himself to argue the construction of the code on appeal to the general term, where Barculo, joined by a panel of two other judges, would rule on the same case. Barculo drew Field into a heated exchange after declaring that “to anyone acquainted with the law as it stood prior to the Code, it is quite obvious that this section is mainly an embodiment of the rules of pleading as they existed, with some omissions and numerous imperfections.” A lawyer who attended the hearing reported that Field “after contending for his view of the case, exclaimed ‘I know that was the *intent* of the legislature.’

‘I beg your pardon,’ said the judge, ‘the legislature meant exactly what they have said and nothing else.’

‘Well,’ replied the counsel, ‘I know the codifiers meant so.’

‘Ah!’ responded the judge, ‘very likely! They seem to have *meant* one thing and *said* another very often, if your argument is good.’”

Barculo ruled against Field, concluding that “it seems to me quite clear that the terms of the section and the other provisions of the Code, as well as the settled principles of good pleading, are irreconcilable with the views of the learned expounding author.”³

Shortly after this decision Field produced his scathing law reform tract expressing ill-disguised contempt for Barculo. “Embodiment of the rules of pleading!” he wrote. “What principles does he refer to? Is he ignorant, that there are other rules of pleading than those of the common law?” To Field, it was obvious the code had prescribed equitable procedures for the case at hand, yet Barculo had judged it by common law formulas.⁴

Despite Barculo’s unusually outspoken hostility to the code, his clash with Field demonstrates a number of common features in the early judicial reception of the code. It shows, for instance, how

³ Alger v. Scoville, 6 Howard 131 (N.Y. Supreme Court General Term 1852), 139–140. The description of the oral argument was provided in a eulogy of Barculo, who died in 1854. John Thompson, “Judge Barculo,” in 20 Barbour 661 (appendix to New York reports) (1883 [1st. ed. 1855]), 668–69.

⁴ Field, *Administration of the Code*, 24–25.

quickly the problematic role of code commissioners was effaced as the code came before judges for interpretation. Like Barculo, most judges shrugged off arguments about commissioner intent and attributed authorship of the code to a legislature which had passed it unexamined and largely unread. That move from commissioner intent to legislative intent was an easy one to make, because judges usually discerned intent from the text itself or from their background understanding of common law practice, rarely or never referring to the political debates that had prompted the constitutional convention, the reform commissions, or the various drafts of the code.⁵

Like Barculo, many other judges instructed the legislature that it could not accomplish what it had intended, not because of any constitutional bar, but because the legislation ran up against natural barriers and because the legislature had done too poor a job of drafting to surmount those obstructions. "I do not deny that it was the intention of the legislature to blend the modes of proceeding at law and in equity," wrote Judge Samuel Lee Selden. "But I insist that it would be unjust to the legislature itself to impute to it the design of abrogating differences which are inherent in the nature of things." Another judge, Robert Earl of the Court of Appeals, similarly declared that "the distinction between legal and equitable actions is as fundamental as that between actions *ex contractu* and *ex delicto* [contract and tort], and no legislative fiat can wipe it out." Against the insinuation that judges were repealing the code, Judge Barculo argued, "It repeals itself. It has been meddling with a subject not understood; and has come into collision with a 'higher law,' – the law of nature – which it cannot overcome. For the distinctions which mark law and equity are laid broad and deep in the nature of things."⁶

The repeated claim that law and equity were distinguished "in the nature of things" will be the main topic of Chapter 6. For now, it is important to begin with the code's merger of legal and

⁵ See, for instance, *Linden v. Hepburn*, 3 Sand. 668 (N.Y. Superior Court 1851); *Giles v. Lyon*, 4 N.Y. 600 (1851); *Williams v. Hayes*, 5 Howard 471 (N.Y. Supreme Court 1851); *Millikin v. Cary*, 5 Howard 272 (Supreme Court 1850); *Knowles v. Gee*, 8 Barbour 300 (Supreme Court 1850), as well as cases discussed in the text below.

⁶ *Wooden v. Waffle*, 6 Howard 145 (N.Y. Supreme Court 1851), 151; *Gould v. Cayuga County National Bank*, 86 N.Y. 75 (1881), 83; *Le Roy v. Marshall*, 8 Howard 373, 376 (N.Y. Supreme Court 1853).

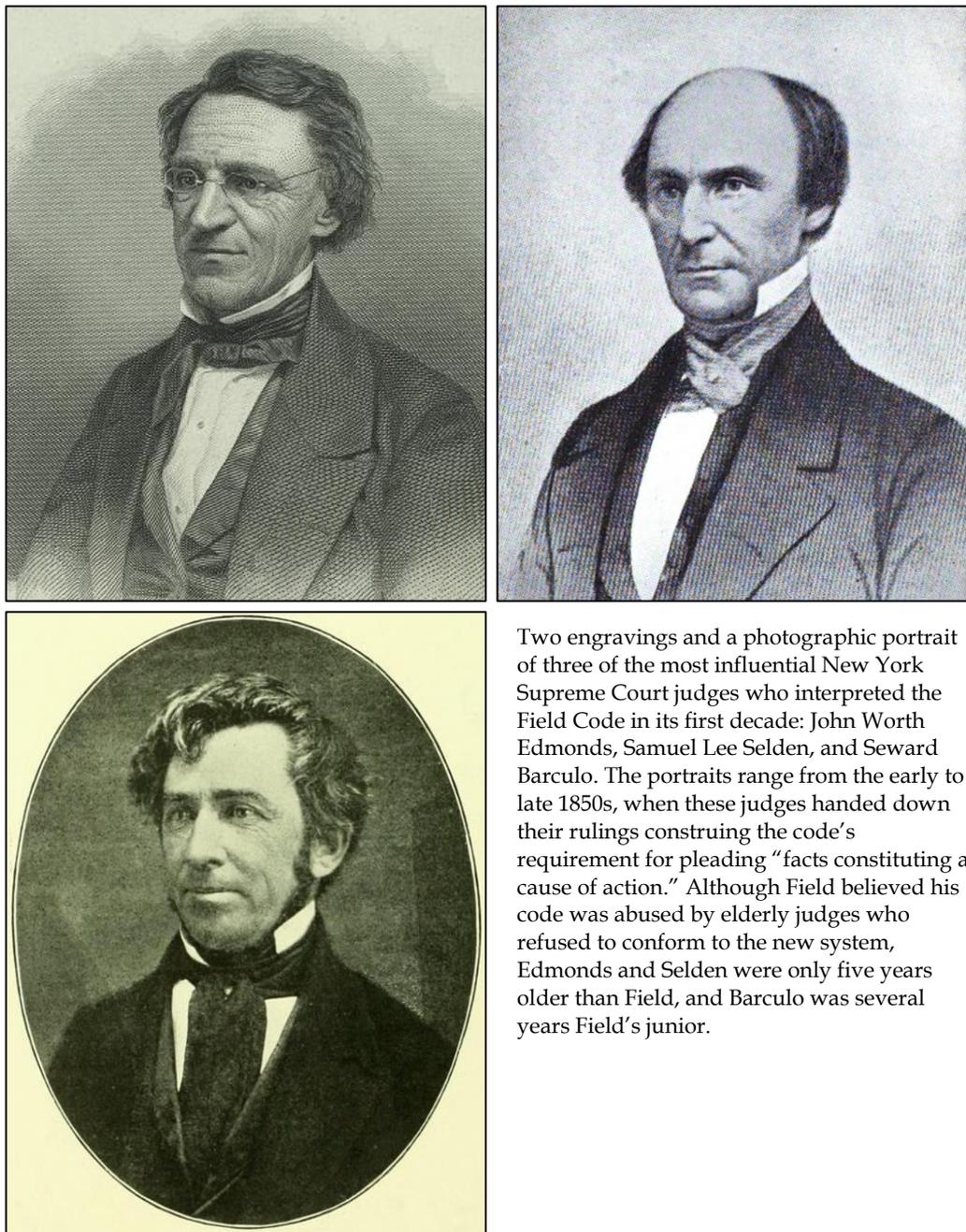
equitable pleading. Because the code required pleaders to state facts “constituting a cause of action” without defining what that phrase meant, jurists were left to puzzle out how common law and chancery had distinguished material claims from frivolous arguments and whether those methods were compatible with each other in a fused system. Thus, rather than curbing the oracular powers of judges, the code enhanced them by its lack of definition. The code further augmented judicial powers by enabling judges to amend virtually any part of the pleadings “in furtherance of justice” to render parties and their counsel more candid about a case.⁷

Candor, indeed, became the self-professed goal of the code and its justification for granting judges extraordinary new powers. The fictions and conclusory language of common law pleadings were, as Judge Edmonds had noted, no longer available routes for parties to evade their code-mandated duty to disclose the “facts” of their controversy at the earliest stage of litigation. Accordingly, this chapter begins with the codifiers’ obsessive focus on truth-telling through pleading, then follows the arguments of leading treatises and key cases in the early reception of the code in New York’s courts as jurists attempted to supply the practical definitions missing from the code’s text.

Through extensive commentary and continual citation, treatises from the 1850s identified a number of cases as being particularly influential in the way New York jurists thought about the code’s requirements for factual veracity. Four cases in particular offer both a nice cross-section of New York’s civil litigation and the judicial personalities who ruled on the code. Accordingly, they receive significant attention in this chapter. The earliest, *Boyce v. Brown*, concerned a trespass to land in rural upstate New York. *Dollner v. Gibson*, handed down by Judge Edmonds in New York City, adjudicated a simple commercial dispute that would have been pleaded in the “money counts” at common law. The Long Island controversy of *Alger v. Scoville* sparked the heated exchange between Field and Judge Barculo and involved dubious financial transfers that, before the code, would have required an

⁷ 1848 New York Laws 526 § 149.

Figure 15.



Two engravings and a photographic portrait of three of the most influential New York Supreme Court judges who interpreted the Field Code in its first decade: John Worth Edmonds, Samuel Lee Selden, and Seward Barculo. The portraits range from the early to late 1850s, when these judges handed down their rulings construing the code's requirement for pleading "facts constituting a cause of action." Although Field believed his code was abused by elderly judges who refused to conform to the new system, Edmonds and Selden were only five years older than Field, and Barculo was several years Field's junior.

Edmonds portrait from John Livingston, *Livingston's Law Register for 1852* (1852), front piece; Selden portrait from Ray B. Smith, ed., *History of the State of New York Political and Governmental* (Syracuse Press 1922), 2:432; Barculo portrait from Edmund Platt, *The Eagle's History of Poughkeepsie from the Earliest Settlements 1683 to 1905* (Platt & Platt 1905), 132. All scans by author.

equitable creditor's bill to unwind. From Rochester came *Wooden v. Waffle*, in which Judge Selden presided over a complicated request for an equitable injunction that ran the pleadings to over five hundred pages.⁸ In all four cases, the supreme court judges (see Figure 15) found one of the party's pleadings insufficient under the new code; and even when Field agreed with the outcomes, he disagreed with the reasoning in all the cases, believing the judges had misconstrued the code's demands for untechnical truth.

Ultimately, the code's aim to sunder substance and procedure was partially realized, but not in the way the codifiers, least of all Field, had intended. Through the slow development of case law and treatise literature, practitioners gradually came to think of the old common law pleading requirements as independent "elements" of a rights claim. In time, the practitioner's sense inverted itself: instead of looking to pleadings to learn the law, apprentice lawyers could look to "the law" to figure out what to plead. But instead of this revolution bursting in with the passage of the code, it developed slowly, as case by case jurists, initially confused by the code's lack of guidance, thought back through the logic of the writ system and wrenched its principles into something like a substantive law of right.

Most Sacred to the Truth: Fact Pleading as Truth-seeking

Historians have widely noted the rise of a Victorian culture of sincerity and earnestness across the nineteenth century in England and America, although the roots of this broad cultural trend remain obscure. English scholars have drawn attention to a rising theology of evangelical authenticity early in the century, while historians of whig republican theory have traced an emphasis on the virtues of honesty and candor as critical to the health of the state.⁹ Of course, evangelical piety and republican

⁸ *Boyce v. Brown*, 7 Barbour 80 (Supreme Court 1849); *Dollner v. Gibson*, 3 Code Rep. 153 (N.Y. Supreme Court 1850); *Wooden v. Waffle*, 6 Howard 145 (N.Y. Supreme Court 1851); *Alger v. Scoville*, 6 Howard 131 (N.Y. Supreme Court General Term 1852).

⁹ On piety, see Walter E. Houghton, *The Victorian Frame of Mind* (Yale 1957), 218–21, 425–26; Martin J. Weiner, *Men of Blood: Violence, Manliness and Criminal Justice in Victorian England* (Cambridge 2004), 13–14; V. Markham Lester, *Victorian Insolvency: Bankruptcy, Imprisonment for Debt, and Company Winding-Up in Nineteenth-Century England*

virtue theory were widespread in the early United States as well, further cultivated by ideals of political and religious “plain speech.”¹⁰ Although the literature on legal discourse is vast, few have investigated how legal modes of speech and an emphasis on candor changed over time, particularly in the early United States.¹¹ But as one English legal historian has recently argued, Victorian earnestness in the quest for truth “was negotiated and manufactured in the courtroom as much as it was in the catechism.”¹²

Indeed, for American codifiers religious rhetoric served less often as motivation than as analogy. In the Early Republic, courtrooms had long been hailed as “temples of justice,” but codifiers pushed the imagery further. Courts might not teach divine religion directly, reasoned the Iowa codifier Charles Ben Darwin, but “a court-house, is in a sort, a school” where “good morals” were preached. And, Darwin continued, “the lawyer is the priest who more than the judge announces those lessons,” since lawyers mediated the lessons of the law both to their clients and to the juries before whom they spoke.¹³ This reliance on priestly imagery was especially striking because codifiers generally railed against the “mystery” and “priestcraft” of traditional common law practice. Casting themselves as priests could only play into the hands of the antilawyers, who charged that lawyers used the mysticism of technical doctrine to keep their profession closed to ordinary citizens. Nevertheless, directly addressing the antilawyers, Darwin emphasized the comparison between

(Clarendon 1995). On whig republicanism, see J.G.A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton 1975); Daniel T. Rodgers, “Republicanism: The Career of a Concept,” 79 *Journal of American History* 11 (1992).

¹⁰ Gordon S. Wood, *The Creation of the American Republic, 1776–1787* (UNC 1969); Daniel Walker Howe, *The American Whigs: An Anthology* (Wiley 1973). On the union of evangelical piety with republican theory, see especially Mark Noll, *America’s God: From Jonathan Edwards to Abraham Lincoln* (Oxford 2002). On “plain speaking” in the Jacksonian era, see Kenneth Cmiel, *Democratic Eloquence: The Fight over Popular Speech in Nineteenth-century America* (Berkeley 1990), ch. 2.

¹¹ For a guide to legal discourse theory, see Peter Brooks, “Narrative in and of the Law,” in J. Phelan & P.J. Rabinowitz, eds., *A Companion to Narrative Theory* (Oxford 2008), 415–26; Robert Cover, *Narrative, Violence, and the Law* (Michigan 1992). A useful analysis of ritual discourse in colonial North Carolina is Richard Lyman Bushman, “Farmers in Court: Orange County, North Carolina, 1750–1776,” in Christopher L. Tomlins & Bruce H. Mann, eds., *The Many Legalities of Early America* (UNC 2001), 388–413.

¹² Wendie Ellen Schneider, *Engines of Truth: Producing Veracity in the Victorian Courtroom* (Yale 2015), 5–6.

¹³ *Report of the Code Commissioners to the Eighth General Assembly of the State of Iowa* (1859), 322–24. On courts as temples of justice, see Michael Kammen, “The Iconography of Judgement and American Culture,” in Maeva Marcus, ed., *Origins of the Federal Judiciary* (Oxford 1992), 248–80.

priestcraft and lawyering: “Take these ministers of public vengeance from your court-houses, and . . . you have broken the chief altar, and silenced and ejected the priest, and your temple of justice, has become a mercenary shamble where profit and loss is selfishly bartered.”¹⁴

Darwin’s statements echoed Field’s 1850 final report of the code. “The courts are, or should be, schools of morals,” Field wrote. “Of all the institutions in society, they should be most sacred to truth.”¹⁵ A church-going Unitarian and brother to a prominent Presbyterian minister, Field was not casually forgetting about churches when he designated courtrooms the most sacred spaces for truth in American society. Field believed “the separation of church and state” (his exact phrase) to be one of the greatest accomplishments of American history, one that had succeeded in making religion a purely private affair.¹⁶ But, as the historian of religion Mark Noll has written, a fully privatized religion made the few remaining institutions of public morality all the more important to a republic that relied on public virtue to counter tyrannical corruption.¹⁷ Truth-speaking thus became a sacred obligation in court, one upon which the health of the polity depended. Monarchical England with its established church might tolerate falsehoods and the nonsense of traditional legal practice, but, codifiers argued, a republic required a legal priesthood to maintain the sanctity of its courts.¹⁸

Truth-telling became an obsessive focus of practice codification reports. “The tendency of our age, is to look for the truth wherever it may be found,” Field announced as a guiding principle for the

¹⁴ *Report of the Code Commissioners* (Iowa 1859), 234. On the criticisms of the common law as “priestcraft,” see Kunal M. Parker, *Common Law, History, and Democracy in America, 1790–1900: Legal Thought before Modernism* (Cambridge 2011), 121–22.

¹⁵ *Final Report of the Commissioners on Practice and Pleadings*, in *Documents of the Assembly of the State of New York*, 73d sess., No. 16 (1850), 274.

¹⁶ David Dudley Field, “American Progress in Jurisprudence,” 44 *American Register and Law Review* 541 (1896), 545–46 (“The greatest achievement ever made in the cause of human progress is the total and final separation of the state from the church . . . , an article of organic law that the relations between man and his maker were a private concern into which other men had no right to intrude.”)

¹⁷ Noll, *America’s God*, 203–16. See also Perry Miller’s posthumously published account of the “tension between law and Christianity in America.” Perry Miller, *The Life of the Mind in America: From the Revolution to the Civil War* (Mariner 1965), 186–206.

¹⁸ For examples of overt application of Protestant religiosity to secular court practice among the codifiers, see especially [Jesse Higgins], *Sampson Against the Philistines, or The Reformation of Lawsuits* (1805); Thomas Smith Grimké, *An Oration on the Practicability and Expediency of Reducing the Whole Body of the Law to the Simplicity and Order of a Code* (1827).

code. “The commissioners feel that they would be sinning against the light of truth” if they did not adopt the Field reforms, wrote the Maryland codifiers. “The object of every rule of evidence ought to be to attain the truth,” wrote Judge Wells of Missouri. “The benefit of all may be lost, or turned to evil, unless there is provided a tribunal . . . with the means of arriving at the truth,” wrote the Kentuckians.¹⁹

All of these reports agreed with Field that no single rule could turn the prior practice of the courts from fiction and falsity towards truth and common sense. Rather they argued that three key reforms would work together as a system to bring the truth into court: pleading facts, verified by oath, with parties competent to stand the scrutiny of cross-examination at trial. Although it is important to understand how those three reforms were to work together, the next chapter will survey the code’s expansion of oathtaking and witness testimony. The focus here is to grasp what Field and other codifiers understood as the central reform of the code, the requirement that parties must plead only the facts of their causes. In time, “fact pleading” became the label that represented the entire system of code remedies and procedure, what many jurists referred to simply as “the American system.”²⁰

In the first report of the code to the New York legislature in 1848, Field argued that “truth, which ought to be the first essential in the proceedings of courts of justice” was “not only disregarded generally, and upon system” in traditional practice, “but that the disregard of truth is forced upon the parties by the present system of pleading.” In Field’s view, the requirement to plead fictions was a requirement to lie. In every use of the common counts or general issue, a litigant pleaded “a denial of what he would not deny in conversation.”²¹ Nevertheless, a solution seemed inherent in the system.

¹⁹ *First Report of the Commission on Practice and Pleadings* (New York 1848), 246; *The Final Report of the Commissioners to Revise the Rules of Practice and Pleadings* (Maryland 1855), 150; R.W. Wells, *Law of the State of Missouri Regulating Pleadings and Practice* (1849), 73; *Report of the Commissioners Appointed to Prepare a Code of Practice for the Commonwealth of Kentucky* (1850), iii. See also *Report of the Commissioners on Practice and Pleadings* (Ohio 1853), 20 (“The age is practical, real, and in earnest; and will have truth, plainness, and good common sense in its courts, as well as elsewhere.”).

²⁰ See, for instance, E.F. Johnson, “The American (or Code) System of Pleading,” *2 Michigan Law Journal* 376 (1893); Charles E. Clark, *Handbook of the Law of Code Pleading* (West 1928). As Douglas Laycock notes, the first work on the modern field of remedies was actually entitled *Remedies and Remedial Rights by the Civil Action According to the Reformed American Procedure*. Douglas Laycock, ed. *Modern American Remedies: Cases and Materials* (Wolters Kluwer, 4th ed. 2010) 1–2 (citing John Norton Pomeroy on Code Remedies (1st ed. 1876)).

²¹ *First Report* (New York 1848), 145, 153. See Chapter 1.

Field believed that although parties often delayed until trial to do it, at some point they presented the “facts” upon which the “law” was to operate.

The distinction between law and fact was at least three centuries old by the time Field codified it in New York. In a wide-ranging rhetorical analysis, Barbara Shapiro argues that the very concept of factuality arose in sixteenth-century English legal practice and only later migrated to journalism, philosophy, and the natural sciences. In its early legal usage, “fact” did not denote “an established truth but an alleged act whose occurrence was in contention.” A man might be “taken in the Fact” of committing arson while others spoke of “false facts.”²² Facts were thus inherently disputed. They might be true or false, provable or not. Law, on the other hand, was fixed and knowable, even when very difficult to discern. Major jurists of the sixteenth century such as Lord Coke accordingly transformed the distinction between law and fact into an institutional distinction. After long training, judges declared the law and guided litigants in legal disputes; lay jurors weighed the proofs and decided which facts were so. The Field Code offered no definition of law or facts, although it often relied on the distinction. Instead, the code followed Lord Coke by resting the distinction not on metaphysics but on institutional competence: juries declared the facts, judges the law. Even for juryless courts like chancery and admiralty, the jury offered a paradigm by which to draw the distinction. Factual propositions could be related in “ordinary language” to laymen, who could evaluate their truthfulness based on the presentation of evidence. The legal effect of the facts, on the other hand, required technical training and might not be obvious to non-lawyers.²³

²² Barbara J. Shapiro, *A Culture of Fact: England, 1550–1720* (Cornell 2000), 11, 44–45

²³ On the history of the law and fact distinction, see William Forsyth, *History of the Trial by Jury* (Clark, NJ: Lawbook Exchange, 1994), 216–248; Ellen E. Sward, “The Seventh Amendment and the Alchemy of Fact and Law,” 33 *Seton Hall Law Review* 573 (2003); Stephen A. Weiner, “The Civil Jury Trial and the Law-Fact Distinction,” 54 *California Law Review* 1867 (1966). *Final Report of the Commissioners on Practice and Pleadings*, in *Documents of the Assembly of the State of New York*, 73d sess., No. 16 (1850), 2:317–21.

Many scholars have focused on traditional prohibitions of juries deciding questions of law, showing how often these rules were contested or at best honored in the breach.²⁴ But even in the province of facts the boundaries could be murky. “Two parties signed a contract” was technically a legal conclusion, where “parties” and “contract” (and even “signed”) were terms of art. But the occurrence was so common and well understood that “ordinary language” might treat the statement as a factual proposition of what happened at a particular time and place. As one codifier explained, “[Party] A promised, looks quite like a fact-statement, until the objector starts the question whether the promise was legal or not, and then the proposition is seen to be a legal one, capable of being divided into its elemental facts of consideration – capacity of promissor – illegal constraint, etc.”²⁵ But then, even these “elemental facts” – consideration, capacity, and duress – involved legal conclusions.

Nevertheless, Field considered the difference between fact and law clear enough as a matter of practice. Whenever counsel summed up their arguments to a jury, the conclusions of those arguments were the facts. Whenever judges instructed juries to return special verdicts stating the facts found (rather than the detailed evidence that pointed to the facts or the legal effects the jury hoped to see applied) they used the same practical reasoning. What was important to Field was that these factual statements appear at the beginning of a controversy, rather than on the day of trial. “Since the facts give the right to relief, it must be proper that they should be stated as they exist,” Field wrote. “It is impossible, that there can be a good reason, why they should be stated untruly, or in any other language” from the outset.²⁶

²⁴ See John Phillip Reid, *Controlling the Law: Legal Politics in Early National New Hampshire* (Northern Illinois 2004); Morton J. Horowitz, *The Transformation of American Law, 1780–1860* (Oxford 1977), 28–29, 141–43. The literature on juries deciding law frequently employs the problematic phrase “jury nullification,” which often assumes, rather than demonstrates, that what the jury is deciding is clearly “against the law.” On the theory of nullification, see Brenner M. Fissell, “Jury Nullification and the Rule of Law,” 19 *Legal Theory* 217 (2013). On American juries as a source of law, see especially Laura F. Edwards, *The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South* (UNC 2009); Renée Lettow Lerner, “The Rise of Directed Verdict: Jury Power in Civil Cases Before the Federal Rules of 1938,” 81 *George Washington Law Review* 448 (2013).

²⁵ *Report of the Code Commissioners* (Iowa 1859), 204.

²⁶ On Field’s view of ordinary language in practice, see his *Short Manual on Pleading under the Code* (1856), 12–13, and discussed in the text below. *First Report* (New York 1848), 141.

Accordingly, Field began his code of practice with pleading as the cornerstone reform. “All the forms of pleading heretofore existing, are abolished” the code declared in its first title on civil actions. It further mandated that “there shall be in this state, hereafter, but one form of action” called a “civil action.” In this single form of action, the complaint was to state “the facts constituting the cause of action, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended.”²⁷

Field’s phrasing met immediate derision from some quarters of the bar, who thought “ordinary language” and “common understanding” conceded too much to vulgar democracy and the impulse to make every man his own lawyer.²⁸ One historian has recently repeated the interpretation that Field hoped to make pleading “so simple and rational that the average citizen would not need a lawyer.”²⁹ Such views misconstrue the intent of Field, a preeminent trial lawyer who maintained throughout his career that “justice is attainable only through lawyers.”³⁰ The point of the code was to instruct his fellow lawyers—and only lawyers—to take the language and style they used at trial (in front of jurors “of common understanding”) and place it up front in the pleadings.

The code was not an attempt to democratize the bar, but Field did argue that courtroom procedure in a democratic republic ought to be legible to citizens in a democratic republic. “Heretofore the records of the courts, have been sealed books to the mass of the people. Though concerned in them as suitors, and participating in them as jurors, they were repulsed by strange forms, and technical language,” the Final Report declared. Fact pleading would restore to public proceedings “at least the same regard to truth, that prevails between members of society, in their daily communications with one another.”³¹ In pleadings, the language of the law had to adopt the ordinary language of commerce,

²⁷ 1848 New York Laws 510, 521; *Final Report* (New York 1850), 225–26, 263–64.

²⁸ See for instance, *Diary of George Templeton Strong*, ed. Allan Nevins, Sept. 28, 1848 (Macmillan 1952), 1:301 (“this reduction of legal practice to a Hottentot standard of simplicity”); Orestes Brownson, “Cooper’s Ways of the Hour,” *Brownson’s Quarterly Review* 5:3 (July 1851), 285.

²⁹ Friedman, *History of American Law*, 397.

³⁰ David Dudley Field, *Legal Reform: An Address to the Graduating Class of the Law School of the University of Albany*, 11.

³¹ *Final Report* (New York 1850), v; *First Report* (New York 1848), 153.

of electioneering, of preaching. Like the Puritans of his Massachusetts homeland, Field preferred public speech to be “plain.” The code produced a “plain and rational system of procedure” that required pleading “a plain statement” simple enough that “a plain man” could understand it.³²

Indeed, Field’s defense of the code on the basis of popular sovereignty had a distinctly Puritan cast to it. “In a country where the people are sovereign, where they elect all officers, even the judges themselves, where education is nearly universal,” he wrote in the Final Report, “it was not long possible, to keep the practice of the courts enveloped in mystery.”³³ Beginning with William Sampson, American codifiers had often likened their critiques of the “mysteries” of the common law to Protestant attacks on Catholic superstition, but Field pressed the analogy further.³⁴ The forms of action came from an “artificial system of procedure, conceived in the midnight of the dark ages, established in those scholastic times when chancellors were ecclesiastics and logic was taught by monks.” It might be “very fit for the schoolmen with whom it originated, but” it was “unfit for the practical business of life.” Robert Yelle has written that codification efforts in British India comprised explicitly Protestant efforts to “disenchant” Hindu law, transforming magical utterances into mundane charges and counter-charges in the courts. Field likewise saw his code as part of the overthrow of medieval scholasticism and superstition begun by the Protestant Reformation. “There is no magic in forms,” the first report of the code concluded. The forms of action were merely “old jingles of words, invented somewhere about the times of the Edwards.”³⁵ In Field’s view, their perseverance was not only unreasoning superstition, but a commitment to falsehood in a republic that could not suffer corruption in its courts or mystification of its people’s law.

³² David Dudley Field, “The Study and Practice of the Law,” 14 *Democratic Review* 345 (1844). David Dudley Field, *What Shall be Done With the Practice of the Courts? Shall It Be Wholly Reformed?* (1847), 21–22.

³³ *Final Report* (New York 1850), v.

³⁴ On the connections between codification proposals and Protestant anti-Catholic polemic, see Kellen Funk, “When Chancellors Were Ecclesiastics and Logic Was Taught by Monks: The Theological Premises of American Codification,” unpublished manuscript, DOI: 10.17605/OSF.IO/56ZDS.

³⁵ *First Report* (New York 1848), 141; David Dudley Field, *Legal Reform: An Address to the Graduating Class at the University of Albany* (1855), 20; Robert A. Yelle, *The Language of Disenchantment: Protestant Literalism and Colonial Discourse in British India* (Oxford: Oxford University Press, 2012; Field, “Study and Practice of the Law,” 349.

So Little Danger in the Courts: Judge and Jury in the Reformed System

Although the jury was crucial to marking the distinction between law and fact, Field gave comparatively little attention to the jury as an instrument of truth-seeking. Across all their reports, the New York commissioners emphasized that fact pleading was the key to truth-seeking in the civil courts. “If the party be not confined in his pleading to what he believes, no adequate reform in pleading can ever be affected,” the Final Report concluded.³⁶ Other American codifiers echoed the New York emphasis on factuality, and, like Field, all generally treated the right to a jury trial as incidental to truth-seeking reforms. Because most state constitutions preserved the right to jury trial (at least in cases where it “has been heretofore used,” as New York’s did), codifiers were generally content to repeat these preservation clauses with little comment. Only those commissions that reported adversely on the Field Code, such as Maryland’s, poeticized jury participation as “the great end of government.”³⁷

The codifiers’ indifference to the jury is at odds with historical commentary on the Field Code. Some accounts present the code as a jury-empowering attempt to thwart judicial tyranny, a product of Jacksonian democracy that expanded lay participation in civil justice.³⁸ A literal reading of the law provides some support for these views. Since the codifiers hoped to provide “a uniform course of proceeding, in all cases,” and since by constitutional mandate they had to make jury trial available in some cases, the codes accordingly allowed factual disputes in any case to be resolved by a jury.³⁹ Commentary on the rules occasionally noted that equity’s juryless proceedings arose when jurors

³⁶ *Final Report* (New York 1850), 274. See also *Second Report of the Commissioners on Practice and Pleadings* (New York 1849), 12 (“The Commissioners regard the verification of pleading of indispensable necessity in the system adopted by the code.”)

³⁷ New York Constitution of 1846, art. 1, § 2. See *First Report* (New York 1848), 51 (expressing a preference for bench trial in “special proceedings” derived from equity: “They are not cases in which trial by jury ‘has been heretofore used,’ [citing the constitution] and may therefore be tried in any other manner”). *The First Report of the Commissioners to Revise the Rules of Practice and Pleadings* (Maryland 1855), 17.

³⁸ See Stephen N. Subrin, “David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision,” 6 *Law and History Review* 311 (1988), 318–19; 333–34. On the legal system’s increasing reliance of the jury over time, see George Fisher, “The Jury’s Rise as Lie Detector,” 107 *Yale Law Journal* 575 (1997).

³⁹ *First Report* (New York 1848), 76–77.

“could neither read nor write” and might have been led astray by gullibility or ignorance. But, wrote Missouri’s codifier, in modern America, “their daily business and intercourse with all classes enables them to know more of men, their passions, interests, feelings, and prejudices, and the influence these may exercise over them, than the judges do.”⁴⁰

Most code reports had a different focus, however. Field thought his code a major advancement in American democracy—but for its principles of pleading rather than any expanded jury right. Plainspoken, factual pleadings created a system in which nothing “which any person of ordinary intelligence and education cannot understand.”⁴¹ Such a system might help a juror better understand his duty, Field granted, but he and the other codifiers hoped to excuse jurymen from that duty altogether. Along with an expanded right to a jury trial came an expanded right to waive a jury. Renée Lettow Lerner has recently argued that the Field Code’s encouragement of waiver represented a watershed moment in the gradual vanishing of the American civil jury. “One of the most burdensome duties of the citizen, is the performance of jury service,” Field wrote. “If that burthen can be lessened . . . we shall regard it as a great benefit.” If jurors were now better educated, more industrious, and generally wiser in the ways of the world, all the more reason for the legal system to stay out of their way and let them contribute to the bustling economy.⁴²

Critically for Field, nothing in the jury system inherently promoted the search for truth. The commissioners preferred “the rapid examination which takes place on common law trials before juries,” but figured “a judge is as competent to estimate the weight of testimony as a juror, and can do it as rapidly,” as the First Report argued. It was the oath-bound cross-examination by skilled counsel that “leads to the truth,” rather than the presence of lay jurors.⁴³

⁴⁰ Wells, *Law of the State* (Missouri 1849), 45–46, 70–71.

⁴¹ *Final Report* (New York 1850), v.

⁴² Renée Lettow Lerner, “The Failure of Originalism in Preserving Constitutional Rights to Civil Jury Trial,” 22 *William & Mary Bill of Rights Journal* 811 (2014), 835–36; *First Report* (New York 1848), 189.

⁴³ *First Report* (New York 1848), 178. See also New York constitution of 1846, art. 6, § 10, and for background, Amalia Kessler, “Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial,” 90 *Cornell Law Review* 1181 (2005).

In contrast to the jury, Field's code accorded much more power and responsibility to the judiciary than commentators have appreciated. Given the importance of candid pleading to his system, the code could hardly have done otherwise. Although Field chided conservative judges for turning their backs on the future, his ideal vision for pleading arose from a deeper past. In the thirteenth and fourteenth centuries, English sarjeants-at-law conducted their pleadings orally before the judges, exchanging views on theories of liability and raising factual considerations until a dispositive issue arose for trial. "When the presence of the judge was withdrawn," Field observed, pleading "lost an essential part of its original character."⁴⁴

Oral pleading, as Field understood it, had involved an element of give-and-take among lawyers and judges. Judges could advise on the spot about the legal effects of any particular plea, and lawyers could disclose the actual facts of their cases piece by piece until they reached a disputed point to be resolved by a jury. "The substitute for that now is the trial," Field argued. The evasions of common counts and general issues in modern written pleadings allowed counsel to plead multiple causes and defenses and then present their best evidence at trial. Using procedures that mimicked medieval pleading, lawyers at the commencement of the trial orally negotiated disputed points and offered their proofs before the judge determined which points and which proofs would go to the jury. Field admitted that a system that relied exclusively on oral pleading would be impractical in a large commercial state where parties litigated complex multi-party and multi-issue transactions, but he nevertheless hoped to turn written pleading back towards the judicially managed give-and-take of medieval practice.⁴⁵ Factual pleadings rather than formulaic fictions would inform parties about the nature of the dispute and the proofs they would need to gather well before trial – so long as judges did their part to keep pleaders honest.

⁴⁴ *A Short Manual on Pleading*, 28–29.

⁴⁵ *First Report* (New York 1848), 144; *A Short Manual on Pleading*, 28–29.

Accordingly, the code empowered judges “when the allegations of a pleading are so indefinite or uncertain, that the precise nature of the charge or defence is not apparent” to require the parties to amend. Further “at any time, in furtherance of justice,” the court could “amend any pleading or proceeding, by adding or striking out the name of any party, or by correcting a mistake . . . in any other respect, or by inserting other allegations material to the case.” If upon trial there arose a variance between the pleadings and the proofs, the court could order “immediate amendment” of the pleadings to conform to the evidence presented – this in addition to the direction that the court must grant “any relief consistent with the case made by the complaint” (except in default judgment). Taken literally, all these provisions of the code granted judges full power to redraft pleadings, even to the extent of granting unrequested remedies against previously unnamed parties based on allegations or arguments never raised by counsel.⁴⁶ The original draft of the code had restrained judges from “substantially” changing “the cause of action,” but Field dropped this language in the 1849 amendments, explaining “there is so little danger of the courts going too far, in allowing amendments, that the qualification can be omitted without danger. It is the intention of the commissioners to allow and encourage amendments of every kind, whenever justice will be promoted by them.”⁴⁷

Both treatises and the early cases that construed the code in the late 1840s and early 1850s demonstrate that jurists largely understood Field’s aim to move the looser, more informal negotiations of oral pleading from trial to a preparatory pretrial phase. Judge Edmonds announced that “it has been very seldom . . . that I have taken occasion to examine the [written] pleadings.” He instead relied on legal counsel to inform him orally of the dispute at trial. Edmonds declared his optimistic hope that the code could bring the same level of candor to written pleadings before trial. In *Boyce*, Augustus Hand (1803–1878), expressed similar appreciation that the code was attempting to produce candor at

⁴⁶ 1848 New York Laws 525–26 §§ 145–52; 1849 New York Laws 648 §§ 159–60; *Second Report* (New York 1849), 29; *Final Report* (New York 1850), 281.

⁴⁷ 1848 New York Laws 526 § 149; *Second Report* (New York 1849), 29–30.

an earlier, less hurried stage of proceedings. "When the law and the fact are decided by the judges, . . . the judge selects the points in the pleadings to which the proofs are to be applied," he wrote. "But when this is done in the haste of a jury trial it is more difficult, and casts upon the court great power and responsibility, and this selection often takes the counsel by surprise."⁴⁸

Although he admired the attempt at candor, Hand worried that Field's effort to produce facts without any regard to rules of form and to accord liberal powers of amendment to judges would result in troubling consequences. Without "certain settled principles by which good pleading is tested," he reasoned, "doubt, uncertainty and perplexity, to say nothing of constant novelty and diversity, will tend to render the administration of justice at least tardy, precarious and irregular, if not capricious."⁴⁹ Indeed, although Field was one of the more prominent critics of "judge-made law," his code had the curious quality of legitimizing and extending the very activities of the oracular judge that had troubled reformers and codifiers like William Sampson. Upon the code's enactment, judges gained new powers to declare the law by passing judgment on the sufficiency of pleadings apart from all traditional restraints of common law form or equitable analogy to those forms. And, as the cases showed, when "conservative" judges refused to apply the code "in its spirit," they frequently acted to maintain the rule of law in the sudden absence of the rule of writs.

Facts are Facts: The Fate of the Forms

For treatise writers seeking to explain the code, the most striking feature of the legislation was that nowhere in an 800-page code of pleading could one find precise instructions on how to plead. "It *abolishes* but it does not *reconstruct*; it tears down an old system, but it does not build up a new and complete one in its place," complained a prominent early expositor of code practice in New York, George van Santvoord (1819–1863). Another treatise author, Henry Whittaker (1808–1881), wrote that

⁴⁸ Edmonds, *An Address on the Constitution and the Code of Procedure*, 14; Boyce, 7 Barbour at 86.

⁴⁹ Boyce, 7 Barbour at 87.

under the code, “Every case must, in fact, depend upon its own circumstances, and each step in pleading has its own peculiar rules as to sufficiency or insufficiency,” but the code contained few of these “peculiar rules.” It required sufficient facts “constituting the cause of action,” but defined none of those words and offered no guidance on what even a basic contract claim ought to look like.⁵⁰

The material that follows is necessarily some of the most technical and complicated in this study, so it may help to begin with a more trivial example to develop our sense of the lawyer’s craft.⁵¹ Suppose a disgruntled season ticket holder sues for a refund, or even damages, claiming his perpetually winless professional sports team “isn’t a real football team anyway.” It would take only a slight sense of civic commitment for us to wish such a claim quashed as early as possible so that scarce public resources are not expended on it. A law professor might say there’s no “cause of action” here, though that would be an inartful way of putting it. Of course there is a “cause” of action: the poor performance of the team. In the older language of the common law, we could even call this a “wrong” that has occurred in the world. But it is a wrong without a remedy, a wrong the public courts need not take cognizance of, based on a well developed social sense that the wrong is trivial, not rising to the level of an actual injustice.

So our one-time fan repleads, and this time claims that a recklessly errant throw by the team has caused him great physical injury, and he seeks compensation from the team’s owner. Now the complaint sounds much more like a wrong the courts have a tradition of remedying, but we may need to know more. If, “in fact,” what the fan means by “recklessly errant throw” is simply that a game-winning pass was dropped, and “great physical injury” means only that the fan was distressed by another losing season, we are back where we started with a frivolous suit seeking an undeserved remedy.

⁵⁰ George van Santvoord, *A Treatise on the Principles of Pleading in Civil Actions under the New York Code of Procedure* (2d. ed. 1855), 12, 14, 62; Henry Whittaker, *Practice and Pleading under the Code* (2d. ed. 1854), 1:325.

⁵¹ With appreciation to John H. Langbein’s lectures on the history of the common law for supplying this particular triviality.

Without getting too ahistorical, one could say that the aim of pleading in the common law tradition is to get the right match between 1) a legal theory of a wrong the courts can remedy and 2) the facts of an encounter that seem sufficiently like the facts of other cases in which the remedy has been applied. But despite these requirements being the foundation of all mediated legal remedies, nowhere does the law spell out either one with much clarity. The practitioner's sense of craft arises in a half-articulated understanding of which claims and facts will do the trick. There is no inherent reason a court could not remedy the sports fan's discontent, except that it has not done so before, and a well-developed craft sense constrains the imagination from seeing how it could be done now.⁵² It would be utterly jarring to that craft sense to continue to require (1) and (2) above, but to forbid any reference to past practices. Was that, practitioners had to ask, what the Field Code did?

To return to mid-nineteenth-century New York, van Santvoord spoke for a great number of lawyers when he wrote that "the question that meets [a lawyer] on the threshold is, what facts constitute a good cause of action? and without the aid of any form or precedent to guide him, this question must be satisfactorily answered before he can safely take the first step in pleading." By speaking of causes of action without defining any of them, the code appeared to incorporate the common law by reference. Van Santvoord argued that since "the act itself does not pretend to furnish rules to determine in all cases what shall be a sufficient 'statement of the facts constituting a cause of action or defence' . . . , this must still rest upon those well established general rules and principles of pleading which existed at common law."⁵³

Field interpreted such claims as an attempt to overthrow his code and preserve common law practice exactly as it was, so he tried to supply the missing definitions in his law reform tracts. "What are the 'facts' to be stated in a pleading, is really a question of no difficulty, if the code be read, and

⁵² See, in a similarly lighthearted vein, see Samuel L. Bray, "The Parable of the Forms," unpublished manuscript (May 24, 2018), <https://dx.doi.org/10.2139/ssrn.3178122>.

⁵³ van Santvoord, *A Treatise on the Principles of Pleading*, 12, 14, 62.

fairly administered," Field wrote in the tract criticizing New York judges. "The 'facts constituting the cause of action,' or 'constituting a defense,' are the facts, to which the law is to be applied."⁵⁴ Field's tautological definition was hardly an improvement. Neither did the Final Report of the code define "fact" (and indeed, it engaged in its own tautology by declaring that "judicial remedies are such as are administered by the courts"), nor were other codifiers able to offer more precision. "Indeed, facts are facts," the Iowa code affirmed.⁵⁵

As jurists continued to struggle with the requirements of fact pleading, Field's Law-Reform Association published another tract in 1856 titled "A Short Manual of Pleading Under the Code." Its second rule (after "pleadings must be true") declared "FACTS ONLY MUST BE STATED. This means the *physical facts*, cognizable to the senses, or capable of being shown to a jury without the aid of legal inferences; the *facts* as contradistinguished from *the law*, from *argument*, from *hypothesis*, and from *the evidence* of the facts." The rule that pleadings should not state the law or arguments, however, "does not imply that the rules of logic, the rules which lie inherent in the nature of things, exist for pleading no longer. They must exist in every system." How then, did one avoid pleading the frivolous details of evidence on the one hand without conclusory statements of law on the other? "What is and what is not essential, an uninstructed person might not readily discover," Field admitted, "but a lawyer ought not to be in doubt."⁵⁶ Thus even the codifier of pleadings and practice ultimately relied on unwritten practice in order to explain his codification of pleading.

Field did attempt to articulate what it was lawyers did in practice. "The following question will determine, in every case, whether an allegation be material; Can it be made the subject of a material issue; in other words, if it be denied, will the failure to prove it decide the cause in whole or in part?" If so, it was neither evidence nor law but an "ultimate fact" that belonged in a pleading.

⁵⁴ Field, *Administration of the Code*, 18.

⁵⁵ *Final Report* (New York 1850), 10 § 5; *Report of the Code Commissioners* (Iowa 1859), 204.

⁵⁶ *A Short Manual on Pleading*, 10, 13-14.

Field, however, considered the material elements of a claim to be the essence of substantive law and thus inherently unable to be prescribed in a procedure code.⁵⁷ When Field undertook the codification of all civil law in the 1860s, he proceeded on this principle, defining property and contract rights as enumerated lists of material elements, the violation of which could be easily pleaded. In the meantime, Field argued that substance and procedure worked together in the same way—the substantive elements being merely scattered across case reports rather than collected in a code.⁵⁸ Elements were to be defined by substantive law and not by procedural form.

Thus Field paradoxically declared that “the facts vary, with the cases as they occur, and no fixed form can be given, which will correspond with their ever-changing phases” while he simultaneously produced a “book of forms” to guide pleaders.⁵⁹ While Field asserted that pleadings under the code had no stable form and that an attempt to force any two cases with their infinite variety of facts into one form could re-introduce artifice and technicality into the system, he nevertheless recognized “natural” classifications in the law that distinguished, for instance, claims arising on contracts from those based on physical injury, recovery from a trespasser on real property versus recovery of assets from one’s trustee. The form book indicated that these various types of claims would indeed have standard elements pleaded across all claims of the same type, but Field imagined that the elements arose from a substantive body of law rather than being dictated by the forms themselves.⁶⁰

It was on this point that practitioners struggled to follow Field, for most practitioners had learned the law not as discrete bodies of substantive doctrine (say, contract and tort), but as so many varieties of pleading requirements. One knew which contracts required express consideration not because of a substantive law of contracts but because one knew which cases required consideration to be pleaded and which permitted it to be implicit. Such practitioners were astonished when a code of

⁵⁷ *A Short Manual on Pleading*, 15.

⁵⁸ See *The Civil Code of the State of New York Reported Complete by the Commissioners of the Code* (1865).

⁵⁹ Field, *Administration of the Code*, 18. *Book of Forms Adapted to the Code of Procedure* (1860).

⁶⁰ See *First Report* (New York 1848), 261-71; *A Short Manual on Pleading*, 18-28; *Book of Forms Adapted to the Code of Procedure*.

pleading offered none of this information, and treatise writers worked to supply the deficiency. Both Whittaker and van Santvoord devoted hundreds of pages of their treatises on pleading to provide a primer on the law of contracts, tort, real and personal property, and van Santvoord produced an additional treatise on pleading “in former equitable cases” that again offered an introductory guide to mortgages, guardianship, and other matters of equitable jurisdiction.⁶¹ “It is not true then,” van Santvoord explained, “as one on a cursory glance might be led to suppose, that the main *rules* of pleading, founded as they are in sound logic and solid reason, are utterly abolished, though the *forms* may be.” Just as treatises on “pleading and practice” before the code had run over a thousand pages covering major bodies of Anglo-American law, so early treatises on code practice continued to include broad surveys of legal rules in their treatments on pleading. “Pleading, as we have seen, is a matter of substance and not of form, under the Code,” van Santvoord concluded, but the old forms were the only guides to the new substance.⁶²

After writing his pleading manual and book of forms, Field took a further step towards clarifying his reforms by subsidizing a new treatise written by his clerk and soon-to-be-partner Thomas G. Shearman (1834–1900). Field had hired Shearman shortly after the latter had been admitted to the bar at twenty-seven years old, and in the course of his clerkship Shearman thoroughly adopted the outlook of his mentor. He wrote in preface to his treatise that “the conviction has grown upon me more and more, throughout the progress of the work, that the failure of the profession in general to appreciate and accept the radical change effected by section 69 of the Code is, more than any and all things else, the source of the confusion and uncertainty which have infected our practice for the last

⁶¹ Whittaker, *Practice and Pleading under the Code*, 1:164–87 (surveying essential requisites in a variety of cases), 259–72 (surveying grounds for demurrer for insufficiency in a variety of case types); van Santvoord, *A Treatise on the Principles of Pleading*, 216–69 (contracts), 271–93 (tort, real and personal property – under the general heading of trespass), 293–08 (real property in equity); George van Santvoord, *A Treatise on the Practice in the Supreme Court of the State of New York in Equity Actions Adapted to the Code of Procedure* (1860).

⁶² van Santvoord, *A Treatise on the Principles of Pleading*, 12, 14, 17 (“A full consideration, therefore, of the subject of the science of pleading might be said to embrace the discussion of the principles of law on which the action is grounded, and which determine the kind and measure of relief.”).

sixteen years." At the time, section 69 was, of course, the one declaring that "the distinction between actions at law . . . are abolished."⁶³

Instead of "forms of action" Shearman preferred to speak of "kinds of relief." He introduced the term when defining a "cause of action," connecting the latter to the traditional idea that common law remedies rectified a defendant's wrongful act: "A cause of action, although for the sake of brevity we shall call it a *claim*, is nevertheless not accurately described by that word. For upon a single cause of action the plaintiff may be entitled to several distinct kinds of relief. The *cause* of action is the defendant's wrongful act, and not the remedy which the plaintiff seeks." Having pointed out the false equivalency of claims for relief and causes of action, Shearman nevertheless maintained the substitution through the remainder of his treatise. He classified claims for relief into those seeking recovery of a debt, those seeking damages for personal injury, and those affecting specific property. And like the other treatises, Shearman advised that in each claim, "every fact which, at common law or in equity, was necessary to sustain the pleader's case, must be alleged in his pleading." Thus, Shearman too included a long primer on the law of contracts, illustrating material elements case by case, although his presentation had a Fieldian cast to it. Decisions at common law and in equity were treated as providing a set of "rules" for contracts, and these rules informed the requirements for what facts ought to be pleaded in particular cases.⁶⁴

Thus despite the contentious tone taken by Field and several New York jurists, both sides basically agreed that substance and form might be distinguishable without being separable. In Shearman's rendering, substantive law defined the material elements of a right to recover a remedy,

⁶³ John L. Tillinghast and Thomas G. Shearman, *The Practice, Pleadings and Forms in Civil Actions in the Courts of Record in the State of New York* (1870), v. See also John Townshend, *The Code of Procedure of the State of New York as Amended to 1868* (1868), 85 § 69. Although purportedly a second volume of Tillinghast's *Practice*, Shearman had become the sole author of the joint work in the mid-1860s and had largely rewritten the first volume after his own design. On Shearman's apprenticeship with Field, see Charles Parlin & Walter Earle, *Shearman & Sterling, 1873-1973* (Shearman & Sterling 1973), ch. 1.

⁶⁴ Tillinghast & Shearman, *The Practice, Pleadings and Forms in Civil Actions*, 57, 17, 82-88 (equitable claims), 89-101 (contract claims), 102-10 (tort claims).

and the material elements dictated the form of pleading and procedure. Traditional practitioners, however, reversed these premises. When jurists like Edmonds wrote that “the principles of pleading are left untouched,” they were not seeking to repeal the code. Rather they were replying to Field that substantive rules were in fact found in the old rules of pleading. Van Santvoord summarized his understanding of the code with the maxim: “The forms of action are abolished, but their substance and the principles which govern them are preserved.” And Judge Barculo agreed that “there is *substance* in the distinction between actions.” Therefore it was in the old rules of pleading where lawyers could inform themselves about the substantive content of the new rules.⁶⁵

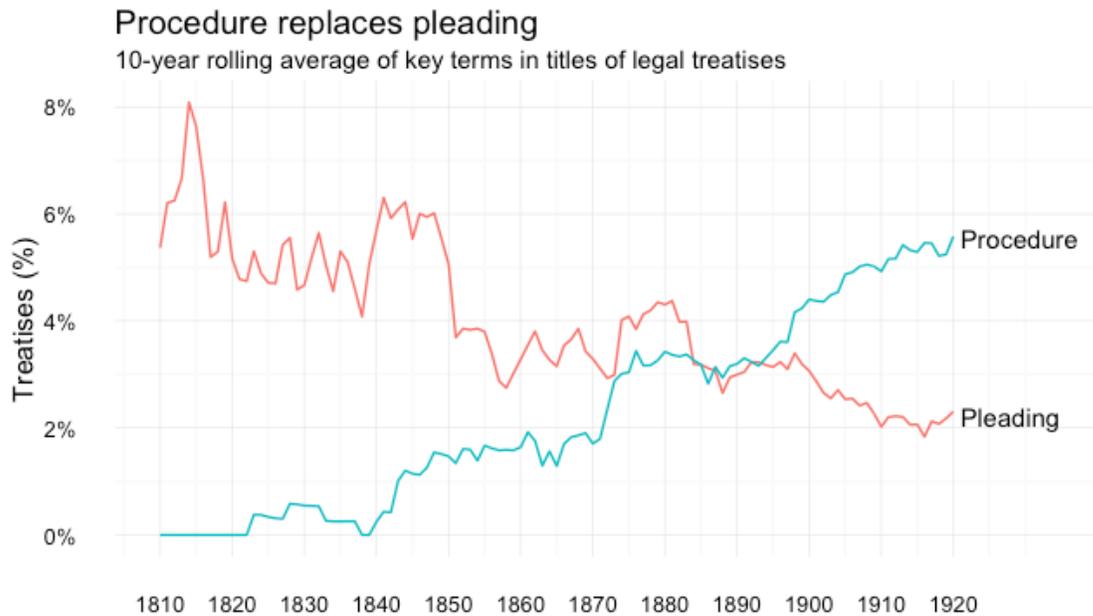
Several decades after the rise of code practice, the English legal historian Henry Maine wrote his famous observation in *On Early Law and Custom* that “so great is the ascendancy of the Law of Actions in the infancy of Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure; and the early lawyer can only see the law through the envelope of its technical forms.”⁶⁶ Maine did not fully appreciate that the reversal of his aphorism had occurred in his own lifetime. His “early lawyer” described American practitioners in the 1860s quite well. Applying the code in practice, jurists believed the old forms of action best apprised lawyers what elements of a claim they would have to prove at trial – the envelope of technical form continued to carry the substantive law within.

After a couple decades of self-consciously extracting substantive rules from old formulary pleadings, traditionalist lawyers gradually turned Field’s theoretical prescriptions into an actual description of the law in practice. Treatises on “practice” in general became scarce, while treatments of “procedure” grew slimmer as they focused less on the general rules of civil obligations. (See Figure 16.) As G. Edward White has noted, with the abolition of the formulary system, tort became a distinct

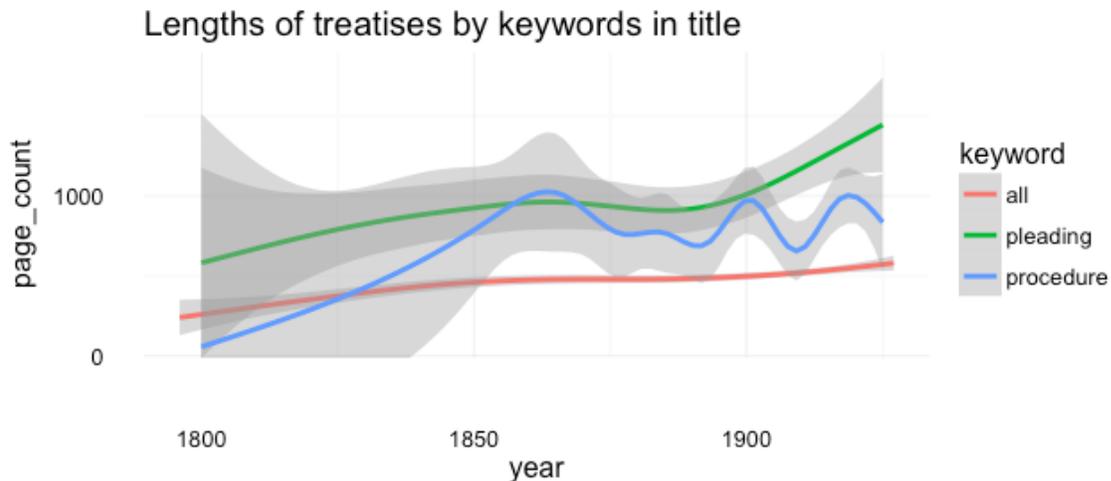
⁶⁵ *Dollner v. Gibson*, 3 Code Rep. 153 (N.Y. Supreme Court 1850), 154; van Santvoord, *A Treatise on the Principles of Pleading*, 56; Le Roy, 8 Howard at 376. See also William Hornblower, “Fifty Years of Reformed Procedure,” 6 *American Lawyer* 288 (1898), 290 (“Forms of actions are abolished, but kinds and classes of action remain.”)

⁶⁶ Sir Henry Sumner Maine, *On Early Law and Custom* (London, 1890), 389. On Maine’s historicism, see David M. Rabban, *Law’s History: American Legal Thought and the Transatlantic Turn to History* (Cambridge 2013), 115–49.

Figure 16.



Besides some interest in Louisiana’s new code of procedure produced in 1820, “procedure” did not exist as a legal category in America until the production of the Field Code in the 1840s. “Procedure” then gradually eclipsed “pleading” as the dominant description of civil practice.



In the early nineteenth century, as in early modern England, “pleading and practice” were treated as synonymous to the law itself. Pleading treatises tended to be the bulkiest literature on the market, containing far more pages than the average treatise on more specialized topics. With the rise of the codes, “civil procedure” briefly came to encompass the same legal breadth but gradually shrank as it shed “substantive” categories such as the law of torts into their own legal domains. The spikes in the early twentieth century represent the rise of “case books” – long reprints of appellate cases for the purpose of academic instruction.

Data drawn from American treatises in Gale Group’s Making of Modern Law: Legal Treatises database. For details, see Appendix B.

legal domain by the end of the century, a substantive body of law with its own doctrines and rules. As in torts, so also in contracts and a growing number of subfields: “substantive law” now defined the elements of rights claims, and pleaders had to learn their content from these substantive rules.⁶⁷

Of course, the separation of substance from procedure did not happen immediately and, as jurists tried to tell Field, could not happen immediately. “The science of pleading is broken up. Its foundations are now to be relaid,” wrote Judge Selden. “Let each one whose duty it may become to aid in the erection of the new edifice, lay his block; and if found not to fit, let more skillful masons remove it and fill the vacancy with another.”⁶⁸ Without any guidance from the code, the substantive elements of each common law claim would have to be formulated judge by judge and case by case. Each would have to inquire how a claim would have been pleaded under the old forms, which parts of those forms created material substantive elements, and which were mere “technical” or fictitious requirements. Some inquiries would be more difficult than others. In trover (money damages for wrongful taking of personal property), the allegation that one casually lost the goods was clearly a fiction that need no longer be pleaded. But what about an allegation that the plaintiff had demanded the return of the goods and been refused? Most trover cases never went to issue over the sufficiency of the plaintiff’s pretrial demands, but a few had. Was a demand then a disposable fiction or a material element the plaintiff had to plead to justify a recovery? Van Santvoord advised that in some cases the demand was material (bailment, taking of goods) while in others it would be a needless fiction (the wrongful sale or destruction of property).⁶⁹

In its ultimate practical effect, the Field Code did not abolish the forms of action – it multiplied them, exponentially. Whereas before the code a pleading using the form of trover could introduce nearly a dozen claims relating to the wrongful conversion of personal property, now each individual

⁶⁷ G. Edward White, *Law in American History, Volume 2: From Reconstruction Through the 1920s* (Oxford 2016), 230–80.

⁶⁸ Wooden, 6 Howard at 148.

⁶⁹ van Santvoord, *A Treatise on the Principles of Pleading*, 276–77.

theory had its own form, defined by its material elements, all of which had to be pleaded in proper order and with sufficient supporting facts. Shearman's treatise provided over three hundred form pleadings, and even that was "much reduced from what was contemplated," leaving out many forms for formerly equitable actions.⁷⁰ Paradoxically, the procedure code may have contained much more material than civilians considered to be "procedure," but it contained far less material than Anglo-American jurists had considered to be the law of "pleading and practice," which the commission purported to codify.

Judges were left to fill in the gaps, defining the material elements of each remedial claim and thereby creating the very oracles that codification was supposed to destroy. By making causes of action substantive and leaving them undefined in the procedure code, Field created the conditions for judges to directly declare the substantive law rather than deciding mere rules of proof or pleading as early modern practitioners had described their practices. At times, judges expressed their worries that the code "casts upon the court great power and responsibility"; but instead of drawing attention to the need to declare substantive law, judges more often proclaimed faithful adherence "to certain settled principles by which good pleading is tested."⁷¹

The Chain and the Rope: "Material" Facts at Law and in Equity

The transformation of the old formulary system into sets of substantive material elements for each claim raised a further complication in light of the code's fusion of law and equity, because the very notion of materiality appeared to differ in each tradition. "The allegations in a pleading at law, consist of a *chain* of facts, all tending to establish some definite legal right," Judge Selden explained.

⁷⁰ On the multiplicity of claims that could come under a single form of common law action, see Wells, *Law of the State* (Missouri 1849) 44; *First Report of the Commissioners* (Maryland 1855), 44-45. Tillinghast & Shearman, *The Practice, Pleadings and Forms in Civil Actions*, iv. Cf. William P. LaPiana, "Just the Facts: The Field Code and the Case Method," 36 *New York Law School Law Review*, 287 (1991), 313 ("Yet, whatever David Dudley Field hoped the changes would accomplish, the New York courts managed to limit the effect of the Code to the abolition of the forms of action as verbal formulas only, not as legal concepts.").

⁷¹ Boyce, 7 Barbour at 86.

“An equity pleading, on the contrary, frequently, if not generally, consists of an accumulation of facts and circumstances, without logical dependency, but the accumulated weight of which is claimed to be sufficient to raise or defeat an equity.” Following the same metaphor, Judge Barculo pithily explained that “the one is a chain which is worthless if a single link fail; the other a rope composed of numerous strands, some of which may give way, and yet enough remain to secure some relief.”⁷² In effect, each system had used a different standard of materiality. At common law, “material” meant *dispositive* of the case; in equity, “material” meant *considerable*.

The dilemma judges faced was that any decision they made on defining the material elements of a claim was likely to run afoul of some provision of the code. Common law pleadings were plain and concise, but often conclusory. Equitable pleadings were factually detailed and devoid of fiction, but they were rarely “simple” and concise as the code seemed to require. An early consensus developed among New York judges that it was better to err on the side of decisive, conclusory statements of common law pleading.⁷³

One of these cases—a debt collection—was the one that opened the rift between Field and Judge Edmonds. Plaintiffs Dollner and Potter had sold nearly \$600 worth of stearin (a fat used in candle making) to Adam Maitland, an agent of defendant Gibson, but Gibson never paid the bill. How should Dollner have complained? Was it a material “fact” that the partners sold stearin “to the defendant”? That seemed to involve several conclusions of law, particularly the rules of how agents bound their principals. Were the facts, then, that the partners sold to Maitland, and “Maitland acted with the knowledge and assent of said defendant, and as his agent”? That might stray too far into

⁷² Wooden, 6 Howard at 152; Le Roy, 8 Howard at 375. Summarizing the case law, van Santvoord explained that “the words *material issue* are to be understood . . . as a single issue *decisive of the whole case*,” but in equity claims consisted of “a variety of facts and circumstances, one of which, if denied or disproved, was not entirely decisive against the party claiming; and yet such a fact might be, or might become in the failure of proof of other allegations, a material fact to entitle the party to the particular relief sought, and therefore properly set forth in the pleading.” van Santvoord, *A Treatise on the Principles of Pleading*, 75.

⁷³ See, for instance, Dollner, 3 Code Rep. at 153; Millikin v. Cary, 5 Howard 272 (N.Y. Supreme Court 1850); Boyce, 7 Barbour at 80; Shaw v. Jayne, 4 Howard 119 (N.Y. Supreme Court 1849).

immateriality, for those statements would not have been decisive of the case at common law (express agency might be disproven, but Gibson's liability would still stand). Dollner and Potter's counsel opted for the latter strategy to include more facts.⁷⁴

In hearing the defendant's motion to strike out the complaint, Edmonds, who had sympathetically explained the code to law students two years earlier, now showed some peevishness in having to apply the code in daily practice. He opined that "among the many questions of doubt and difficulty which have arisen under the Code—and those have been very numerous which flow from the imperfect and inartificial use of the language in which it is expressed—there has been none which has given rise to as much diversity of opinion as that in regard to pleading." Even in the paradigm case of a simple creditor's remedy, the line between evidence, fact, and law was difficult to draw. In Edmonds's experience, pleaders "are misled by their familiarity with the old mode of pleading in equity That whole thing, however, is changed."⁷⁵ Edmonds understood the requirement for "simple," straightforward pleadings to refine the old common law forms by stripping away their fictions and leaving "the dry allegation of the fact, without detailing a variety of minute circumstances, which constitute the evidence of it." In this case, the material element was the sale and delivery of goods, so the "dry allegation of the fact" should have stated merely that, not the immaterial actions of intermediate agents.⁷⁶

Edmonds's rule was easy to administer in former common law actions, which may have been why so many other judges adopted it at first. Nearly the same pleadings as before could be used and

⁷⁴ Dollner v. Gibson, 3 Code Rep. 153; 2 Edmonds 253 (N.Y. Supreme Court 1850).

⁷⁵ At chancery, where *viva voce* trials were uncommon, written pleadings supplied the role of testimony by stating the detailed circumstances of a case. Equitable pleading, according to Edmonds, "was not merely a mode of setting out a claim, but was a means of obtaining evidence of particular facts to substantiate that claim, and it necessarily dealt in probative facts as well as in the legal effects of them." 3 Code Rep. at 153–55; 2 Edmonds at 253–55. Numerous cases commented that although the code seemed to recommend equitable pleadings, the pleadings ought to have this critical difference of omitting the evidentiary examination. See, for instance, Wooden, 6 Howard at 155 ("The pleading can no longer be used as an examination. All that is inserted for that purpose, therefore, may be stricken out as redundant."); van Santvoord, *A Treatise on the Principles of Pleading*, 79 ("Except to obtain a discovery, no necessity ever existed for detailing the evidence even in a bill in Chancery. It was useful only to enable a complainant to examine his adversary as a witness.").

⁷⁶ 3 Code Rep. at 153–55; 2 Edmonds at 253–55.

reused to seek common law remedies, so long as overt fictions were discarded. The publishers of law blanks lost no time running off new common law-style pleadings for use under the new code. (See Figure 17.) The standard was difficult to apply in equity-style claims, however. In one early case Judge Selden presided over a complicated real property controversy in which the plaintiff sought an injunction. The plaintiff's complaint consisted of 41 pages, the defendant's answer 458 pages. Even after Selden struck most of the answer for stating immaterial evidence and argumentation, he thought it clear "that the term 'material issue' can not be applied to an equity pleading in the common law sense, as an issue decisive of the whole case."⁷⁷

Further explaining his approach to interpreting the code, Selden argued that despite the code's attempt to abolish the distinction between law and equity, each tradition proceeded on fundamentally different ideas about disputed issues. Selden urged that the centrality of the jury to common law proceedings had created this difference. Through "the use of simple and settled forms of issues," Judge Hand agreed, "juries can generally respond yea or nay."⁷⁸ Because common law actions had developed through the binary judgment of the jury's yea or nay, material issues at common law could always be decisive. The plaintiffs either sold and delivered the goods to the defendants or they did not. That "fact" was not to be a question of degree, shifting with particular circumstances, but of stark occurrence or non-occurrence. As rule-bound and precedential as equity may have become by the 1840s, its dispositive issues nevertheless continued to raise questions of relative weight for a judge to assess. Was an injunction deserved, all things considered? For a limited time or permanently, given the circumstances?

Thus after initial consensus on adopting the common law standard of materiality, judges gradually reversed the early decisions, at least as they might apply to equitable claims and defenses. Summarizing the new line of cases, van Santvoord reasoned that, despite the supposed fusion of law

⁷⁷ Wooden, 6 Howard at 152.

⁷⁸ Wooden, 6 Howard at 150; Boyce, 7 Barbour at 86.

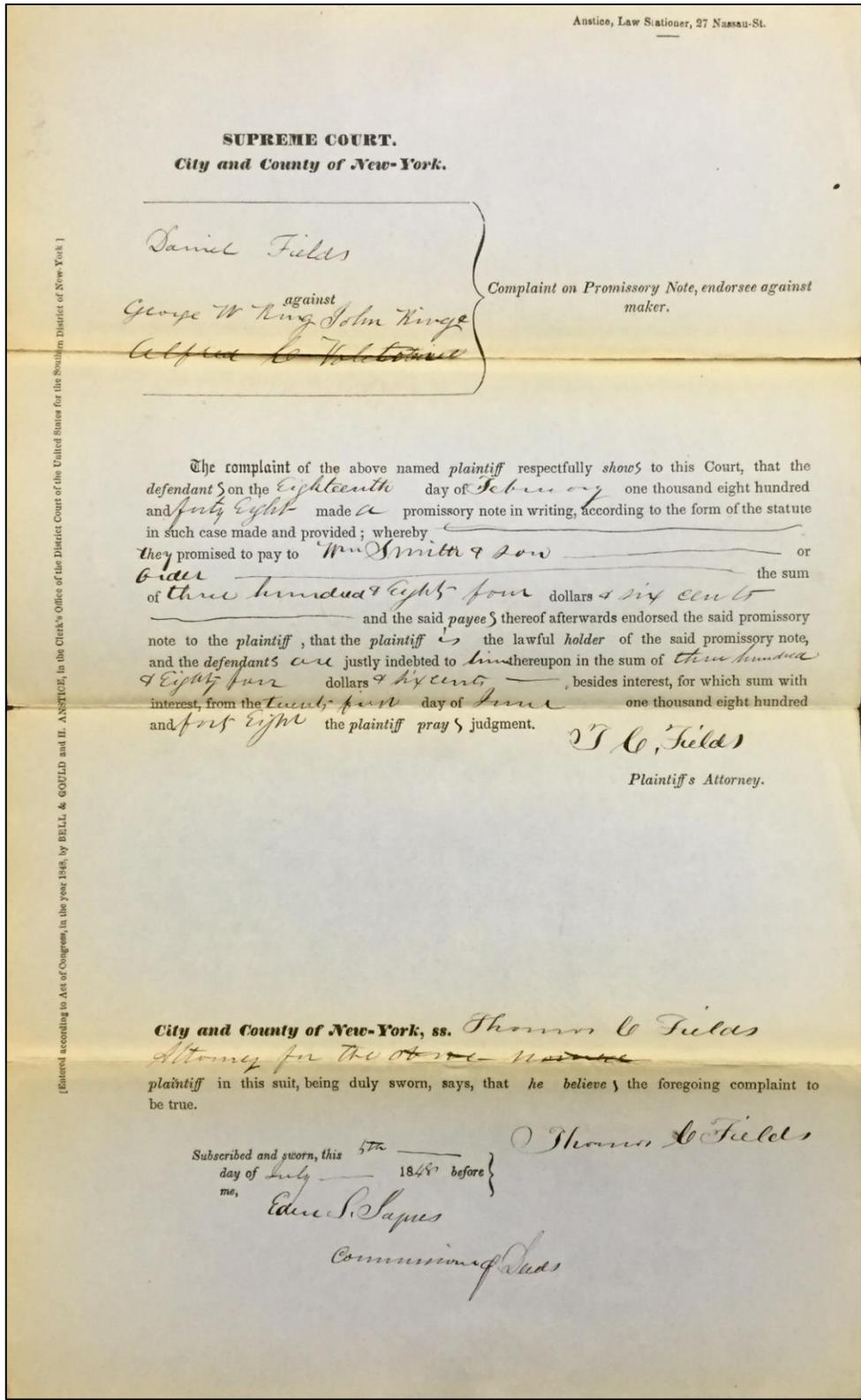


Figure 17.

Printers of “law blanks” lost no time adjusting to the new code, as seen in this filing from just a few days after the code went into effect.

Like the money counts in Chapter 1 (compare Figure 1), this complaint is based on an unpaid promissory note. The pleading is around 800 words shorter than the money counts, and it states the actual amount of the note (\$384.06).

The bottom of the form provides for a notarized verification that the litigant or his attorney believes the above material to be true. In this case, the plaintiff has opted to have his attorney (incidentally, his brother) swear to the veracity of the note. See Chapter 5 on verification.

New York City Municipal Archives, Office of the County Clerk, 31 Chambers St., Manhattan. Pleadings of the Supreme Court of Judicature Collection, PL-1848-F-26, Fields v. King et al. Photo by author.

and equity, “the statement of facts in a pleading is to be made in accordance with the particular kind of relief demanded.” For common law remedies, say upon simple contracts, pleaders were to allege decisive facts with an eye to their “legal effects,” but for equity-style remedies, pleaders were best advised to state “a variety of facts and circumstances” any of which “might become in the failure of proof of other allegations, a material fact to entitle the party to particular relief sought.”⁷⁹

Field and Shearman disagreed with this newly developing consensus because it kept alive the distinction between law and equity that the code in its famous section 69 had expressly abolished. Moreover, pleading “legal effects” or “legal conclusions” in common law claims threatened to return pleadings to the “artificial system” that had obscured truthful facts beneath fictions pleaded simply in order to satisfy the elements of common law pleading. Field insisted “a legal inference, or conclusion from the facts, should not be stated; that is not the province of the pleadings under our system.” But Field and Shearman continued to struggle to define “facts” in a way that generally separated them from “legal inferences or conclusions” which were the exclusive “province of the court” and not of pleadings.⁸⁰ Shearman wrote that:

Facts, within the meaning of the Code, are in general actual occurrences—physical facts, capable of demonstration by evidence without any reference to municipal law, and from which the court can draw the legal conclusions necessary to sustain the pleader’s case. . . . Thus, if A. borrows money of B., the borrowing is a fact, and the non-payment is a fact, but the consequent inferences that B. *owes* A. the money, and that A. is *entitled* to have it, are conclusions of law, and not actual facts.

Such subtlety, as courts frequently pointed out, could be difficult to apply in practice. How, for instance, could one factually state a claim to land without invoking “ownership” or “possession” or

⁷⁹ Van Santvoord, *A Treatise on the Principles of Pleading*, 75, 244. See Millikan, 5 Howard at 272; *Minor v. Terry*, 6 Howard 208 (N.Y. Supreme Court 1851); *Williams v. Hayes*, 5 Howard 471 (N.Y. Supreme Court 1851); *Fry v. Bennett*, 5 Sand. 54 (N.Y. Superior Court 1851); *Buddington v. Davis*, 6 Howard 401 (N.Y. Supreme Court 1851); *Field and Stone v. Morse*, 7 Howard 12 (N.Y. Supreme Court 1852).

⁸⁰ *A Short Manual on Pleading*, 10, 13–14.

at the very least the “delivery” of a deed, yet all of these terms were legal constructions. Could they not, then, in Shearman’s phrasing, be “actual facts”?⁸¹

Shearman admitted that “the rule excluding conclusions of law is not however to be enforced too rigidly. Mixed allegations of law and fact are frequently allowed, sometimes to avoid prolixity, and in other cases because such allegations are quite as much in harmony with the ordinary usages of speech, and as readily understood as the pure facts upon which they are based.”⁸² But in that case, responded Judge Selden, the code failed to state an administrable rule, and “to determine precisely *how great* an infusion of law will be allowed to enter into the composition of a *pleadable* fact, precedent and analogy are our only guides.”⁸³

Whittaker’s treatise advised lawyers “to state not one word, not on syllable more” than necessary, as “every unnecessary allegation” gave “an advantage to the adversary.” Nevertheless, out of caution most lawyers pursued the opposite strategy, and Shearman recorded by 1870 a consensus “that the rules of pleading applied in chancery to the *stating* part of a bill, are the best rules left from the old practice as a guide in the new.”⁸⁴ The eminent trial lawyer Charles O’Conor agreed with Shearman’s assessment. Like Edmonds, O’Conor had eagerly advocated for the code when it appeared in 1848. Well known as a “radical reformer,” O’Conor had sat on the constitutional convention’s judiciary committee that had created the practice commission, and O’Conor was the only member who argued for fusion and codification in the same measure.⁸⁵ But also like Edmonds, O’Conor had become disaffected by the code in practice. By the 1870s he supported his law partner James Coolidge Carter as he crusaded against codification. In O’Conor’s experience of code pleading,

⁸¹ Tillinghast & Shearman, *The Practice, Pleadings and Forms in Civil Actions*, 9–10. See *Dows v. Hotchkiss*, 10 N.Y. Legal Observer 281, 283–84 (Supreme Court 1852).

⁸² Tillinghast & Shearman, *The Practice, Pleadings and Forms in Civil Actions*, 12.

⁸³ *Dows*, 10 N.Y. Legal Observer at 284.

⁸⁴ Whittaker, *Practice and Pleading under the Code*, 1:326; Tillinghast & Shearman, *The Practice, Pleadings and Forms in Civil Actions*, 3.

⁸⁵ See Chapter 2, above. See also “Some Recollections of Charles O’Conor,” 29 *Century* 725 (1885).

“the common practice is to tell your story to the court, precisely as your client tells it to you, and just as any old woman, in trouble for the first time, would narrate her grievances” to her neighbor.⁸⁶

Even accounting for O’Conor’s exaggerations, the striking feature of the code’s preference for equitable pleading was its rejection of earlier theories about judicial constraint. As code pleading eliminated the formal structures that had guided lawyers to a precise, decisive manner of coming to an issue, it abolished the “public adjustment” of litigation that the influential Sarjeant Henry John Stephen had vaunted as the systemic restraint on judicial discretion and private judgment. Not only did the code position judges to declare the substantive law, enhancing their oracular role, it removed the conclusory style of pleading that was supposed to prevent judges from managing and framing litigation so as to invite the production of new law. As another practitioner wrote in criticism of the code, “the net result” of the new system “has been to throw upon the courts the burden of analyzing the contents of the complaint and of determining in each instance what is the substance of the cause of action set forth or sought to be set forth, and whether equitable or legal, tortious or contractual rights are involved.” Stephen and Story’s treatises had warned that this was the precise danger of civilian pleading: it allowed judges to frame the very questions to which they were to provide the legal answers. Equity could make limited use of the power so long as it followed behind and analogized itself to the processes of the common law.⁸⁷ Those processes abolished, every case under the code became an equity case, and every judge a chancellor.

It Repeals Itself: The Problem of Alternative Arguments

When Judge Edmonds agreed to strike the needlessly detailed facts of agency in the *Dollner* case, it left the complaint without any allegation of the defendant’s liability, and Edmonds accordingly

⁸⁶ “Mr. O’Conor and the New York Code,” 1 *Albany Law Journal* 302 (1870), 303.

⁸⁷ Hornblower, “Fifty Years of Reformed Procedure,” 290. See generally Chapter 1; Henry John Stephen, *A Treatise on the Principles of Pleading in Civil Actions* (2d. ed. 1827 [1824]), 498; Joseph Story, *Commentaries on Equity Jurisprudence as Administered in England and America* (1836), 1:22. See also B. Tucker, *Principles of Pleading* (1846), 1–4; S. Croswell & R. Sutton, eds., *Debates and Proceedings in the New-York State Convention* (1846), 444 (Worden).

ruled that the claim must fail. Under both the specific provisions of the code on amendments as well as the general instruction that pleadings “must be liberally construed, with a view to substantial justice between the parties,” Edmonds could have merely amended the pleading to state that Dollner sold directly to Gibson, and Gibson was thus liable. Edmonds was well aware that “the subject of amendments is put forth quite prominently in the Code, as being as liberal as could be devised,” but like most judges, both in New York and elsewhere, he refused to assume the powers the code had conferred on him to edit party pleadings.⁸⁸

Another prominent code-friendly judge who refused such powers was Field’s own brother, Stephen, chief justice of the California supreme court from 1859 to 1863 and the legislator who had introduced the final draft of the New York code into California law in 1850. Like Edmonds, Stephen regularly expressed frustration with counsel who failed to heed the rule “that facts, and not the evidence of facts, should be alleged.” Stephen may have had an even harder time dealing with western lawyers, who used the pleadings as a chance to spin colorfully detailed stories of frontier life that, Stephen thought, “subserve no useful purpose, and are only calculated, when read to the jury, to excite prejudice against the defendants.” In one such case, Stephen reproduced nearly the entirety of David Dudley’s pleading manual as the official decision in the case.⁸⁹ Nevertheless, like Edmonds, Stephen Field did not order an amendment on the court’s own motion; he granted motions to edit the pleadings only if raised by opposing counsel.

What, then, explains the apparent conservatism of judges under the code? Some, like Barculo, may have been reflexively hostile to its attempted reforms, but many like Edmonds and Stephen Field were professed allies of the reformed system. Even Barculo’s biographer declared him to be an earnest advocate of the code’s reforms until he had to administer them in practice.⁹⁰ In some cases, judges

⁸⁸ 3 Code Rep. at 155–56; 2 Edmonds at 256–57; 1848 New York Laws 524; Edmonds, *An Address on the Constitution and the Code of Procedure*, 36. See also *First Report* (New York 1848), 158 (commissioners “provide a means of amendment of the most liberal character, as liberal, indeed, as we could devise”).

⁸⁹ *Coryell v. Cain*, 16 Cal. 567 (1860); *Green v. Palmer*, 16 Cal. 571 (1860).

⁹⁰ Thompson, “Judge Barculo,” 659–61.

professed the need to restrain themselves in light of the powers the code had placed upon them. In a case that recognized both the expansion of equitable pleading under the code and the need for judges to declare anew the substantive elements of each remedy claimed, Judge Selden declared that “if there is any one who can meet the responsibility of acting judiciously . . . with unshaken nerve, I am not the man.”⁹¹ Whether or not all judges shared Selden’s sentiment, there were two other practical barriers that prevented judges from acting like the oracular chancellors the code proclaimed them to be.

The first problem was that, as Judge Barculo had written, the code seemingly “repeals itself” in the way it both demanded “liberality” in the joinder and amendment of claims yet also prohibited arguments in the alternative. Since Field’s “rule number one” was that “pleadings must be true,” both the code and Field and Shearman’s commentary on it made clear that arguments in the alternative could not be permitted in the reformed system. “Obviously,” Shearman wrote, code pleading’s central “purpose would be entirely defeated, if the plaintiff should be allowed to put his demand in an alternative or hypothetical form.” One of the earliest cases brought under the code provided an apt illustration. The defendant answered that he did not cross plaintiff’s land and trample the garden, but “if” he did, he had an easement which the garden obstructed. The court struck the answer as insufficient. It could not have been factually true that the defendant both did and did not cross the plaintiff’s land.⁹²

Field’s attempt to prohibit arguments in the alternative were at the root of his altercation with Judge Barculo. The code’s provision for the joinder of claims in the same action between the same parties enumerated seven classes of actions and stated that “the plaintiff may unite several causes of action in the same complaint,” provided that “the causes of action so united must all belong to one only of these classes.” The classes included contracts express or implied, injuries by force, injuries

⁹¹ Wooden, 6 Howard at 148.

⁹² *A Short Manual on Pleading*, 10; Tillinghast & Shearman, *The Practice, Pleadings and Forms in Civil Actions*, 114; Boyce, 7 Barbour at 80.

without force, injuries to character, claims to recover real property, claims to recover personal property, and claims against a trustee.⁹³ Field wrote elsewhere that “our own opinion is decided, that the plaintiff should be left free to unite, in the same action, all his controversies with the same parties, if he be so inclined,” citing to former practices in equity and admiralty. The intent of the joinder restriction seems to have been to ensure that plaintiffs did not resort to the old “common counts” of common law pleading, whereby the same claim could be argued under different theories of recovery and joined in one action. But with the code’s abolition of the forms of action, it was not entirely clear what claims fit into which categories. Did the failure to deliver goods give rise to a claim upon implied contract, or to recover property, or against a trustee on a theory of bailment? “Had the old phraseology with which the profession was familiar been retained, fewer mistakes would have been made in this respect,” van Santvoord wrote.⁹⁴ Almost all trusteeships were created by contract, so could trustee claims be joined with contract claims under the first class, or did they have to be separately litigated since they had their own class? That was the issue of the case Field argued before Barculo, and Barculo ruled that trust claims could not be joined to contract claims under the plain meaning of the code’s enumerated classes.⁹⁵

On joinder and amendment, the code thus instructed judges to simultaneous liberality and constraint. Actions could be freely united and amended at the option of the parties, but they could not be united or amended if doing so would become a means of arguing in the alternative, joining different theories of the same claim to improve one’s chances at trial or gradually amending answers to concede admissions. Of course the difficulty was that judges could not know in advance how parties and their counsel were strategically using their pleadings. That created the second problem for judicial activism under the code. Although the code required (and Field’s tracts urged) judges to be active in policing

⁹³ 1848 New York Laws 525 § 143.

⁹⁴ Field, *Administration of the Code*, 21–24; van Santvoord, *A Treatise on the Principles of Pleading*, 346.

⁹⁵ *Alger v. Scoville*, 6 Howard 131 (N.Y. Supreme Court General Term 1852).

the pleadings to force candor from the parties, re-creating the give-and-take of oral negotiation, the legislation provided insufficient details about how this process should work through written pleadings and motions. The entire regulation on this point, in the amended code of 1849 read:

§ 160. If irrelevant or redundant matter be inserted in a pleading, it may be stricken out, on motion of any person aggrieved thereby. And when the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain, by amendment.

Nowhere else did the code define or regulate “motions,” nor clarify how motions differed from demurrers which sought entire dismissal of an action for failure to plead a legal cause of action or defense.⁹⁶ Treatise literature recognized these issues would have to be resolved by case law.⁹⁷

In practice, litigants preferred to file demurrers – better to win a claim outright than to merely force an amendment on one’s adversary. But whether parties moved for amendments or demurrers, judicial decisions on these motions became matters of record that could then be challenged on appeal.⁹⁸ By attempting to formalize in written pleadings the informal oral negotiations that had taken place at trial, over time the Field Code essentially abolished those negotiation practices altogether. The oral back-and-forth between judges and counsel had never become a matter of record and thus no precedents could accumulate to bind these practices to particular rules. By forcing those negotiations into the record, the Field Code made judges more reluctant to exercise their newfound powers. In

⁹⁶ David Graham’s treatise explained that “a demurrer is a pleading by either party, admitting the truth of the facts in the preceding pleading, but denying that they are sufficient to maintain the action.” David Graham, *A Treatise on the Practice of the Supreme Court of the State of New York* (2d ed. 1836), 754. A demurrer permitted a party to argue that even if everything his adversary said was true as a matter of fact, it failed as a matter of law because there was no remedy a court could offer on that set of facts (e.g., the case of the disgruntled football fan discussed above). The original code permitted demurrer on the grounds that 1) a plaintiff did not have capacity to sue, 2) the action was redundant with another action already pending between the parties, 3) there was a defect of joinder, either of parties or issues, and 4) the complaint did not “state facts sufficient to constitute a cause of action.” 1848 New York Laws 521–522, § 122. As in the rest of the code, that last phrase went undefined.

⁹⁷ 1849 New York Laws 648; van Santvoord, *A Treatise on the Principles of Pleading*, 348–54; Whittaker, *Practice and Pleading under the Code*, 1:352–55; Tillinghast & Shearman, *The Practice, Pleadings and Forms in Civil Actions*, passim, 131–201.

⁹⁸ See, e.g., 1849 New York Laws 680 § 329 (permitting an appeal after judgment to review any intermediate order, involving the merits, and necessarily affecting the judgment”). On the application of this provision to a demurrer, which in some cases operated as a final judgment and in other as an intermediate order, as well as motions to edit the pleadings, see Whittaker, *Practice and Pleading under the Code*, 2:200–05.

court the idea of editing written pleadings to create liabilities and requests for relief where they had not existed before seemed unthinkable.

Or, more probably, the idea seemed too lawyerly. As one western lawyer exclaimed, judicial power of amendment was “a monstrosity in judicial procedure.” It was for counsel to plead and amend pleadings, and if one side made a mistake, counsel on the other side could take tactical advantage of it by moving to strike.⁹⁹ And counsel, of course, wished only to strike defective pleadings, not cure them to help their adversary’s case. Rather than risk the appearance of impartiality by supplying winning arguments and formulas to defective pleaders, judges ignored the code and deferred to the lawyers, granting—only when requested—motions to remedy defective pleadings by striking them.

Conclusion

This chapter has examined the early reception of code pleading in the courts and treatise literature of New York. Field and the code commissioners believed that litigants did not disclose the honest facts of their cases until trial at common law, when lawyers and judges orally negotiated the issues to be tried and the proofs to be taken. Affronted by the legal system’s apparent allowance for falsehood and evasions in the fictitious forms of action, the codifiers attempted to force truth into litigants’ written pleadings. Without defining either “facts” or the “cause of action” those facts were to support, the code created several major problems in actual practice. Judges had to reconstitute former rules of pleading into material elements of substantive causes of action, gradually overriding common law definitions of materiality with equitable standards for stating facts “at large.” Facing new responsibilities to declare substantive law along with new powers to re-frame disputes out of the factual materials offered by the litigants, judges largely acted with a sense of restraint, declaring their

⁹⁹ “A Code Lawyer on the Code,” *Rocky Mountain News* (Denver, Colo.), January 24, 1877.

faithfulness to inherited structures of adjudication rather than exercising the entire discretion the code accorded them.

To be sure, the code dramatically changed significant aspects of the practice of pleading. Overt fictions like the finding and losing of trover quickly disappeared, and the length of pleading significantly diminished even as the more straightforward common law claims became more factually detailed.¹⁰⁰ By the time van Santvoord and Whittaker produced their second editions in the mid-1850s, lawyers were routinely organizing their allegations into enumerated propositions designed to track the settled “elements” of various classes of claims. Early confusion about whether statements of ownership or delivery were actual facts or legal conclusions had been settled with positive answers from the courts.¹⁰¹

But as they had done before the code, practitioners needed to consult the case law and the treatises to find these prescriptions. The code declared there to be but one form of action even as the commissioners’ official form book provided several hundred forms for different “classes” of actions. In his most sympathetic reading of the code, Judge Edmonds recognized that substantive law would ultimately fix procedural form. “So long as other parts of the Law, not connected with the pleadings or practice of the Courts, recognize substantial distinctions, in their very nature, between simple contracts and obligations under seal, and between the tenure of and rights appurtenant to, real and personal property, so long there will and must be substantial differences in the causes of action in respect to those subjects,” Edmonds declared in his laudatory address on the code. But while the “Code has swept away from our jurisprudence the old forms of action,” he remarked, “it has not blotted from our minds or our books the old learning on that subject.”¹⁰² As Edmonds recognized,

¹⁰⁰ Twelve out of the first fifty cases in the B-plaintiff filings from 1849 were filed on a single page, for instance, a circumstance almost never attained before the Code. New York City Municipal Archives, Office of the County Clerk, 31 Chambers St., Manhattan. Pleadings of the Supreme Court of Judicature Collection, PL-1849-B-1-B-50.

¹⁰¹ Whittaker, *Practice and Pleading under the Code*, 312, 369; 468–75; van Santvoord, *A Treatise on the Principles of Pleading*, 196, 537; 243–52.

¹⁰² Edmonds, *An Address on the Constitution and the Code of Procedure*, 22–24.

sheer truthfulness could not be an administrable principle. “The grand object being the creation of a certain and material issue upon some important part of the subject matter in dispute,” cases could hardly proceed if they had to “set out all the circumstances” as they actually happened.¹⁰³ If the codifiers were ever to achieve their goal of a scientifically systematized and coherent substantive law, some artifice would be required to make the messy truths of any given case conform to the expected elements of legal rights. That was the magic of forms.

¹⁰³ Dollner, 3 Code Rep. at 155; 2 Edmonds at 255–56.

Chapter 5

The Swearer's Prayer

Oathtaking and Witness Testimony

On Sunday, October 9, 1859, a couple months before passing a bar examination and beginning employment at the firm of David Dudley Field, Thomas Shearman sat awed by America's most famous preacher, Henry Ward Beecher. "I never was so *quickly* affected by any sermon I ever heard – it seemed to reach my heart at once," Shearman wrote in his journal that afternoon. His wife "got quite cross with me for crying so much!" The son of a revivalist Presbyterian and brother to the author of *Uncle Tom's Cabin*, Beecher was renowned for his imaginative metaphors and soothing pulpit oratory. Comparing Beecher to Charles Finney, the firebrand revivalist of an earlier era, Beecher's successor at the Plymouth Church in Brooklyn remarked that "Dr. Finney drove men to repentance; Mr. Beecher drew them." Indeed, the sermon that Shearman said "melted me right down from the very beginning," was titled "The Gentleness of God."¹

Besides moving the implacable litigator to tears, the striking feature of Beecher's sermon that Sunday was its agnosticism about the afterlife. Here is the concluding section, where Beecher commonly placed his central themes and most powerful images:

Sometimes, in dark caves, men have gone to the edge of unspeaking precipices, and, wondering what was the depth, have cast down fragments of rock, and listened for the report of their fall, that they might judge how deep that blackness was; and listening – still listening – no sound returns; no sullen splash, no clinking stroke as of rock against rock – nothing but silence, utter silence! And so I stand upon the precipice of life. I sound the depths of the other world with curious inquiries. But from it comes

¹ Diary of Thomas G. Shearman, October 9, 1859, Papers of Thomas G. Shearman, Shearman & Sterling Law Library, 575 Lexington Ave., New York. Henry Ward Beecher, "The Gentleness of God," Sermon Preached at Plymouth Church, Brooklyn, New York, October 9, 1859, in Gaius Atkins, ed., *Master Sermons of the Nineteenth Century* (Willett, Clark & Co. 1940) 84-102; Lyman Abbott, *Henry Ward Beecher: A Sketch of His Career* (1887), 94-95.

no echo and no answer to my questions. No analogies can grapple and bring up from the depths of the darkness of the lost world the probable truths.

Beecher left the connection of this passage to the theme of God's gentleness implicit for his audience. The connection was clear to Shearman, though. When he wrote his memoirs in the 1880s, Shearman devoted the first hundred pages telling not how he became a lawyer but how he became a devout Christian who rejected the doctrine of hell. In Beecher, Shearman found a kindred spirit, a respectable New Yorker of reputable orthodoxy who nevertheless relaxed the doctrines of damnation that had been so crucial to an earlier generation of American revivalists.²

In the same era that mainstream American evangelicals might publicly doubt that a gentle God could damn souls to hell, the Field Code sought to sunder any remaining connection between the legal system and Christian ideas of perdition by fundamentally changing the civil law's most explicit link to theology: the testimonial oath. While devout jurists and moral theologians in the eighteenth and nineteenth centuries insisted that the obligation of an oath depended on the swearer's belief in supernatural and usually eternal consequences for oathbreaking, Field and many of his fellow codifiers sought to relocate the obligations of truth-telling fully within a temporal legal system. Under the code, perjury prosecutions and especially the skillful cross-examination of counsel would sufficiently deter and detect falsehood without any further reliance on theology.

Proceduralists have long been interested in the murky history of rules that disqualified potentially relevant testimony, and recent work on religious history has traced out tensions between constitutional aspirations of religious neutrality and the theologically fraught jurisprudence of oath-taking in the nineteenth-century United States. This chapter explains the central significance of the Field Code to both these stories, particularly by taking stock of George Fisher's monumental work, "The Jury's Rise as Lie Detector." Focusing mostly on criminal trials, Fisher's article considers how in

² Beecher, "The Gentleness of God," 98; see *Memoirs of Thomas G. Shearman*, volume 1, *Shearman Papers*. At this time, a confidant observed, "Mr. Beecher believed in retribution . . . more definitely than he did subsequently." Abbott, *Henry Ward Beecher*, 94.

Figure 18.



Printed reproduction of a film portrait of Thomas G. Shearman (1834-1900) when he was twenty-seven years old, around the time David Dudley Field first hired him to perform clerical work on Field's civil code. Six years later, Shearman became the law partner of Field and his son Dudley.

Papers of Thomas G. Shearman, Shearman & Sterling Law Library, 575 Lexington Ave., New York. Scan by author.

the nineteenth-century the oath became devalued as a guarantee of truth and was replaced by confidence that the jury could weigh conflicting testimony.³ But civil practice diverged in important ways from criminal procedure. Parties were admitted to testify in civil trials decades before criminal defendants could offer sworn testimony, and under equitable procedure, many of the most important civil litigations took place without a jury to serve as lie detector. Accordingly, this chapter argues that one story of the Field Code is the *lawyer's* rise as lie detector. Codifiers expected the ordeal of a lawyerly cross-examination to substitute for the terrors of damnation, whether it was a jury or judge who witnessed the proceedings.

This vision encountered multiple difficulties in practice. The code's oath requirement for pleadings fit unevenly with other regulations on the burden of proof and the failure of perjury for "voluntary" oaths. When the code's qualification of party testimony unleashed prevarication in civil trials, codifiers shifted their theory of cross-examination from deterrence of lying to detection of falsehood. That move, however, forced codifiers to confront two issues that Fisher keeps distinct in his account: the question of piety and the problem of race. Fisher surmises that theology had little to do with the fortunes of the legal oath in the nineteenth century. Professional jurists, he contends, made no calculations about a litigant's soul, only the legitimacy of the legal system in the here and now. So long as oaths appeared to cast some kind of divine sanction over civil proceedings, jurists sought to prevent conflicts of testimony that would have revealed civil justice to be a merely human enterprise, and parties—whose testimony could not have but conflicted—were accordingly excluded from testifying altogether. In the nineteenth century, a "transatlantic trend" replaced God with the jury as a "black box" of legitimacy: conflicts of testimony could be allowed so long as judgment of credibility was left to a jury whose reasoning processes were as inscrutable as divine providence. Fisher then explains the extreme gradualism of this shift—which took half a century to carry out state by state—

³ George Fisher, "The Jury's Rise as Lie Detector," 107 *Yale Law Journal* 575 (1997).

as a product of America's racial politics. Party qualification to testify raised the problem of racial qualification to testify, and Fisher finds that states reluctantly permitted party qualification only after the political settlements of the Civil War and Reconstruction forced them to admit all races to the witness stand.⁴

With regard to civil admissions, Fisher notes that "unfortunately, I have found no contemporary commentary bearing on these issues."⁵ This chapter supplies some of that commentary, and in doing so, it challenges some of Fisher's central claims. Barbara Shapiro has vigorously disputed Fisher's evidence that the legal system did not permit conflicts of testimony before the rise of party qualification, especially in civil cases.⁶ Shapiro's argument implies that theology provided more than just a cover for the legitimacy of the law's processes, and this chapter likewise argues that many jurists did indeed take doctrines of perdition seriously in restraining parties from the temptations of perjury. For that reason, nineteenth-century assaults on the doctrine of hell, especially from within the center of Protestant orthodoxy, go some way towards explaining changes to the law. Reforms such as the Field Code did not simply replace the oath with cross-examination, after all; they instead multiplied the use of oaths by requiring oaths on pleadings and permitting parties to take the oath on the stand. The legal oath was not abandoned, but the theological gravity under it shifted.

As Fisher notes, this process happened gradually and became caught up with the question of whether race made one incompetent to testify. But rather than the straightforward narrative that Fisher offers, in which racial qualification steadily preceded full party admission, this chapter reveals a much more complicated history. The Field Code encountered the tension between party qualification and racial exclusion in its earliest days. In the particular way the Field Code replaced equitable discovery with party testimony, code states often permitted party testimony for years,

⁴ Fisher, "The Jury's Rise as Lie Detector," 674, 697-98.

⁵ Fisher, "The Jury's Rise as Lie Detector," 674.

⁶ Barbara J. Shapiro, "Oaths, Credibility and the Legal Process in Early Modern England," I & II, 6-7 *Law & Humanities* 145, 19 (2012-2013).

sometimes for decades, before they abolished racial exclusions. What Fisher believes to be an analytical impossibility was in fact the lived experience of litigation in most western and midwestern states. And when jurists sought to make sense of the situation, they again turned to the theology of hell, reviving and transforming a mode of sacral reasoning the code had sought to abolish.

The Swearer's Prayer: Oaths in the Civil Legal Tradition

The legal oath had a history even more ancient than the common law forms of action. Across the High Middle Ages, controversies could be resolved entirely upon the question of which party agreed to swear for the legitimacy of his claim. Ecclesiastical authorities at the time made clear that false swearing was a mortal sin, liable to everlasting punishment in the afterlife.⁷ Perhaps for that reason, civil authorities in the sixteenth and seventeenth centuries became extremely guarded in their allowance of oathtaking. Unwilling to become accessories to a witness's damnation, magistrates might permit criminal defendants, children, or "infidels" to speak in court, but they spoke unsworn, disallowed to stake the ultimate wager of their souls on the truthfulness of their testimony. Civil parties, those especially tempted to swear falsely for mere monetary gain, were largely banned from testifying. The only partial exception—discovery procedure at chancery—developed at the time the chancellery was an ecclesiastical office, and the chancellor could administer an oath in his dual capacity as priestly confessor and secular jurist.⁸

Like early treatments of pleading, early modern treatises on evidence were entirely focused on guiding practitioners through the technical details of practice. Guides on legal evidence elaborated the cases in which oaths were required or excused, but they usually did not undertake to explain what

⁷ John S. Bekerman, "Procedural and Institutional Change in Medieval Manorial Courts 1250–1550," 10 *Law and History Review* 197 (1992), 203–04; R. H. Helmholz, *The Ius Commune in England* (Oxford 2001), 101–02.

⁸ See William Wake, *A Practical Discourse Concerning Swearing* (1696), 25–35; Jean Domat, *The Civil Law in Its Natural Order*, trans. William Strahan (1772), 462–66; Michael R. T. McNair, *The Law of Proof in Early Modern Equity* (Duncker & Humblot 1999), 204–19; John H. Langbein et al., *History of the Common Law: The Development of Anglo-American Legal Institutions* (Aspen 2009), 247–48. See also, R.H. Helmholz, *The Spirit of the Classical Canon Law* (Georgia 2010), ch. 6.

an oath was, what it was for, and how it was supposed to work.⁹ An exception was one of the earliest works on evidence, the mid-eighteenth-century treatise by Geoffrey Gilbert, who wrote that the exclusion of certain witnesses from swearing an oath was a matter of “Piety.” Gilbert tentatively explained that “the Reason seems to be” that such witnesses “are not admitted to hurt their Consciences by Swearing.”¹⁰ Commentators like Gilbert seemed reluctant to admit that jurists relied on religious devotion to make fundamental practices of the legal system workable. For all the advances of eighteenth-century jurisprudence, the law was not an autonomous domain. Barbara Shapiro has shown how frequently assize sermons before court sessions focused on the oath, explaining its theological significance and the necessity of religion to create, as one cleric stated, “the most firm and sacred bond that can be laid upon all that are concerned in the administration of public Justice.” But these ubiquitous sentiments in assize sermons do not appear to have been preserved in the judicial instructions or opinions actually handed down at the assizes.¹¹

This same division of genera continued into the nineteenth century: Treatises on evidence gave the rules on oath-taking without explaining the act’s significance, while moral theologians labored to make up that deficiency. William Paley’s *Principles of Moral and Political Philosophy* explained that “whatever be the form of an oath, the *signification* is the same. It is the calling upon God to witness, *i.e.*, to take notice of what we say, and it is invoking his vengeance, or renouncing his favor if what we say be false.”¹² Paley thought that English overuse of the oath might drain it of its solemnity, and he encouraged lawmakers to assess “penalties proportioned to the public mischief of the offence” of false testimony. But so long as the legal system continued to rely on the oath, Paley insisted that oaths

⁹ See, e.g., William Nelson, *The Law of Evidence* (1717); John Morgan, *Essays upon the Law of Evidence* (1789); S. M. Phillips, *Treatise on the Law of Evidence* (1816); John F. Archbold, *A Summary of the Law Relative to Pleading and Evidence* (1824).

¹⁰ Geoffrey Gilbert, *The Law of Evidence* (1756), 159.

¹¹ Barbara J. Shapiro, “Oaths, Credibility and the Legal Process in Early Modern England: Part One,” 6 *Law and Humanities* 145 (2012), 151–52 (quoting John Tillotson, *The Lawfulness and Obligation of Oaths* (1681)).

¹² William Paley, *The Principles of Moral and Political Philosophy* (1785), 162. Paley therefore lamented the “obscure and elliptical form” of the English oath, which merely appended the words “so help me God” to the promise to tell the truth. *Ibid.* 160–61.

“carry with them no *proper* force or obligation, unless we believe that God will punish false swearing with more severity than a simple lie.”¹³

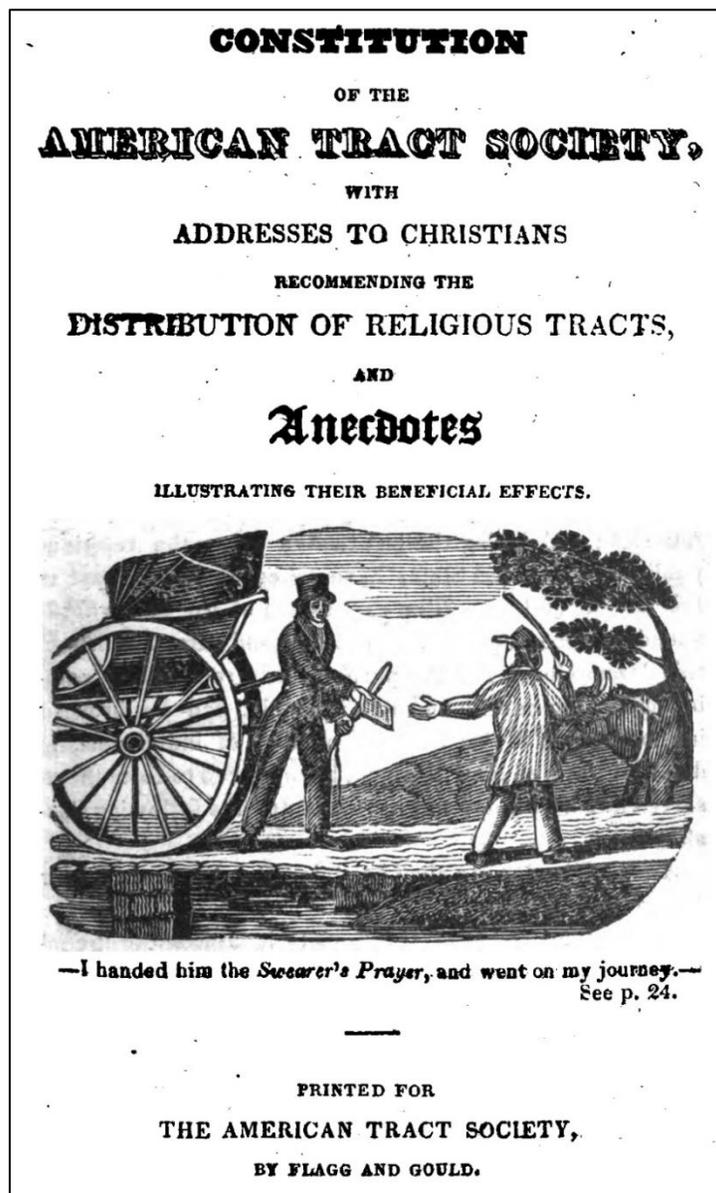
Half a century later, moral theologians widely cited and elaborated on Paley’s definition of the oath. Field hoped to make plainspoken pleadings exhibit the same truthfulness as everyday conversation and commercial discourse, but that, explained the mid-nineteenth-century moral theorist William Whewell, was precisely the problem oaths were meant to correct. “If the Witness were to give his Evidence, the Jury their Verdict, the Judge his sentence, with the carelessness and perversion of truth and right, which men often allow themselves in common conversation; the administration of justice would be impossible,” Whewell wrote in his work, *The Elements of Morality: Including Polity*. Legal testimony required more solemnity and care than ordinary conversation, and oaths offered a “natural way of acknowledging and marking this moral solemnity, among religious men, . . . by acting, and declaring that we will act, as in the presence of God.” While jurists avoided drawing the explicit link between legal ritual and religious piety, Whewell declared that oathtaking was the fundamental basis of legality itself, “for a State, not claiming a moral reality for its acts, by means of religious solemnities [i.e., oaths], could not stand against a great body of citizens bound together by religion.” Without due regard for the oath, the state itself and its legal apparatus vanished, leaving to any religious oathtaking body the right of revolution.¹⁴

Popular explications of the legal oath followed similar lines. During the first half of the nineteenth century, one of the most widely disseminated tracts—of any kind—was titled “The Swearer’s Prayer, or, His Oath Explained.” (See Figure 19.) Its lengthy translation of “so help me God” ran in part: “O God! thou hast power to punish me in hell forever: therefore let . . . every lie that I have told . . . rise up in judgment against me, and eternally condemn me!” The tract concluded, “Swearer,

¹³ Paley, *The Principles of Moral and Political Philosophy*, 164–65.

¹⁴ William Whewell, *The Elements of Morality: Including Polity* (1845), 2:87–88.

Figure 19.



“The Swearer’s Prayer” was such a popular tract, there were tracts about the tract, compiling anecdotes about its widespread distribution and reporting its transformative reception. Here an illustration of the tract’s distribution prefaces an annual report of the American Tract Society.

Frontpiece, *The Publications of the American Tract Society*, vol. 1 (1824). Scan by author.

this is thy prayer!!!"¹⁵ And for some laymen, the threat of hell was the foremost, or even the exclusive, safeguard of an honest oath. As late as 1852, a poor Irishman could testify that "I know what perjury is, and that the punishment of perjury is damnation; I never heard that a man could be transported for perjury; I never heard that a man would be punished by the law of the land for perjury."¹⁶

Accordingly, treatises that were pitched to justices of the peace or magistrates – those who straddled the line between laymen and professionals, were often more explicit about the need for piety to make oaths legally useful. Thomas Peake's early *Compendium of the Law of Evidence* explained that children under the age of fourteen could be sworn only if they appeared to have "the sense of religion." New Yorker Oliver Barbour's "practical treatise," *The Magistrate's Criminal Law* likewise counseled that "a man wholly without religion . . . shall not be received to give evidence in any case whatever."¹⁷

Whether or not the legal treatises made it explicit, the sacral logic of the oath remained largely undisturbed into the early days of the American Republic. When the liberal theorist John Locke famously excluded atheists from his plans for religious toleration, he did so on the basis that atheists denied an afterlife and therefore offered worthless oaths. Likewise, when George Washington urged in his Farewell Address that "religion and morality are indispensable supports" to "political prosperity," his argument relied solely on civil oathtaking. "Let it simply be asked: Where is the security for property, for reputation, for life, if the sense of religious obligation desert the oaths which are the instruments of investigation in the courts of justice?" Accordingly, state after state received the common law rule barring non-Christians from oathtaking in the Early Republic.¹⁸

¹⁵ [William Rust,] *The Swearer's Prayer, or His Oath Explained*, Virginia Religious Tract Society (1813), 1-2; reprinted by the Newark Cent Society, 1814; the Religious Tract Societies in the Western Country, 1818; Lincoln & Edmands, 1820; the New-York Religious Tract Society, 1820; the Religious Tract Society (England), 1839; the Presbyterian Church in the Confederate States of America, 1861. The American Tract Society reported distributing 42,000 copies of the tract in Andover alone. *The Publications of the New England Tract Society* (1820), 5:236.

¹⁶ Testimony of Jordan, *Report of the Trials at the Petty Sessions of Achill* (1852), 20.

¹⁷ Thomas Peake, *A Compendium of the Law of Evidence* (2d. ed., 1804), 123; Oliver L. Barbour, *The Magistrate's Criminal Law* (1841), 380.

¹⁸ John Locke, *A Letter Concerning Toleration* (1796), 56; Jeremy Waldron, *God, Locke, and Equality: Christian Foundations*

An Oath on the Big Book: Verification of Pleadings

If Field expected statements of fact to disenchant pleadings, the second major reform in his system appeared at first to re-enchant them. “Every pleading,” read section 133 in the original code, “must be subscribed by the party” and “verified by the party, his agent or attorney, to the effect that he believes it to be true.” That is, as the note explained, the code proposed to “test” pleadings by requiring “a verification by the oath of the party.”¹⁹ Oaths may have had a long history of crossing the sacred and secular divide in the common law tradition, but for that very reason they had not usually been required of so mundane an activity as pleading. The application of the oath to pleadings raised a number of immediate difficulties for the commissioners, but not the one that would have been obvious even a generation earlier: the risk of perdition. Far from reintroducing any “magic” eliminated with the forms of action, Field’s expansion of the oath shows just how much American legal practice had become secularized by mid-century.

The conviction that the threat of hell secured the solemnity, and thus truthfulness, of an oath rapidly deteriorated in early nineteenth-century America. Jud Campbell and Kathryn Gin Lum argue that the spread of Christian Universalism at the turn of the nineteenth-century directly contributed to the demise of state restrictions on oath-takers. Though they never attracted significant numbers, Universalists counted among their members leading statesmen and moral reformers, who seemed to prove by their example that virtue and veracity could be founded on something other than the fear of everlasting perdition. By the 1830s, the exclusion of Universalists and other varieties of Christian heterodoxy raised significant concerns that the judicial system was subverting constitutional law by

in Locke’s Political Thought (Cambridge 2002), 223; John C. Patrick, ed., *The Writings of George Washington: From the Original Manuscript Sources, 1745–1799* (Government Printing Office 1931–1944), 35:229; “Review on the Exclusion of Infidels from Judicial Oaths,” 1 *Christian Spectator* 444 (1829); Sarah Barringer Gordon, “Blasphemy and the Law of Religious Liberty in Nineteenth-Century America,” 52 *American Quarterly* 686 (2000).

¹⁹ 1848 New York Laws 525; *First Report of the Commission on Practice and Pleadings* (New York 1848), 145.

preferring certain religious sects and denying religious expression to others.²⁰ Many states at this time—including New York—amended their constitutions to forbid religious discrimination in oathtaking.²¹

The speed at which the theological foundation of the oath disappeared was dramatic. As late as 1820, a New York appellate court had banned a Universalist from taking a testimonial oath.²² Yet the sacral logic of future divine retribution was completely absent from every commissioner report on civil procedure three decades later, both in New York and elsewhere. In his 1847 tract laying out an ideal procedure system, Field expressed incomprehension that “some persons are very tender of the consciences of parties, thinking that the temptation to perjury will prove too strong for human frailty, . . . if I understand the drift of their argument.” Focus on an individual’s conscience seemed misplaced to Field, for all that really counted was whether party oaths were more likely in the aggregate to disclose truth or conceal it. Gone was the concern that a court might become complicit in condemning a soul to hell, or that divine retribution secured veracity. Concern for conscience thus struck Field as a “palpable absurdity, that because, in some cases, the motive of interest is stronger than the principle of honesty, therefore those truths which are only known to interested parties shall forever be hidden.”²³ A few truthful statements were more valuable than numerous falsehoods and guilty consciences.

Rather than serving as a means to re-sacralize civil proceedings, Field meant oath requirements to be a further step in the disenchantment of procedure. In the Final Report, Field

²⁰ Wesley Jud Campbell, “Testimonial Exclusions and Religious Freedom in Early America,” *Law and History Review* (forthcoming); Kathryn Gin Lum, *Damned Nation: Hell in America from the Revolution to Reconstruction* (Oxford 2014), 28–35.

²¹ See New York Constitution of 1846, art. 1, § 3 (“no person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief”). On the broader debates over Christian oaths and office-holding or witness testimony, see David Sehat, *The Myth of American Religious Freedom* (Oxford, rev. ed., 2015), 17–23, 54–62; Steven K. Green, *The Second Disestablishment: Church and State in Nineteenth-Century America* (Oxford 2010), 142–49, 172–218.

²² *Jackson ex dem. Tuttle v. Gridley*, 18 Johns. (N.Y.) 98 (1820). Within three years the future Chancellor of New York confined the reach of *Jackson* by ruling that a witness could testify as long as he “believes that he will be punished by his God even in this world, if he swears falsely.” *People v. Matteson*, 2 Cow. 433, 433 (N.Y. Ct. Oyer & Terminer 1824); Campbell, “Testimonial Exclusions and Religious Freedom.”

²³ David Dudley Field, *What Shall Be Done with the Practice of the Courts? Shall It Be Wholly Reformed?* (1847), 11.

counseled the legislature to “abolish oaths altogether,” so long as pleading and other solemn affirmations still carried temporal penalties for perjury. The rest of the commentary was devoted to other secular concerns. In order to protect state constitutional rights against self-incrimination, the commissioners decreed that no admissions in civil pleadings could be used as proof in a criminal trial.²⁴ If parties worried that their knowledge of a dispute was too uncertain to swear to factual veracity, the commissioners provided “a means of amendment of the most liberal character; as liberal, indeed, as we could devise.” And earlier drafts of properly amended pleadings would not support a prosecution of perjury.²⁵

The secularity of the oath and of Field’s code featured in a curious joke that circulated in the western newspapers in the 1870s. A woman rushed her husband into a clerk’s office and demanded her husband take an oath “that he will not strike me again.” The clerk protested that he was not empowered to administer oaths, but “‘it don’t make any difference,’ said the woman. ‘He’s got to take an oath on the big book, before you, that he won’t lick me again.’” His protests ignored, the clerk “took down from one of the shelves a copy of the code of Civil Procedure and laid it before the man, who placed his hand upon it and repeated what his wife told him, and which was as follows: ‘I solemnly promise that I will never beat or abuse my wife again, and if I should so far forget myself as to do so, this promise which I now make may be used against me in aggravation of punishment in any criminal proceeding.’ The woman then thanked the clerk, and turning to her husband said, ‘John, you are a

²⁴ 1848 New York Laws 525; *Final Report of the Commissioners on Practice and Pleadings*, in *Documents of the Assembly of the State of New York*, 73d sess., No. 16 (1850), 2:275, 787 (“We would not require” an oath, the commissioners wrote, if a party “merely preferred the declaration or affirmation . . . whenever it can be done with safety” — that is, whenever the threat of a perjury prosecution made the gravity of a solemn legal statement clear to a pleader). On the complicated conflation of party disqualification rules with privileges against self-incrimination, see John Fabian Witt, “Making the Fifth: The Constitutionalization of American Self-Incrimination Doctrine, 1791–1903,” 77 *Texas Law Review* 825 (1999).

²⁵ *First Report* (New York 1848), 158. When pressed by the English bar, Field confirmed that a party could even amend a complaint to state an entirely different cause of action than originally sued. *Evidence on the Operation of the Code* (1852), 34 (“Suppose the case turns out to be wholly different from what was stated in your complaint, and you have still a cause of action, but a perfectly different cause of action? — [Field:] In that case I may amend my complaint so as to suit it.”)

good man after all, and I know you'll keep your promise.'"²⁶ In the anecdote, the penalty for oathbreaking was described in purely temporal terms—an aggravated criminal punishment. By literally replacing the Bible with the code of civil procedure, the tale drew its humor from the understanding that there could be no magic, no objective spiritual consequence to such an oath. But like its more solemnly administered counterpart, the mock oath could perform its function, so long as those using it believed in it.

Sifted with More than Ordinary Care: Party Testimony

The third prong of reformed procedure was closely related to the first two. If parties were now obligated to state the facts of their dispute under oath in their pleadings, it was but a short step to permit parties themselves to be called to the stand to testify under oath at trial. And if parties were competent witnesses, there could be no reason to exclude any other witness who might have an interest (usually defined as a financial stake) in the litigation. The short step towards party competency, however, turned into a decade-long struggle in New York, where legislators reluctantly incorporated party testimony into the code only in 1857.²⁷

The code's original enactment in 1848 permitted interested non-party witnesses to testify, but it allowed only a limited form of party testimony. As with the oath requirement, Field insisted that "the only just enquiry is this; whether the chances of obtaining the truth, are greater from the admission or the exclusion of the witness." In Field's experience, the likeliness of truthful testimony was clear. "In the great majority of instances the witnesses are honest, however much interested, and in most cases of dishonesty the falsehood of the testimony is detected, and deceives none," the First Report concluded.²⁸ Nevertheless, the commissioners did not extend their logic on interested witnesses to party testimony. Instead, they allowed party testimony only as a substitute for the old

²⁶ "A Husband's Oath—How His Wife Made Him Swear on the Code of Civil Procedure," *Denver Daily Tribune*, January 24, 1877.

²⁷ See 1857 New York Laws 1:744.

²⁸ *First Report* (New York 1848), 246.

equitable bill for discovery (which the code then abolished). A party could be called to the stand only by an adverse party, and testimony on one's own behalf was discouraged. To replace discovery's function as a means of securing pretrial admissions, the examination could be conducted before trial, but then the party could not be called to the stand again at trial.²⁹

The continuing distinction between parties and interested witnesses showed the sizable gulf between written pleadings and oral statements before a court. When Lord Brougham's Law Amendment Society surveyed New York lawyers on their opinions about the code reforms, extending testimonial competency to parties received the most hostile answer, even among those who otherwise supported the new code. "If had at all," explained Myron Wilder, a lawyer from rural Canandaigua, party examination should be conducted only "before the day of trial." For "after the excitement of the trial has commenced" and lawyers had "animadverted upon the parties and 'badgered the witnesses,' it is in effect setting a trap for the soul when you call the party on the stand to testify."³⁰ A written pleading solemnly prepared in a lawyer's office—and with his careful counsel—guarded against perjury in ways the spontaneous and emotionally charged proceedings in a live trial would not.

But once again the commissioners spent no time arguing about traps for the soul. In the Final Report they declared that "in this completed code, we are for abolishing the remaining portion of the rule of exclusion, and for declaring parties competent as well as others" to testify. The completed code adopted an expansive rule that rendered any person with "organs of sense" a competent witness, regardless of interest or party status. The code exempted only children and the insane, and it privileged spouses, attorneys, clergy, and physicians from testifying. A party who chose to testify automatically waived all privileges. Even then, the commissioners worried they were being too liberal with privileges and invited the legislature to scale back. As under the 1848 code, parties could be

²⁹ 1848 New York Laws 559.

³⁰ *Evidence on the Operation of the Code*, 11–13.

deposed before trial to secure admissions, but then they could be called again to sift their testimony at trial.³¹

The “excitement” of an oral trial might have dissuaded some lawyers from permitting party testimony, but the codifiers argued that it was precisely the live, oral proceedings that extracted the truth from parties. Generally opposed to technical, Latinate phrases, they made an exception in their frequent praise for *viva voce* testimony – testimony made literally with “the living voice,” live, oral, and most importantly, able to be challenged by the living voices of opposing counsel. “A written deposition taken in private, is not the best means of eliciting the truth,” Field explained, because it was only in public trials before counsel and possibly before juries that witnesses “are subjected to the most searching and often offensive examination.”³²

“Offensive examination” was central to Field’s ideal system. Through cross-examination the skilled lawyer could overwhelm an obfuscating witness, frightening him with the consequences of perjury while probing his story from every direction. On this point, Field could draw on sources outside New York, as Connecticut and even England had begun experimenting with party testimony. The Final Report quoted at length a report by Lord Brougham, who reasoned that “the dread of detection and of consequent punishment, even in the absence of every moral sentiment, will in the great majority of instances check the commission of perjury. The *party* knows that his testimony will be sifted with more than ordinary care, and this knowledge must have a tendency to restrain any inclination to falsehood.”³³

³¹ *Final Report* (New York 1850), 714 § 1708, 726–27, 767–72 §§ 1821, 1830–32.

³² *First Report* (New York 1848), 244. See also Well, *Law of the State* (Missouri 1849), 68–69 (“Whenever a witness can be examined, *viva voce*, in court, before the jury and the parties, it is better to do so, as new questions may become necessary from the answers to, or evasions of other questions, and new matter of enquiry may become necessary, or be suggested on the trial. Besides, the witness will be less apt to prevaricate, when thus examined in open court and in the presence of the party against whom he is testifying. A private examination in an office is not so likely to obtain the truth.”).

³³ Connecticut Revised Statutes tit. 1, ch. 10. § 141 (1849); An Act for Improving the Law of Evidence. 6 & 7 Vict. ch 85. § 1 (1843); An Act for the More Easy Recovery of Small Debts and Demands in England. 9 & 10 Vict. ch. 95, § 83 (1846). *Final Report* (New York 1850), 715–25.

“Sifting the conscience” was an old phrase that originated in ecclesiastical writings but was now frequently applied by Field and Lord Brougham to truthseeking in the secular civil courts. And the ministerial analogy did not end there. Renée Lettow Lerner and Sarah Barringer Gordon have traced the ways early nineteenth-century lawyers adapted the “emotional speechifying” of itinerant revivalists.³⁴ If closing arguments mimicked the altar call, as Lerner contends, then cross-examination according to the codifiers sought the conviction of sin. Putting their own gloss on Field’s report, the Ohio commission, like contemporary preachers, detailed the terrors that awaited sinners on the witness stand. “The witness is aware of the suspicion which rests upon him,” by “this imposing array” of judge, jury, and opposing counsel. “They are fully determined not to be deceived. . . . Their eyes are bent upon him with the keenest solicitude, they watch with eagerness the most trifling movement; the slightest hesitation in his answers does not escape their notice; they observe the expression of his countenance, his attitude and demeanor, and the very intonations of his voice.”³⁵ Never mind perdition; cross-examination would be hell enough to deter dishonest litigants.

Deterrence was the crucial point. However much English and American reformers praised cross-examination as a means of detection, they did not expect they would have to use it that way very often. (As Lord Brougham had phrased it, “the dread of detection . . . restrain[ed] any inclination to falsehood.”) The point was important, because Anglo-American evidence law continued to respect the sanctity of another kind of oath: the juror’s oath. By their oath, jurors too were risking their souls by participating in litigation (note that when Myron Wilder complained about “a trap for the soul,” he did not specify whose soul – the defendant’s or the jury’s – he had in mind). If two parties offered exactly conflicting testimony, at least one was committing perjury, and the jury would be called upon, in effect, to declare which soul was damned, a dangerous enterprise given Christ’s commandment to

³⁴ See Samuel Warren, *A Popular and Practical Introduction to Law Studies Civil, Criminal, and Ecclesiastical* (1846), 234; Dennis R. Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (Routledge 2010). Renée Lettow Lerner, “The Transformation of the American Civil Trial: The Silent Judge,” 42 *William & Mary Law Review* 195 (2000), 233–39; Gordon, “Blasphemy and Religious Liberty,” 691.

³⁵ *Report of the Commissioners* (Ohio 1853), 130.

“judge not, lest ye be judged.”³⁶ But in their early reports, the codifiers did not believe that allowing party testimony would seriously increase conflicting testimony. “There is a natural tendency to declare the truth which is never wholly eradicated,” the Ohio codifiers wrote. Coupled with this tendency, the fear of detection would deter perjury from even occurring the first place.³⁷

The Inquisitorial Ordeal: The Paradigm Case of Debt Collection

The code replaced the theological foundations of legal formulary systems, oathtaking, and examination with a secular rationale. Whatever the afterlife might hold for oathbreakers, the codifiers contended that the ultimate threat of a perjury prosecution and the penultimate unpleasantness of a live cross-examination would deter falsehood and render civil proceedings altogether more truthful. Although their commentary often traded in abstractions and generalizations, codifiers both in New York and around the states and territories specified the benefits of their system for one case in particular, that of a debt collection. When they tried to illustrate what they meant by fact pleading, when they argued for the necessity of an oath, and when they touted the efficiencies of extracting testimony from the parties themselves, they continually recurred to the example of an action on a promissory note or bill of sale as a paradigm case.³⁸

In their schedule of forms, the New York commissioners showed how fact pleading should work in the case of an unpaid debt. The pleader should not state, on the one hand, all the trivial details of a transaction through one’s agents, nor, on the other, legal conclusions that one party contracted with or owed money to another. Rather, the complaint should state that the plaintiff sold goods and

³⁶ Campbell, “Testimonial Exclusions and Religious Freedom.” For contemporary concerns about the risks for a juror’s conscience, see John Longley, *Observations on the Trial by Jury* (1815), 30; Eli Price, *Discourse on the Trial by Jury* (1863), 19 (“But the conscience and oath of each juror who joins in the verdict, is pledged for its truth and justice to the parties, to society, and to God.”). For the medieval origins of this idea, see James Q. Whitman, *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial* (Yale 2016).

³⁷ *Report of the Commissioners* (Ohio 1853), 140.

³⁸ As Jed Rubenfeld has explained in a constitutional context, a paradigm makes the abstract intentions of lawmakers more definite by providing concrete applications, usually in the form of cases the lawmaker was seeking to provide for or prohibit going forward. Jed Rubenfeld, “The Paradigm-Case Method,” 115 *Yale Law Journal* 1977 (2006).

the defendant agreed to pay, but had not. The answer should state, if true, whether the defendant had in fact paid or whether the plaintiff's goods had been defective.³⁹

The oath would then secure the key piece of information: the exact amount owed. Under the "common counts" of former practice, a demand for \$100 might be stated four different ways, thus pleading \$400 damages, although the actual trial would limit the recovery to the original \$100. By forbidding repetition and abolishing the various forms of action to recover on an obligation, the commissioners expected to force plaintiffs to state in one line the exact amount owed, whatever the theory of recovery.⁴⁰

Upon this system of verified pleading, the commissioners provided additional rules to speed along remedies in proceedings upon debt. Default judgment would issue if a complaint were not answered within twenty days, and the code abolished the customary thirty-day waiting period between judgment and enforcement. The Final Report offered even more summary proceedings that effectively cut the twenty days down to five. Default judgment could be entered by the clerk at any time in the year, not just during court sessions as under former practice. A defendant's answer might delay judgment until the court term, but as defendants too had to verify their answers under oath, the commissioners hoped to foreclose sham defenses that only caused delay. In fact, they expected most defendants would accept default judgment, and they cited this as a prime feature of the code. Courts would be relieved of cases where the amount owed was not really in dispute, and if defendants had to accept a default, at least they did not have to incur the additional expenses of hiring a lawyer.⁴¹

Indeed, the commissioners sounded antilawyerly in how strongly they stated their desire "to relieve defendants, as far as possible, from the necessity of employing a lawyer." Default judgment could never exceed the damages stated in the original complaint. If "the defendant is not disposed to

³⁹ *First Report* (New York 1848), 261–68.

⁴⁰ *First Report* (New York 1848), 139–40; Wells, *Law of the State* (Missouri 1849), 92–93, 99–102. See also *Report of the Code Commissioners to the Eighth General Assembly of the State of Iowa* (Iowa 1859), 185; *Report of the Commissioners* (Ohio 1853), 50–52, 65–66.

⁴¹ *First Report* (New York 1848), 182–83 § 202, 197; *Final Report* (New York 1850), 570–74.

controvert” the pleaded amount, explained the report, “he may, with perfect safety, permit judgment by default, as the law limits the recovery, in that case, to the amount specified.” Ideally, the commissioners wrote, most trials could be avoided when “credit requires that the remedy should be speedy.”⁴²

The commissioners further explained that competent party testimony could then remedy “one of the worst evils of our judiciary system”: nondisclosure of assets by defaulting debtors. The ability to call an adverse party was “designed to furnish a cheaper and easier method of discovering the concealed property of a judgment debtor,” Field explained.⁴³ The debtor himself might be the only person fully informed about his ability to pay his debts, but the disqualification of party testimony prevented disclosure unless a plaintiff resorted to the expensive and time-consuming discovery proceedings of a creditor’s bill in chancery. Many smaller debts were not worth litigating at chancery, and thus, explained codifiers in Ohio, “there are innumerable cases, where the dishonest man escapes the payment of his debt or the performance of his obligations, by the inability of the adverse party to adduce the requisite legal proof, which his own testimony would always supply.”⁴⁴

In the debates over procedural codification, debt collection thus provided a concrete application through which codifiers could think about the metaphysics of formulary systems and testimonial oaths. The truth that the codifiers hoped to produce was paradigmatically commercial truth: How much, “in fact,” did parties owe one another, and to what extent would their assets satisfy a judgment against them? When codifiers attempted to illustrate the absurdities of traditional practice, they most often pointed to cases in trover and assumpsit—the actions used to recover on unpaid contracts.⁴⁵ Their opponents instead turned to noncommercial forms, such as those for assault and battery, to argue that pleadings were sufficiently clear and concise already.⁴⁶ When the English bar

⁴² *Final Report* (New York 1850), 256, 571; *First Report* (New York 1848), 238–39.

⁴³ *First Report* (New York 1848), 201

⁴⁴ *Report of the Commissioners* (Ohio 1853), 135.

⁴⁵ See, for instance, *Report of the Commissioners* (Ohio 1853), 6; Wells, *Law of the State* (Missouri 1849), 101–04.

⁴⁶ See, for instance, *Journal of the House of Representatives of the State of Minnesota* (1858), 514–15.

interrogated Field about the New York reforms, they peppered him with hypothetical cases of real estate encumbered with multiple mortgages of unclear priority. Field waved off realty questions as uninteresting or uncomplicated under the code, and instead he focused on the ways oath-bound pleadings and party testimony in cases of personalty settled “an immense mass of business, which occupies a great deal of time in your Court of Chancery.”⁴⁷

For further evidence that American codifiers were exchanging the traditional sacredness of the oath for oaths with purely commercial significance, one could make a good start with John Worth Edmonds, the trial judge who had advocated for the code before becoming one of Field’s greatest judicial antagonists. After the death of his wife in 1850, Edmonds sought comfort in spiritualist séances, and by 1853 Edmonds had resigned his seat on the supreme court bench to become of America’s more prominent spirit mediums and apologists for Spiritualism. In his memoirs, Edmonds recounted how spirit guides had revealed to him the true nature of the afterlife – not a binary of heaven and hell, but rather a graduated series of stages toward enlightenment. If anything like a hell existed, it was synonymous with earthly life in the here-and-now.⁴⁸

Despite his unusual religious views, Edmonds and Field were agreed on their juridical approach. Edmonds explained to law students in 1848 that temporal penalties alone would allow the oath to restore “to pleadings their truth-telling character.” Edmonds praised the democratic, plainspoken nature of code pleading and complacently noted that the code urged “a somewhat general abandonment of the trial by jury.” He further complimented code practice as “a valuable substitute for the creditor’s bill,” remarking that testimonial qualification and oathtaking by parties marked “the shadowing forth of an important aid to creditors . . . against the efforts of a fraudulent

⁴⁷ *Evidence on the Operation of the Code*, 28–29, 33. After the survey of New York attorneys, the reform tract re-published the minutes of an examination of Field, “taken before the Commissioners appointed to inquire into the Process, Practice, and System of Pleading, the Court of Chancery. – Monday, December 22nd, 1851.” The questions were posed by Lord Romilly, the Master of the Rolls.

⁴⁸ Gin Lum, *Damned Nation*, 151–57; Hon. J. W. Edmonds, “Personal Experience,” 1 *The Shekinah* 265 (1852), 270–71.

debtor.”⁴⁹ The infusion of democratic politics into plainspoken pleading (and not into jury service), the interconnections between fact pleading, oathtaking, party testimony – from the parts to the whole, Edmonds understood the code on its own terms: terms of merchant credit.

Learning to Live with Perjury: From Deterrence to Detection of Oathbreaking

On the face of it, Field’s statute requiring all pleadings to be verified by oath seemed like it should have been easy to implement. In practice, the rules of oathtaking became one of the more complicated departments of code pleading. Judge Edmonds’s decision in *Dollner* forecast future troubles by observing that “the nature of the oath which, under the code, the party is required to make in regard to his pleading . . . is subordinate . . . and necessarily qualified by” the artifice required to conform the factual narratives of pleadings to the substantive elements of legal rights.⁵⁰ However, it was by no means clear whether such a “qualified” oath could give rise to perjury. Remarkably quickly, lawyers in all the early code states abandoned their faith in cross-examination and prosecution as a deterrence to perjury, arguing instead that their skillful cross-examinations, if they could not deter, at least could detect the violation of the oath and thus secure the truth in court. Some argued that they were forced to this position when the code itself seemed to demand perjury from the parties.

From the earliest days of code practice, some lawyers doubted whether perjury could even be committed under code pleading. One New York attorney wrote in to the *Code Reporter*, a magazine founded to share judicial decisions and professional discussion on the new code. The lawyer noted that the code required pleadings to be verified, “but does not state, *in terms*, that it shall be *verified by oath*.” The attorney wondered, then, “Can a party who verifies a complaint or answer on oath, knowing it to be wholly false, be convicted of perjury?” The editor bemusedly answered, “We cannot imagine how any doubt can arise on the subject,” but in subsequent issues, the *Reporter* admitted the

⁴⁹ John W. Edmonds, *An Address on the Constitution and the Code of Procedure* (1848), 15, 31, 38, 42–43.

⁵⁰ *Dollner v. Gibson*, 3 Code Rep. 153, 155; 2 Edmonds 253, 256 (N.Y. Supreme Court 1850).

question was more difficult than it first appeared.⁵¹ The literal provisions of the code seemed to put defendants in an intolerable dilemma. Although a plaintiff generally bore the burden of proof, the defendant could not put the plaintiff to his proof without denying a material allegation under oath, at the risk of perjury. But if a defendant could not deny an allegation he suspected or believed or even knew to be true, the plaintiff would be relieved of the burden of proof the law assigned to him. “Can a party be convicted of the crime of perjury,” a Minnesota lawyer exclaimed, “under a law *requiring* him upon *oath* to deny ‘*all the material facts in the case?*’” If so, the code basically forced defendants into testifying against themselves. If they sought to hold plaintiffs to their proof, as traditional due process demanded, they opened themselves to criminal prosecution for perjury on their pleadings. Thus, the *Code Reporter* ultimately concluded, “the Code does not render it necessary to verify pleading on oath, but if it does, then it is unconstitutional.”⁵²

The commissioners remained resolute in their Second Report, waiving verification only when an admission would subject a party to prosecution for “an infamous crime” (other than perjury), and expressing “regret, that a more stringent rule in respect to the verification of pleadings is required, but they have reason to believe, that the spirit of the code in this respect has not been always regarded.”⁵³ The legislature overruled the commissioners with two new provisions designed to ameliorate the oath requirement. First, the oath was made optional unless the parties themselves insisted on it, which largely re-instituted the rules of pleading at chancery. To force an admission under oath from the defendant, a plaintiff would himself have to swear to his own facts, including the allegation that he could not come by the needed information any other way than the admission of the defendant. Under such a rule, it was no longer clear when an oath was “voluntary” or “required by law,” and the distinction was crucial for perjury. Under longstanding rules of equity, derived from

⁵¹ 1 Code Rep. 26–27 (1848–1849).

⁵² Report of Aaron Goodrich, *House Journal* (Minnesota 1860), 220; 1 Code Rep. 2 (1848–1849). See also Henry Whittaker, *Practice and Pleading under the Codes* (1852), 169 (advising plaintiffs always to verify their complaints so as to effectively shift the burden of proof to defendants).

⁵³ *Second Report* (New York 1849), 28.

biblical injunctions against needless swearing, a voluntary oath was an “unlawful” oath and could not support a charge of perjury. The same year as the New York amendment, the *Code Reporter* favorably cited an Ohio chancery decision restating the voluntary oaths rule, and New York courts applied the rule to code practice a few court terms later.⁵⁴

The second mitigating amendment took Field’s commentary on the code and made it a point of law. “It is not required of a party, that he state absolutely, that the matters pleaded are true, inasmuch as his knowledge may not extend to the whole case,” the Second Report had explained, “but it is intended to put him upon his veracity, and to require him to state nothing, that he does not believe to be true.” The legislative amendment accordingly specified that with the oath a party swore not that the facts were true, but that they were believed to be true at the time of pleading, a more difficult burden for a prosecutor to prove perjury.⁵⁵ Together, the quasi-voluntary nature of the civil oath and knowledge requirement for conviction rendered perjury convictions on civil pleadings largely impractical. Printed reports contain very few instances of a perjury prosecution on civil pleadings – or indeed, on any ordinary civil case. Most perjury prosecutions arose from criminal actions or extraordinary circumstances in maritime proceedings or before justices of the peace.⁵⁶ In one peculiar case in the 1870s, the county court in Tompkins upheld a perjury conviction when a defendant lied in his pleading about paying off a promissory note and sought to escape punishment by arguing that the pleading did not directly claim the note was paid, only that “the defendant says” it was paid, that is, a true allegation of a false statement.⁵⁷

⁵⁴ On the antiquity of the rule, see Helmholz, *The Spirit of Classical Canon Law*, 156. *Silver v. State* 17 Ohio 365 (Ohio Chancery 1847); 2 *Code Reporter* 29; *People v. Travis*, 4 *Parker’s Criminal Reports* 213 (Buffalo Superior Court 1854).

⁵⁵ New York law had made it perjury for any person to “wilfully and corruptly swear, testify, or affirm falsely, to any material matter,” making it ambiguous whether intentionally swearing to facts one did not know to be false constituted perjury. 2 Revised Statutes 681 § 1. The code amendment thus clarified that such an act would not be perjury.

⁵⁶ See, e.g., Frank F. Brightly, *A Digest of the Decisions of All the Courts of the State of New York from the Earliest Period to the Year 1892* (1893), 3:5924–27.

⁵⁷ *People v. Christopher*, 4 (11) Hun 805 (Tompkins County Court, N.Y. 1875).

When the English began admitting party testimony in civil cases, according to a recent study by Wendie Ellen Schneider, perjury prosecutions (and convictions) nearly tripled in the early 1850s, gradually declining as lawyers increasingly trusted cross-examination as the greatest “engine of truth” in civil trials. In America, however, perjury trials based on civil pleadings were scarce, even as many lawyers recognized that parties lied with regularity. “Under the New York code the provisions concerning verification of pleadings are completely evaded and rendered of no avail,” griped one emigrating New York lawyer in the 1870s, “and no man has ever been convicted of perjury under them to this day, although the spirit of the provisions are violated in almost every action brought.” Schneider demonstrates that the British reluctance to rely solely on cross-examination as a deterrent stemmed largely from the professional and class divisions of the bar. Chancery solicitors avoided cross-examination techniques they associated with the low class pleaders of the Old Bailey criminal court, while common law barristers attempted to prove that cross-examination could be a gentlemanly art.⁵⁸ The American bar remained comparatively less stratified before the Civil War, and many attorneys practiced in multiple court systems and borrowed one another’s procedures. New York solicitors, for instance, adopted live cross-examination techniques in chancery decades before the Field Code.⁵⁹

Importantly, the English did not adopt Field’s rules for pleading under oath. American judges thus faced an additional pressure to overlook potentially perjured testimony, because such testimony was often offered just to be consistent with the pleadings. If it seemed unfair to relieve plaintiffs of the

⁵⁸ Wendie Ellen Schneider, *Engines of Truth: Producing Veracity in the Victorian Courtroom* (Yale 2015), ch. 1 & ch. 2; “A Code Lawyer on the Code,” *Rocky Mountain News*, (Denver, Colo.), January 24, 1877.

⁵⁹ See Kessler, “Our Inquisitorial Tradition.” There is perhaps no better example of the integrated American bar than Field’s co-commissioner David Graham, Jr., a renowned solicitor at New York chancery as well as professor of common law practice and pleadings at New York University. And if Lerner and Gordon are right that trial lawyers derived their rhetorical strategies from revivalists, evangelists found much more success in America making the upper classes familiar with confrontational addresses and combative questioning. See, for instance, the contrasting studies of Charles Finney in middle-to-upper-class Rochester versus his English tour, where he largely gained a hearing only in downtrodden Wales. Paul E. Johnson, *A Shopkeeper’s Millennium: Society and Revival in Rochester, New York, 1815–1837* (Hill & Wang 2004 [1976]); John Wolfe, *God and Greater Britain: Religion and National Life in Britain and Ireland, 1843–1945* (Routledge 1994), 6–7.

burden of proof through a defendant's verified pleadings, it seemed abusive to prosecute parties for sticking to their pleaded stories when put on the stand. Commentators reported a common belief "that the verification of a pleading under the Code can not, under any circumstances, constitute perjury." If that were true of the pleadings, critics complained, then both written and vocalized "perjury seems to be fast becoming legalized under the corrupting influences of the 'Code.'"⁶⁰

Even in states that adopted Field's more "stringent" rule, the threat of perjury prosecution failed to deter false pleading—or false testimony. In 1853, the Ohio commissioners adopted Field's rules with the comment, "We trust in the general regard of the great mass of the people for truth, [and] in the rigor of the criminal laws of the State to deter the dishonest from perjury."⁶¹ But by the end of that same decade, judges in the state—as well as their counterparts in New York and across the Atlantic—had abandoned the hope of deterrence and clung only to the promise of detection. The 1859 Iowa code commission solicited surveys from lawyers and law reformers across the Midwest, from New York, and even in London. Three English barons on the Court of Exchequer supported putting parties to their oaths, though they admitted the rule "effects much justice at the expense of much perjury." Baron George Bramwell wrote, "I cannot now understand how litigation can be conducted without it. It is absolutely certain that the truth is better got at." But, he followed up, "no doubt there is more direct perjury." Samuel Martin agreed that the rule elicited truth. "It must be admitted, however, that it has produced perjury to an extent not which certainly did not exist before." American jurists were just as sanguine about "whether under this system justice is not purchased at the expense of demoralization" in the words of an Ohio lawyer recently appointed to the faculty at the University of Virginia.⁶²

⁶⁰ *McCrorry v. Skinner*, 2 Ohio 268 (1860); *House Journal* (Minnesota 1860), 220. See also *Report of the Code Commissioners* (Iowa 1859), 288 (Richard Busted (New York): "I regard it as a direct inducement to frauds, and a terrible temptation to perjury. I am satisfied that the last crime has greatly increased through the instrumentality of this provision.").

⁶¹ *Report of the Commissioners* (Ohio 1853), 140.

⁶² The Ohio transplant to Virginia was Professor James P. Holcombe. The third baron from the Court of Exchequer was James Shaw Willes. *Report of the Code Commissioners* (Iowa 1859), 232–34.

Judges on the Ohio court of common pleas agreed that perjury had become rampant under the reformed system, but none found the epidemic particularly troubling. "If perjury is committed, it is very soon disclosed" Judge James L. Bates assured his Iowa correspondents. His colleague, B. F. Hoffman, agreed that "the chief objection is merely, that it produces perjury," but the chance at truth outweighed the objection. Yet another Ohio judge responded, "Much perjury exists in the swearing of parties. It is really alarming, but in many cases does conduce to truth." With truth so easy to detect, codifiers expressed no lingering concerns about presenting conflicting testimony to oath-bound jurors. "The probabilities, the appearance of the witness, the cross-examination, the circumstances, the corroboration of others, etc., almost always makes it easy to see who has the truth on the point in dispute," Judge Hoffman concluded. "The point must be naked and isolated indeed, the contradiction plump and evenly balanced in manner, matter, etc., not to tell where the real truth is."⁶³

Rather than undertaking the English experiment of exemplary prosecutions, then, American lawyers largely made their peace with perjury. Ignoring criminal sanctions, Judge Hoffman further reasoned that perjurers "will soon find their true social and trading position at the lower end of the scale, and out of the good opinion of honest men." The handicap to bargaining was apparently all the just punishment of perjury. Some judges continued to insist into the 1860s that "where, in the course of legal proceedings, the oath of a party is required, the intention is to appeal to his conscience and to his religious sense." Judge Hoffman, however, waved off such concerns, concluding that he "would not be tender of [parties'] internal mental condition, at the expense of others' rights and dues."⁶⁴

Whose Mendacity Is Proverbial: The Disqualification of Racialized Witnesses

"Admission is the rule here," Field explained in defense of the rules making parties competent witnesses at trial. "Exclusion is the rule of the common law. Let in all the light possible, we ask. Not

⁶³ *Report of the Code Commissioners* (Iowa 1859), 234–36.

⁶⁴ *Report of the Code Commissioners* (Iowa 1859), 234–35.

so the common law; exclude the light, it says, lest perchance it deceive you; unmindful, as it appears to us, that poor light is better than none." The apparent rise of perjured testimony under the code may have meant that the light was much poorer than Field had expected, but at least the compromises of the code allowed truthseeking that former practices had foreclosed. Even as it became evident that party testimony had opened the floodgates to falsehood, some truth, previously excluded, was streaming in as well, and Field shared the same confidence as the Ohio judges that lawyers could easily elicit the truth. "Let us not fear, that judges and juries will be deluded into a belief of an improbable or untrue story, though the parties themselves be the persons who utter it," he urged.⁶⁵

Field's argument was commended outside New York. "I entirely concur with your opinion, that all rules for the exclusion of evidence are rules for the exclusion of light," the Missouri codifier R. W. Wells wrote to Field. In his report, Field reprinted the recommendations of William Storrs, Chief Justice of the Supreme Court in Connecticut, a state that had recently abolished party disqualifications. "For although, it is obvious that there will be much false swearing by parties in their own behalf under it," Storrs admitted, juries could "make the proper allowance for the interest and situation of the witnesses, especially as he is personally before the Court, and is subjected to the searching operation of a cross-examination." The Ohio commission concurred. "The tests of truth are almost innumerable, and tried by them, falsehood is laid bare and recoils upon the head of him who utters it," they wrote in their report.⁶⁶

But just when lawyers in state after state were learning to live with perjury, confident in their ability to detect the truth, many states introduced a new policy of testimonial exclusion in their codes. It began in one of the earliest adopters of the code, California. As enacted by the legislature, the state's Practice Act tracked the 1849 version of Field's code by permitting the examination of adverse parties and abolishing the disqualification of non-party interested witnesses. The act then provided that "no

⁶⁵ *Final Report* (New York 1850), 715; *First Report* (New York), 246.

⁶⁶ *Final Report* (New York 1850), 715-17; *Report of the Commissioners* (Ohio 1853), 129.

black, or mulatto person, or Indian, shall be permitted to give evidence in any action to which a white person is a party, in any Court of this State." When Field's brother Stephen J. Field introduced David Dudley's completed draft in the next session, he incorporated the racial exclusion, although he adjusted the blood quantum defining "black" (upward) and "Indian" (downward) from the levels set in 1850.⁶⁷ For the latter category, the state assembly briefly considered mitigating the absolute exclusion. Perhaps "Christianized Indians whom two disinterested white persons, citizens of the State, shall, on oath, testify, in open court, that they are known to them, and that they consider their testimony under oath worthy of credit" could testify, "leaving the credibility of such Indians to the jury." With a tied vote, however, the assembly decided to leave the exclusion absolute.⁶⁸ Field and the other codifiers offered no commentary on their change to the New York code. Testimonial exclusions of racialized peoples were not new in American law, and the language of the California rule closely tracked the laws of midwestern states from which many Californians had emigrated.⁶⁹

Commentary would be provided several years later by an infamous case in the state supreme court, *People v. Hall*, which extended the testimonial exclusion of blacks and Indians to the Chinese as well. *Hall* has become widely noted for its strained attempts to include Chinese people in the statutory construction of "Indian," as well as for its reasoning that if "a race of people whom nature has marked as inferior" were admitted to testify, they would next clamor for "all the equal rights of citizenship, and we might soon see them at the polls, in the jury box, upon the bench, and in our legislative halls."⁷⁰

⁶⁷ 1850 California Laws 455 § 306; 1851 California Laws 114 § 394. Stephen Field's code changed the blood quantum to consider a person an Indian from one-half to one-fourth, and a Negro from one-eighth to one-half.

⁶⁸ *Journal of the House of Assembly of the State of California* (1850), 990-91, 1000.

⁶⁹ See 1807 Ohio Laws 54; *Jordan v. Smith*, 14 Ohio 499 (1846); 1839 Iowa Laws 379.

⁷⁰ *People v. Hall*, 4 Cal. 399 (1854). As the citation indicates, the case was a criminal prosecution for murder committed by a white man, but all three witnesses to the murder were Chinese. As the criminal and civil procedure codes contained identical language on the exclusion of testimony, *Hall* was understood to apply to civil cases as well. See *Speer v. See Yup Co.*, 13 Cal. 73 (1859). William J. Novak, "The Legal Transformation of Citizenship in Nineteenth-Century America," in Meg Jacobs et al., eds., *The Democratic Experiment: New Directions in American Political History* (Princeton 2003), 85-119; John R. Wunder, "Chinese in Trouble: Criminal Law and Race on the Trans-Mississippi West Frontier," in Gordon Morris Bakken, ed., *Law in the West* (Garland 2001), 75-92; D. Michael Bottoms, *An Aristocracy of Color: Race and Reconstruction in California and the West, 1850-1890* (Oklahoma 2013), ch. 1.

What accounts of the case have failed to notice, though, is how thoroughly the case subverted the codifiers' faith in cross-examination as an infallible test for truth at trial. Most of the opinion in *Hall* sought semantic connections between Native American *Indians* and the West *Indies* in order to bring all Asian peoples under the terms of the statute. In the final pages, the opinion pivoted and argued that "even admitting the Indian of this Continent is not of the Mongolian type," the legislature clearly intended a policy that excluded all non-white testimony in court. "The evident intention of the Act was to throw around the citizen a protection for life and property, which could only be secured by removing him above the corrupting influences of degraded castes," the majority wrote. In elaborating this racial degradation, *Hall* focused on a supposed inability to respect the oath among the Chinese, "whose mendacity is proverbial" and who were "incapable of progress of intellectual development" to respect either oaths of office or of testimony. The most vital clue to legislative intent, the opinion concluded, was the comparison to "domestic Negroes and Indians, who not unfrequently have correct notions of their obligations to society." Surely the legislature did not mean to protect white citizens by excluding the oft true testimony of California's black and native populations only to allow foreign races to testify without inhibition.⁷¹

As a matter of legislative intent, *Hall* seemed to have had the interpretation right. The point of the statute had not been to specifically exclude certain races but to generally exclude all non-white testimony. The specific mention of "black" and "Indian" had been to set the legal levels of blood quantum that would assign race, and a later legislature clarified the law by adding "Mongolians" and "Chinese" to the Indian clause with its requisite one-half blood quantum.⁷²

However, the admission that the rule excluded the frequently true testimony of these groups for sake of policy entirely undermined the code reforms to witness testimony. If anyone's mendacity had become proverbial by the mid-1850s, it was that of white parties and interested witnesses. Yet,

⁷¹ 4 Cal. at 403.

⁷² 1863 California Laws 60.

the codifiers had argued, within the totality of the trial, truth was easy to discover and self-interested lying easy to detect. Sensing the contradiction that white lawyers in front of white juries could easily sift truth from white witnesses but not from “inferior” races, Montana’s governor Sidney Edgerton vetoed the entire code of civil procedure for its racial exclusions. “Our Juries and Courts are composed exclusively of white men and I consider the Caucasian race competent to weigh evidence coming from any witness of any race wisely, justly and well,” he concluded. The legislature overrode the veto without comment.⁷³

California’s contradictory testimonial rules migrated to other jurisdictions, enjoying an influence almost as widespread as the Field Code itself. Chapter 3 offered a macroscopic view of the code’s spread using tools of digital analysis. Similar tools can be deployed for a more targeted analysis of legal migration at the level of individual rules. Since the text analysis project split the codes into their individual component sections and measured their similarities, a clustering algorithm can organize sections into “clusters” of similarity. This method provides legal historians with a way of noticing small changes in the wording and substance of the law. Most discussions of algorithmic reading have focused on “distant reading,” or have balanced the claims of computational distant reading by using it as a means to enable traditional close reading. This method of clustering, however, is a kind of algorithmic close reading. By deforming the texts – taking them out of the context of the codes and putting them into the context of their particular variations – historians are able to pay attention to those variations.⁷⁴ The cluster of racial exclusions among code states follows, with commentary, in Table 1:

Table 1: Clusters of Racial Competency Rules in Nineteenth-Century Codes and Legislation

Disqualifying the testimony of racialized parties and witnesses was not new to the procedure codes. The following laws from midwestern states with large free black populations would be echoed in adaptations of the Field Code.

OH1807-0001	That no black or mulatto person or persons, shall hereafter be permitted to be sworn or give evidence in any court of record, or elsewhere in this state, in any cause depending, or matter of controversy,
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⁷³ *Journal of the House of the Territory of Montana* (1865), 201-02, 207-10.

⁷⁴ See Lisa Samuels and Jerome McGann, “Deformance and Interpretation” 30 *New Literary History* 25 (1999).

	where either party to the same is a white person, or in any prosecution, which shall be instituted in behalf of this state, against any white person.
IA1839-0780	A negro, mulatto, or Indian, shall not be a witness in any court or in any case against a white person.
IN1843-6330	No negro, mulatto or Indian, shall be a witness, except in pleas of the state against negroes, mulattoes, or Indians, and in civil causes where negroes, mulattoes, or Indians alone are parties: every person other than a negro having one-fourth part of negro blood or more, or any one of whose grandfathers or grandmothers shall have been a negro, shall be deemed an incompetent witness, within the provisions of this article.

Racial qualifications were introduced to the Field Code tradition in California, first in Elisha Crosby's draft of 1850, then in Stephen J. Field's draft of 1851. Many western states would copy Stephen Field's provision. Notable divergences are highlighted in italics.

CA1850-3270	306. No black, or mulatto person, or Indian, shall be permitted to give evidence in any action to which a white person is a party, in any Court of this State. Every person who shall have one eighth part or more of negro blood, shall be deemed a mulatto; and every person who shall have one half Indian blood, shall be deemed an Indian.
CA1851-4380	394. The following persons shall not be witnesses: 1st. Those who are of unsound mind at the time of their production for examination; 2d. Children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly; and; 3d. Indians, or persons having one fourth or more of Indian blood, in an action or proceeding to which a white person is a party; 4th. Negroes, or persons having one half or more Negro blood, in an action or proceeding to which a white person is a party.
CA1868-3990	394. The following persons shall not be witnesses: First. Those who are of unsound mind at the time of their production for examination. Second. Children under ten years of age, who, <i>in the opinion of the court</i> , appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly. Third. Mongolians, Chinese, or Indians, or persons having one-half or more of Indian blood, in an action or proceeding wherein a white person is a party. Fourth. Persons against whom judgment has been rendered upon a conviction for a felony, unless pardoned by the governor, or such judgment has been reversed on appeal. [<i>note: no exclusion of African American testimony after the Civil War</i>]
OR1854-3380	6. The following persons shall not be competent to testify: 1. Those who are of unsound mind, or intoxicated at the time of their production for examination; 2. Children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly; 3. Negroes, mulattoes and Indians, or persons one half or more of Indian blood, in an action or proceeding to which a white person is a party.
WA1855-3150	293. The following persons shall not be competent to testify: 1st. Those who are of unsound mind, <i>or intoxicated at the time of their production for examination</i> . 2d. Children under ten years of age, who appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly. 3d. Indians, or persons having more than one half Indian blood, in an action or proceeding to which a white person is a party. [<i>note: no exclusion of African American testimony</i>]
UT1859-2440	215. The following persons shall not be competent to testify: 1. Those who are of unsound mind or intoxicated at the time of their production for examination. 2. Children under ten years of age, who appear to be incapable of receiving just impressions of the facts respecting which they are examined or of relating them truly. Negroes, mulattos, and Indians, or persons having one fourth of negro or Indian blood, in an action or proceeding to which a white person is a party, <i>but shall not be disqualified from testifying against another</i> .
NV1861-3800	342. The following persons shall not be witnesses: First. Those who are of unsound mind at the time of their production for examination. Second. Children under ten years of age, who, in the opinion of the court, appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly. Third. Indians, or persons having one half or more of Indian blood, and negroes, or persons having one half or more of negro blood, in an action or proceeding to which a white person is a party. Fourth. Persons against whom judgment as been rendered upon a conviction for a felony, unless pardoned by the governor, or such judgment has been reversed on appeal.
ID1864-3910	352. The following persons shall not be witnesses: First. Those who are of unsound mind at the time of their production for examination. Second. Children under ten years of age, who, in the opinion of the

	court, appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly. Third. <i>Chinamen</i> or persons having one-half or more of <i>China blood</i> ; Indians, or persons having one-half or more of Indian blood, and negroes, or persons having one-half or more of negro blood, in an action or proceeding to which a white person is a party. Fourth. Persons against whom judgment has been rendered upon a conviction or felony, unless pardoned by the governor, or such judgment has been reversed on appeal.
AZ1865-3970	396. The following persons shall not be witnesses: 1. Those who are of unsound mind at the time of their production for examination. 2. Children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly; and, 3. Indians or persons having one-half or more of Indian blood, in an action or proceeding to which a white person is a party. 4. Negroes, or persons having one-half or more negro blood, in an action or proceeding to which a white person is a party.

Kentucky differed from other code states by making no distinction between incompetency (an absolute bar) and privilege (which might be waived). Kentucky also maintained a strict disqualification of parties and interested witnesses while other Field Code states made parties at least partially competent to stand examination.

KY1851-6150	568. The following persons shall be incompetent to testify: 1. Persons convicted of a capital offense, or of perjury, subornation of perjury; burglary, robbery, larceny, receiving stolen goods, forgery, or counterfeiting. 2. Infants under the age of ten years, and over that age, if incapable of understanding the obligation of an oath. 3. Persons who are of unsound mind at the time of being produced as witnesses. 4. Husband and wife, for or against each other, or concerning any communication made by one to the other, during the marriage, whether called as a witness while that relation subsisted or afterwards. 5. An attorney, concerning any communication made to him by his client in that relation, or his advice thereon, without the client's consent. 6. Persons interested in an issue, in behalf of themselves, and parties to an issue, in behalf of themselves or those united with them in the issue. 7. Negroes, mulattoes, or Indians, in any action or proceeding where a white person, in his own right, or as representative of a white person, is a party, except in actions brought to recover a penalty or forfeiture for a violation of law, against a negro, mulatto, or Indian.
MT1865-3520	320. The following persons shall be incompetent to testify: First, Persons who are of an unsound mind at the time of their production for examination. Second, Children under ten years of age who appear incapable of receiving just impressions of the facts respecting which they are examined or of relating them truly, <i>but the court in its discretion may allow such children to testify, and the facts herein enumerated shall go to their credibility.</i> Third, Husband or wife for or against each other, or concerning any communication made by one to the other during the marriage, whether called as a witness while that relation existed or afterwards. Fourth, An attorney concerning any communication made to him by his client in that relation, or his advice thereon, without the client's consent. Fifth, A clergyman or priest concerning any confession made to him, in his professional character, in the course of discipline enjoined by the church to which he belongs, without the consent of the person making the confession. Sixth, A negro, Indian, or Chinaman, where the parties to the action are white persons, <i>but if the parties to an action or either of the parties is an Indian, negro, or Chinaman, a negro may be introduced as a witness against such negro, an Indian against such Indian, or a Chinaman against such Chinaman.</i> A negro within the meaning of this act is a person having <i>one-eighth</i> or more of negro blood, an Indian is a person having one-half or more of Indian blood, and a Chinaman is a person having one-half or more Chinese blood.

Iowa's code began by defining competency purely in terms of understanding the legal oath, and in the same section it barred racialized testimony (even if racialized actors could understand the oath). Wyoming followed the same tack, but softened the racial bar by adopting the same standard used for children: only those adjudged incapable of perceiving and relating facts were barred from testifying.

IA1851-8890	2388. Every human being of sufficient capacity to understand the obligation of an oath is a competent witness in all cases both civil and criminal except as herein otherwise declared. But an indian, a negro, a mulatto or black person shall not be allowed to give testimony in any cause wherein a white person is a party.
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NE1855-8890	2388. Every human being of sufficient capacity to understand the obligation of an oath is a competent witness in all cases both civil and criminal except as herein otherwise declared. But an indian, a negro, a mulatto or black person shall not be allowed to give testimony in any cause wherein a white person is a party.
WY1870-3400	325. Every human being of sufficient capacity to understand the obligations of an oath, is a competent witness in all cases, civil and criminal, except as otherwise herein declared. The following persons shall be incompetent to testify: First, Persons of unsound mind at the time of their production. Second, <i>Indians and negroes who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them intelligently and truly.</i> Third Husband and wife, concerning any communication made by one to the other during the marriage, whether called as a witness while that relation exists or afterwards. Fourth, An attorney, concerning any communication made to him by his client in that relation or his advice thereon, without the client's consent in open court or in writing produced in court. Fifth, A clergyman or priest, concerning any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs, without the consent of the person making the confession.

States that did not borrow Field's evidence code nevertheless borrowed prohibitions of racialized testimony. Two distinct strands emerge in legislation from the Deep South as well as from the Upper South and Midwest.

MS1848-5430	All negroes, mulattoes, Indians, and all persons of mixed blood, descended from negro or Indian ancestors, to the third generation, inclusive, though one ancestor of each generation may have been a white person, shall be incapable in law, to be witnesses in any case whatsoever, except for and against each other.
AL1852-1470	2276. Negroes, mulattoes, Indians, and all persons of mixed blood, descended from negro or Indian ancestors, to the third generation inclusive, though one ancestor of each generation may have been a white person, whether bond or free, must not be Witnesses in any cause, civil or criminal, except for or against each other.
TN1858-12180	3808. A negro, mulatto, Indian, or person of mixed blood, descended from negro or Indian ancestors, to the third generation inclusive, though one ancestor of each generation may have been a white person, whether bond or free, is incapable of being a witness in any cause, civil or criminal, except for or against each other.
DC1857-7110	A negro shall be a competent witness for or against a negro in any criminal proceeding, and shall be a competent witness in any civil case to which only negroes are parties, but not in any other case.
VA1860-7350	A negro or indian shall he a competent witness in a case of the commonwealth for or against a negro or indian, or in a civil ease to which only negroes or indians are parties, but not in any other case.
IL1866-3570	A negro, mulatto or Indian shall not be a witness in any court, or in any case, against a white person. Any person having one-fourth part negro blood shall be adjudged a mulatto.

Altogether, fifteen states and territories overwrote Field's competency rules with racial exclusions. Indeed, the only Field Code family that admitted party testimony without racial exclusions was in the postbellum South – a further sign, critics complained, that the code was the imposition of northern radicals.⁷⁵ A couple states sought to mitigate the contradiction between the acceptance of white perjury and the abhorrence of nonwhite mendacity by excluding only “Indians and Negroes

⁷⁵ In addition to California, the other code states to exclude racialized testimony were Arizona, Idaho, Indiana, Iowa, Kansas, Kentucky, Missouri, Nebraska, Nevada, Montana, Oregon, Tennessee, Washington, and Wyoming. On southern complaints about the code and African American testimony, see for instance, Diary of David Schenk, January 19, 1864 to December 31, 1872, MSS volumes 5 and 6, David Schenk Papers, University of North Carolina Chapel Hill.

who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them intelligently and truly." That too was a textual borrowing, from Field's exemption of children under ten-years-old from testifying. On this reasoning, races could be excluded if the chance for truth was minimal because of infantile incapacities. Even racist codifiers like Governor Edgerton recognized this rule as a fiction. In his reading, the racial exclusions conferred a *benefit* on "the Negro population" because colored litigants could offer testimony in their cases against each other, while white litigants wishing to rely on black testimony were deprived of useful evidence – useful, because admittedly true in many cases.⁷⁶

In his study of the "Jury's Rise as Lie Detector," George Fisher argues that witness disqualification rules were an "anachronistic survival" of "an age that mistrusted the jury's power to spot the truth and trusted instead the truth-assuring powers of the oath." Focusing mainly on the disqualification of criminal defendants, Fisher admitted that the rules permitting party competency in civil courts (which preceded criminal competency by decades) were mysterious. Although oath-taking and cross-examination were centuries-old practices, lawyers rather suddenly trusted the latter more exclusively around the mid-nineteenth century. The disqualification first broke down in England, so simplistic explanations based on Jacksonian democracy do not suffice. Fisher noticed that in many states, party disqualification was abolished close to the same time racial exclusionary rules were, and he surmises that states "maintained the old bar against civil parties because their lawmakers saw no good way to reconcile testimony by parties with their racial exclusion laws." Postbellum rights of equal protection, at least on paper, thus offers one key to explain how cross-examination came to replace the oath as the security of truth. "In those states that maintained racial exclusion laws, legislators chose to avoid an awkward clash between those laws and rules permitting testimony by civil parties simply by resisting the latter as long as they retained the former," Fisher concludes.⁷⁷

⁷⁶ 1866 Nebraska Revised Statutes 449; 1870 Wyoming Laws 572; *House Journal* (Montana 1865), 201–02, 207–10.

⁷⁷ Fisher, "The Jury's Rise as Lie Detector," 661–62, 673–74.

Fisher's study—and subsequent scholarship on oath-taking and cross-examination in America—misses the central importance of the Field Code in this history, however. The most popular version of the code in other states was not the one that completely abolished the disqualification of party testimony, but the one that nearly did so. In those codes, parties were not fully competent to testify as other witnesses, but they nevertheless offered oath-verified pleadings and could examine one another adversely at trial. Further, in most codes, if an adverse examination did not produce anticipated admissions, the examining party could then introduce his own affirmative testimony. The difference between these codes and full party competency was thus only a technical rule of sequence. Moreover, by counting states but ignoring territories, Fisher undercounted the number of jurisdictions that basically permitted party testimony but excluded testimony from racial minorities. Fisher's original chart, corrected with the code jurisdictions, follows in Table 2:

Table 2: Code-Corrected Version of Fisher's Comparison of Competency Rules

Jurisdiction	Fisher's Date for Racial Exclusion Abolished	Fisher's Date for Party Testimony Allowed	Date for Qualified Party Testimony under the Codes
Kansas	1858	Same	
Kentucky	1872	Same	1853
Louisiana	1867	Same	
Oregon	1862	Same	1855
North Carolina	1866	Same	1868
South Carolina	1866	Same	1870
Virginia	1866	Same	
California	1863	Same	1850
Florida	1865	Same	
Alabama	1865	1867	
Arkansas	1867	1874	1870
Delaware	Unknown	1881	
Georgia	1865	1866	
Illinois	1865	1867	
Missouri	1865	1866	1849
Ohio	1849	1853	1853
Tennessee	1866	1868	
Texas	1866	1871	
West Virginia	1866	1868	
Indiana	1865	1861	1852
Maryland	1866	1864	
Mississippi	1865	1857	
Iowa	<i>not listed (1860)</i>	<i>not listed</i>	1851
Washington	<i>not listed (1877)</i>	<i>not listed</i>	1855
Idaho	<i>not listed (1875)</i>	<i>not listed</i>	1864
Arizona	<i>not listed (1887)</i>	<i>not listed</i>	1865
Montana	<i>not listed (1872)</i>	<i>not listed</i>	1865

Wyoming	<i>not listed</i> (1874)	<i>not listed</i>	1870
Nebraska	<i>not listed</i> (1925)	<i>not listed</i>	1855
Nevada	<i>not listed</i> (1869)	<i>not listed</i>	1861

It appears, then, that many lawyers could in fact live with the “awkward clash” of rules allowing party testimony for the sake of truthseeking while excluding racialized testimony even if it were truthful.

Fisher’s comparison of civil and criminal practice is helpful though. Looking mostly at criminal practice, Fisher emphasized the jury’s rise as lie detector, but within the Field Codes it may be more appropriate to speak of the lawyer’s rise as lie detector. Many civil trials did not empanel a jury, especially after the Field Code explicitly encouraged parties to waive their rights to a jury. In fact, the higher the stakes and sophistication of a civil trial, the more likely it was to be tried solely by the bench, as it would have been in the traditional chancery system.⁷⁸

When New York’s practice commission turned its attention to criminal procedure, it was the truthseeking powers of the lawyer that the commissioners hoped to keep from reaching a jury. In an 1849 proposed code of criminal procedure, the commission argued that, unlike civil practice, truthseeking was not the chief goal of criminal practice. If it were, “the French practice” of using cross-examination to “extract from the defendant evidence of his guilt” might be appropriate. Under the New York constitution, however, truthseeking in criminal proceedings had to be secondary to protecting civil rights of the accused. The proposed code of criminal procedure thus did not make criminal defendants competent to testify, even though the commission abolished civil party disqualifications the same year. Rather, the criminal code allowed a defendant to offer exculpatory statements without facing the rigors of cross-examination “proceeding on the assumption of his guilt” and driving him “to the alternative of equivocating as to facts, or of denying circumstances plainly true, or of what is occasionally his resort, declining to answer.”⁷⁹

⁷⁸ See Renée Lettow Lerner, “The Failure of Originalism in Preserving Constitutional Rights to Civil Jury Trial,” 22 *William & Mary Bill of Rights Journal* 811 (2014), 835–36.

⁷⁹ *Fourth Report of the Commissioners on Pleading and Practice* (New York 1849), xxv–xxix.

Ultimately, many who adopted Field's code refused to maintain this distinction between civil and criminal practice. If a policy of protecting civil rights could trump the purposes of factfinding on the criminal side, it might do so in civil practice as well. And in many western states before the Fourteenth Amendment, codifiers reasoned that the civil rights of white litigants – the protection of their property, their trades, and in some cases their liberty – outweighed the truth value of testimony from what the California supreme court called the “degraded castes.”

Moreover, other codifiers disagreed with Field – and with Fisher – about the sanctity of oaths. Fisher argues that religious impulses cannot explain the history of oathtaking or its displacement by cross-examination, but many lawyers – especially in the West – continued to link the two with religious piety into the late nineteenth century. Cross-examination could make a witness sweat, shift his eyes, or stutter his speech, wrote one journalist, only because the witness was under oath and dreaded the cosmic penalties for oathbreaking. In the case of the Chinese, however, “it was difficult to shape an oath solemn enough to bind them.” In their perception of Chinese spirituality, western lawyers concluded that merely temporal penalties did not, in fact, make witnesses nervous enough that their prevarication could be detected by cross-examination. Such testimony thus had to be excluded, not because it was frequently untrue, but because it was no longer possible to discern truth from falsehood. Field might have been ready to abandon oathtaking and all pretense of spiritual punishment, but the reform ran headlong against the racial prejudices of the western bar, who insisted that cross-examination required some degree of Euro-American piety to work its magic.⁸⁰

⁸⁰ Fisher, “Jury's Rise as Lie Detector,” 598-599; Frank Tuthill, *The History of California* (1866), 373. See also *Ingram v. Robbins*, 33 New York 409 (1865) (“Where, in the course of legal proceedings, the oath of a party is required, the intention is to appeal to his conscience and to his religious sense, and also to the dread of the temporal punishment which the law has denounced against the crime of perjury.”); Memorandum of a Conversation between William King, esq., of Savannah, and Carl Schurz, *Senate Executive Documents for the Thirty-Ninth Congress*, No. 29 (1866), 2:83-84 (on southern reasoning about the inability of negroes to respect an oath). Cf. William Speer, *Answer to the Objections to Chinese Testimony* (1857).

Conclusion

This and the previous chapter have sketched out the three interconnected reforms believed by the codifiers to promote truthseeking under code practice. Civil truth became a stool supported by the three legs of fact pleading, oathtaking, and party testimony. In the paradigm case of a debt collection, fact pleading would clarify the amount owed, verification by oath would cure delay and force admissions, and party examination could terrify a recalcitrant debtor into disclosing the true value of his assets. But like the attempted abolition of the forms of action, the code's reforms to civil oathtaking remained incomplete and inconsistent. Verified pleadings threatened to invert the law's normal system of burdens of proof. Equitable traditions regarding unlawful oaths made liability for perjury unclear in the codified system, even as codifiers presumed that legislative fiat must make all prescribed oaths lawful. In adapting and applying the code, legislatures and courts accordingly permitted parties to swear so as to keep the burden of proof on the plaintiff and schedule a trial if desired, leaving cross-examination to sift the truth apart from the solemnity of swearing.

Codifiers and trial lawyers eagerly accepted the bargain, content to overlook a rising tide of self-interested perjury so long as their powers of courtroom oratory and examination exposed it to the trier of fact. However, their faith in their powers did not extend so far as to permit the testimony of racialized witnesses in most western and midwestern jurisdictions before the onset of Reconstruction. In cases in which proof lay in the testimony of the Chinese, Indians, blacks, or mixed-race speakers, a discarded theology of sacral oaths became powerful once again. Lawyers who had dismissed the threat of hell and divine retribution in adopting the new law of civil testimony later pleaded that degraded races lacked the requisite spirituality to make temporal perjury and keen cross-examination trustworthy instruments of seeking out the truth.

Scholars such as Kenneth Abraham and G. Edward White nevertheless persist in seeing the nineteenth century as a movement from "premodern" modes of investigation, marked principally by a reliance on oaths, to a "rational" system of proofs relying on forensic and behavioral science. What

such accounts miss is that in the Field Code—a central work in the construction of legal modernity—the use of oaths to measure “spiritual weight” did not decline but markedly increased.⁸¹ Just as the code multiplied legal forms in the attempt to abolish them altogether, the code’s abrogation of sacral oaths greatly multiplied their use and power in the civil trial. Field would have readily abandoned oaths altogether, but recognizing the political impossibility of such a move, he instead sought to apply them to every pleading, a previously unimaginable expansion of their role. And with the oaths came popular conceptions of theological meaning and obligation. Codifiers like Field and Shearman may have learned to live without hell under a benevolent God, but in regions of the country with heightened racial tensions, their fellow codifiers dreaded to litigate without the fear of God.

⁸¹ Kenneth S. Abraham & G. Edward White, “The Transformation of the Civil Trial and the Emergence of American Tort Law,” 59 *Arizona Law Review* 431 (2017).

Chapter 6

The Nature of Things

Law and Equity

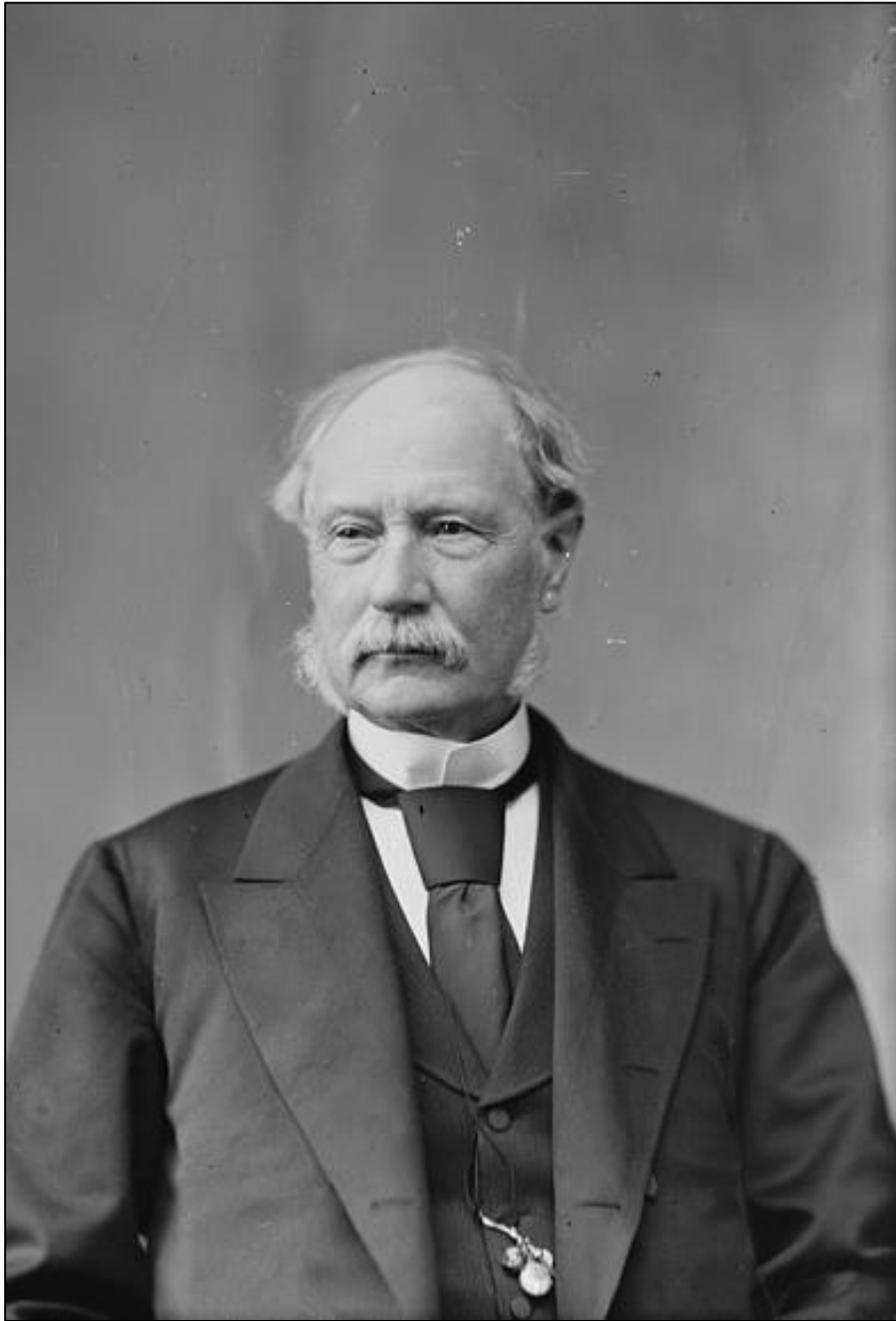
The most famous photograph of David Dudley Field is Matthew Brady's, likely made around the time that Field traveled to Brussels promoting a two-volume draft international code in the 1870s. Brady's portrait casts Field as an elderly statesman of the bar, wearing the fine clothes and accessories fitting for an elite lawyer of international repute. (See Figure 20.) This portrait was at least the fourth time Field had sat in Brady's studio. Brady (1822–1896) had made an early daguerreotype of Field around the time of the original procedure code (see Figure 3 in Chapter 2), and on other occasions had photographed Field with his brother Cyrus and other board members of the transatlantic cable project.¹ The 1870s image was clearly meant to capture Field at the culmination of his career, America's premier lawgiver and leader of the bar (which Field would officially lead, as president of the American Bar Association, a few years later).

But at nearly the same time, quite a different image of Field was in circulation. The New York political cartoonist Thomas Nast (1840–1902) despised Field. No other lawyer became the target of Nast's satirical art as often as Field. Balding on top but boasting uncommonly thick mutton chops for a civilian, Field's visage was easily parodied and instantly recognizable. Throughout the 1870s, Nast depicted (the usually unnamed) Field binding Justice in procedural red tape or standing guard as a lion over his clients' wealth.² In Nast's final illustration of Field in early 1878, the Devil himself visits the brooding lawyer's office, seeking to retain Field's famous services.

¹ A Brady photograph of the six Field brothers is available at the Library of Congress Prints and Photographs Division, LC-USZ62-139570 (b&w film copy negative). The Field portraits in connection with the Atlantic cable project can be found at the Matthew B. Brady Studio Portrait Photograph Collection, Series I, New York Historical Society, 170 Central Park West, New York, NY.

² See Renée Lettow Lerner, "Thomas Nast's Crusading Legal Cartoons," 2011 *Green Bag Almanac* 2d 59 (2011).

Figure 20.



Portrait of David Dudley Field, Jr., by Matthew Brady, taken around 1875.

Library of Congress Prints and Photographs Division, Brady-Handy Collection, Film Reproduction No. LC-DIG-cwpbh-05048.

Figure 21.



Thomas Nast, "They Do Each Other Honor," *Harper's Weekly*, February 24, 1877, 152.

Coincidentally, Nast invoked a core equitable concept by renaming the Devil "the Most Ancient Fraud."

Nast saw Field not as an eminent reformer and codifier but rather as the chief lieutenant of a legal corps who exploited technicalities to exonerate and protect the corrupt leaders of an especially corrupt age. Field first earned the disdain of Nast and other municipal reformers in the late 1860s when he and his law partner Thomas G. Shearman became lead counsel to the notorious robber barons Jim Fisk and Jay Gould.³ Field then defended the head of New York's Tammany Hall machine William "Boss" Tweed, against both civil and criminal prosecutions brought by Samuel Tilden and Charles O'Connor, making himself an even more frequent target of Nast's pen. Tilden deeply disappointed Nast by retaining Field in turn for the disputed presidential election of 1876, which is why Nast listed Tilden in the rogues' gallery of his devil cartoon. (See Figure 21).

Nast's assessment of Field was largely shared by the railroad reformer Charles Francis Adams Jr. (1835–1915). After the Civil War, American railroads became massive financial assets, offering their owners and managers abundant opportunities for profit and plunder. Although Fisk and Gould liked to call their acquisitions "raids," they excelled in using lawyers to keep their investments within arguably legal bounds—clandestinely buying up shares or the power to vote their proxies, trading stock on inside information (not yet regulated or forbidden), and extending themselves personal loans which, on paper, would be paid back to the railroad corporation.⁴ Before retaining Field, Fisk and Gould had wrested control of the Erie Railroad from Cornelius Vanderbilt in what in 1868, Charles Francis Adams dubbed the "Erie War."⁵

Of particular interest to Adams was "an Erie raid" which unfolded after Vanderbilt had withdrawn. Seeking access to Pennsylvania's coal mines, Fisk and Gould commenced their distinctive style of raid against the Albany & Susquehanna Railroad, a 150-mile spur through western New York.

³ On Field's corporate clients and career, see Daun Van Ee, *David Dudley Field and the Reconstruction of the Law* (Garland 1986). See also George Martin, *Causes and Conflicts: The Centennial History of the Association of the Bar of New York* (Fordham 1997), 3–15.

⁴ On the securitization and personal profits in nineteenth-century railroad ownership and management, see Richard White, *Railroaded: The Transcontinentals and the Making of Modern America* (Norton 2011).

⁵ Charles Francis Adams & Henry Adams, *Chapters of Erie* (1871); John S. Gordon, *The Scarlet Woman of Wall Street: Jay Gould, Jim Fisk, Cornelius Vanderbilt, the Erie Railroad Wars, and the Birth of Wall Street* (Weidenfeld & Nicolson 1988).

Its president, Joseph Ramsey, proved more recalcitrant than Vanderbilt, and, with headquarters in Albany, had skillful legal counsel of his own. Each side continually filed and received injunctions against the other over the summer. Field secured decrees from a New York City judge enjoining the issuance of new stock and the voting of recently transferred stock. Ramsey's lawyers secured a decree from an Albany judge enjoining the enforcement of the New York City injunction. Months of injunctions and counter-injunctions followed until the New York City judge granted Field's request to declare the A&S in receivership: The entire line and all its assets were transferred to two temporary receivers pending the next corporate election. But the court in Albany decreed its own receivership in favor of Ramsey and managed to issue process one hour earlier than New York City.⁶

The maneuvering came to a head at the annual corporate election in Albany on September 7, 1869. Per the bylaws, shareholder voting could not begin until noon, and the poll had to remain open an hour. Field and Shearman waited literally until the eleventh hour to spring their trap. Their reliable New York City judge had ordered the arrest of Ramsey and the other officers. At 11:45, Shearman proceeded to the officers' boardroom with the sheriff, while Field transferred the Erie party's proxies to a band of fifty Irish "roughs" brought to town (and plied with drink) for the occasion, and together they proceeded to the meeting room for the vote. The Erie-favored directors won handily.⁷

The tale was all that a muckraker could want, and Adams relished telling it, but how to explain it? Here in a land of liberty, fresh from a war of emancipation—"This, be it remembered, was . . . in New York, and not in Constantinople," Adams drolly reminded his readers—judges of the lowest trial courts were issuing secret decrees of imprisonment, seizing and redistributing property, and undermining one another's decrees. And so far as lawyers then and later could determine, none of it

⁶ Adams & Adams, *Chapters of Erie*, 135–91; Lerner, "Thomas Nast's Crusading Legal Cartoons," 65–68.

⁷ Adams & Adams, *Chapters of Erie*, 174–81; George Ticknor Curtis, *An Inquiry into the Albany & Susquehanna Railroad Litigations of 1869 and Mr. David Dudley Field's Connection Therewith* (1871); Albert Stickney, "The Truth of a 'Great Lawsuit,'" 14 *Galaxy* 576 (1872); Francis C. Barlow, *Facts for Mr. David Dudley Field* (1871).

ran afoul of the code. As Adams saw it, the problem therefore arose from the code itself, under which “local judges . . . are clothed with certain . . . powers in actions commenced before them, which run throughout the State.” Adams relished the irony that the name of these “certain powers” that prospered injustice was “equity.”⁸

Like Field himself, equitable jurisprudence could at times appear stately and dignified, at other times as the diabolic assistant of the robber barons. This multifaceted quality makes it difficult to tell the story of equity in America even setting aside the usual difficulty that each state and territory had a different configuration of legal institutions and a corresponding jurisprudence. This chapter offers an assessment of what specialists refer to as the “fusion” of law and equity attempted by Field’s code by paying close attention to what lawyers meant by invoking “equity” in the mid-to-late nineteenth century. Then as now, jurists pointed to various features of the old English chancery system as the essence of equity, and depending on which feature received the focus, the Field Code could be said to abolish, transform, or significantly enhance equitable practice. Rather than adjudicate – as so many contemporary scholars do – what equity is, this chapter presents contending views from Field’s day about what equity was, and whether it could, “in the nature of things,” expand beyond its traditional confines. This chapter begins with the debates about fusion at the New York constitutional convention of 1846 and then follows the practical consequences of Field’s attempt at fusion in the Albany & Susquehanna litigation. Like the two previous chapters, this one concludes that the Field Code incorporated so many traditional structures of thought in its assumptions that its declaration forever abolishing the distinction between law and equity proved impossible to put into practice.

Then and Now: The Problem of Defining “Equity”

Historians of nineteenth-century American law have been hasty in their treatment of equity. Ignoring the cautious arguments of colonial legal historians that “Americans objected to chancery

⁸ Adams & Adams, *Chapter of Erie*, 22, 175.

courts rather than to equity law," some scholars have treated the gradual disappearance of chancery courts as if equity was disfavored, discarded, and "moribund" in America until coming to life again in the twentieth century.⁹ Influential jurisdictions like Massachusetts and Pennsylvania largely did without courts of chancery, it is noted, while New York and Virginia abolished theirs around mid-century, and new states in the West never created them. Not until late in the century did federal judges seem to rediscover the equitable injunction, which they deployed against striking laborers.¹⁰

The problem is that many of these accounts tend to reduce the sprawling and sophisticated system of chancery to one or another small subset of its functions and then eulogize the demise of "equity." Thus Roscoe Pound and his admirers Charles Clark and Edson Sunderland (the main drafters of the 1938 Federal Rules of Civil Procedure), interested as they were in judicial discretion and pretrial investigation powers, thought they were reviving a long-dormant equity in their twentieth-century reforms.¹¹ More recently, scholars have made "inquisitorial" devices like written, juryless process an essential feature of equity, while some have emphasized equity's flexible moral maxims ("those seeking equity must come with clean hands") over the "rigid" decrees of legislatures or common law courts.¹²

Behind many of these accounts is a modernization teleology. Separate courts of common law and equity with their cumbersome, "technical" processes were relics of the medieval ages that neglected the needs of the quickening market economy, on this account. Certainty of outcome, secured

⁹ Stanley N. Katz, "The Politics of Law in Colonial America: Controversies over Chancery Courts and Equity Law in the Eighteenth Century," in Donald Fleming & Bernard Bailyn, eds. *Perspectives in American History* (Little, Brown 1971), 5:257-84, 265; see also Daniel J. Hulsebosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664-1830* (UNC 2008), 60. For the "moribund" view of equity, see Peter Charles Hoffer, *The Law's Conscience: Equitable Constitutionalism in America* (UNC 1990), 147; Stephen N. Subrin, "David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision," 6 *Law & History Review* 311 (1988).

¹⁰ See especially Hoffer, *The Law's Conscience*.

¹¹ See Stephen N. Subrin, "How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective," 135 *University of Pennsylvania Law Review* 909 (1987); Hoffer, *The Law's Conscience*, 91.

¹² Amalia D. Kessler, 'Our Inquisitorial Tradition: Equity procedure, due process, and the search for an alternative to the adversarial', 90 *Cornell Law Review* 1181 (2005); Morton J. Horwitz, *The Transformation of American Law: 1780-1860* (Harvard 1979), 266.

by clear substantive rules at the expense of procedural niceties, and efficiency of proceedings were the irresistible demands of commerce. If chancery indulged in dilatory written examinations or if common law multiplied fees with fictionalized pleadings, so much the worse for traditional practices.¹³ In this framework, the traditional distinction between law and equity “lingered on for a surprisingly long time,” and equity’s survival in particular was “remarkable.”¹⁴

In this respect, modern commentary differs little from that of the nineteenth century. What counts as equity in the United States has often been in the eye of the beholder. Chapter 1 surveyed Oliver Barbour’s practical, and Joseph Story’s theoretical, account of equity in the 1830s, the one emphasizing a lack of consistent form, the other rule-bound formality. Simply by noting how forcefully Story argued that equity was *not* concerned about implementing natural justice or mitigating the harshness of the common law according to discretion, one can infer how widespread the contrary views were at the time.¹⁵ The law-and-literaturist Gary Watt offers a helpful prescription here. Instead of reducing equity to one or another practice—or even a combination of notable practices—Watt proposes that equity is best understood as four “clusters” of language involving maxims, remedies, doctrines, and property.¹⁶ In respect to the Field Code, it is the language of remedy that is of most concern, for in fact it was Field’s purpose to reduce equity entirely to the language of remedy. This discussion will follow the fortunes of that idea, with the caveat that it is only one dimension of equity confronted by the code.

One key feature of equitable remedies was that they supplemented the law (“followed the law,” in Story’s favorite maxim) by operating personally on a party, according to conscience, to keep that party from using the law as a tool of injustice. Watt offers as a paradigm example the very old

¹³ Lawrence M. Friedman, *A History of American Law* (Simon & Schuster, 2nd ed., 1985), 395–401; see also Horwitz, *Transformation of American Law*, 265–66.

¹⁴ Friedman, *History of American Law*, 27; Hoffer, *The Law’s Conscience*, 86.

¹⁵ Joseph Story, *Commentaries on Equity Jurisprudence as Administered in England and America* (1836), 1:10–22.

¹⁶ Gary Watt, *Equity Stirring: The Story of Justice Beyond Law* (Hart 2009), 89–90.

case of an unrecorded land transaction with a credulous buyer.¹⁷ By the strict letter of the Statute of Frauds (1677), transactions in land not made in writing were not binding.¹⁸ But from the seventeenth century onward, the Court of Chancery would not allow an unscrupulous seller to use that technical requirement “unconscionably” in order to renege against a good-faith buyer and keep the income. It is important to note how chancery would do that: the court did not “set aside” the normal rule, nor even, in theory, did it make an exception to the rule in a particular case. Instead, the court enjoined the seller personally from raising the Statute of Frauds as a defense to the buyer’s suit to perform the transaction.¹⁹ The law remained the law, fully in effect in even in the case at bar. The only coercion was, in essence, a restraint on pleading. Could the seller plead the statute, he would win. But at chancery, he simply could not plead it. It was as if equity could remove the aces from your deck of cards at the blackjack table. The rules of blackjack are still the rules. You might even win your game. But certain strategic moves are now closed off to you, not by rule, but because chancery has made them physically impossible to play.

These illustrations suggest the supplementary nature of equity (limiting the strategic moves without changing the rules) and equity’s restraint on persons rather than things or rights (chancery didn’t remove everyone’s aces, only yours). The crucial language remaining to be explored is the idea that equity made its moves in keeping with good conscience. The invocation of conscience was nearly universal in early equity, and as Chapter 1 noted, nineteenth-century equity pleadings continued to insist that the parties sought their remedies “as shall be agreeable to equity and good conscience.”²⁰

As with the traditional proscriptions of oath-taking, it was not always clear in equitable jurisprudence whether the conscience equity acted upon was the arbiter’s or the litigant’s. From the

¹⁷ Watt, *Equity Stirring* 111–113.

¹⁸ An Act for Prevention of Frauds and Perjuries, 29 Chas. 2 c. 3 (1677).

¹⁹ For a collection of equitable exceptions to the Statute of Frauds, see Roy Moreland, “Statute of Frauds and Part Performance,” 78 *University of Pennsylvania Law Review* 51 (1929).

²⁰ See, e.g., Oliver Barbour, *A Treatise on the Practice of the Court of Chancery* (1843), 37.

quasi-religious origins of chancery (early chancellors were bishops and drew upon ecclesiastical law for their procedures and rulings), chancellors certainly claimed to be guided by conscience, but the early modern historian Dennis Klinck warns scholars not to give this language too much of a subjective and individualistic (that is, Protestant) reading.²¹ Conscience might dictate a chancellor's rulings, but it was also what spurred a party to state the facts truly on oath in discovery, or to obey the chancellor's injunction. Klinck observes that after the Protestant Reformation, the equation of conscience with personal—and therefore a possibly arbitrary—belief made chancery's reliance on conscience problematic for critics of oracular law. Klinck argues that by the eighteenth century, conscience had ceased to hold independent analytic power in equitable jurisprudence. Conscience, that is, could only be understood in the precedential case law of the court of chancery. Traditional remedies granted in chancery were, *a fortiori*, in keeping with conscience. Novel twists on those remedies were not.²²

For many ordinary lawyers in the mid-nineteenth-century United States, the description of equity as a set of procedures, remedies, and precedents probably summed up their views on the system. The workaday practitioner understood from experience which remedies could be pleaded at law and which required him to don the title of "solicitor" and file in chancery.²³ In turn, that experience

²¹ Dennis R. Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (Ashgate 2010), 5. See also Meg Lota Brown, *Donne and the Politics of Conscience in Early Modern England* (Brill 1995), 25–36; Michael G. Baylor, *Action and Person: Conscience in Late Scholasticism and the Young Luther* (Brill 1977), 201–02. Mike MacNair argues, convincingly, that the earliest meaning of *conscience* in equity had no spiritual or moral valence but was strictly literal: judgment "with knowledge," specifically with knowledge of facts that could be learned only through chancery's inquisitorial procedures and were foreclosed by the common law's disqualification of parties and interested witnesses from testifying. Mike MacNair, "Equity and Conscience," 27 *Oxford Journal of Legal Studies* 659 (2007).

²² Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England*, 270–73. On conscience in early English equity, see Timothy S. Haskett, "The Medieval English Court of Chancery," 14 *Law & History Review* 245 (1996); J. L. Barton, "Equity in the Medieval Common Law," in R.A. Newman, ed., *Equity in the World's Legal Systems* (Brussels 1973), 139–155; Helmut Coing, "English Equity and the *Denunciatio Evangelica* of the Canon Law," 71 *Law Quarterly Review* 223 (1955).

²³ The leading treatises on equity practice in pre-code New York include J.W. Moulton, *The Chancery Practice of the State of New York* 2 vols. (1829–1832); Joseph Parkes, *The Statutes and Orders of the Court of Chancery and the State Law of Real Property of the State of New York* (1830); David Graham, *A Treatise on the Organization and Jurisdiction of the Courts of Law and Equity in the State of New York* (1839); Oliver L. Barbour, *A Treatise on the Practice of the Court of Chancery* (1844).

kept lawyers mindful, both that equity offered some space to explore alternative remedies where the common law proved inadequate, but also that this space could not be reached except as an extraordinary recourse after the common law failed. As the legal historian Frederick Pollock wrote at the end of the century, equity kept alive the hope that there might be no right (or more precisely, no wrong) without a remedy, even if, as Joseph Story observed, equitable jurisprudence in practice continued to permit the occasional failure of remedy.²⁴

In addition to these workaday practitioners, an impressive number of lawyers—especially among those who would become America’s leading corporate counsel—devoted significant effort to think philosophically and systematically about their dual system of jurisprudence. For the most part, they never published their conclusions in books or pamphlets, and rarely did their views on jurisprudential abstractions enter their courtroom arguments. They did, however, speak up at the numerous constitutional conventions held around mid-century and in legislative reports each time the code was introduced or revised in a jurisdiction. One of the earliest and most influential of these occasions, New York’s 1846 constitutional convention, featured the arguments and themes that would be debated across the country. Through the month of August 1846, twenty of the state’s leading attorneys spoke one after the other, each describing in detail an ideal judicial system and the role of law and equity within that system. Attention then shifted westward, as Iowa, Indiana, Ohio and Kentucky became early adopters of the Field Code—the latter two nevertheless maintaining an institutional division between the trial of legal and equitable claims.²⁵

²⁴ Frederick Pollock, “The Continuity of the Common Law,” 11 *Harvard Law Review* 423 (1898): 424–25; Story, *Commentaries on Equity*, 1:8.

²⁵ See S. Crowell & R. Sutton, eds., *Debates and Proceedings in the New-York State Convention* (1846); William G. Bishop & William H. Attree, eds., *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of New York* (1846); *Report of the Commissioners Appointed to Prepare a Code of Practice for the Commonwealth of Kentucky* (1850); *Revision of 1860 Containing All the Statutes of a General Nature of the State of Iowa* (1860); H. Fowler & A.H. Brown, eds., *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Indiana* (1850).

Legal history was a favorite starting point among lawyers debating law and equity, and practitioners showed an impressive facility with the history of Roman, Greek, and English law. Most agreed on the general outlines, though they disputed the lessons this history presented. Many accounts began with Aristotle's distinction between Law, which was necessarily universal in its nature, and *Epieikeia*, "a correction of law, where by reason of its universality, it is deficient."²⁶ Roman praetors were said to have introduced laws of *Æquitas* "for the sake of helping out, supplementing, and correcting the Civil Law."²⁷ As for the English tradition, the story ran that after the writs had become fixed in number and form (around the common law forms of action), the chancellor began making new writs returnable to his own court, establishing jurisdiction over extraordinary remedies. As the early chancellors were high church officials holding the title "keeper of the king's conscience," their jurisprudence emphasized the ability to rule according to discretion to do justice between the parties when the law by its ordinary processes and general rules was deficient. During the reign of Elizabeth I, it was settled that chancery could enjoin the enforcement of a common law judgment, but chancery would not interfere where common law could adequately address a case.²⁸

As New Yorkers looked at the judicial systems of other states, they noted that those without courts of chancery—the favored examples were Massachusetts and Pennsylvania—either incorporated or mimicked equity jurisprudence and devices over time. Pennsylvania may not have had a "court of chancery," but from the colonial period onward it maintained an Orphans Court in which equity powers and procedures pertaining to guardianship were administered. Unwilling to grant judges the equitable power to imprison for civil contempt, state lawmakers approximated chancery's injunctive powers to compel specific performance with "conditional judgments": juries

²⁶ Anthony Laussat Jr., *An Essay on Equity in Pennsylvania* (1826), 17.

²⁷ William Whewell, *The Elements of Morality* (1845), 329.

²⁸ *Report of the Code Commissioners to the Eighth General Assembly of the State of Iowa* (Iowa 1859), 440–43; Whewell, *Elements of Morality*, 330–32; Laussat, *An Essay on Equity in Pennsylvania*, 13–17; Bishop & Attree, *Report of the Debates*, 600–02 (Nicoll). For a twenty-first century account of seventeenth-century equity, see David Ibbetson, "The Earl of Oxford's Case (1615)" in Charles Mitchell and Paul Mitchell, *Landmark Cases in Equity* (Hart 2012), 1–32.

returned catastrophically high damages awards but execution was conditioned on the defendant's failure to perform what the court determined – following equity jurisprudence – he or she should do.²⁹

The Nature of Things: Separatist Visions of Law and Equity

A striking feature of the New York convention debates was how much the opponents agreed with one another. Perhaps in part primed by Gulian Verplanck's analysis of the arrears in chancery and by Arphaxad Loomis's pleading reform bills in the legislature, most if not all of the delegates agreed that common law pleading required some adjustment to make it more flexible – perhaps by extending equitable powers of amendment, discovery, and enforcement to common law actions – and that equity required either a larger staff or a more limited grant of appellate review (or both) so that the single chancellor's office did not become a bottleneck on the system. That is, contrary to the conclusions of American legal historians like Stephen Subrin, Amalia Kessler, and Morton Horwitz, the vast majority of lawyers and lay delegates at the convention expected that equity would continue and prosper in the reformed system.³⁰

The question was in what form, but that question provoked weeks of rancorous debates. The opponents of fusing law and equity in a single institution of uniform procedures – call them “separatists” for ease of reference – worked out a taxonomy of law that to the New York lawyer George Simmons proved that the “division of remedies into legal and equitable, is founded on a natural distinction, and that it is impracticable to blend them under a common code of procedure, or to administer them by the machinery of courts similarly organized.” In Simmons's taxonomy, capital-e Equity was synonymous with justice itself. It encompassed all of morality, from the “voluntary” precepts of religion to obligations “established by the State. *This [latter] part is the law,*” Simmons

²⁹ See Laussat, *An Essay on Equity in Pennsylvania*, 56–57, 105–08. The Orphans Court took written proofs, relied on bench trial, and could decree injunctions and contempts. On equity in Massachusetts, see Phyllis Maloney Johnson, *No Adequate Remedy at Law: Equity in Massachusetts 1692–1877*, Yale Law School Student Legal History Papers, Paper 2 (2012), available at http://digitalcommons.law.yale.edu/student_legal_history_papers/2.

³⁰ See Subrin, “David Dudley Field and the Field Code”; Kessler, *Inventing American Exceptionalism*, 144–50; Horwitz, *Transformation of American Law*, 265–66.

explained. Written law was equity calcified, a subset of justice whose principles had been articulated by judges and legislators. But even the best of human wisdom was fallible and incomplete; its expressions of justice aimed at universality but were insufficiently nuanced and failed to account for all the accidents and contingencies of life. A third subset of equity, then (in addition to morality and positive law) was the technical, little-e equity administered in chancery, the discretionary search for as-yet unexpressed or half-expressed principles of justice that could correct the occasional mishaps caused by human pretensions to universalize short-sighted legal principles.³¹

By reserving discretion to these extraordinary cases, Simmons believed the rule of law was maintained without granting too much arbitrary power to the courts. He concluded that human wisdom could “only divide the great mass of such cases into classes of actions, to be followed by the ordinary courts, and then constitute an extraordinary tribunal to take charge of the residue, and nothing but the residue, that its *action* may be at least so far limited by reason of its jurisdiction being so far confined.” Simmons, like other separatists, readily granted (along with Story) that the development of distinct institutions of law and equity was a historical accident, but he argued that the institutional separation pointed to a conceptual separation that was real, founded “in the nature of things” and thus impervious to historical contingency. So long as general laws used classifications to efficiently organize the great mass of human actions into categories of judgment, an extraordinary jurisdiction would have to intervene when the general categorizations failed.³²

The fusionists’ mistake, according to New York City lawyer Lorenzo Shepard, was their belief that all wrongs could be “reduced to the same class, and be comprehensible in the same general remedies.” Abstracting a menu of remedies and making them available for all cases ignored how “wrongs are infinitely diversified in their natures and infinitely diversified in their remedies.” The

³¹ Bishop & Attree, *Report of the Debates*, 664, 667 (Simmons). See also J. T. Humphry, “Lecture at the Incorporated Law Society” 51 *Legal Observer* 67 (1856); Whewell, *Elements of Morality*, 316–27.

³² Bishop & Attree, *Report of the Debates*, 666 (Simmons). See also Humphry, “Lecture,” 68–69.

best that lawmakers wishing to spread the One rule of law over the Many exigencies of life could hope to achieve was to classify similar enough injuries under particular remedies (the forms of action), yet leave enough room for discretion when those classifications failed (equity). Abolishing these classifications would empower judges to freely grant injunctions, one of the most powerful and closely guarded tools of equity, a danger Shepard was particularly keen to avert. Without the traditional confines created by the jurisdictional distinction between law and equity, the only alternatives Shepard saw were for courts to arrogate the injunctive power—an act of tyranny—or for the legislature to enumerate every possible case in which the device would be permitted—a hopelessly tedious task that would inevitably remain incomplete.³³

These remarks on the infinite diversity of wrongs and the difficult classifications of law show that what was at stake for the separatists, at the twilight of the rule of writs, was the fundamental legitimacy of the legal order. Equity and the rule of law required that like cases should be treated alike, but even this principle involved a manifest legal fiction, for no two cases in human experience were completely alike. It was the artifice of the lawmaker to discern commonalities between cases and invest them with legal significance, usually by applying a particular remedy to a certain set of common harms.³⁴ Abolishing the classification and making all remedies available to every case would not “simplify” procedure, but make it enormously more unwieldy, one separatist concluded, “as each case would rest upon its own particular circumstances and [become] its own form.” Every case, that is, would become an equity case, but separatists argued that it was “dangerous to convert [New York’s] standing army of judges into so many chancellors, with all the arbitrary power of that court.” Equitable discretion was tolerable only because there were so many definite categories of legal cases to which it could not apply, Simmons argued: “Cases cognizable in the law . . . are by law defined and enumerated in order to prevent the capricious and arbitrary action of the court, and to make those

³³ Bishop & Attree, *Report of the Debates*, 622, 624 (Shepard).

³⁴ For a succinct contemporary discussion on this point, see Beverly Tucker, *Principles of Pleading* (1846), 1–4.

remedies easy, clear, and free from uncertainty. Injuries to be redressed in equity courts are undefined, unclassified, non-enumerated." It had taken centuries to enumerate the categories of remedies that worked for the run of cases and excluded equitable discretion. "To unite law and equity would be to retrograde for three centuries," another separatist therefore warned.³⁵

"Retrograde" was usually hurled at the separatists, but lawyers like Simmons and Shepard insisted they were at the leading edge of legal modernization. Like craftsmen seeking to return to feudal labor practices, it was the fusionists who, Shepard argued, were "at variance with a principle that has done more for the development of human industry, both physical and mental, than any other. I allude to the division of labor. — This has been the great cause of perfection in every art." The division of labor, hailed as the infallible principle of economic modernization, ensured that "the tendency of society is to separate the courts of law and equity, and so to secure more expert and competent judges, more prompt and perfect remedies," developments Simmons perceived in all modernizing jurisdictions.³⁶

Behind these arguments frequently lay the suspicion that the jury posed a problem for the fusionists. Separatists lauded the value of the common law jury — so long as it was confined to actions at common law — but, said Shepard, "it may be accounted among our misfortunes that [there] are causes to which it cannot be applied."³⁷ The fusionists thus faced a dilemma: To truly achieve fusion, they would either have to abandon the jury — an important safeguard of democratic liberty, at least within its sphere — or make all cases triable by jury — reducing New York's sophisticated business law to amateurism. Separatists recognized that in many instances equity's supposedly extraordinary intervention had become routinized and bound to precedent as tightly as any common law form of

³⁵ Bishop & Attree, *Report of the Debates*, 591 (Marvin); *ibid.*, 491, 668 (Simmons); Croswell & Sutton, *Debates and Proceedings*, 446 (Marvin).

³⁶ Bishop & Attree, *Report of the Debates*, 622 (Shepard); *ibid.*, 663, 662 (Simmons) ("The jurisprudence of the modern states of Europe is progressively developing equity, as a distinctive branch of remedial justice, just in proportion to their progress in liberty and civilization."). See also *ibid.*, 572 (Jordan).

³⁷ Bishop & Attree, *Report of the Debates*, 621 (Shepard). See also Croswell & Sutton, *Debates and Proceedings*, 446–49 (Jordan).

action, but this did not mean the court could be abolished and its cases transferred to law. It was rather an indication of how successfully the division of labor and the absence of the jury had fitted New York law for modern commerce. “The exceeding complication of many subjects of equity jurisdiction, though it may be regretted,” Shepard reasoned, “is one of the necessary incidents to high civilization – to extended commerce, and to the vast and involved circle of the transactions of men.”³⁸

In addition to the absence of a jury, separatists noted that equity’s pleading system was peculiarly suited to its extraordinary jurisdiction, but would not fit well with the efficient classifications aimed at by the common law. Fusionists expected to create a uniform procedure in which a plaintiff could state the simple facts of the case and a court would apply the appropriate remedy without “technical” obstructions. The western lawyers Richard Marvin and Alvah Worden replied that civil law jurisdictions in continental Europe and in Louisiana employed such a system with far more technicality, cost, and delay than in the New York system. “The difference between the common law forms of procedure and the civil, was simply this,” Marvin explained, “by the former, the *conclusion* or result only of a great variety of facts and circumstances was stated or averred and the legal consequence following therefrom was alleged,” while the “civil law forms were incomparably more prolix, more complicated, more difficult to prepare” because the “whole story must be told” in all its varying detail. Fusionists might decry common law technicality and fiction, but fact-pleading had its own technical pitfalls, protested Worden: “In civil law proceedings, the party bringing his action must be technically accurate, not merely to a common intent, but to every intent. . . . The party must state the facts precisely as his proof will substantiate or he will fail. . . . The proceedings are such as only the most specious and artful special pleader can draw up.”³⁹

If separatists did not convince fusionists with the ontological claim that, as Shepard put it, the distinction of law and equity was a “difference resting not solely in the will of the Legislature – nor in

³⁸ Bishop & Attree, *Report of the Debates*, 621 (Shepard). See also *Report of the Commissioners* (Kentucky 1850), vi.

³⁹ Bishop & Attree, *Report of the Debates*, 591 (Marvin); Crosswell & Sutton, *Debates and Proceedings*, 444 (Worden).

any great degree dependent on or controlled by it, but existing in the unalterable nature of things themselves," the separatists did at least win over a few lawyers with the argument that, at the very least, fusion could not be accomplished merely through the abstraction of procedure from substance, with only the former undergoing reformation. As Simmons argued, "the very *forms* of proceedings stick so close to the *substance*—the practice of courts is so adhesive to their doctrines—that" fusion would prove impracticable if it were attempted. Sympathetic fusionists like Charles Kirkland and Ira Harris agreed that fusion could be achieved only gradually and would involve many substantive changes. Merely redrafting the rules of pleading and expanding available remedies would not result in fusion, for "the present modes are incorporated and interwoven with all our habits of business, and I may say, almost with all our legal notions and ideas."⁴⁰ To these lawyers, traditional practices ran deep through the legal order and would not disappear within a generation—and certainly not within a single legislative session.

In sum, separatists claimed that at least a notional distinction between law and equity fundamentally inhered "in the nature of things," or at least in the nature of the common law tradition that, on all accounts, was to continue on in New York. So long as the law traded in general classifications, an extraordinary jurisdiction would have to vest in some arbiter to declare that a particular case was inadequately remedied by the general classifications and required something more specifically tailored to the circumstances. Separatists maintained that institutionally separating ordinary from extraordinary jurisprudence could enhance expertise in both and could allow for tailored procedures—factually detailed pleadings when the contextual circumstances mattered, conclusory statements presented to a jury when they did not. In none of these statements did the delegates treat these procedures—whether "inquisitorial" examinations, fact pleading, or the absence

⁴⁰ Bishop & Attree, *Report of the Debates*, 621 (Shepard); *ibid.*, 664 (Simmons); see also *ibid.*, 590 (Stetson) ("The forms of practice he believed were not the result of arbitrary rules, but existed in reasons behind the causes themselves. An uniformity of practice might be effected, but he did not believe that the distinction in the various actions at law and equity could be abolished."); *ibid.*, 575 (Kirkland); *ibid.*, 639–41 (Harris).

of the jury—as the essence of equity. If equity had an essence, it was its ability to go beyond the classifications of the common law to provide a more adequate remedy in a particular case.

Strikingly absent from separatist arguments was a robust defense of equity as a system of conscience. The word “conscience” was invoked many times at the convention, not least because certain proposals would have added “freedom” (or “liberty”) “of conscience” to the constitution, or provided for conscientious objections to military service.⁴¹ In the context of chancery, fusionists several times made it a point to argue that equity had ceased to make meaningful use of conscience (see below). But only twice in separatist arguments did the term even come up. In the first instance, the Anti-Rent lawyer Ambrose Jordan was largely indifferent on many reform proposals and tepidly supported the continued separation of law and equity, but he was adamant that a judiciary directly elected “from the people” would cause those judges to “imbibe and retain more of the great general principles of moral justice; of what might be called the impulses of natural equity,” and to “blend and harmonize” legal rules “with the *discretion* of enlightened conscience.” Jordan’s argument in favor of an elected judiciary hardly shed light on what equity as a system of conscience consisted of.⁴²

The second instance came from Simmons, the more articulate of the separatists. Simmons offered the classic defense of equity as a system of “discretion and good conscience” over against the common law system of “strict law.” In invoking conscience, Simmons argued, it was not “just as if the rules of equity jurisprudence were the dictates of the personal conscience and personal discretion of the judge,” but were instead “the conscience and discretion of the law.” Equitable conscience as the objective conscience of the law rather than the personal convictions of an arbiter was an idea as old as Lord Coke’s tenure (1606–1616). What Simmons meant by it was that apart from any specific rule enforceable in a court of common law, the law expressed clear and objective principles that guided

⁴¹ See Bishop & Attree, *Report of the Debates*, 550, 196–97, 1054–55.

⁴² Bishop & Attree, *Report of the Debates*, 571 (Jordan).

jurists on when to abate the strict enforcement of any particular rule.⁴³ Simmons warned his co-delegates that if a formal and regularized mechanism for taking account of the law's conscience were not maintained, conscience would not disappear but would break through "irregularly and at random; so abolish equity jurisdiction in civil cases, and it will be exercised by courts and juries *without* law or rule, under the seductive influences of particular hard cases." Simmons maintained that states that had not developed courts of chancery ran an informal system of equity in precisely this way, relying on unpredictable spurts of remedial legislation or the oracular jury to get around strict enforcement of the law, but in only a half-principled and certainly unarticulated way.⁴⁴ He concluded by urging his colleagues not to put New York on the same path.

A Play upon Words: Fusionist Views on Law and Equity

To committed fusionists, the history of legal development in England and America proved only that the distinction between law and equity "has no foundation in the nature of things," as Field put it. "Its existence is accidental, and continues till now only because we have been the slaves of habit." Unlike his more moderate colleagues, Field was confident these old habits of thought could be transformed if lawyers better understood that names like "equity" and legal forms of action were not "real existences" but "rather ancient formulas, scholastic in their structure and origin, whose vitality has long since departed."⁴⁵

This strong form of nominalism commonly appeared in fusionist arguments. The "natural" distinction between law and equity was "the erroneous conclusion of minds warped and contracted by long continued habits and prejudices, and by the 'set forms of speech' to which they have invariably been accustomed," argued Kirkland at the New York convention. After the delegates agreed to create

⁴³ For these propositions, Simmons cited William Whewell's treatise, *The Elements of Morality*, discussed in the Part II Introduction and in Chapter 5. Bishop & Attree, *Report of the Debates*, 664 (Simmons) ("I can only commend my young friends to *Whewell* [sic] to learn, not merely that there is a national conscience, common to all of one nation and expressed by its laws; but a universal conscience, common to all nations and expressed by the *Law* of nations.").

⁴⁴ Bishop & Attree, *Report of the Debates*, 663–64.

⁴⁵ [David Dudley Field], "The Convention," *New York Evening Post*, August 13, 1846.

“one supreme court, having general jurisdiction in law and equity,” the New York City corporate attorney Charles O’Conor regretted that the phrase “law and equity” entered the constitution, fearing that “as long as we spoke of law and equity as distinct things in our constitution, . . . the legislature would not feel at liberty to unite and blend them into one.” Arphaxad Loomis, the future co-drafter of the Field Code, agreed. “Law and equity” seemed to have talismanic power to his colleagues, but “the difference was more in words than in reality. . . . There might as well be any other hieroglyphical symbol by which to proceed as to retain those under which the practice was now conducted.”⁴⁶

To support their point, fusionists spent entire days at the convention arguing that equity had lost its distinct emphases on discretionary justice and had become indistinguishable from law in its precedent-bound jurisprudence. The separatists’ fears about arbitrary discretion dated back to the early seventeenth-century, when John Selden famously joked that equitable “conscience” could be as variable as the size of “a Chancellor’s foot.” But, O’Conor argued, after two centuries of building precedents, “there was not at present any such thing recognized in jurisprudence, as the will or arbitrement of a good and conscientious man finding some measure of justice between neighbors, which the law did not define and declare. It was the law of the land, and not the conscience of the chancellor, by which the right of the citizen must be determined. . . . The maxim that our rights were to be measured by the length of the chancellor’s foot was exploded long ago.” The New York City lawyer Henry Nicoll agreed that “conscience” no longer informed the work of chancery, and “the court had long since ceased to be a tribunal of mere discretion. It administered justice in obedience to positive rules and in strict conformity to its own established precedents.”⁴⁷

⁴⁶ Bishop & Attree, *Report of the Debates*, 576 (Kirkland); Crosswell & Sutton, *Debates and Proceedings*, 440 (O’Conor); Bishop & Attree, *Report of the Debates*, 590 (Loomis). See also *Report of the Code Commissioners* (Iowa 1859), 440 (“soon they came to confound names with things”).

⁴⁷ Frederick Pollock, ed., *Table Talk of John Selden* (1927), 43. Crosswell & Sutton, *Debates and Proceedings*, 443 (O’Conor); Bishop & Attree, *Report of the Debates*, 601 (Nicoll). See also *ibid.*, 576 (Kirkland) (“The judge who administers ‘equity’ is bound by authority alike with him who administers ‘law’: the one can no more exercise his own unregulated ‘discretion’ than the other.”); *ibid.*, 638 (Loomis) (If he “knew anything of the principles of equity, they were as well settled as those of the common law. Nor could [the chancellor] construe away a statute law as the gentleman supposed.

Fusionists declared equity's "extraordinary" jurisdiction and its power to "supply the deficiencies" of the law were likewise empty phrases. The elderly Jacksonian lawyer Michael Hoffman insisted that "for more than a hundred years no court of equity has claimed or exercised the power to modify or soften the rigor of the law – or grant relief on mere grounds of moral right, or conscience, that was not given it by fixed rules of law." On this point, the fusionists boasted the support of so eminent a jurist as William Blackstone, who had written that both systems "are now equally artificial systems, founded on the same principles of justice and positive law, but varied by different usages in the forms and modes of their proceeding."⁴⁸

Blackstone's distinction between principles of justice and modes of proceeding inspired the fusionists to argue that procedural fusion could be accomplished without disturbing the substantive law. "The difference between law and equity, and the only difference," O'Connor claimed, "was in the form of pleading and the remedies." Following up that argument, Nicoll encouraged the legislature to "amalgamate" the systems, "altering no rule of law or equity – but simplifying the forms of bringing causes into court." Again and again, delegates drew contrasts between "form," "mode," "proceedings" on the one hand and "substance" on the other. "The difference between 'law' and 'equity' is a difference in the *remedies* and *substantially* in nothing more," Kirkland concluded.⁴⁹

Concerning those remedies, equity judges could decree money damages as at common law, but they also administered a variety of other injunctive and declarative remedies backed by their power to hold parties in contempt. No case in equity required pleading the forms of action; rather, bills in chancery consisted of (often quite detailed) factual statements, usually verified under oath.⁵⁰ Fusionists commonly understood, then, that uniting law and equity basically involved extending

He was bound just as much by rigid rules of law as the common law judge."). On the regularization of equity in the late seventeenth century, see Dennis R. Klinck, "Lord Nottingham's 'Certain Measures,'" 28 *Law & History Review* 711 (2010).

⁴⁸ Bishop & Attree, *Report of the Debates*, 679 (Hoffman); 3 *Blackstone's Commentaries* 434.

⁴⁹ Croswell & Sutton, *Debates and Proceedings*, 443 (O'Connor); *ibid.*, 464 (Nicoll); Bishop & Attree, *Report of the Debates*, 576 (Kirkland).

⁵⁰ See Barbour, *Practice of the Court of Chancery*, 1:115–19.

equitable procedure—perhaps with some alterations to diminish verbose pleadings—to all cases. O’Conor’s “view was that the forms of pleading used in chancery, reduced and cut down to the extent they might be, were the true forms by which civil justice might be administered in all cases, in one court, and by a uniform mode of practice.” That was because equity had “literally no form about it. The party stated his case, and asked the relief he desired, and the court, if he proved his case, gave him the relief.”⁵¹

This view of equity’s straightforward proceedings provided the fusionists with a rebuttal to the separationist argument that law and equity improved the law through a division of labor. As in any trade, the division of labor spurred progress only when it created “efficiency,” a term favored by the fusionists. When two courts performed similar functions, and when the same case often had to seek remedies in both courts, law and equity did not sharpen expertise but created needless redundancies. “Why may not the judge have the power to administer to the party, what in his case the law determines to be a proper and necessary remedy,” asked Hoffman. “Why should he be obliged, if he wants one remedy, to go to one court, and if he wants another to go into another?”⁵²

Enough lawyers wished to see jury trial preserved that fusionists adjusted their plans to accommodate a possible expansion of jury trial into formerly equitable proceedings, generally optimistic that the factual complexities of equity were perhaps no worse than certain cases at common law. Even if equity proved too complicated for jury trial, Hoffman argued fusion might have a salutary effect on equitable jurisprudence if judges and lawyers had to make equitable jurisprudence clear enough that it could be presented to a jury in the course of a few hours.⁵³

⁵¹ On equitable remedies, see generally David Graham, *A Treatise on the Organization and Jurisdiction of the Courts of Law and Equity in the State of New York* (1839); Barbour, *A Treatise on the Practice of the Court of Chancery*. Bishop & Attree, *Report of the Debates*, 562 (O’Conor). See also *ibid.*, 648 (Morris) (“All your causes being commenced in the same tribunal, under the same practice, the rough corners of the common law will be smoothed by the principles of equity, and the law will be applicable to human nature as it is.”).

⁵² Bishop & Attree, *Report of the Debates*, 676 (Hoffman); see also *Report of the Code Commissioners* (Iowa 1859), 444. On efficiency, see especially Bishop & Attree, *Report of the Debates*, 643–46 (Harris); *First Report of the Commission on Practice and Pleadings* (New York 1848); *Opinions of Lord Brougham, on Politics, Theology, Law* (1841), 227.

⁵³ Bishop & Attree, *Report of the Debates*, 616 (Brown); *ibid.*, 678 (Hoffman); *ibid.*, 600–01 (Nicoll).

In all these points, Field was the consummate fusionist. Perhaps no colleague exceeded Field's legal nominalism and legislative positivism. To Field, the supposed distinctions of equity were "little more than a play upon words"; "law and equity ought to mean precisely the same thing." In the past century, "it would not at any time have been thought proper or safe for the Courts to disregard an established precedent," and "in almost every instance where an improvement has been made in the laws, it has come from the Legislature." The only reason New York had separate court systems, "if reason it may be called, was purely historical," which was to say, accidental. As positive law kept the courts distinct, so positive law could unite them and eliminate the distinction forever.⁵⁴

Field insisted that the distinction between law and equity "grows out of legal procedure; it does not spring from distinct, inseparable rights; it does not inhere in the nature of things." The only difference between law and equity were the remedies each court could decree; there was no such thing a "legal right" distinct from an "equitable right." Lawyers commonly spoke that way, "but only because there are legal remedies and equitable remedies. Once abolish the distinction between the latter, and the distinction between the former perishes with it." By defining rights as "substantial" and remedies as "procedural," Field thought he saw a way through the legitimacy problems raised by the separatists. The latter worried that in a fused system every case would become a long recitation of facts. Unmoored from the precedents that defined which facts legally triggered a cabined set of remedies, judges could rule arbitrarily. But Field argued that the rule of law was secured not by stringently defining remedies and their availability, but by positively defining rights. The written law enumerated the rights of social actors. When those rights were violated, pleading need only show the fact of violation without contorting itself to fit a particular remedy. Instead of cabined remedies, comprehensive legislation—a substantive code if the legislation were properly organized—would

⁵⁴ David Dudley Field, "Legal System of New York" (1866) in A. P. Sprague, ed., *Speeches, Arguments, and Miscellaneous Papers of David Dudley Field* (1884), 1:338, 340; David Dudley Field, "Law and Equity," 18 *Albany Law Journal* 509 (1878), 510–511; David Dudley Field & Alexander Bradford, *The Civil Code of New York Reported Complete* (1865), xxvii.

protect against judicial arbitrariness. If no positive right had been violated, a judge had no discretion to grant a remedy; if a right had been violated, then *any* remedy that vindicated the right would be appropriate. Field was not particularly concerned that judges would decree the “wrong” remedy. Professional experience would guide lawyers and judges towards appropriate remedies, and the appellate process would correct any windfall awards. As with his theory of pleading generally, Field once again relied on lawyers’ ingrained habits of thought to dodge a conceptual difficulty of his prescribed remedial system.⁵⁵

In sum, Field and his fellow fusionists believed the distinction between law and equity could be easily and cleanly replaced by making a distinction between substantive right and procedural enforcement. They denied that chancery offered a unique approach to vindicating rights, certainly not one that was more concerned with doing justice according to conscience. Chancery’s precedential jurisprudence convinced them that equity’s methods of defining substantive rights or rendering judgments upon them were indistinguishable from those of the common law. “If equity be designed to supply the defects of law,” Field reasoned, “it is as easy to incorporate the supplement into the body of the law itself as to keep it forever a distinct system.”⁵⁶

On this account, equity’s creative measures to subvert and supplement inadequate common law remedies were recast merely as so many new rules. To return to the case of an unrecorded land transaction, in the Fieldian scheme, equity did not so much restrain the seller from pleading the Statute of Frauds in a particular case as it carved out a new legal classification and created a new rule: the Statute of Frauds is binding only on sellers, and not on certain buyers. Adequately state the rule, and the extraordinary procedures to restrain pleading could, in theory, fall away.

⁵⁵ Field, “Legal System of New York,” 340; Field, “Law and Equity,” 510–11. “This object [to vindicate rights] is not peculiar to any form of remedy, whether it be legal or equitable, or whether it fall within any one of the subordinate classes of actions, as they now exist at law, but is common to all.” *First Report* (New York), 74–75.

⁵⁶ Field, “The Convention.”

Fusion by Diffusion: The Code's Treatment of Equity

After New York abolished its court of chancery, Field and the other commissioners crafted the code ostensibly to provide “a uniform course of proceeding, in all cases, legal and equitable.”⁵⁷ Acting on his belief that fusion was a problem only of procedure, Field sought to solve it in the code of procedure. “The distinction between actions at law and suits in equity [is] abolished,” the opening section read.⁵⁸ Complaints had to contain “a statement of the facts constituting the cause of action” and a demand for relief, but no matter what remedy a plaintiff requested, the court could grant “any relief consistent with the case.”⁵⁹ Judges were empowered to order sheriffs to arrest defendants, seize their property, or, if it appeared the plaintiff might suffer irreparable injury, enjoin a defendant’s actions.⁶⁰ As New York now had only one court of general jurisdiction, these powers were conferred on the thirty-three district court judges across the state. Under the code, every trial judge became a chancellor.

Overall, the commissioners insisted that “the basis” for code procedure “was substantially that upon which courts of equity were originally founded.”⁶¹ Looking back in 1878, Field observed that some states had adopted the code with “an express provision that, when the legal and equitable rules clash with each other, the latter shall prevail. Such a provision may be expedient, from abundant caution, but I conceive it nevertheless to be unnecessary,” Field argued, “because it is implied in the blending of the procedure.” Field’s co-commissioner Arphaxad Loomis concurred; in his view, the code had produced a “system [that] approaches and assimilates more nearly with the equity forms than with those of the common law” by granting a plaintiff “any relief the facts warranted.”⁶²

⁵⁷ David Dudley Field, *What Shall Be Done with the Practice of the Courts: Shall It Be Wholly Reformed?*, (1847), 7.

⁵⁸ 1848 New York Laws 510 §. 62.

⁵⁹ 1848 New York Laws 522 § 120, 540 § 231.

⁶⁰ 1848 New York Laws 510 § 62; 1848 New York Laws 522 § 120; 1848 New York Laws 540 § 231; 1848 New York Laws 527–35 tit. 7.

⁶¹ *Second Report of the Commissioners of Practice and Pleadings* (New York 1849), 7.

⁶² Field, “Law and Equity,” 510; Arphaxad Loomis, *Historic Sketch of the New York System of Law Reform in Practice and Pleadings* (1879), 25–26.

For decades, proceduralists tended to take the commissioners at their word, but the conventional account now rejects the idea that the code sought to extend equitable practices to all cases. On the centennial anniversary of the code, Roscoe Pound, with perhaps some forgivable hyperbole given the occasion, claimed that the features of the indisputably equitable Federal Rules of 1938 “could have been attained at least eighty years [earlier] if Field’s Code of Civil Procedure had been developed and applied in its spirit,” especially in its spirit of “equitable shortcuts” to remedies.⁶³ But in a pair of articles written in the early 1980s, Stephen Subrin declared Pound’s view a “myth” meant to hide the radicalism of the Federal Rules by anchoring them to a deeper past. “Equity conquered common law” for the first time in the Federal Rules, said Subrin, but the Field Code “leaned as much, or more, toward the view of common law procedure as to equity.”⁶⁴

I have sketched a refutation of Subrin’s thesis in significant technical detail elsewhere.⁶⁵ Suffice it to say here that Subrin’s account suffers from relying exclusively on the first, partial, report of the code in 1848 and ignores the commissioners’ final draft and report as well as much of their contemporary writings. Subrin also falls prey to essentializing equity as “discretion,” thereby ruling out a lengthy code of detailed rules as necessarily inequitable; yet he does not consider the actual practices of equity in the nineteenth century or in New York, the technical rules of which were described in treatise literature in significantly more rigorous detail than used in the Field Code. These are important points to note, because the literature declaring American equity “moribund” until the twentieth century relies on Subrin’s conclusion that, as one account puts it, “the drafters of the [Field Code] had no use for equity.”⁶⁶

⁶³ Roscoe Pound, “David Dudley Field: An Appraisal,” in Alison Reppy, ed., *David Dudley Field: Centenary Essays* (NYU 1949), 14.

⁶⁴ Subrin, “How Equity Conquered Common Law,” 909; Subrin, “Field and the Field Code,” 337–38.

⁶⁵ Kellen Funk, “Equity without Chancery: The Fusion of Law and Equity in the Field Code of Civil Procedure, New York 1846–76,” 36 *Journal of Legal History* 126 (2015).

⁶⁶ Hoffer, *The Law’s Conscience*, 91.

Paying attention to the actual practices of chancery at the time demonstrates that the commissioners really did transform every case into an equitable case, at least insofar as equitable “procedure” as they defined it would be available in any proceeding. Like chancery, the code required straightforward, factual pleadings and allowed liberal powers of joinder and amendment. The code sought to replicate equity’s power to extract party statements in a bill of discovery by abolishing the disqualification of party testimony and allowing pre-hearing depositions of a party. The common law jury became waivable, and though the code required *viva voce* examination, this too had become a standard practice in New York equity by the 1830s.⁶⁷ All equitable remedies, including injunctions, contempt, and processes for accounting, partitioning, receiving and disposing of property continued under the expansive provision for “any relief consistent with the case made by the complaint.” Until the legislature enacted a substantive civil code, judges were to look to legal and equitable precedents (though without regard to the division) to determine whether a complaint made out an appropriate “cause of action” by stating facts showing the violation of the plaintiff’s rights.⁶⁸

The fusion of law and equity was a common project across the common law world in the nineteenth century.⁶⁹ In general, one might say that Field Code states sought to accomplish fusion largely through equity’s diffusion.⁷⁰ Under the code, every trial judge became a chancellor, every case a potential application of equitable remedies.⁷¹ Most other states that adopted the code abolished their

⁶⁷ See Kessler, *Inventing American Exceptionalism*, ch. 2.

⁶⁸ 1848 New York Laws 540, § 231; 1849 New York Laws 670, § 275; *Final Report of the Commissioners on Practice and Pleadings*, in *Documents of the Assembly of the State of New York*, 73rd Sess., No. 16 (1850), 2:314 § 751.

⁶⁹ See especially P. G. Turner, John Goldberg & Henry Smith, eds., *Equity and Law: Fusion and Fission* (Cambridge, forthcoming).

⁷⁰ See Funk, “Equity without Chancery.” My article joins a growing literature showing how much procedural fusion had been accomplished in America and England before the more celebrated dates of fusion in the 1848 Field Code and the 1873 Judicature Act. See, for instance, Kessler, *Inventing American Exceptionalism*, ch. 3; Patricia I. McMahon, “Field, Fusion and the 1850s: How an American Law Reformer Influenced the Judicature Act of 1875,” in P.G. Turner, ed., *Equity and Administration* (Cambridge 2018), 424–62.

⁷¹ Even jurisdictions that did not adopt the Field reforms vested equity powers in many more judges than England’s lone chancellor (before 1813) and vice-chancellors (after 1841). See Michael Lobban, “Preparing for Fusion: Reforming the Nineteenth-century Court of Chancery,” *22 Law & History Review* 389, 565 (2004). Most southern states employed two to four chancellors early on, before granting equity jurisdiction to county or district courts in the 1820s and 1830s. Federal district judges received a uniform equity code from the Supreme Court in 1822. Most code jurisdictions and an

separate chancery courts (or started out with the code and thus never established such courts). Codifiers directed judges to assess pleadings by the former standards of chancery rather than the conclusory statements of the common law writs, and they directed practitioners to plead equitable and common law actions and defenses together without signaling a distinction.

None of this is to say that the code actually did make every case an equity case, or that traditional structures of common law practice suddenly disappeared. Subrin may have misdiagnosed the commissioners' intent, but he was not entirely wrong to read the code as something less than a codification of equitable practice. In the early years of the code, Field and other fusionists dashed off pamphlets and law review articles criticizing judicial decisions that distinguished between law and equity or forced "common law" litigants to follow the old forms of action.⁷² Among New York's trial judges, Alexander Smith Johnson received the praise of fusionists for disregarding the distinction and allowing nontraditional joinders and remedies. Henry Selden on the Court of Appeals received their condemnation. It was "plain," Selden wrote, that the state constitution's grant of jurisdiction "in 'law and equity,' has not only recognized the distinction between them, but placed that distinction beyond the power of the legislature to abolish." Lawrence Friedman has written of these judges that "it was as if upper courts tried, not cases, but printed formulae, and tried them according to warped and unreal distinctions."⁷³

increasing number of reform states allowed the joinder of legal and equitable claims and encouraged the use of equitable practices—temporary injunctions and bench trial—in all litigation. Charles M. Hepburn, *The Historical Development of Code Pleading in America and England* (1897); Kristin Collins, "A Considerable Surgical Operation": Article III, Equity, and Judge-Made Law in the Federal Courts," 60 *Duke Law Journal* 249 (2010); Laussat, *Essay on Equity*, 153–57.

⁷² See [David Dudley Field], *The Administration of the Code* (1852); "Progress of Union of Law and Equity," 5 *United States Monthly Law Magazine* 1 (1852); John Norton Pomeroy, *Remedies and Remedial Rights by the Civil Action, According to the Reformed American Procedure* (1875); J.N., "The Codification of the Law," 3 *Albany Law Journal* 101, 121 (1871). And in a somewhat later era, Charles E. Clark, "The Union of Law and Equity," 25 *Columbia Law Review* 1 (1925); Charles W. Joiner & Ray A. Geddes, "Union of Law and Equity, A Prerequisite to Procedural Revision," 55 *Michigan Law Review* 1059 (1957).

⁷³ Clark, "The Union of Law and Equity," 4 (citing *Marquat v. Marquat*, 12 N.Y. 336 (1855) and *New York Ice Co. v. North Western Insurance Co.*, 23 N.Y. 357 (1861)); *Reubens v. Joel*, 13 N.Y. 488, 497 (1859) (Selden, J.). Friedman, *History of American Law*, 400.

Such criticisms tend to overlook how much the code itself seemed to require a separatist jurisprudence. This was partly owing to the commissioners' haste to produce multiple drafts of the code in the late 1840s. Many of the proceedings surrounding complicated equitable remedies such as the partition of property (and related actions for account, dower, and waste) were defined and regulated by the 1829 Revised Statutes. Rather than go through these proceedings one by one and re-codify or reform them in the spring of 1848, the commissioners left the Revised Statutes in force as to many formerly equitable remedies. In their final draft in 1850, they largely re-copied the Revised Statutes, explaining it as a matter of path dependence that had developed over the previous two years. The commissioners insisted that "the form of civil actions under the code, is in its nature adapted to almost every case requiring the interposition of judicial authority." Nevertheless, they retained special procedures for "actions in particular cases" – all of which had formerly been equitable and regulated by statute – for the "advantage of following the beaten track already enlightened by the judicial consideration to which the code has been subjected."⁷⁴

Another barrier to fusion-by-diffusion was the constitutional requirement to preserve the right to jury trial "in all cases in which it has been heretofore used."⁷⁵ Although that prevented the commissioners from making the equitable bench trial the only mode of trial under the code, they could have accomplished fusion either by mandating jury trial in every case or, theoretically, leaving the mode of trial to the choice of plaintiffs, who could insist on the constitutional right of a jury trial if they wanted to. Instead, the commissioners gave the parties the choice to waive or claim the right to a jury but also set default rules that differed based on the remedy sought. Actions seeking the recovery of real property or money damages defaulted to a jury trial, while "all other cases" defaulted to bench

⁷⁴ *Final Report* (New York 1850), 378, note to tit. 11.

⁷⁵ N.Y. Constitution of 1846, art. I, § 2.

trial. With these differing modes of trial came different procedures in regard to timing and summonses as well, a distinction between legal and equitable traditions in all but name.⁷⁶

A final barrier proved to be the codification of debtor protection laws, which, as related in Chapter 2, were part of the impetus to fusion reforms in the first place. Common law courts could not order the arrest of fraudulent debtors to execute their decrees of money damages. Chancery could, but only after going through the procedures of examination to establish that a defendant was fraudulently concealing assets. The Field Code made parties competent to be examined on oath at trial, thus extending equity's power to ferret out fraud in ordinary contract cases if the need arose. But in order to safeguard New York's act to abolish imprisonment for debt, the code abolished *capias* procedures (which treated the initiation of a civil suit the same as a criminal suit – with the arrest of the defendant until bail was granted), and it enumerated claims in which a party could be arrested at the outset or during the progress of a suit (*mesne* process).⁷⁷ In effect and by explicit decree, defendants could not be arrested in contract claims. Thus, throughout the code, both initially and as finalized by the commissioners, rights to certain remedies and modes of proceeding depended on the form of the complaint, which in turn depended on the remedy sought, which in turn depended on the traditions distinguishing legal from equitable relief.

After judges and treatise writers reasoned that such rules preserved a distinction between law and equity and bound certain remedies to the form of the pleadings, Field retorted with a hypothetical: Imagine there used to be separate courts for men and women, with different proceedings. Those who could not see that the code accomplished fusion were arguing in effect that there was something “in the nature of things” which prevented a fusion of men and women's proceedings using “uniform pleadings, a uniform manner of taking testimony, trial by jury in every case in which a man was the

⁷⁶ 1848 New York Laws 547 §154, 536 §203; *Final Report* (New York 1850), 227–33, 318–19.

⁷⁷ *Final Report* (New York 1850), 451–53 § 1071 & note.

suitor, and the reexamination of a verdict only after the manner practiced in men's courts."⁷⁸ The analogy may have been apt but was not very instructive, because even the language of this hypothetical formula preserved the old conceptual distinctions on which separatists relied.

Rather than distinguish between cases for money damages and "all other cases," the code states of Kentucky, Iowa, Oregon, Tennessee, and Arkansas explicitly preserved an institutional distinction between law and equity. Because these states—like most others—scheduled different court sessions for jury trial and for bench trial, they referred cases to either the "law" or "equity" calendar and forbade the joinder of legal and equitable claims so as not to disrupt the schedule. Even New York continued the latter practice, while judges spoke in their decisions of sitting "in equity" or "at law." "They tend to keep up a distinction that no longer exists," Field lamented of his home state in 1878, "and go far to confuse and mislead."⁷⁹ What Field did not say was how much his own legal practice had contributed to the hardening distinction between law and equity, not least in the Albany & Susquehanna litigation.

Form and Substance: The "Great Lawsuit"

Compared to the many complicated financial schemes executed during his career, Jay Gould's raid on the Albany & Susquehanna Railroad—which New Yorkers would refer to afterwards as "the Great Lawsuit"—was fairly simple and straightforward.⁸⁰ As the newly installed president of the Erie

⁷⁸ See Henry Whittaker, *Practice and Pleading Under the Code, Original and Amended, With Appendix of Forms* (2d ed., 1854), 1:56 ("Although . . . the preamble [of the Code] seems to contemplate the abolition of all distinction between legal and equitable remedies also, that abolition is, to some extent, and must always continue to be, impracticable."). Field, "Law and Equity," 510–11.

⁷⁹ Field, "Law and Equity," 510–11.

⁸⁰ Besides the litigation documents, only a couple of which were printed, the main primary sources for the A&S fight are Albert Stickney, "The Truth of a 'Great Lawsuit,'" 14 *Galaxy* 576 (1872), and Francis C. Barlow, *Facts for Mr. David Dudley Field* (1871), two partisans for Ramsey and fierce critics of Field's; George Ticknor Curtis, *An Inquiry into the Albany & Susquehanna Railroad Litigations of 1869 and Mr. David Dudley Field's Connection Therewith* (1871), a staunch (and well compensated) defender of Gould and Field; and *Charges of the Bar Association of New York Against Hon. George G. Barnard and Hon. Albert Cardozo and Hon. John H. McCunn* (1872), a quasi-legislative hearing prompted by the newly formed New York City Bar Association. Of the three, Curtis clearly wrote with the (often unpublished, sometimes lost) litigation documents in hand, and he provides a more detailed account of those documents as to date, time, party, and legal theory. With cautious regard for Curtis's clear incentives to paint Field in the best light, the following account relies largely on Curtis for its chronology.

Railroad, Gould sought in the summer of 1869 to purchase the A&S, ostensibly to connect the two lines. To do so, Gould needed to win over a majority of the board, because the A&S's president Joseph Ramsey was, by all accounts, genuinely fearful Gould would plunder the corporation without adding value to the line, so he adamantly opposed the sale.

Gould's opening moves raised no legal (or equitable) complaints. Per the A&S charter, the towns along the line had each received a share of stock that they were free to vote or transfer as their governing bodies wished. Gould began purchasing stock from towns eager to see their holdings go at par value (or governed by men eager to receive Gould's finder's fee). Gould used straw purchasers so as not to tip off Ramsey prematurely, but by the end of July it became clear that Ramsey and the directors loyal to him would control only a minority of the stock by September's annual board meeting. Though most contestants in the coming duel judged Ramsey's motives pure, Ramsey was the first to grasp the sword of litigation.⁸¹

The suing started in Oneonta, a tiny town about halfway between Albany and the Pennsylvania border. A Ramsey loyalist petitioned for an injunction in the nearest supreme court to restrain the town from selling its stock. The code permitted an injunction to be imposed *ex parte*—without hearing from the other side—“upon its appearing satisfactorily to the court or judge, by the affidavit of the plaintiff, or of any other person, that sufficient grounds exist therefor.” The code did not state what grounds were sufficient for an *ex parte* injunction; New York's annotated 1868 code listed in small type over the span of eight pages all the reported cases in which such injunctions had been granted and refused so that practitioners could consult the case law and try to make analogies in their own cause.⁸² The Oneonta petition claimed that town leaders were planning to accept payment for less than par value in contravention of their public trust. Judge J.M. Parker granted the *ex parte*

⁸¹ Curtis, *An Inquiry into the Albany & Susquehanna Railroad Litigations*, 5–8.

⁸² 1868 New York Code of Civil Procedure 398–406, notes to §§ 219–220.

injunction on August 2 but dissolved it on August 5 when a Gould-allied director appeared and offered proof that Gould was paying full par value for the stock.⁸³

Between the August 2 and August 5 Oneonta proceedings, Field and Shearman got to work, filing three separate lawsuits in New York City. One, on behalf an A&S investor, targeted 3,000 shares of stock that had reverted to the A&S and that the suit claimed Ramsey had re-issued to his allies without receiving payment. (New York did not criminalize the issuance of watered stock until 1912, but in civil suits, investors or directors could seek to restore value that had been lost in such transactions.) The petition requested both that the re-issuance be declared void but also that a neutral party be appointed to “receive” and hold the stock until it was stricken from the firm’s books. A second suit, on behalf of a director, sought an *ex parte* injunction ordering Oneonta’s town stock transferred to Gould’s purchaser (note that the writ ran against the corporation’s bookkeeper to record the sale, not against the town that was under Judge Parker’s injunction not to sell). That injunction was instantly granted by the New York City Judge George Barnard. The third suit, on behalf of the same director, once again targeted the 3,000 shares of re-issued stock but sought a different remedy from the investor suit. This time, Field and Shearman asked that Ramsey be removed as director for his malfeasance and that the corporation be enjoined from issuing further stock except at a public sale. Barnard granted that injunction the same day as well, on August 4.⁸⁴

Having dislodged the first stone, Ramsey was also busying himself with an avalanche of legal filings at precisely the same time. On August 5—it is unclear whether it was before he was served with notice of Judge Barnard’s injunction suspending his authority—Ramsey filed suit in Albany in his own name attempting to have Gould-allied directors removed from office. Ramsey’s *ex parte* affidavit alleged a conspiracy among the directors to transfer possession of the A&S to the Erie

⁸³ Curtis, *An Inquiry into the Albany & Susquehanna Railroad Litigations*, 8–9.

⁸⁴ Curtis, *An Inquiry into the Albany & Susquehanna Railroad Litigations*, 11–18.

Railroad for private ends rather than for the good of the company. Judge Rufus Peckham of Albany granted the injunction on the spot.⁸⁵

Ramsey then attempted to shore up his position in the coming elections. To do so, he mortgaged the A&S for bonds which he then loaned to allied purchasers. The purchasers used the money to buy 9,500 shares of stock that the board—now bereft of Gould directors—issued. Remarkably, Ramsey was engaging in the very behavior he had accused Gould of conspiring to commit, using corporation assets to funnel money into private hands so those hands could acquire more of the corporation's assets. To prevent any further stock sales from upsetting the new balance of power, Ramsey had the corporation's books transferred offsite—more sensational journalists claimed he hid them in an Albany graveyard.⁸⁶

All of these Ramsey activities transpired on August 5. On August 6, the dueling litigants filed two more suits—one in Albany, one in New York—seeking the same relief: that the entirety of the A&S rail system be taken from the control of its board and president and transferred to a receiver pending the next corporate election. Barnard granted the New York receivership the same day, appointing as one of the “neutral” receivers Gould's close associate Jim Fisk. Judge Peckham in Albany, unaware of the New York filings, also granted a receivership and, being already on the spot, installed a Ramsey ally named Robert H. Pruyn as the receiver.⁸⁷

Crucially for Field and Shearman, the next day, August 7, was a Saturday. When their clerk John W. Sterling arrived in Albany to serve the receivership papers on the corporation's headquarters, he found Pruyn already claiming to act as receiver. But time was on Gould's side. An obscure section of the code provided that in New York County only, orders took effect immediately upon being signed by a judge. In all other counties, judicial orders took effect only within business hours.⁸⁸ Sterling

⁸⁵ Curtis, *An Inquiry into the Albany & Susquehanna Railroad Litigations*, 10–11

⁸⁶ Curtis, *An Inquiry into the Albany & Susquehanna Railroad Litigations*, 10–11

⁸⁷ Curtis, *An Inquiry into the Albany & Susquehanna Railroad Litigations*, 24–30.

⁸⁸ 1868 New York Code of Civil Procedure §§ 24, 401.

telegraphed his predicament to his Shearman, who sought a “writ of assistance” from Barnard, received the signature, and telegraphed the writ back to Sterling the same day. The A&S litigation became legendary, but the telegraphed writ was probably its most famous episode among professionals, apparently the first time a lawyer had been so audacious to attempt to serve process through this new technology. And the writ itself was entirely uncommon. A writ of assistance authorized the use of necessary force to counter resistance to an equitable receivership. By professional accounts, it had hardly if ever been issued in New York, and Shearman may have only known about it because he has spent the previous decade reading pleading treatises in order to prepare a work on code pleading.⁸⁹ (Shearman’s imaginative use of equitable remedies would, by example, go on to have devastating effects on the railroad-oriented labor movement in later decades.⁹⁰)

The grant of a writ of assistance did not result in the parties coming to blows. Pruyn filed suit to enjoin the sheriff from acting on Shearman’s writ on the theory that writ was void for improper service. On Monday, Pruyn’s injunction was granted. Rather than test the validity of a writ of force, Field raced to Albany and sent an emergency telegraph to Governor John Hoffman at West Point. Hoffman dispatched the militia before the dueling receivers could rally their mobs to fight for control of the railroad.⁹¹

Having lost temporary control of most the A&S’s assets to the militia, all efforts now focused on the September 7 board meeting. Judge Barnard ordered the 3,000 re-issued shares into a receivership, appointing Field’s former law clerk W.J.A. Fuller as receiver. Like the writ of assistance, the use of a receivership for shares of stock under § 244 of the code was – as the 1868 annotated code

⁸⁹ Curtis, *An Inquiry into the Albany & Susquehanna Railroad Litigations*, 30-34. On Shearman’s treatise-writing, see Chapter 4.

⁹⁰ Later in the century, equitable receiverships of bankrupt rail lines became the justification for federal equity to counteract strikes with force on a theory of preserving property entrusted to the federal government. See Walter Nelles, “A Strike and Its Legal Consequences – An Examination of the Receivership Precedent for the Labor Injunction,” 40 *Yale Law Journal* 507 (1931); P.F. Brissenden, “The Labor Injunction,” 48 *Political Science Quarterly* 413 (1933).

⁹¹ Curtis, *An Inquiry into the Albany & Susquehanna Railroad Litigations*, 38-44.

again shows—basically unprecedented. Receivers were commonly appointed to oversee estates, not a single slice of intangible property which was unlikely to be “materially injured or impaired” as the code required. Barnard also ordered an injunction in a suit by Gould to prevent the 9,500 shares of watered stock from being voted at the meeting. Nevertheless the day before the meeting, an Albany judge ordered that no stock be voted *unless* the 9,500 shares were also voted.⁹²

That same day, September 6, Field and Shearman worked out their final preparations for the meeting. They faced two problems: they needed access to the corporate books to record the stock Gould had purchased since the books were withdrawn in early August, and they needed to prevent Ramsey from voting the proxies of his 9,500 shares of watered stock. They believed § 179 of the code could address both problems at once. That was the section that abolished imprisonment in civil cases except for the fraudulent debtor—that is, one who concealed personal property that rightfully belonged to the plaintiff. Field drew up a pleading framing the corporation’s books as just such property and seeking the arrest of Ramsey and his closest allies who had aided in the concealment. Judge Barnard signed the order the same day, as had become his custom, but Field and Shearman waited to serve it on the Albany sheriff until 11:45 the next day, fifteen minutes before the meeting began.⁹³

Though it may seem incredible, this account has significantly simplified the A&S litigation. Ramsey’s allies alone secured at least six more injunctions concerning the shareholders’ meeting. My purpose in summarizing this dizzying array of injunctions, receiverships, and more exotic equitable remedies is to make three points. First, the litigation illustrates vividly (more than a treatise could) how fully equity—especially in its provisional remedies—did not inhere in articulable principles of substantive law but in chancery’s traditional power to change the game without changing the rules. No party sought, and no judge granted relief that was directly contrary to what another court had

⁹² Curtis, *An Inquiry into the Albany & Susquehanna Railroad Litigations*, 44–47.

⁹³ Curtis, *An Inquiry into the Albany & Susquehanna Railroad Litigations*, 63–64.

ordered (setting aside the simultaneously granted receiverships, when one court could not have known what another was ordering elsewhere). One judge ordered a town not to sell stock, another ordered a bookkeeper to record the transaction as if it had already happened. One judge ordered shares not to vote, another ordered the remaining shares not to vote without the first group. One judge ordered a writ of force, another—in desperation—enjoined the sheriff from executing writs. In all these cases the first judgment remained technically undisturbed, but the game could not be played out—the aces had been removed.

But, second, these equitable maneuverings show how, as George Simmons argued at the convention, “the very *forms* of proceedings stick so close to the *substance*. . . . The practice of courts is so adhesive to their doctrines” that they could not be pulled apart without serious damage to the fabric of legality.⁹⁴ By attempting to reduce equity to a list of procedures and remedies on a page, Field showed how greatly those remedies had depended on traditional structures of uncodified thought to keep them within practical bounds, especially the bounds of conscience. By requiring “sufficient grounds” for an equitable remedy, Field was not alluding to substantive rules to be codified elsewhere, because there was no substance to codify. In the 1860s, there were no “elements” of an injunction as there were of a breach of contract claim. The grounds were sufficient or insufficient only in the mind of the judge, hopefully illuminated by hundreds of cases deemed sufficient for an injunction—and by hundreds of cases deemed insufficient. Codifiers scoffed at the notion that conscience had any part left to play in modern equity, or that the law could have a conscience. Their own litigations demonstrated otherwise, showing how greatly their system depended on conscience. But instead of the conscience of the law, their code had substituted the conscience of (the probably bribed⁹⁵) Judge Barnard.

⁹⁴ Bishop & Attree, *Report of the Debates*, 664 (Simmons). And the damage from the A&S litigation would indeed be serious—see Chapter 7.

⁹⁵ See *Charges of the Bar Association of New York Against Hon. George G. Barnard* (impeaching Barnard for bribery).

Finally, the litigations illustrate what Douglas Laycock calls “the death of the irreparable injury rule.” Laycock proposes that in a post-fusion system, the traditional requirement that equity intervene only if common law damages are shown to be inadequate (“irreparable injury”) has functionally disappeared. It is always found automatically satisfied, if the question is raised at all. Laycock suggests we accept the bargain of the codifiers. Every case is now an equity case, no case is extraordinary, and litigants may seek whatever relief they desire.⁹⁶ The A&S litigation suggests that Laycock is right, but only to a point. Once again, the ambiguities of “procedure” and “substance” produced the slippage. Was the traditional requirement to show the inadequacy of damages a substantive rule of equity, an “element” of showing entitlement to relief? Or was it merely a pleading requirement, a talismanic phrase one uttered when invoking equity's jurisdiction and one that could accordingly be abandoned once all cases fell within equity's jurisdiction? By leaving the rule out of their reformed code of procedure, the commissioners implicitly opted for the second answer.

But in another sense, the irreparable injury rule did not die with fusion; rather its traditional effects became all the more deeply entrenched. That is why negligent manufacturers pay tort victims money damages instead of entering into receivership. It is also why Field and Shearman could arrest Ramsey by plausibly arguing their claim sounded not in contract but in the law of corporations, a former preserve of equity. The irreparable injury rule may no longer be invoked, but to this day, the “adequacy” of money damages remains hardwired into practice, even for victims who lose life or limb, while the “extraordinary” decrees of equity remain available to corporate litigants, even when only lost profits are on the line. The forms of proceedings have stuck close to the substance.

The Triumph of a Tradition in Erie's Last Chapter

Field and Shearman's deployment of equity in what could have been the culminating battle of the Erie War had been nearly flawless. Through their strategic combination of injunctions,

⁹⁶ Douglas Laycock, “The Death of the Irreparable Injury Rule,” 103 *Harvard Law Review* 687 (1990); Douglas Laycock, “The Triumph of Equity,” 56 *Law & Contemporary Problems* 53 (1993).

receiverships, and arrests for attachment, they cobbled together a shareholder majority at their September 7 meeting while their Albany rivals were being arrested. But whether through lack of nerve or simple miscalculation, the sheriff did not remove President Ramsey from the building but merely detained him in the boardroom. It took Ramsey only half an hour to draw up the proper bond paperwork and pay bail—\$25,000 apiece for him and his allied directors. (Ramsey’s arrest in the same room where a young J.P. Morgan was present proved fortunate.) The liberated directors then held their own meeting within the bylaws’ conditions and elected their own slate of directors before one o’clock. After all the *ex parte* injunctions and receiverships, an actual trial would finally determine who controlled the Albany & Susquehanna.⁹⁷

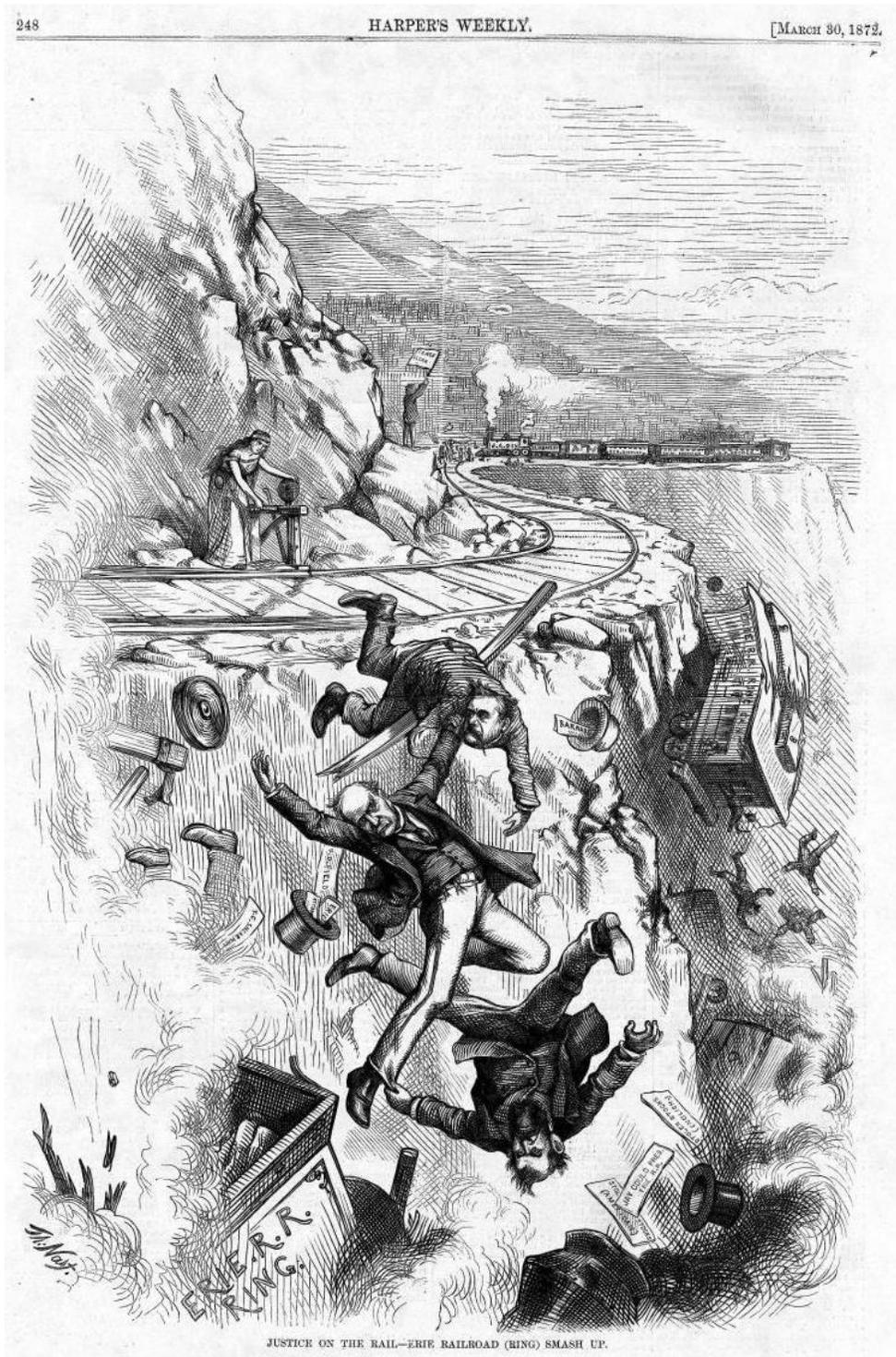
At the conclusion of the trial the following January, Judge Darwin Smith of Rochester employed yet another power of equity to cut through the knot of injunctions and receiverships: the power to declare acts of fraud void. Smith found that from the beginning, Gould’s Erie party had been engaged in a fraudulent conspiracy. Barnard’s first injunction had been decreed in a “suit instituted for a fraudulent purpose,” and all the receiverships of track and stocks since then had been procured “in aid of fraudulent purposes.” Thus, “in equity” these acts were void, the votes of Erie-received stock were void, and the Ramsey directors were duly elected and remained rightfully in possession of the railroad. “As the case was on the equity side of the court,” Charles Francis Adams commented, approvingly, “there was no intervention of a jury, no chance of an inability to agree on a verdict.”⁹⁸ The mess that equitable remedies had created, equitable precepts had cleared up. The Albany party swept the field, as Thomas Nast exulted. (See Figure 22.)

As with the “sufficient grounds” needed for an injunction, no list of substantive elements defined “fraud” for purposes of equitable remedies. But acting to restrain fraudulent parties from

⁹⁷ See Adams & Adams, *Chapters of Erie*, 181–85.

⁹⁸ Adams & Adams, *Chapters of Erie*, 188 (quoting *People v. Albany & Susquehanna Railroad Co.*, 1 Lans. 308, 337–38 (1870)).

Figure 22.



Thomas Nast, "Justice on the Rail—Erie Railroad (Ring) Smash Up," *Harper's Weekly*, 30 Mar. 1872, 248.

From top to bottom: Judge George Barnard, David Dudley Field, Jay Gould.

taking advantage of the strictness of the writ system had been one of chancery's oldest functions, and one most closely identified with the equitable conscience. Had he looked, George Simmons might have seen his prophecy of equitable conscience—no longer part of the formal regularized law—breaking through informally and irregularly in the law's uncodified gaps.⁹⁹ Smith's opinion used the phrases "I think" or "seems to me" over twenty times, reflecting both the fact that fraud was ultimately a matter of discretion for the judge to decide and that Smith had to rely on his own conscience to make the decision. Smith concluded by remarking on his "deep sense of oppression, from the weight of the great responsibility involved in [the case's] decision." But he found "relief . . . from the fact that my decision is not necessarily conclusive upon the parties, if I have erred in judgment or opinion, the error is not irrevisable."¹⁰⁰ Other consciences would weigh the matter.

Fortunately for Gould, Smith was correct about those other consciences. As Erie's lead counsel, Field appealed Judge Smith's decision, and the absence of a jury became the basis for his remarkable appeal. The foundation of Field's argument was the 1860 case *Hartt v. Harvey*. Fusionists usually did not regard *Hartt* important enough to include on their lists of offensive cases, but its reasoning followed Selden's insistence on the natural distinction between law and equity: "Although the distinction between actions at law and in equity is abolished," its key section read, "yet the inherent distinction between legal and equitable jurisdiction and relief exists, and it is not in the power of constitutions or legal enactments to abolish it." The decision claimed that even the code recognized this truth "in prescribing different modes of trial for the two classes of action." Accordingly the *Hartt* court held that in a suit to remove a corporate officer on the basis of fraudulent voting, equitable remedies were inappropriate, and the plaintiff should have sought a common law writ of *quo warranto*. Well before its abolition, the New York court of chancery had strongly established the precedent that chancellors would not become deeply involved in corporate elections. So long as duly installed

⁹⁹ Bishop & Attree, *Report of the Debates*, 663–664 (Simmons).

¹⁰⁰ *People v. Albany & Susquehanna Railroad Co.*, 38 How. Pr. at 308.

inspectors collected and counted the votes, equity would not allow the losers to re-run an election through litigation. Common law courts could remove officers who lacked a proper basis for holding office, but the *quo warranto* writ carried the procedural requirements that the “people of New York” be joined as litigants (effectively a public interest requirement) and the claim of official authority be subjected to jury trial. When the plaintiff in *Hartt* sought to remove two directors without joinder of the people or jury trial, the court dismissed the complaint.¹⁰¹

As much as *Hartt* must have offended Field’s vision of reform, the precedent was invaluable to his appeal. “As a court of equity,” Field argued, Judge Smith’s court “could not entertain jurisdiction . . . respecting the title to the office of directors.” It was a settled principle that “equity cannot interfere in the government of corporations,” and since “the action was one in the nature of *quo warranto*,” the “defendants had the right of trial by jury.” Justice Johnson—the same who was lauded by fusionists for his sympathetic views—approved Field’s arguments. “Elections to office” were never “matters of equitable consideration. They depended only on legal inquiries and legal principles,” Johnson ruled. That the case was “eminently proper for jury trial is obvious,” and thus the court vacated the more important judgments of Judge Smith and ordered a new trial.¹⁰²

One could, of course, treat these cases only as an instance of Field’s mercenary lawyering, his ability to set aside his personal philosophy of law in order to use every precedent that advantaged his clients.¹⁰³ Field may have been able to satisfy himself that *Hartt*’s flawed substantive reasoning could be separated from the useful procedural rule that it provided, but the *Hartt* line of cases tended to

¹⁰¹ *Hartt v. Harvey*, 32 N.Y. 55 (1860), 66.

¹⁰² *People v. Albany & Susquehanna Railroad Co.*, 57 N.Y. 161 (1874), 164–65 (presentation of Field), 171–72, 176 (Johnson, J.). The Albany party successfully outmaneuvered Fisk and Gould once again, by leasing the road while the appeal was pending to the Delaware & Raritan Canal Company, a mega-corporation with sufficient wealth and legal counsel to withstand further litigation by the Erie party. Field’s successful appeal vacated punitive damages Judge Smith had assessed on Fisk in Gould. Contented with that outcome, they turned their attention to other ventures. See Adams & Adams, *Chapters of Erie*, 190–91.

¹⁰³ Commentators then and now have emphasized Field’s mercenary lawyering. See especially Michael Schudson, “Public, Private, and Professional Lives: The Correspondence of David Dudley Field and Samuel Bowles,” 21 *American Journal of Legal History* 194 (1977).

believe the fusionists' claims that there were no "substantial" distinctions of law and equity that would be affected by a merger of the courts. So much of New York's corporation jurisprudence had arisen out of church disputes that its chancery court had long established precedents that equity would not invade corporate ballot boxes and remove officers (the disputed election in *Hartt* itself was in a church, not a business enterprise).¹⁰⁴ By sending corporate litigants to seek their remedy at law, the chancellors preserved the legitimacy of their functions by creating a rule that was indistinguishably substantive and procedural. Equitable discretion was too invasive for corporate elections, but a jury drawn from the community – in a case with a sufficiently high public interest – might arrive at a remedy that was both just and socially approvable. In Field's ideal jurisprudence, either Gould or Ramsey had the right to corporate office, and a judge sitting without a jury could vindicate that right – which is precisely what happened when Judge Smith ruled against Field. Field's appeal, however, drew on the logic that procedure itself created rights – the right to a jury trial, to corporate office, to vindication of the public's interest – but as they had for centuries, these rights depended upon which remedy a litigant sought.

Conclusion

Writing to the *Albany Law Review* in 1878, Field succinctly, if unwittingly, highlighted the ambiguities of law and equity in the United States. "Fusion of law and equity is an expression common in England, though little used in this country," he explained. "We express the same general idea by the phrase, union of legal and equitable remedies." Indeed, American commentators since the time of Joseph Story had discussed the "union" of law and equity in ways resonant of the more famous Union formed by America's federated constitutional system. But while the Constitution's "more perfect Union" left its component states distinct and intact, fusionists like Field insisted that "the perfect union

¹⁰⁴ On New York chancery's reluctance to enter into church disputes, see *Robertson v. Bullions*, 11 N.Y. 243 (1854).

of law and equity” required, “to express differently the same idea, . . . the complete obliteration of every distinction between them.”¹⁰⁵

Field not only traded the image of a completely blended alloy (“fusion”) for the more ambiguous “union,” he also subtly altered the object of union: from “fusion of law and equity” to “union of legal and equitable remedies.” As this chapter has shown, to Field and other American fusionists, there was no difference between the two expressions. Law and equity were perceived to be simply two sets of remedies, with no natural or necessary relationship between those remedies and substantive rules or doctrines. The relationship between rights and remedies, the modes of reasoning about rights, and the mechanisms for vindicating rights between the two systems were seen to be, if not already the same, at least amenable to assimilation: legal doctrine (one need not say whether it was legal or equitable) offered substantive rules, while a trans-substantive procedure navigated the practitioner to an open menu of remedies. Convinced of this view, fusionists appeared perplexed by their adversaries’ contention that law and equity were traditions in which rights, remedies, and the processes that linked them were complexly interwoven and might inhere in “the nature of things.”¹⁰⁶

This chapter has shown the ways Field’s opponents often had a keener view of how traditional modes of practice would carry on despite, or even in furtherance of, the code’s purported abolition of the divide between law and equity. Separatists were well aware of the historical accidents and contingencies that had led to the formation of common law and equity as separate institutions. By invoking nature, they did not mean that at all times and places law and equity would have to remain institutionally and conceptually distinct. Rather, theirs was a nature within the Anglo-American, or even broadly western, legal tradition. Societies need not necessarily classify harms and artificially define a common set of actions to remedy those harms, but *if* they did, then in the nature of things –

¹⁰⁵ Field, “Law and Equity,” 509.

¹⁰⁶ On this oppositional view to fusion, see S. Warren, *A Popular and Practical Introduction to Law Studies* (1846), 197–99.

human imperfection being one of those things—the classifications would prove inadequate in particular cases.

Equitable practices in particular did not readily yield to the fusionists' attempt to cleanly sunder them into substantive or procedural categories. Equitable remedies remained in some sense extraordinary, targeted against the ordinary functioning of judicial executions and awarded on the basis of whether or not an arbiter found "sufficient grounds" according to conscience. When the fusionists found themselves frustrated by an equitable conscience, it was they who insisted that procedural rights, such as a jury trial, inhered in the nature of the remedy sought, such as a corporate office.

Although the project to fuse law and equity and sunder rights from remedies remained incomplete, its attempt in the Field Code powerfully influenced the development of American law. When the Massachusetts native Walter Ashburner produced his *Principles of Equity* in 1902, he insisted that "the two streams of jurisdiction, though they run in the same channel, run side by side and do not mingle their waters."¹⁰⁷ Ashburner's views became influential around the world, especially in Australia, where jurists insisted Americans were pursuing a "fusion fallacy."¹⁰⁸ Nevertheless, Ashburner had little influence in his native country. In the United States, trans-substantive procedure became the dominant paradigm, law- or equity-specific procedures the oft-overlooked anomalies.¹⁰⁹

As diffuse as equity became, several jurisdictions remained committedly separatist. Illinois, Delaware, and New Jersey maintained separate courts of chancery and left common law procedures relatively unaltered until the mid-twentieth century. By the late 1870s, fusionists liked to joke that Illinois and New Jersey were "the Yellowstone Park of common law pleading."¹¹⁰ The jest shows how

¹⁰⁷ Walter Ashburner, *Principles of Equity* (1902), 23.

¹⁰⁸ See especially M. Tilbury, "Fallacy or Furphy?: Fusion in a Judicature World," 26 *U. New South Wales L.J.* 357 (2003).

¹⁰⁹ See Robert M. Cover, "For James Wm. Moore: Some Reflections on a Reading of the Rules," 84 *Yale Law Journal* 718 (1975). On the agendas of normal science and perceived anomalies within a closed scientific discipline, see Thomas S. Kuhn, *The Structure of Scientific Revolutions* (Chicago, 3d ed., 1996 [1962]).

¹¹⁰ See, for instance, "Current Topics," 32 *Albany Law Journal* 161 (1885); Charles E. Clark, "The New Illinois Civil Practice Act," 1 *University of Chicago Law Review* 209 (1933).

pervasive the fusionist's views had become, and how closely linked they were to a modernization thesis: The distinction of law and equity and the preservation of the forms of action were obsolete patches of wilderness in the modern world of corporate capitalism. Without the persistence of these state governments, their practices were doomed to extinction.

Yet these states were persistent, and their persistence troubles the fusionists' modernization narrative. Despite their "retrograde" procedures, Illinois and New Jersey prospered commercially. That the leading edge of finance and corporate capitalism—futures trading in Illinois, general incorporation in New Jersey—could originate and flourish in these Yellowstone Parks indicated that modern capitalism might find sufficient "certainty" and "efficiency" in the forms of action as it could under fact pleading. The elite lawyer Charles O'Connor (one of Field's opponents in the coming Tweed litigation) admitted as much during the 1846 convention. Although O'Connor favored fusion and codification at the time, he conceded that the forms of action and the law-equity distinction were "tolerably understood by the profession generally," who could use the devices "to bring in such a verdict as worked out the ends of justice."¹¹¹ By the 1870s, O'Connor had abandoned the drive towards fusion, and the question facing "the profession generally" was how to calm the public's outrage over the Great Lawsuit. Because that debate raised central questions about the professional ethics of the lawyers involved, and how those ethics had been influenced by Gould's munificent retainer fees, it is the subject of the next chapter.

¹¹¹ Croswell & Sutton, *Debates and Proceedings*, 441 (O'Connor).

PART III

THE CODE AMERICÁN

We shall have a book of our own laws, a CODE AMERICAN, not insular but continental, as simple as so vast a work can be made, free in its spirit, catholic in its principles! And that work will go with our ships, our travelers, and our armies; it will march with the language, it will move with every emigration, and make itself a home in the farther portion of our own continent.

—David Dudley Field, Address to the Albany Law School (1855)

In 1888, David Dudley Field became the eleventh president of the still nascent American Bar Association. Founded by seventy-five lawyers in Sarasota Springs, the Association was dominated by New Yorkers but remained rudderless in its professional mission. Its founding charter dedicated its members to “the promotion of the administration of justice and a uniformity of legislation throughout the country.” But ten years into its history, the Association’s members—who hailed from solid code states like Missouri, common law states like Michigan, and Anglophile reform states like Massachusetts—disagreed sharply over what legislation actually was and whether national uniformity in legislation was even desirable.¹ Before his presidency, Field saw one of his codification proposals mangled in debate. Field therefore tried a different tack by reviving the strategy used forty years earlier: Field would build a professional consensus around national codification by starting with procedure.

Field’s original measure, co-drafted in 1886 with the theorist of municipal law John F. Dillon (1831–1914), was the seemingly anodyne resolution “that the law itself should, so far as possible, be

¹ John A. Matzko, “‘The Best Men of the Bar’: The Founding of the American Bar Association,” in Gerald Gawalt, ed., *The New High Priests: Lawyers in Post-Civil War America* (Greenwood 1984), 75–90; Henry Martyn Field, *Life of David Dudley Field* (1898), 307; Simeon E. Baldwin, “The Founding of the American Bar Association,” *3 American Bar Association Journal* 658 (1917), 695.

reduced to a statute.”² In the ensuing debate, Field and Dillon clarified that the resolution was meant only to establish, as a first step, that legislation was preferable to case law as a source of governance. Whatever steps the Association should take towards legislation was an independent question on which the resolution supposedly did not depend. The accompanying report clarified that Association members could read the resolution as a call for codification if they chose, but that “the real question is whether the American people should be governed by legislation or by litigation.” Addressing the national Association, Field pitched the resolution in nationalist terms. “An unwritten or inaccessible law is un-American,” his report read. “The law of the legislature, as distinguished from the law of the courts, is the necessary sequence of the American doctrine, that the functions should be apportioned between three great departments, legislative, executive and judicial.” But even after a century under this purportedly American doctrine, “our practice is inconsistent with our theory.”³

Common law lawyers were quick to challenge Field. Henry Budd, a lawyer from the anti-code state of Pennsylvania, offered what was by now a standard objection to codification. Granted that a binding American code could somehow be formulated and enacted, “the code won’t execute itself, [and] must be interpreted.” Without a “body of juris-consults to meet together to discuss problematical questions and decide them,” there would “still be law-making by litigation as before.” Budd was especially disparaging of Field’s belief that codification fit naturally with American political theory. The foundation of American politics, according to Budd, was not legislative supremacy as Field had it, but the federated system of independent states. Recasting arguments made all along the American frontier, Budd argued that codes were inherently a tool of imperial administration, because only an imperialistic regime could enact a single piece of legislation across an entire continent. “But it

² *Report of the Ninth Annual Meeting of the American Bar Association* (1886), 11. Two other signatories to the report were George G. Wright of Iowa and Seymour D. Thompson of Missouri. *Ibid.*, 358. Wright dissented from the report because he thought it too disparaging of civil jury trials. *Ibid.*, 359. On Dillon’s jurisprudence, see Hendrik Hartog, *Public Property and Private Power: The Corporation of the City of New York in American Law, 1730–1870* (Cornell 1989), 220–27.

³ *Report of the Ninth Annual Meeting of the American Bar Association*, 328–29.

would be a very different thing were that code, drawn by the most skillful lawyer this country can produce, to be put before the legislatures of the thirty-eight states.”⁴

The prominent New York case reporter Austin Abbott (1831–1896) attempted to salvage Field’s resolution with a practical compromise. He moved to amend Field’s resolution to state “that the law, so far as in its substantive principles it is settled, should be reduced to the form of a statute.” The amended resolution made clear that any resulting code would not change the law but only gather settled precedents into one place, much like a treatise, albeit one with legislative force behind it. Abbott defended the proposal not with theories of governance, but as a practical question of “whether it will facilitate the labors of the profession and of the bench.” Case reports, Abbott knew from experience, had continued to multiply from the time lawyers first complained about the bulk of precedents during the Jacksonian era. “We have to range the reports of the whole country, whereas thirty years ago we only looked at the reports of our own state,” Abbott contended, and now “reports are multiplying so that their authority is breaking down by the mere mass of them.”⁵ If nothing else, codification could be a labor-saving device, and that was American enough. As modified by Abbott, the resolution passed on a fairly evenly divided vote of 58–41, hardly a clarion call for codification by the only national lawyer’s association.⁶

Returning as president in 1888, Field ignored Abbott’s resolution relating to “substantive” law and instead started down the path of codification from a familiar place: procedure. Field reported that in 1887 he had visited Senator Francis Cockrell of Missouri in Washington to work out a plan for a federal code of procedure. Support for a federal procedure code had stalled in the Senate, but Field believed with the Association’s support it could pass, and he urged a resolution from his 1886 report that the Association go on record advocating for a federal procedure code.⁷

⁴ *Report of the Ninth Annual Meeting of the American Bar Association*, 20.

⁵ *Report of the Ninth Annual Meeting of the American Bar Association*, 45–47.

⁶ *Report of the Ninth Annual Meeting of the American Bar Association*, 74.

⁷ *Report of the Eleventh Annual Meeting of the American Bar Association* (1888), 69.

Field understood the resolution to mean more than simply an adjustment of practices in the federal courts. "If a Federal code of procedure is once made," he reasoned, "the codes of procedure in the various states (for I believe there will be one in every state eventually) will naturally assimilate themselves to the code of Federal procedure." Federal codification, encouraged by the national Bar Association, was thus a direct path to a national code. The setbacks suffered by the procedure code in Field's home state, and the resistance to the Field Code along the eastern seaboard, could be reversed by being transcended at the federal level. "Do gentlemen know what has already happened?" Field asked in his presidential address. "Do they know that the code of procedure of New York which was framed and passed in 1848, which abolished the distinction between law and equity, has gone the circuit of the world?" Referring in part to the adaptation of his code in western and southern states and in part to reformed English procedure for which he took credit, Field proclaimed that his "code has been followed in twenty-six states and territories of this Union, and it is followed in almost every colony where there is an English speaking people. It is in Australia, it is in Singapore, it is in Hong Kong, it is in China."⁸

The litany of Field's claimed procedural colonies bears a remarkable resemblance to an address Field had delivered more than thirty years earlier to a graduating class of students at Albany Law School. At that time, the future appeared bright for Field's codification efforts. The completed procedure code was annually introduced in New York's legislature and was making its way across the West. Field was hopeful more codes would follow: codes of civil, criminal, and constitutional law. Field stressed to the students that codification was the key to measuring New York's stature against other states and even other nations. "Shall this imperial State be outstripped in the noble race by either of her sisters, or by that queenly island, mother of nations, which having been our parent, is now our rival?" No, he answered. In the race for empire, the Empire State would be the first to "win the well-

⁸ *Report of the Eleventh Annual Meeting of the American Bar Association*, 69.

deserved prize; that we shall have a book of our own laws, a CODE AMERICAN, not insular but continental, . . . and that work will go with our ships, our travelers, and our armies; it will march with the language, it will move with every emigration, and make itself a home in the farther portion of our own continent, in the vast Australian lands, and in the islands of the southern and western seas." Like the Code Napoleon, the Code American would be a monument of civilization. Unlike the French code, an American code would be "as simple as so vast a work can be made, free in its spirit, catholic in its principles!"⁹

In his address to the American Bar Association, Field essentially proclaimed his Albany prophecy fulfilled. The Code American turned out to be his code, a procedure code. It had crossed the continent and even, in Field's telling, the western seas. It had traveled with emigrants to the West, and with armies to the South. But its dominance remained fragmented by American federalism. Some states avoided codification, some, like his home state, took half measures which distorted his intentions. "Now," he pleaded with the Bar Association, "let us make a code of procedure for the Union, and that will lead to what we all desire, I think; to an assimilation of the practice in all the states. I hope the resolution will be adopted without a dissenting voice."¹⁰ It was.¹¹

The previous chapters have shown that although the contingencies of politics shaped the development of American procedure, and although Field and the codifiers thought they were revolutionizing the law, Anglo-American legal practice remained fundamentally stable. Fact pleading did not abolish the artifice of formulary pleading but merely multiplied the forms; oath-taking did not abolish fiction or desacralize the law but changed the kinds of pious fictions that could be told; fusion in practice retained a separate jurisprudence for law and equity with separate procedures depending on the remedy. But even if the structure of legal practice remained largely unchanged from its late

⁹ David Dudley Field, *Legal Reform: An Address to the Graduating Class of the Law School of the University of Albany* (1855), 32.

¹⁰ *Report of the Eleventh Annual Meeting of the American Bar Association* (1888), 70.

¹¹ *Report of the Eleventh Annual Meeting of the American Bar Association* (1888), 79.

medieval configuration, the code did introduce certain features that then and now have come to distinguish American practice from the rest of the world's legal systems.

In a recent work, Amalia Kessler argues that a professional legal culture of adversarialism is both an American distinctive and an enduring legacy of the Field Code.¹² The chapters that follow take up Kessler's invitation to "focus on the historical particularities of the American experience" that account for perceived differences between western legal systems.¹³ Chapter 7 surveys the code's extension of the so-called "American rule," that each party bears its own litigation costs and pays its own lawyer. Chapter 8 concludes the present study by evaluating the reception of the Field Code at the federal level, through what the federal codifiers called the "American system" of procedural rulemaking.

Kessler's work chronicles how "adversarialism" became defined as a key component of due process in American legal culture even before the New York code made "process" a domain of law to be codified. On this ground, Kessler argues that the code "simply ratified what lawyers themselves had already accomplished," and that the code's "supposedly revolutionary merger of law and equity . . . was in fact little more than a *fait accompli*."¹⁴ That may well have been the case for adversarialism, and Kessler shows convincingly that well before the New York codification, oral combat in open court triumphed over written examinations taken in private as the main lawyerly mode for eliciting facts.¹⁵

But within its 800 pages, the New York code contained so much more than the regulation of witness examinations and the related trappings that are sometimes identified as adversarial. Kessler's account shows how lawyers seized opportunities where they saw them to define their combative trial practices with the "due process" required by a liberal democratic society.¹⁶ My account concurs that

¹² Amalia D. Kessler, *Inventing American Exceptionalism: The Origins of American Adversarial Legal Culture, 1800–1877* (Yale 2017), ch. 3.

¹³ Kessler, *Inventing American Exceptionalism*, 7.

¹⁴ Kessler, *Inventing American Exceptionalism*, 111, 136.

¹⁵ Kessler, *Inventing American Exceptionalism*, 67–111.

¹⁶ Kessler, *Inventing American Exceptionalism*, ch. 6.

the power of professional lawyers was central to domains in which the Field Code wrought the most influence – and created the most distinctly American legal practices. Lawyers disagreed sharply about the wisdom behind the formulary system and the fusion of law and equity, but abolishing fee regulations, empowering lawyer-driven discovery, and investing lawyers with rulemaking authority were far less divisive measures among the bar, and far more successful code reforms.

The features that distinguished American legal practice by the end of the nineteenth century (and distinguish it to this day) were those aspects of lawyerly power created or augmented by the Field Code. This study, therefore, is less concerned with the debate about whether “adversarial” procedures meaningfully distinguish American (or English) legal culture from the “inquisitorial” modes of European procedure,¹⁷ and instead contributes to the literature on the ways codification enhanced modern legal institution-building. The comparativist R.C. Van Caenegem argued that a jurisdiction’s distinctive legal history and legal culture were largely controlled by the institution that became preeminent during nineteenth-century codification controversies. In France, that institution was the legislature; in Germany, the professoriate. In England, codification was controlled – and thus successfully resisted – by the judiciary.¹⁸ Van Caenegem largely excluded the United States as having no codification controversy to speak of. The following chapters contribute to Van Caenegem’s paradigm by showing that in America, it was the professional bar who gained in power and preeminence through the fortunes of codification.

As this study has shown, the United States did have a codification controversy, but one misinterpreted because of an anachronistic fallacy that assumes procedure is and always has been an unimportant and therefore uncontroversial supplement to the real law. In fact, the controversial Code American was a lawyers’ code, and a lawyers’ code was a procedure code. The coincidence was not unimportant, for it was in procedure that the lawyers found their power.

¹⁷ Cf. Mirjan R. Dmaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (Yale 1991).

¹⁸ R. C. Van Caenegem, *Judges, Legislators and Professors: Chapters in European Legal History* (Cambridge 1987).

Chapter 7

How Shall the Lawyers Be Paid?

Fees & Costs

A long and labyrinthine paper trail stretching from 1850s California and beyond circled around a temporary respite on the witness stand of a New York courtroom in 1865, where sat the famed explorer and first (failed) Republican presidential candidate John C. Frémont (1813–1890). In some ways, the litigation was all about Frémont and not about him at all. Before the Democrats had fixed on what seemed to be the inspired choice of General George B. McClellan for their presidential nominee in 1864, a fractured Republican Party had briefly considered unseating Lincoln to replace him with Frémont. That was, partly, what brought Frémont to the center of New York political squabbles as the Civil War was winding down.¹ But in the suit that brought Frémont to the stand, he was only a minor witness, called in primarily to discuss David Dudley Field’s retainer fees.

Field had been an early champion of Frémont in the Republican Party and had eagerly joined Horace Greeley of the *New York Tribune* and Salmon Chase, Lincoln’s Treasury Secretary, in Frémont’s 1864 gambit. Their bitter opponents in ’64, going back to the Democratic-Whig rivalry, were William Seward and his chief journalist lieutenant Thurlow Weed. After Weed accused George Opdyke, a former mayor of New York City and one of Chase’s major banking allies, of corruptly making “more money . . . than any fifty sharpers, Jew or Gentile, in the City of New York,” Field sued, hoping to use a wide-ranging libel suit to air his and Opdyke’s many grievances against Weed.²

¹ See Sven Beckert, *Monied Metropolis: New York City and the Consolidation of the American Bourgeoisie, 1850–1896* (Harvard 2001), 126; T. Harry Williams, *Lincoln and the Radicals* (Wisconsin 1965), 326–29; Allan Nevins, *Frémont: Pathmarker of the West* (Longmans, Green & Co. 1955), 573–79.

² On Field’s connections to Opdyke and his management of the libel case, see Daun Van Ee, *David Dudley Field and the Reconstruction of the Law* (Garland 1986), 138–61.

One of the libel claims concerned Weed's allegation that Opdyke had fleeced an unsuspecting Frémont. However, most of Frémont's examination concerned not his dealings with Opdyke, but rather the striking revelation elicited by Weed's counsel that Frémont had paid Field a retainer of \$200,000 before his 1856 presidential run, a staggering sum for a single legal representation at the time. As the defense counsel had hoped, Field could not help but take the bait, stretching out the examination on a tertiary point in order to justify his fee, and by implication, his integrity as a lawyer conducting a high stakes litigation (the libel suit sought \$50,000 in damages). Field walked Frémont back through a bewildering array of transactions structured to offload a mining interest that had gone bad before the presidential run. Field's fee, Frémont acknowledged, was paid in stock with a par value of \$200,000 but whose market value was uncertain. Frémont had no objection "at all" to it when it was negotiated, and told Field he "richly deserve[d] it" when transferring it at the end of the representation.³ The two had contracted freely, and privately.

Turning from Frémont to the gallery, Field made a miniature speech taunting his opposing counsel. "My friend [Edwards] Pierrepont [(1817-1892)] need not waste his thoughts" on such a high fee, Field snarled, "for nobody will ever make him such an offer, and he would not earn so much were he to live a hundred years." As for William M. Evarts (1818-1901), the future defense counsel at President Johnson's impeachment, Field invited him to "sit down with me and compare the fees he has received from the public treasury" for representing New York and the federal government at various times. "I will promise to make no public inquiry into the amount he has received, and we will both cry quits and be even."⁴ Defending himself publicly a few years later after the Albany & Susquehanna litigation, Field deployed the same tactics: insulting his fellow lawyers as unskilled and therefore envious of the high fees he could command, while simultaneously threatening to reveal his opponent's own dubious compensation schemes.

³ *The Great Libel Case, Opdyke Against Weed: A Full Report of the Speeches of Counsel* (1865), 8, 63-64.

⁴ *The Great Libel Case*, 148-49.

This chapter traces those professional and ethical arguments through the history of the code's deregulation of lawyer fees. Fees, however, must be understood in their relation to legal "costs" – by no means a mere synonym in the nineteenth century. Costs were the legal expenses, including fees, chargeable to the loser in a litigation. Before the code, New York strictly regulated the costs that victorious lawyers had to be paid by their adversaries. It was unclear whether the limits on costs were also the limits on fees that lawyers could negotiate with their own clients, but lawyers at the time commonly spoke as if the limits were the same, and they loudly complained that theirs was the only craft burdened by legislative price fixing.

Cost-shifting, including making the loser of a litigation pay the victor's attorney fees, is typical in western legal systems, so much so that the prevalent practice of the United States in requiring each party to bear its own litigation costs and fees is seen as a distinctive feature of American legality, commonly dubbed "the American rule."⁵ As the Supreme Court explained in its first invocation of the term, "the rule here has long been that attorney's fees are not ordinarily recoverable in the absence of a statute or enforceable contract," on the premise that "litigation is at best uncertain and one should not be penalized for merely defending or prosecuting a lawsuit, and that the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel."⁶

The leading account on the history of the American rule by John Leubsdorf echoes the Court's formulation. "In a sense, the American rule has no history," he writes. "As far back as one can trace, courts in this country have allowed winning litigants to recover their litigation costs from losers only to the extent prescribed by the legislature."⁷ These formulations are highly misleading, however,

⁵ See Robert V. Percival & Geoffrey P. Miller, "The Role of Attorney Fee Shifting in Public Interest Litigation," 47 *Law & Contemporary Problems* 233 (1984); Thomas D. Rowe, Jr., "The Legal Theory of Attorney Fee Shifting: A Critical Overview," 1982 *Duke Law Journal* 651 (1982).

⁶ *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717-18 (1967). For the Supreme Court's modern explication of the rule, see *Alyeska Pipeline Svc. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247-71 (1975).

⁷ John Leubsdorf, "Toward a History of the American Rule on Attorney Fee Recovery," 47 *Law & Contemporary Problems* 9 (1984), 9.

because rarely in American history until the mid-twentieth century has there been an “absence” of a cost-shifting statute. Most U.S. jurisdictions for most of the nineteenth century had a comprehensive cost-shifting statute, and for the majority of those jurisdictions, that statute was (or was superseded by) the Field Code. Although the code deregulated lawyer fees, it preserved the traditional logic and practices of cost-shifting, largely expanding the equitable practice of having lawyers petition the court for costs to shift after each victorious motion or phase of litigation by appending the words “with costs” to their motion or plea.

We can get a sense of how pervasive cost-shifting was, even during the supposed “heyday” of the American rule in the late nineteenth century, from a popular lawyer joke at the time. A lawyer was called on to pray at a community picnic. “Not being experienced in such duty, he rose and attempted the Lord’s prayer, and succeeded very well until he came to the passage ‘Give us this day our daily bread,’ when, from the force of habit, he immediately added, ‘with costs.’”⁸ Cost-shifting was, almost until the time the Supreme Court declared it to be a foreign practice, the reflexive vocabulary of the American lawyer.

What lawyers at the time called “the American rule” was not the regulation of cost-shifting, but actually the Field Code’s proclamation that lawyers were entitled to contract for and enforce their fee agreements instead of adhering to the English and civilian traditions of accepting fees as a mere gratuity.⁹ In time, the one American rule gave rise to the other, this chapter argues, as Field’s system of unregulated fees put increasing strain on the code’s justification for cost-shifting. Rather than deterring meritless or unscrupulous litigation practices through cost-shifting, Field and other elite

⁸ The earliest instance of the joke I have found is the *Bellows Falls Times* (Bellows Falls, Vt.), November 13, 1868. The joke circulated widely in 1869, but continued to run around the code states as late as the 1890s. See, for instance, *Yorkville Enquirer* (Yorkville, S.C.), October 31, 1896. Incidentally, this joke was discovered by my digital history collaborator, Lincoln Mullen, using a similar approach to text analysis as the project in Chapter 3 to trace biblical quotations across nineteenth-century U.S. newspapers. See Lincoln Mullen, *America’s Public Bible: Biblical Quotations in U.S. Newspapers*, website, code, and datasets (2016): <http://americaspublishible.org>.

⁹ See, for instance, H. Gordon McCouch, “Pierce v. Kyle: Agreement for Compensation Between Attorney and Client,” *40 American Law Register & Review* 751 (1892), 752.

lawyers turned increasingly to local bar associations to police attorney ethics. And in Field's case, the local bar association was the one that arose directly in response to his Erie Wars litigation.

The Irresistible Temptation of Pecuniary Interest: Fees and Costs in 1840s New York

Despite the central importance of lawyer compensation to the structure of legal practice and professionalism, legal historians know surprisingly few details about how lawyers were paid in the nineteenth-century United States, beyond close studies of the legal careers of a few exceptional figures such as John Adams and Daniel Webster.¹⁰ We can discern some things from contemporary case law – for instance, that the American colonies and states of the Early Republic did not enforce English rules against champerty (essentially, a payment by a lawyer to a client to instigate litigation) and therefore permitted a variety of contingency fee arrangements from early on in their history.¹¹ But although cases appear in every jurisdiction of lawyers suing former clients, no doubt the choice to do so was not taken lightly, and lawyers appear to have been especially careful to keep from inviting negative precedents that would affect their fundamental ability to earn a living through the law.

Two dangers confronted a lawyer suing to collect a promised fee. The first was that the action might be disallowed entirely. Summarizing a civil tradition running back to republican Rome, Blackstone's *Commentaries* had asserted that "a counsel can maintain no action for his fees, which are given . . . not as a salary or hire, but as a mere gratuity, which a counselor cannot demand without doing wrong to his reputation."¹² In 1790s England, Lord Kenyon (1732–1804) emphasized in a series of opinions the rule that medical and legal professionals practiced for gratuitous honoraria, not compensation to which they had any colorable right in the law of property or contract.¹³ Although a

¹⁰ L. Kinvin Wroth & Hillier B. Zobel, eds., *Legal Papers of John Adams* (Harvard 1965), lxix–lxxii; Alfred Konefsky & Andrew King, eds., *The Papers of Daniel Webster: Legal Papers* (University Press of New England 1982), 246–49.

¹¹ Peter Karsten, "Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, a History to 1940," 47 *DePaul Law Review* 231 (1998), 234–40.

¹² 3 *Blackstone's Commentaries* 28.

¹³ See *Chorley v. Bolcot*, 4 T.R. 317 (1791); *Turner v. Phillips*, 1 Peake's N.P.C. 123 (1791); *Fell v. Brown*, 1 Peake's 96 (1791). See also *Lipscome v. Holmes*, 2 Camp. N.P. 441 (1810).

few states early after the Revolution repudiated the gratuitous fee rule by statute, New York was not one of them, and courts there would not confront the question of a lawyer's entitlement to compensation until the surprisingly late date of 1840.¹⁴

The second danger, particularly in New York, was that courts might recognize an entitlement to fees but then limit those fees to the amounts prescribed by statute. At the time, it was by no means clear whether "fees and costs" meant the same thing in the law. Generally speaking, "costs" were the charges that were shifted by the court from the loser to the winner of a litigation at its conclusion. These charges included both actual costs such as those for paper goods for making copies as well as fees paid to clerks and to the adversary's lawyer. That is, what made a charge a "cost" – even if it was nominally a "fee" – was that a loser at trial could be forced to pay it. Lawyers called these "taxable" charges.¹⁵ Not all states provided for taxable costs, and most certainly did not provide the depth and detail of regulation that New York gave to the subject. It was clear enough that New York's many limits on the charges per "folio" of attorney work product were meant to limit taxable costs imposed on an adversary; but were they also limits on what lawyers could receive from their own clients?

That was one popular interpretation in 1830s New York, even as lawyers attempted to find ways to charge beyond what the low limits of the Revised Statutes arguably allowed. Theodore Sedgwick chronicled both views in his explosive tract, *How Shall the Lawyers Be Paid?*, one of the clearer windows into how lawyer compensation actually worked in nineteenth-century New York. Sedgwick wrote that clients typically conflated costs with fees. When clients discovered the amount of costs shifted at the end of trial, "they make this same tariff the rule of compensation between the attorney and his client." If attorneys tried to charge more, some clients held "out all the terrors of the law," by which Sedgwick meant the threat that lawyers would have to litigate for their fees, and possibly lose

¹⁴ At least, no New York court had confronted the question in a case subsequently reported on the record. See *Stevens & Cagger v. Adams*, 23 Wend. 57 (New York Supreme Court 1840) (discussed below and collecting cases from other states that had abolished the English rule of gratuitous fees).

¹⁵ See generally Walker Marshall, *A Practical Treatise on the Law of Costs in Suits and Proceedings in All the Courts of Common Law* (2d ed., 1862).

if the courts ruled their fees a gratuity. Other terrors could have been in store, as the Revised Statutes made it a misdemeanor for public officers to charge more than the fees “provided for by law.”¹⁶

Nevertheless, Sedgwick acknowledged, lawyers did charge more than the folio fees made taxable by the Revised Statutes. These were called “counsel fees” in a technical attempt to evade the statute should the courts ever decide that prescribed costs were indeed the limits on what “attorneys” could charge their clients. The idea was that a “counsellor” who advised on the law was a different sort of professional and provided a different service from an “attorney” who appeared in court, standing the place of their client. Just as America had not generally followed the English separation of barristers from solicitors, attorneys and counsellors were often the same person in the same cases, but at least arguably the client was paying two different fees to two different professionals. Unlike the prescribed attorney fees in the Revised Statutes, which were low amounts tagged to the number of folios in a filing (generally 25 cents a folio at common law and 28 cents a folio in chancery), counsel fees could be charged by the task or for a total representation and could range up to hundreds of dollars. In time, counsel fees too were covered by statute. The Revised Statutes provided that counsel fees, including a retaining fee between three and four dollars, could be taxed to the other side.¹⁷ Sedgwick recognized that lawyers opened themselves to claims of extortion if they insisted on counsel fees over and above the statutory rates, “but in point of fact,” he concluded, “no lawyer can or will work, and no client expects that he can or will work, without them.”¹⁸

Sedgwick’s admission about counsel fees is an interesting one, because it undercut the two most prominent points in his tract: his depiction of lawyers as degraded artisans and his argument that fees had to be reformed to give lawyers the proper incentives in their craft practices. Sedgwick complained that “no other workman,” such as the “physician, the sculptor, [or] the tailor . . . is paid

¹⁶ Theodore Sedgwick, *How Shall the Lawyers Be Paid?*, 5–6. *Revised Statutes of the State of New York* (1829), 2:518 § 7.

¹⁷ *Revised Statutes of the State of New York* (1829), 2:621–32.

¹⁸ Sedgwick, *How Shall the Lawyers Be Paid?*, 9–10.

according to statute . . . without any reference to the individual qualification of talent, industry or integrity” of his craftsmanship.¹⁹ But of course, thanks to counsel fees, eminent lawyers could expect their compensation to rise with their talent and industry.

Sedgwick was on somewhat firmer ground in claiming that, counsel fees notwithstanding, lawyers had an incentive to “make all our papers prolix, and to create useless labor and expense” by litigating technical points of pleading that, if won, shifted costs their way independently of the ultimate merits of the suit. Counsel fees were flat rates that clients agreed to usually before a representation began; they would be paid regardless. A lawyer could thus increase his compensation by inflating the page count of filings and then winning, if not the case, at least “interlocutory” motions arguing the finer points of pleading and practice. But in Sedgwick’s telling, lawyers faced not a mere incentive but an “inevitable tendency,” an “eternal and irresistible temptation of pecuniary interest.”²⁰

Again, Sedgwick might have had a stronger argument if lawyers had to subsist solely on the taxable fees they won. But instead of recognizing how counsel fees could mitigate the incentives to over-file, Sedgwick spoke as if the lawyers’ practice was entirely economically determined by the Revised Statutes. “There is no justice in condemning the conduct of the individual,” he concluded. “It is the system that must be reprobated . . . for the sake of justice.” Perhaps that was because Sedgwick was just such an “individual” who would stand condemned otherwise. As he admitted about pleading an unpaid debt, “Here I can tell the story in two lines, yet if I were to narrate it to a court, I should think it very unprofessional to put it in less than twelve hundred words, or thereabouts” which he claimed he and all other lawyers naturally had to do.²¹

Despite his complaint that lawyers were the only craftsmen to have their fees regulated by statute, Sedgwick’s solution was to leave those regulations in place. It was a “rule of inherent justice”

¹⁹ Sedgwick, *How Shall the Lawyers Be Paid?*, 7.

²⁰ Sedgwick, *How Shall the Lawyers Be Paid?*, 7, 19.

²¹ Sedgwick, *How Shall the Lawyers Be Paid?*, 19. See also *ibid.*, 7 (“There are checks upon this it is true, but they are inoperative compared to the sleepless interest of the pleader or practitioner.”).

that losers in litigation had to pay the winner's costs, and so public law would have to continue making sure that only the true "expenses of the controversy" shifted, not necessarily the luxurious expenses of employing "counsel of . . . extraordinary ability." Sedgwick moreover believed that taxable costs might become the sole compensation of counselors—as clients were continually insisting—so long as the rates were raised to sufficiently compensate those who engaged in such "a toilsome, an honorable and an expensive science." Sedgwick suggested that fees should attach not to the folio of work product but to the amount of money demanded as a remedy (or a monetized equivalent of an equitable remedy), with interlocutory costs abolished and a penalty applied to those who dragged out delays. Doing so would ensure that "time is paid for instead of the services, and time represents with sufficient accuracy the services that are performed" by the lawyer.²²

Sedgwick's brief reform tract raised a number of themes that became central to the Field Code reforms. As late as 1840, the relationship between lawyer fees and taxable costs remained uncertain in New York. Although lawyers had found a way to charge fees above the taxable rates in the Revised Statutes, it was uncertain whether such fees would hold up if challenged in court. Lawyers like Sedgwick commonly spoke as if the fee regulations were their only certain source of income, regulations with which no other craft workers had to contend. Sedgwick cast lawyers as virtually powerless to act contrary to financial incentives, an idea that would have a long history in debates about professional ethics, not least in debates about Field's professional ethics. Finally, by turning from fees based on page counts to an early form of the billable hour, Sedgwick showed how difficult it could be to measure and monetize the value of a lawyer's services with precision.

From Status to Contract: *Stevens & Cagger v. Adams*

At almost the same time Sedgwick was penning his tract, a New York court was finally confronting the question of whether lawyer fees were mere gratuities as a matter of state practice.

²² Sedgwick, *How Shall the Lawyers Be Paid?*, 10–11, 17.

Stevens & Cagger, a prominent firm known for its appellate practice, argued two appeals for a Mr. Adams in the New York Court for the Correction of Errors, New York's highest court of appeal at the time.²³ Adams explicitly agreed to pay \$300 for Samuel Stevens to conduct the oral arguments. Stevens expertly structured the transaction as a counsel fee. Another lawyer acted as "attorney" and filed the actual writ of error (the appellate pleading), while Stevens confined himself to the oral argument as "counsel." But when it came time to collect, Adams insisted on paying only the taxable cost of an oral argument under the Revised Statutes – a mere \$3.75.²⁴

The case was so perfectly structured to favor the lawyers, one wonders if it was not manufactured for that purpose. For one, the fact that there was an express agreement removed the thorny problem of how courts should value a lawyer's service if lawyers could indeed collect more than the taxable amount. The stark disparity – almost literally a hundredfold – between the agreed amount and the actual payment surely could not have endeared Adams as a defendant before the court. Perhaps most importantly, the fact that the case concerned appellate argument helped the lawyers get past what New York's highest court noted were "the plain words of a statute." The Revised Statutes prescribed fees for "services . . . done or performed in the several courts of law and equity in this state, by the officers thereof." Although the Revised Statutes did not expressly define officers to include lawyers, Adams's defense counsel pointed out that so many other statutes and cases had declared lawyers to be officers of the court that it had basically become a truism.²⁵ The problem, then, was Title 4, Section 5 of the Revised Statutes' fee regulations: "No judge, justice, sheriff, or other officer whatsoever, . . . shall take or receive any other or greater fee or reward" than those declared in

²³ On the firm's prominence, see George Rogers Howell, *History of the County of Albany, N.Y., From 1609 to 1886* (1886), 1:146–47.

²⁴ *Stevens & Cagger v. Adams*, 23 Wend. 57 (New York Supreme Court 1840), 59.

²⁵ *Stevens & Cagger v. Adams*, 26 Wend. 451 (N.Y. Court for the Correction of Errors 1841), 461 (Senator Gulian C. Verplanck, concurring); *Adams*, 23 Wend. at 57–58.

the preceding regulations.²⁶ If lawyers were public officers of the courts, than they were included in the “other officer” category, and prohibited from charging more than the prescribed fee.

Both the trial court and the Court for the Correction of Errors recoiled from that plain reading, however. The trial court ruled that taking the Revised Statutes literally would “run into an absurdity” that revealed the legislature could have intended only that the fee regulations limited costs taxed between the parties, not fees paid by clients to their counsel. One clue was that the Revised Statutes limited the taxable costs in an appeal (but not necessarily in trial litigation) “only to one counsel on each side, who shall have been actually employed and rendered the service charged.”²⁷ But many appellate lawyers worked in two-lawyer teams as Stevens & Cagger did. Clearly, the court reasoned, the statute was designed to keep such firms from taxing double costs, not from keeping one advocate from being compensated entirely. Second, the court noted that the Revised Statutes not only prohibited officers from collecting higher than their prescribed fees, it actually criminalized the act, deeming it a misdemeanor. Given the prevalence of counsel fees, the court was sure the statute was not intended to criminalize the vast majority of the practicing bar.²⁸

Finally, the court reasoned that Section 5, directed as it was explicitly to sheriffs and “other” officers, “applies only to such officers as are compellable on the requisition of parties to render the services appertaining to their offices, but has not application to counsel.” The logic of that decision accords with recent work by Nicholas Parrillo on the nineteenth-century shift from a fee- and bounty-based regulatory culture to one of salaried judges and bureaucrats.²⁹ Parrillo finds one key stage of that development in changing notions about whom public officers served, and how they should serve. By mid-century, he argues, most states were moving away from fee system that encouraged public officers to treat their clientele as a “customer class” and render extraordinary services for bonus fees

²⁶ *Revised Statutes of the State of New York*, 2:650 § 5.

²⁷ *Revised Statutes of the State of New York*, 2:518 § 4; Adams, 23 Wend. at 61–62.

²⁸ *Revised Statutes of the State of New York*, 2:518 § 7; Adams, 23 Wend. at 61–62.

²⁹ Adams, 23 Wend. at 59; Nicholas R. Parrillo, *Against the Profit Motive: The Salary Revolution in American Government, 1780–1940* (Yale 2013).

and profits. Instead, officers were increasingly expected to expend their best efforts serving all of the public at once. Fee caps became a way not just to limit an officer's total compensation from ballooning to unseemly proportions, but also to destroy any incentive for officers to cultivate a clientele and provide extraordinary services for extraordinary pay.³⁰

The restrictiveness of New York's Revised Statutes seems to map onto these newly developed views about public service quite well, but as the *Adams* court recognized, the prescription of lawyer fees fit uneasily into this emerging world of public servants. The problem was that in the craft logic of practice, some lawyers would naturally exhibit, as Sedgwick argued, more "talent, industry or integrity" than others, and would see their services in higher demand. Were the eminent leaders of the bar to be paid the same as neophytes? Could a lawyer who won a high-stakes case with technical sophistication and skill really receive no monetary reward for the effort? Here the *Adams* court noted that the Revised Statutes were stricter than previous New York fee statutes, in that the Revised Statutes prohibited "tak[ing]" or "receiv[ing]" a higher fee. Earlier laws had required that lawyers not "exact, demand, or ask" any greater fee. Under a strict reading of the Revised Statutes, even the English and European idea of fees as gratuities was out of bounds. Ultimately that reading was too implausible for the court. The principle was too deeply ingrained that lawyers of disparate skill ought to have their superior craftsmanship specially remunerated.³¹

Once past the difficulty of taking the statute literally, neither the trial court nor the court of appeal had much trouble deciding against the civilian rule of fees as gratuities and in favor of enforcing lawyers' contractual rights to their compensation. "The reward of the Roman advocates was influence with the people, from which grew political distinction and power," Stevens argued. But

³⁰ Parrillo, *Against the Profit Motive*, 93–101.

³¹ Sedgwick, *How Shall the Lawyers Be Paid?*, 7. See, for instance, *Laws of the State of New York* (Kent & Radcliffe 1802), 2:66. Amalia Kessler argues that lawyers' self-conceptions in the Early Republic centered on an ideal of gentlemanly combat, giving an adversarial cast to legal professionalism that left limited conceptual space for alternatives to zero-sum contests between disparately skilled and strategic lawyers as the primary mode of dispute resolution. Amalia D. Kessler, *Inventing American Exceptionalism: The Origins of American Adversarial Legal Culture, 1800–1877* (Yale 2017), 152–67.

“with us, the reverse is the case The relation between the counselor and his client is created by contract, and like all other contracts may be enforced in a court of law.”³² Chancellor Reuben Walworth made the chain of reasoning even more explicit in the decision of the high court. “The [Roman] distinctions of patron and client . . . ceased in this state when slavery was abolished,” he declared in the Court for the Correction of Errors. But in the American Republic, no “business or profession . . . is so much more honorable than the business of other members of the community.”³³ Professional honoraria belonged to a world of status, where lower classes served the higher as slaves. But a republic of free and equal men, on Walworth’s reasoning, was a world of contract.³⁴ Walworth affirmed that Stevens & Cagger could collect on their contract; no jurist on the court (comprising the entire state senate at the time) dissented.

The *Adams* case resolved that New York lawyers had the right to sue for their contractual fees, even when those fees vastly exceeded the prescribed rates of the Revised Statutes, which were now defined away as taxable costs. The decision received an unsurprising amount of acclaim among the bar, but it left open the question of how to value a lawyer’s services in the absence of the kind of express agreement Stevens had with Adams. The case that would decide that question was litigated on the very eve of the Field Code, in the spring of 1848, just before the code took effect in July. The case was something of the reverse of *Adams*. James T. Brady was the lead lawyer for the City of New York, called the “corporation counsel.”³⁵ By 1848 (on track with Parrillo’s timeline), the corporation counsel was a salaried position, at \$2,000, but Brady prosecuted a number of successful suits for the city in chancery that resulted in \$8,511 of costs recovered to the city as victor. Brady brought an action

³² *Adams*, 23 Wend. at 57.

³³ *Adams*, 26 Wend. at 452.

³⁴ For an early formulation of the status-to-contract idea, see Henry Maine, *Ancient Law, Its Connection with the Early History of Society, and Its Relation to Modern Ideas* (1861), 170. On a recent assessment of Maine’s thesis, see Katharina Isabel Schmidt, “Henry Maine’s ‘Modern Law’: From Status to Contract and Back Again?” 65 *American Journal of Comparative Law* 145 (2017).

³⁵ The term reflected New York City’s legal origins as a municipal corporation. See Hendrik Hartog, *Public Property and Private Power: The Corporation of the City of New York in American Law, 1730–1870* (Cornell 1989).

essentially to add the taxed costs to his personal compensation, more than quadrupling his salary. Since his contract with the city did not mention taxable costs and did not explicitly limit his compensation to his salary, there was no express agreement as there had been in *Adams*.³⁶ Whereas Stevens had sought to escape the low statutory rates of common law appeals, Brady was seeking to reap a windfall from the high statutory rates of chancery.

The New York City judge and case reporter Lewis Sandford ruled that Brady was entitled to the costs. He interpreted Brady's salary to be his "counsel fee" only, so Sandford laid down the rule that lawyers who actually engaged in litigation as attorneys (or solicitors in chancery) were presumed to be owed *at least* the taxed costs that resulted. Although lawyers had been reluctant to have their services valued only at the prescribed rates, in this particular case full of chancery litigation, the rule happened to net Brady a windfall.³⁷ A brief assembly report on fees in 1845 made clear that "custom and the decisions of the courts" had established that "the counsel is entitled to all, over the amount allowed by the fee bill, that competent witnesses may swear his services are worth." Competent witnesses were "lawyers, of course, just as a farmer, mechanic, or laborer, would in all cases be the best judge of the time, labor and value of any piece of work." In sum, the value of a lawyer's services was a matter to be proved case by case in court – by the defendant if it was argued the value was less than the taxable costs, by the plaintiff if it was argued to be more. Responding to a petition to "equalize" lawyer fees by requiring all practitioners to collect no more than the prescribed rates, the assembly committee refused to create "any legislation compelling the profession of law to submit to restrictions not placed upon any other class of society," and to leave lawyers to "the great principles

³⁶ *Brady v. The City of New York*, 1 Sand. 568 (N.Y. Superior Court 1848).

³⁷ Sandford was not terribly distressed at the windfall, which he blamed on the city's litigiousness and poorly drafted contracts. *Brady*, 1 Sand. at 592 ("If it is said that our conclusion awards to the plaintiff an enormous compensation for his services while corporation counsel, it must be answered that if such be the result, it is to be attributed to the immense extent of the litigation in which the city has been involved, and to the defective legislation of the corporate authorities on the subject.").

of supply and demand, and of the free moral and intellectual capacity of man, to regulate and control his ordinary business operations.”³⁸

Thus, by the time of the Field Code, New York lawyers had won an unequivocal right to their compensation; but unless they secured an express agreement from their clients or put on proof at trial, their services were presumed to be valued at the amount prescribed by the Revised Statutes as taxable costs, a presumption clients and legislators were trying to make a hard and fast rule as late as 1845. Lawyers were still public officers of the court, but new conceptual separations of public office from private gain had not attached to them as it had to sheriffs and other servants of judicial process. And despite both the law on the books and the law in practice declaring their freedom from the prescribed rates of the Revised Statutes, lawyers continued to present themselves as the only craft profession in the Republic that had its rates set by legislation.

A Private Agent for Private Purposes: The Deregulation of Lawyer Compensation

Of all the reforms undertaken by the 1848 code, fee reform received some of the lengthiest and certainly the most passionate commentary in the commissioner’s report. The report completely effaced the steady work of the courts in the 1840s to secure lawyers’ contractual rights to their compensation. Instead, one could easily come away from reading the First Report with the impression that the Field Code was the first time in world history lawyers gained rights to their fees and freedom from legislative regulation. If the code was not so revolutionary in effect, it was at least unabashed in articulating the logic of its rules: “We cannot perceive the right of the state, to interfere between citizens, and fix the compensation which one of them shall receive from the other, for his skill or labor. . . . It is not [government’s] province, to make bargains for the people or to regulate prices.”³⁹

³⁸ *Journal of the Assembly of the State of New York* (1845), 837; Report of the Select Committee on Lawyer’s Fees and Costs in Courts of Law, in *Documents of the Assembly of the State of New York*, 68th Sess., No. 227 (1845), 66:1–9.

³⁹ *First Report of the Commissioners on Practice and Pleadings* (New York 1848), 204–05.

Accordingly, the code welcomed lawyers to a world of free contract. Section 258 abolished “all statutes establishing or regulating the costs or fees of attorneys, solicitors and counsel in civil action,” as well as “all existing [court-created] rules and provisions of law, restricting or controlling the right of a party to agree with an attorney . . . for his compensation.” It declared that “hereafter the measure of such compensation shall be left to the agreement, express or implied, of the parties.”⁴⁰

The report agreed with Sedgwick that the unreformed system “encourages the multiplication of processes, and . . . is not proportioned to the real labor performed.” The commissioners’ main objection was to the Revised Statute’s many pages of tabulated folio fees. “The real labor bestowed upon a lawsuit, is proportioned, not so much to the number or length of proceedings in the courts, as to the difficulty of the questions of law or fact,” the report explained. “One case requires little thought; and almost takes care of itself; another requires a vast amount of study, careful preparation, and great learning. These cannot be measured by any table of fees.”⁴¹ As Sedgwick had argued, it was chiefly the lawyer’s time that was his product, not his paper filings.

But the commissioners did not follow Sedgwick’s recommendation to abolish interlocutory appeals or costs or to penalize parties who delayed a suit by raising objections to form and practice. Instead, they believed the code had already eliminated those tactics precisely because it was a code. The commissioners expected that under their system, technical objections would be few and readily resolved because of the comprehensive clarity of their code; and by holding parties to plead just the facts, verified by oath, they expected judges could cut to the essence of a claim without getting held up by form or “sham defenses.”⁴² Fee reform was to fit hand-in-glove with fact pleading. By eliminating fees based on the folio of work product, any incentive to inflate pleadings with fictions

⁴⁰ 1848 New York Laws 544 § 258.

⁴¹ *First Report* (New York 1848), 205–06.

⁴² *First Report* (New York 1848), 70–73; See also *Final Report of the Commissioners on Practice and Pleadings*, in *Documents of the Assembly of the State of New York*, 73d sess., No. 16 (1850), 2:274–75; *Report of the Commissioners Appointed to Prepare a Code of Practice for the Commonwealth of Kentucky* (1850), ii.

and redundancies for the sake of compensation would be removed, and lawyers could make the best use of their valuable time by quickly and succinctly stating only the necessary and relevant facts.

As in the tracts and reports from earlier in the 1840s, the commissioners' report emphasized the equality of the legal profession with other crafts and professions, despite the fact that lawyers already had the freedom to charge what their clients were willing to pay. The state "may prescribe the salary of the clergyman, or the fee of the physician, with as much reason as the compensation of the attorney," they wrote – which was to say, without reason at all. They reiterated the republican dictum that equality under contract was "the only just rule."⁴³

The *Adams* court had had to wrestle with the question of whether lawyers were public officers for purposes of the Revised Statutes' fee regulations; having abolished the Revised Statutes, the practice commission went further and declared lawyers to be members a fully privatized profession. After comparing lawyers to physicians and clergy, the report anticipated the objection "that the attorney is an officer, admitted by the courts, and therefore, in a position different from the others." But it answered simply "that he is not a public officer, chosen to perform public duties." The lawyer, in this account, was "a private agent" admitted to the court "for private purposes, and on behalf of private persons."⁴⁴

The 1848 report's account of the lawyer as a purely private actor, engaged in the "freedom of industry" alike with any other citizen, stood in tension with the 1850 Final Report of the code regulating admission to the bar. By extending the domain of "procedure" over attorney admissions, the commissioners faced an awkward choice. Compromises with and between the anti-lawyers had left the 1846 constitution unclear. It provided that "any male citizen, of the age of twenty-one years, of good moral character, and who possesses the requisite qualifications of learning and ability, shall be entitled to admission to practice in all the courts of this state," but it placed the clause in the same

⁴³ *First Report* (New York 1848), 205–06.

⁴⁴ *First Report* (New York 1848), 205.

section that regulated the judiciary's appointment powers, implicitly leaving it to the courts decide who would be admitted to the bar.⁴⁵ The Whig legislature, continuing its cooperation with the anti-lawyers, had passed a bill permitting anyone to appear as "a special attorney" on behalf of any litigant, but the courts struck the provision down as unconstitutional.⁴⁶ The commissioners stated that they did not want to insert themselves into the constitutional debate and were "not expressing an opinion of our own" in codifying the rule that only the courts could admit persons to the bar.⁴⁷

Nevertheless, the Final Report gave an extensive policy justification for maintaining the prerogative of courts to control access to the bar. Because "the profession of a lawyer is essential to society," the report argued, "its character and honor are public interests." To show why, the commissioners sketched a straight line from the bar to the political health of a republic. Because "the judicial department is recruited from the legal profession," the "character of the judges" necessarily reflected "the character of the lawyers. Made at the bar; their moral characters there take their complexion. To degrade the bar therefore leads directly and inevitably to the degradation of the bench." Therefore, "anywhere a corrupt legal profession is to be found it is found in the midst of a corrupt and corrupting people."⁴⁸ So despite the First Report's declaration of "the right of the citizen to engage, at will, in any honest calling" and to "receive such reward as he can agree for it," the Final Report came down on the side of regulated admission to the bar.

In defending this choice, the commissioners took special exception to an idea recently propounded by the leading English legal reformer Lord Henry Brougham, who had declared that "an advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons . . . is his first and only duty." Brougham explicitly privileged the lawyer's private duty to his client

⁴⁵ *First Report* (New York 1848), 205; New York Constitution of 1846, art. 6 § 8.

⁴⁶ See *Final Report* (New York 1850), 202; *Devries v. McKoan*, 1 Code Reporter 6 (N.Y. Supreme Court 1848).

⁴⁷ *Final Report* (New York 1850), 202.

⁴⁸ *Final Report* (New York 1850), 206.

above his public duties to the state, arguing that “in performing this duty [a lawyer] must not regard the alarm, the torments, the destruction which he may bring upon others . . . though it should be his unhappy fate to involve his country in confusion.”⁴⁹ Such a view, the New York commissioners wrote, “betrays not only an unsound heart, but an unsound understanding.” A lawyer’s duty “as a moral being requires him to advise justice,” the report explained, and “his position as a legal adviser does not exempt him from the moral duties which bind other men.” A lawyer, that is, was in some sense a public officer, making public scrutiny and regulation of his profession necessary.⁵⁰

It may be tempting to suppose that different commissioners wrote different notes, one pressing for the full privatization of the legal profession, the other advocating separately for public mindedness and its consequent public regulation. An editor of Field’s collected writings claimed Field’s authorship only of the paean to professional duties,⁵¹ but his other published writings advocated both for the view of lawyers as private contractors and of lawyers as public actors whose moral duties were to restrain their zeal for their clients’ causes.⁵² To hold these views together, Field departed from Sedgwick on the determinative power of compensation. Sedgwick had written of economic incentives as “irresistible” to the lawyer. He therefore advocated their continued public regulation so long as the incentives were realigned away from technicality and over-filing. Although Field shared many of Sedgwick’s concerns, he did not share the language of incentives. Field regretted that the Revised Statutes compensated the most meaningless parts of the lawyer’s craft, but that is how he spoke of it: as inadequate compensation rather than as a powerful incentive. Field proposed

⁴⁹ *The Trial at Large of Her Majesty, Caroline Amelia Elizabeth, Queen of Great Britain; in the House of Lords, on Charges of Adulterous Intercourse* (1821), 2:3.

⁵⁰ *Final Report* (New York 1850), 207–08.

⁵¹ See A. P. Sprague, ed., *Speeches, Arguments, and Miscellaneous Papers of David Dudley Field* (1884), 1:296–302. Given the public criticism of Field’s fees at the time his writings were being collected (see below), one should not make too much of the exclusion of the privatization passages from Field’s collected works.

⁵² A Letter from D. D. Field, Esq. of New York, on Law Reform, to Representatives John O’Sullivan in *Documents of the Assembly of the State of New York*, 65th Sess., No. 81 (1842), 5:55–60 (hereafter “Field, Letter to Representative John O’Sullivan”); David Dudley Field, *Legal Reform: An Address to the Graduating Class of the Law School of the University of Albany* (1855), 9.

that lawyers could make any amount of compensation for which they contracted, but doing so need not impugn their professional integrity. A paid advocate could, he surmised, “in civil cases present defenses recognized and provided by law, although he may himself disapprove of the principle and policy of the law. But here the advocate should stop.” The “law and all its machinery” were means towards the end of justice, and no lawyer “in his zeal for the means” could forget the ends.⁵³

Public Judgment and Private Professionalism: The Debate Over Field’s Attorney Ethics

Critics then and now revisited Field’s words in the wake of the Erie Wars. Field’s advocacy for Gould seemed to take the precisely the outline Brougham had cast, using every means for the private advantage of the client while “involv[ing] his country in confusion.” Field’s Final Report had declared that “to assent to the bad scheme of an unjust client, is to become equally guilty with him, and the two are as much conspirators to effect a wrong, as if they had originally concocted a plan of iniquity with the view of sharing in the plunder.” What then of Judge Darwin Smith’s equitable findings that Gould and his “associates” had engaged in a pervasive conspiracy to fraudulently wrest control of the Albany & Susquehanna for private gain? After Darwin’s decision but before Field’s successful appeal, the *New York Times* rebuked Field without naming him. Gould should have found a lawyer at the “Tombs bar,” meaning the disreputable low-class lawyers who hung around the Manhattan jail. Instead, he opened his pocketbook to “a leading jurist and law-reformer of the State . . . and, instead of being shown the door, found no difficulty in employing him in his worst cases.” The paper went on to describe Jim Fisk’s visit to Henry Ward Beecher’s Sunday school to pluck Field’s partner Thomas G. Shearman from the pew.⁵⁴

Field ignored the *Times*, a longtime political antagonist of his. But when Samuel Bowles, editor of the *Springfield Republican* reprinted and commented on some of the New York material, Field lashed

⁵³ *Final Report* (New York 1850), 207–08.

⁵⁴ *New York Times*, December 5, 1870.

out. “What gives you, sitting in private and writing anonymously, authority to render ‘judgment’ upon me?” Field wrote to Bowles at the end of 1870. Field then invoked the two central ideals of his code: public facts and private practitioners. “I am not disputing your right, as a collector of news, to publish any *facts* concerning anybody,” Field wrote, “but you certainly have no greater right to publish your *opinions* respecting the character or conduct of a private person, than you would have to publish them to his face in a private company.”⁵⁵ Bowles countered that although a lawyer might be responsible to private clients, he also “takes a responsibility to the public, on which it may arraign, dispute and judge him.”⁵⁶ An exchange of twenty letters followed between Field, Bowles, and Field’s son Dudley, now a junior partner in Field’s firm.⁵⁷

The lengthy correspondence never strayed far from the opening point: what did it mean for Bowles, or any member of the public, to “judge” Field’s actions as a lawyer? From where did that authority arise, and what standards applied in such a judgment? Conversely, what gave Field the power to dodge public inquiry into his practices, and how could a lawyer really hold himself aloof from a fraudulent conspiracy joined by his chief clients? Field kept his attention focused on the latter question. Suppose his clients were bad men, what then? Should only “saints . . . have a monopoly of lawsuits”? Here Field picked up the old Whig language of “the independence of the bar.” If Gould was wicked, so much more did he need skilled counsel to protect what rights he legitimately had in a democratic society. “I speak for [my clients] in the courts of the country, stand between them and popular clamor, just as I would stand between them and power, if they were menaced by power of any kind, monarchical or republican,” Field concluded.⁵⁸ On this account, the lawyer checked arbitrary power—of both king and mob—by adhering to professional standards that the public, as

⁵⁵ David Dudley Field & Samuel Bowles, *The Lawyer and His Clients* (1871), 5 (on file with the New York Historical Society, 170 Central Park West, New York, N.Y.).

⁵⁶ Field & Bowles, *The Lawyer and His Client*, 15.

⁵⁷ The contours of the debate are covered in Michael Schudson, “Public, Private, and Professional Lives: The Correspondence of David Dudley Field and Samuel Bowles,” 21 *American Journal of Legal History* 191 (1977).

⁵⁸ Field & Bowles, *The Lawyer and His Client*, 6.

outsiders, could not judge. “The lawyer is responsible, not for his clients, not for their causes, but for the manner in which he conducts their causes,” Field wrote in one of his final letters to Bowles. “Here I admit the fullest responsibility,” he closed, but that was not a responsibility to Bowles, who could not possibly judge the manner in which a lawyer practiced his technical craft.⁵⁹

In a final editorial, Bowles recognized that Field was attempting to make the lawyer’s moral code coterminous with expert legal practice. So long as the lawyer’s techniques were within the letter of the law, Field was immune to public scrutiny. That argument might be sound, Bowles argued, if the law were an exact science, in accord with divine law in every way. “But if human imperfection is to be recognized in law and lawyers, – if we admit the moral element into their work, – if there is such a thing as a private conscience, and a public conscience as well, – [Field’s principles] are all wrong.”⁶⁰ Nevertheless, Bowles conceded the ground to Field’s technical argument. Disclaiming any knowledge of New York law or legal practice, Bowles admitted that so far as he knew, “You have sinned against no statute; I will not undertake to say, even, that you have violated any prescript of the code professional.”⁶¹ That was all Field needed to triumph on his opening question. Whoever may have swayed public sympathies, Field was adamant that a knowledge of craft was necessary to understand what Field had done, much less to judge it. Bowles, by admitting his ignorance of craft, had divested himself of jurisdiction to judge.

Recognizing Field’s maneuver, the New York City lawyer Francis Barlow (1834–1896), known among the bar as General Barlow for his decorated Civil War service, took up Field’s offer to condemn him for his manipulation and abuse of technical procedures. In a series of long letter-articles to the *Tribune*, Barlow recounted the Albany & Susquehanna raid day by day, highlighting the unusual and dubious procedures Field and Shearman had deployed, such as the service of summons by telegraph;

⁵⁹ Field & Bowles, *The Lawyer and His Client*, 8–9.

⁶⁰ *Springfield Republican* (Springfield, Ill.), January 30, 1871.

⁶¹ Field & Bowles, *The Lawyer and His Client*, 10.

the last-minute arrest of Ramsey; and the many ex parte orders obtained from Judge George Barnard, including one obtained by rushing Barnard back to New York at midnight from his mother's home in Poughkeepsie.⁶² Barlow especially sought to demonstrate Field's orchestration of Ramsey's arrest, noting that Gould had paid Field \$10,000 to be onsite in Albany the day of the shareholder's meeting.⁶³

Called upon to justify himself with the actual facts and technicalities of his representation, Field drowned Barlow's essays with his counter-response. Field not only responded at length, he commissioned another lawyer, George Ticknor Curtis, to write a volume-length account of the A&S litigation that highlighted the nefarious tactics of the Ramsey side and sympathetically explained and exonerated Field's conduct.⁶⁴ Though Curtis presented his account as that of a neutral observer, Field's brother Cyrus reimbursed him \$3,500 for his efforts.⁶⁵ Field gathered other letters from colleagues attesting to his integrity and professionalism. Critics responded that the letters were no doubt "worth what was paid for them."⁶⁶ Field specifically denied receiving any special fee for appearing in Albany at the disputed election, which he explained as a matter of pure happenstance.⁶⁷ In response, Barlow produced the receipt from the Erie Railroad's accounts.⁶⁸

But just as Bowles had done, Barlow made a tactical blunder at the close his correspondence with Field. Barlow first appealed to the reading public to see "whether Mr. Field has made a fair, candid and responsive answer to the charges which I have brought against him." Then perhaps concerned that the morality of Field's practices was being buried under piles of facts and technical

⁶² Francis C. Barlow, *Facts for Mr. David Dudley Field* (1871).

⁶³ Barlow, *Facts for Mr. David Dudley Field*, 12. See also Chapter 6.

⁶⁴ George Ticknor Curtis, *An Inquiry into the Albany & Susquehanna Railroad Litigations of 1869 and Mr. David Dudley Field's Connection Therewith* (1871).

⁶⁵ Curtis reported only that he was "requested by an intimate friend of Mr. David Dudley Field, to examine the proceedings." Curtis, *An Inquiry into the Albany & Susquehanna Railroad Litigations*, 2. Thomas Shearman recorded Cyrus as the source of the payment in his memoirs, noting that the firm eventually reimbursed Cyrus. Shearman noted that Jeremiah S. Black "wrote one or two telling articles in our favor," leaving it unclear whether Black too was commissioned to write in Field's defense. *Memoirs of Thomas G. Shearman*, 1:188, Papers of Thomas G. Shearman, Shearman & Sterling Law Library, 575 Lexington Ave., New York, N.Y.

⁶⁶ *New York Herald*, December 11, 1872.

⁶⁷ Barlow, *Facts for Mr. David Dudley Field*, 41-42.

⁶⁸ Barlow, *Facts for Mr. David Dudley Field*, 54-55.

arguments, Barlow closed with the promise to “take care that his conduct is investigated before a body of men who cannot be deceived by small tricks and petty evasions.”⁶⁹ Field leaped at the offer, interpreting it as a pledge to take the matter before the nascent Association of the Bar of the City of New York. “After all, the professional tribunal is the true one” that should judge him, Field wrote. It had been founded “for the mutual advantage of its members, and as well to protect them from unfounded attacks as to maintain the purity and dignity of the profession.”⁷⁰ Whether or not Field was winning on the merits, he was certainly winning on procedure. Once again he shifted jurisdiction, this time from the court of public opinion to a private bar association.

That association had been founded in early 1870, during the midst of the Field-Bowles correspondence. Its leaders were a mix of municipal reformers as well as lawyers who had directly participated in the A&S litigation on one side or the other. Although they founded the association in direct response to the public outcry over Field’s lawyering, the latest history notes that “it seems incredible, but the first three histories of the Association . . . never mention Field by name.”⁷¹ Bar associations were nothing new by the late nineteenth-century, but many early bar associations had gone defunct around mid-century. The New York City association became the first of many modern bar associations and, like New York’s code, it provided a model the others could emulate.⁷²

The founding documents and speeches of the Association of the Bar of the City of New York were shot through with appeals to public interest and public service, both implicit and explicit rebukes of Field’s privatized ideal of the lawyer. The call to organize the association, circulating in the papers in December 1869, advertised that the association would “sustain the profession in its proper position in the community, and thereby enable it, in many ways, to promote the interests of the public.”⁷³

⁶⁹ Barlow, *Facts for Mr. David Dudley Field*, 68.

⁷⁰ Barlow, *Facts for Mr. David Dudley Field*, 68–69.

⁷¹ George Martin, *Causes and Conflicts: The Centennial History of the Association of the Bar of the City of New York* (Fordham 1997), vi.

⁷² John A. Matzko, “‘The Best Men of the Bar’: The Founding of the American Bar Association,” in Gerard Gawalt, ed., *The New High Priests: Lawyers in Post-Civil War America* (Greenwood 1984), 76, 79.

⁷³ Quoted in Martin, *Causes and Conflicts*, 15.

Refusing to be cowed by his colleagues and former associates, Field made sure to be one of the earliest subscribers to the call and an avid attendee of the organizational meetings. At the first meeting, George Templeton Strong counted two hundred lawyers. “The decent part of the profession was well represented . . . , and among them was the virtuous D. D. Field,” he wryly commented.⁷⁴ With Field in the room, his opponent from the Opdyke litigation William M. Evarts used the opening discussion to ensure all understood that Field’s censurable activities made the association necessary:

Why, Mr. Chairman, you and I can remember perfectly well (and we are not very old men), when, for a lawyer to come out from the chambers of a Judge with an *ex parte* writ that he could not defend before the public, before the profession and before the Court, would have occasioned the same sentiment toward him as if he came out with a stolen pocket-book.⁷⁵

It was clear enough to Evarts that Field could not defend his injunctions to the public. Now he would have to defend them to the profession.

More implicit barbs came from Samuel Tilden, then in the midst of his multi-pronged political and legal offensives against Boss Tweed. Tilden expressly opposed the public-mindedness of the bar to private fee-seeking. In the midst of breaking up municipal “rings” of all sorts, Tilden declared that he did “not desire to see the Bar combined, except for two objects. The one is to elevate itself . . . ; the other object is for the common and public good.” But “if the Bar is to become merely a method of making money, making it in the most convenient way possible, but making it at all hazards, then the Bar is degraded.” Tilden closed by linking his concern for public mindedness over fees in a peculiar fusion with New York imperialism. If New York was to remain “the commercial and monetary capital of this continent” it had to “establish an elevated character for its Bar, and a reputation throughout the whole country for its purity in the administration of justice.” Tilden then reiterated that the commercial wealth of the state depended on its bar not pursuing its fees at all costs.⁷⁶ To gain the world for New York, its lawyers had to keep their souls.

⁷⁴ *Diary of George Templeton Strong*, ed. Allan Nevins (Macmillan 1952), 4:273.

⁷⁵ *Report of Proceedings of the Bar Association of the City of New York* (1870), 28.

⁷⁶ *Report of Proceedings of the Bar Association of the City of New York*, 20–21.

Field maneuvered as expertly in the bar association as he had in the courts. Within the first year of the organization, he gave the “committee on amendment of the law” its first assignment by referring to them proposed code amendments that restricted the equitable appointment of receivers. The association crafted the amendments into a bill and sent it to the legislature, where no action was taken.⁷⁷ Field not only got to retain his title as the great law reformer, he scored the implicit point that his actions had been legally sanctioned at the time and, given the legislature’s indifference, legal and moral still. Field was also active in amending the association’s by-laws to establish and regulate a grievance committee to hear members’ professional complaints about one another. Crucially, the by-laws provided that any proceedings would remain private until the committee ordered publication.⁷⁸

Sometime after Barlow pledged to have Field investigated by the profession, the grievance committee instituted proceedings on Field’s litigation practices but never issued a report. By September 1872, some of the members had organized a special committee to investigate lawyers implicated by the recent state impeachment proceedings against Judge Barnard. Field, of course, was one such lawyer, given all the *ex parte* orders granted by Barnard in the A&S litigation. But as with the grievance committee, the special committee delayed reporting, continually asking for more time.⁷⁹

Finally, Field professed to have had enough, and during a December meeting of the association, he gave one of the most remarkable speeches of his career. “I mean to meet this now and here,” he declared, demanding that the association print the original records from the grievance committee, “every word [of which] was taken in shorthand and remains of record.” Once again, Field’s main complaint was that his private practices were being submitted to public judgment. Despite the duly conducted secret investigation of the grievance committee, “these raiders have chosen to make their charges publicly before the whole body in a way to have them reported and

⁷⁷ Martin, *Causes and Conflicts*, 56–57.

⁷⁸ Martin, *Causes and Conflicts*, 58; *Charter and Constitution of the Association of the Bar of the City of New York* (1873), 16.

⁷⁹ Martin, *Causes and Conflicts*, 57–60, 91–92.

published to the world without giving the member assailed an opportunity to defend himself." Field reminded his colleagues their professional duties were "judicial in their character." Judgment on Field's career was pending, but the "raiders" were seeking to stir up "public opinion" to influence it.⁸⁰

Field then unleashed his scorn on those he considered to be the chief "raiders," Barlow above all. Field claimed that the grievance committee would not publish its records because Field had revealed "evidence of disreputable practices by most of [his opponents] and a clue to further evidence." He then named some of them. Barlow he charged with public embezzlement while attorney general. Joshua Van Cott he claimed had forged a bond with his dead brother's signature, and down the list Field went. But more terrible in Field's eyes than the lawyers' corruption was their practical incompetence. Field went on at length detailing Barlow's blunders in a particular suit before the Marine Court. He concluded that all his opponents "have so little knowledge or experience of difficult lawsuits that they do not know whether an order is right or wrong." Given their lack of technical sophistication, how could they possibly judge Field's actions? "I might as well talk to a child as to [Barlow] about a course of action in a difficult case," Field sneered. "Would you have me justify my action to such a man—so incompetent, so ignorant?"⁸¹

If the Chicago journalist could not judge Field's professional conduct, nor could the New York Attorney General, nor could the gathered bar of New York City, who could? Field landed on the only practical answer left available: the courts. Litigations from the A&S and Erie suits were still playing out. Let them run their course, Field reasoned. "Must we have two suits of practitioners—one for the courts and another for this association?" In time, judges would pronounce on the litigation tactics of the lawyers, as Judge Smith had done in the A&S suit. And in time those opinions would be reviewed. (Smith had been reversed on Field's technical jury argument by the time of the grievance proceedings

⁸⁰ *New York Herald*, December 11, 1872.

⁸¹ *New York Herald*, December 11, 1872.

before the association.) Implicitly, Field was once again arguing what he had urged from the first with Bowles: whatever was found legal by the courts was moral as a matter of practice.

The association undertook no further proceedings on Field, and he was never censured. The next decade Field was elevated to the presidency of the national American Bar Association. The “public conscience” Samuel Bowles had argued for had been transfigured into a professional conscience of the organized bar. But in reality, the professional conscience was little different from the private conscience that had exonerated Field all along. The historian of the city bar association notes that all records from the grievance proceedings and from the special committee have gone missing from the archives.⁸² Perhaps Field did indeed introduce evidence about his unscrupulous colleagues. A project to privatize the bar that began with the deregulation of fees ended in the utterly private proceedings of a bar association founded with express purposes of public interest. Whatever the association’s professional judgment of Field, it remains private to this day.

From Unjust Actors to Unfortunate Victims: The Course of Cost-Shifting Under Code Practice

While Field expected the abolition of fee limitations to work a revolution in the bar, his views on taxable costs were quite traditional. The code made it “a general rule” that “the losing party, ought . . . to pay for the expense of the litigation.” The reason was the conventional one. “He has caused a loss to his adversary unjustly, and should indemnify him for it.” As with many departments of practice under the original code, the paradigm given was of a debt collection. “The debtor who refuses to pay, ought to make the creditor whole,” the report reasoned, not just for the unpaid debt, but for the legal hassles of trying to collect it.⁸³ Both the reasoning and the example were featured in Theodore Sedgwick’s tract a decade earlier, which declared, “It is intolerable that a person should without the payment of a just demand, drive the plaintiff to bring suit, . . . keep him at bay for years, and at last

⁸² Martin, *Causes and Conflicts*, 91, 100 n.5.

⁸³ *First Report* (New York 1848), 206–07.

when he is finally compelled to discharge the demand, be released on mere payment” of the debt. Justice demand that the defendant, and by extension any losing litigant, make good “the onerous expenses which his folly or injustice has occasioned.”⁸⁴

On this ground, the code disagreed with the critics of the loser-pays rule both in spirit and in prescription. By the 1840s, a host of lawyers and laymen alike had criticized cost-shifting rules and especially the theory that cost-shifting corrected the “injustice” of a litigant filing or defending a suit ultimately adjudged to be without merit. In practice, critics charged, suits were concluded on technical points of procedure so often that characterizing one litigant as virtuous and the other as unjust was a mistake. “If a promissory note was mis-recited by a word, a non-suit was the result,” complained Field’s co-commissioner Arphaxad Loomis. Could it really be said the loser of the suit was an unjust actor, inflicting a needless harm on his adversary?⁸⁵ No, critics answered. Losing a suit was more a misfortune than an act of malice. Like the rain falling on the just and unjust, one account observed, lawyers “take fees from both plaintiff and defendant in collecting debts” without any real regard for fault. Taxable costs were more a measure of “skill in law jugglery,” than the justice of the cause.⁸⁶ For these reasons, a number of states abandoned or severely scaled back English cost-shifting rules, most prominently Massachusetts and Pennsylvania.⁸⁷ And some, like Iowa, declined to import the code’s cost-shifting provisions.⁸⁸

Nevertheless, New York commissioners insisted on cost-shifting. The leading account on cost-shifting in America generally credits the Field Code for launching states towards the “American rule”

⁸⁴ Sedgwick, *How Shall the Lawyers Be Paid?*, 10.

⁸⁵ Arphaxad Loomis, *Historic Sketch of the New York System of Law Reform in Practice and Pleadings* (1879), 6.

⁸⁶ John W. Pitts, *Eleven Numbers Against Lawyer Legislation and Fees at the Bar* (1843), 29, 53. See also Hiram P. Hastings, *An Essay on Constitutional Reform* (1846), 26; Michael Hoffman, “Letter on Reforms Necessary in the Body of Law, in the Written Pleadings, and in the Practice of the Courts” (Mar. 21, 1846), in Thomas Prentice Kettle, ed., *Constitutional Reform in a Series of Articles Contributed to the Democratic Review* (1846), 68.

⁸⁷ Sedgwick, who agreed with Field’s traditional views of cost-shifting, said of Massachusetts and Pennsylvania that they left righteous suitors “to pay for having had the pleasure of a law suit.” Sedgwick, *How Shall the Lawyers Be Paid?*, 10.

⁸⁸ *Report of the Code Commissioners to the Eighth General Assembly of the State of Iowa* (Iowa 1859), 381, note to § 845.

where each party bore its own litigation costs, including attorney's fees, but it calls the code itself a "paradox" and "incoheren[t]" for permitting free contract between clients and their attorneys but then imposing nominal charges on litigants who had no contract to compensate the other side's attorney.⁸⁹ Yet jurists at the time recognized that "free contract" could coexist with *quantum meruit*—a remedy to compensate work performed on the fiction that there had been an implied contract. For all the code's abolition of fiction, it made sure that "implied contracts" remained cognizable between attorneys and those they served.⁹⁰ Field adopted the conventional logic that the winner deserved—had earned—compensation from the loser because his code was supposed to make it so. By requiring courts to reach the merits of a claim, and by severely restricting the grounds on which a case could be dismissed, Field believed that losing a claim on "technical" points was no longer likely. By eliminating "fiction and evasion" in pleading, Field argued the code system would finally bring about the world the treatises had for so long described in theory, where to proceed on a losing claim was tantamount to acting in bad faith.⁹¹

Keeping a system of cost-shifting required commissioners to face again the question of how to value a lawyer's services. They agreed that clients' freedom to contract with their lawyers did not include the freedom to stick their opponents with the total bill, but they did not proceed to offer a valuation. Instead, the one task they left to the legislature in reporting the code was to fill in the blanks for the costs that would follow each phase of litigation, offering only the lame advice that any amount selected would be too little to compensate for the lawyer's time in some cases, and too much in others.⁹² The 1848 legislature decided seven dollars would be awarded for litigation that terminated before trial, twenty dollars after trial, and fifty dollars after appeal.⁹³ The commissioners reasoned that

⁸⁹ Leubsdorf, "Towards a History of the American Rule on Attorney Fee Recovery," 17–21.

⁹⁰ 1848 New York Laws 544 § 258.

⁹¹ *First Report* (New York 1848), 206–07; Field, Letter to Representative John O'Sullivan, 56; David Dudley Field, *What Shall Be Done with the Practice of the Courts? Shall It Be Wholly Reformed?* (1847), 33–37.

⁹² *First Report* (New York 1848), 207.

⁹³ 1848 New York Laws 545 § 262.

their phase system approximated the costs “generally upon the difficulty of the case, and the amount at risk.”⁹⁴ It also served to encourage litigation to settle rather than continue, unlike the system that rewarded the multiplication of filings.⁹⁵

The other major question was how to shift costs. Judicial discretion over awarding costs had been about the only distinction between the Revised Statutes’ provisions for costs at common law, where shifting happened automatically at the end of a litigation, and in equity, where lawyers had to petition for costs and courts had discretion to grant or deny the petition.⁹⁶ Once again, the commissioners punted. Costs shifted automatically in cases involving claims for money damages or the recovery of real property; costs shifted in all other cases at the discretion of the court. Cost-shifting thus became yet another ground on which the commissioners inadvertently preserved the traditional distinction between law and equity.⁹⁷

The Field Code did not spawn the “American rule” in 1848, but over time, the commissioners’ attempt to preserve cost-shifting did indeed fall victim to their abolition of regulated lawyer fees, in three ways. First, the Field Code made clear that taxable costs were untethered from the value of a lawyer’s services. In the theory propounded by the code reports, taxable costs were based on penalizing an unjust actor for prolonging litigation, not on an approximation of the value of services rendered. Before the code, Judge Sandford had articulated a legal standard that made the taxable costs the presumed value of the attorney’s fee on an implied contract until the parties proved otherwise.⁹⁸ After the code, the presumption disappeared, and lawyers had to prove their implied contracts by deposing their brethren to testify about the market rates of their services.⁹⁹

⁹⁴ *First Report* (New York 1848), 205–07.

⁹⁵ Field, Letter to Representative John O’Sullivan, 56 (“[T]he indemnity ought to be so adjusted, as to furnish no temptation to litigation.”).

⁹⁶ *Revised Statutes of the State of New York*, ch. 10, tit. 1, §§ 2 (“[T]he costs of all suits and proceedings in equity . . . shall be paid by such party as the court shall direct.”), 3 (specifying cost-shifting for “any action or proceeding at law”).

⁹⁷ See 1848 N.Y. Laws 544–45 §§ 259–61.

⁹⁸ *Brady v. The City of New York*, 1 Sand. at 568.

⁹⁹ See Benjamin Vaughan Abbott and Austin Abbott, *Digest of New York Statutes and Reports* (1884), 387–89.

Second, as the Supreme Court noted in its 1967 articulation of the American rule, “it has been argued that since litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit.”¹⁰⁰ That is, the pre-code view persisted that a loser of a litigation was, as one Wisconsin assemblyman put it, an “unfortunate victim.” The 1852 Wisconsin legislature was considering New York’s code. An assembly committee advised against the code’s cost-shifting provisions, or having any cost-shifting at all. It argued that, given the imperfections of human justice, most losing litigants were more likely to be “a defeated though honest party” rather than user of “chicane and trickery.” It likened fee bills to the indiscriminate destruction of a natural disaster, and it encouraged tribunals “to be lenient in general, even towards the unsuccessful party; for such is the [courts’] imperfection, that could a change of venue be taken to the court of Heaven, who knows how many of their decisions would be reversed.”¹⁰¹

Even the Field commentary from 1850 recognized that not all losing litigants were knowingly inflicting an injustice on their opponents. In the same commentary disputing Lord Brougham’s ideal of the zealous advocate, Field wrote that, even in a codified system, “the law, moreover, is not so clear and precise, but that it may be mistaken or perverted. A strong mind at the bar, and a weak one on the bench, lead often to erroneous judgments. . . . Before ordinary tribunals, more depends on the advocate than is generally imagined.”¹⁰² Field’s rebuke of Brougham not only undercut his reasons for cost-shifting, it also showed why the old view of a losing litigant as misfortunate rather than malicious could not but be amplified under Field’s fee system. If so much depended not on merit but on counsel, and if magnates like Gould and the corporations they controlled could pay exorbitant rates for the “best” counsel, what was the point of penalizing losers? Of course the haves were going

¹⁰⁰ *Fleischmann Distilling Corp*, 386 U.S. at 718.

¹⁰¹ Report of the Committee Relating to Fees To Be Allowed the Party Recovering Judgment, in *Journal of the Assembly of the State of Wisconsin* (1852), 344–52.

¹⁰² *Final Report* (New York 1850), 207–08.

to come out ahead.¹⁰³ Such was the logic that underlay much of the uproar when Field agreed to represent William “Boss” Tweed after his corruption prosecutions. Few articulated any legal objection to Field’s argument—Tweed had been sentenced to eleven years in prison under a statute that provided for a maximum penalty of only one year. What both lawyers and laymen alike found galling was that Tweed, freshly convicted of embezzling \$6 million from the City, could nevertheless pay high rates to a lawyer who would inevitably find some technical defect with the prosecution.¹⁰⁴ By deregulating compensation, the Field Code only fueled the objection that litigation came down to who could afford the best lawyer, undercutting a reason to shift those costs from the loser.

Finally, the Field Code gave further momentum to the other reason stated in the Supreme Court’s articulation of the American rule: “that the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents’ counsel.”¹⁰⁵ As Peter Karsten has shown, contingency fees were widely used in early American practice, but lawyers employing that fee structure often ran a risk of seeing their fees ultimately disapproved by courts wishing to hold them to English champerty rules. By abolishing all former statutes and court rules regulating attorneys’ fees, the Field Code and its imitators unequivocally sanctioned the contingency fee and other alternative fee arrangements that permitted lawyers to bring claims on behalf of those who could not pay up front.¹⁰⁶ Courts thereafter might set aside contingency fees that were “unconscionable” in their rate or manner of negotiation, but the principle itself had to be allowed under the new statute. “Many a poor man with a just claim would find himself unable to

¹⁰³ Marc Galanter, “Why the ‘Haves’ Come Out Ahead: Speculations on the Limits of Legal Change,” 9 *Law & Society Review* 95 (1974).

¹⁰⁴ See Renée Lettow Lerner, “Thomas Nast’s Crusading Legal Cartoons,” 2001 *Green Bag Almanac* 2d 59 (2001), 63–75; Kenneth D. Ackerman, *Boss Tweed: The Rise and Fall of the Corrupt Pol Who Conceived the Soul of Modern New York*, (Carroll & Graf Pub. 2005), 239–71; Martin, *Causes and Conflicts*, 104–19.

¹⁰⁵ *Fleischmann Distilling Corp.*, 386 U.S. at 717.

¹⁰⁶ Karsten, “Enabling the Poor to Have Their Day in Court,” 234–42.

prosecute his rights, could he make no arrangement to pay his advocate out of the proceeds of his suit," a judge explained in the code state of Missouri.¹⁰⁷

By the 1920s, academic commentators cited the prevalence of suits by poor litigants under contingency fees and other arrangements as a further reason that cost-shifting might be inappropriate in the general run of cases. Here, the "misfortune" of losing a litigation coincided with the larger misfortune of poverty and all its constraints on pursuing rights claims in the courts.¹⁰⁸ The gradual elimination of cost-shifting also ensured that lawyers could offer their services pro bono without running the risk of a disastrous cost award should they prove unsuccessful. Thus, an attorney like Louis Brandeis, in the heyday of his litigations as "the People's Lawyer," could explain his pro bono representations as a "luxury cost" of time rather than money. "Some men buy diamonds and rare works of art, others delight in automobiles and yachts," Brandeis famously pronounced. "My luxury is to invest my surplus effort . . . to the pleasure of taking up a problem and solving, or helping to solve, it for the people without receiving any compensation."¹⁰⁹ That, too, was a fee arrangement made possible by the code.

Conclusion

This chapter has sketched some of the complicated ways the Field Code brought on the reign of the so-called American rule of costs and fees. In the nineteenth-century, lawyers used the term "American rule" to signify the code's signal departure from past English and American practice by both entitling lawyers to their compensation and by making that compensation publicly unrestricted. The American rule was, originally, the rule of free contract for a lawyer's fees. But by maintaining a system of shifting costs to the victor of a litigation, the code endorsed the exact opposite of what the American rule would become in the twentieth century. In time, the code's regime of free contract for

¹⁰⁷ *Duke v. Harper*, 2 Mo. App. 1, 10-11 (1876).

¹⁰⁸ See Arthur L. Goodhart, "Costs," 38 *Yale Law Journal* 849 (1929).

¹⁰⁹ Quoted in Melvin Urofsky, *A Mind of One Piece: Brandeis and American Reform* (Scribner's 1971), 36.

fees ate away at its purposes for cost-shifting. Those who lost to the highest compensated corporate counsel were seen as unfortunate rather than unjust, and the increasing access of the poor to court through contingency fees mitigated against imposing the risk of loss on the already destitute.

By eliminating the restrictions placed on lawyers' fees, the code made possible both David Dudley Field's adventures in corporate lawyering as well as Louis Brandeis's public service for no fee at all. Of course, we should not mistake the one as equally weighted as the other—a historical wash. Robert W. Gordon has frequently argued that the lionization of figures like Brandeis is one of the American legal profession's central problems. By celebrating the occasional public-minded attorney, lawyers and legal historians implicitly normalize the far higher percentage of the profession that confined itself to private gain.¹¹⁰ By acknowledging that the Field Code made both paths possible, we should not lose sight of which path its own author ultimately chose.

That choice touched off one of the most significant battles among American lawyers over their professional duties and ethics. Field continually shifted ground on who could judge his professional character, first denying that power to the public press, then to individual colleagues, then to the organized profession. Field defeated the move to censure him and denied that his compensation debased his professionalism. Ultimately he succeeded in keeping his practices private, enclosed within a bar association unwilling to publicize its proceedings against him.

Field's argument that the procedural judgment of the courts set the sufficient boundaries on professional ethics became something of a de facto rule. Field's partner Thomas Shearman invoked it shortly after proceedings wound down in the bar association. When a new slate of directors finally ousted Gould from the presidency of the Erie Railroad, the new head counsel Samuel L. M. Barlow

¹¹⁰ See, for instance, Robert W. Gordon, "Law and Lawyers in the Age of Enterprise," in Gerald Geison, ed., *Professions and Professional Ideology in America* (North Carolina 1983), 70–110; Robert W. Gordon, "The Ideal and the Actual in the Law: Fantasies and Practices of New York City Lawyers, 1880–1910," in Gerard Gawalt, ed., *The New High Priests: Lawyers in Post-Civil War America* (Greenwood 1984), 51–74; Robert W. Gordon, "The Independence of Lawyers," 68 *Boston University Law Review* 1 (1988); Robert W. Gordon, "The Lawyer Citizen: A Myth with Some Basis in Reality," 50 *William & Mary Law Review* 1169 (2009).

(no relation to Francis) dismissed Shearman. Sherman's "only subsisting obligation" was that he "not act against the Company, in matters in which [he had] special knowledge."¹¹¹ As Gould's personal counsel, Shearman protested that he would go on representing Gould against his former client the Erie Railroad. He assured Barlow that he had "consulted some professional friends, entirely disinterested, all of whom agree with my view of duties," but he also offered to submit the question to a presiding appellate or trial court judge "and to abide by the decision of either Judge."¹¹²

Barlow wrote back with a tone both bemused and irate by turns. "I, too, have consulted disinterested professional friends, who agree with me that your views, as to your rights and duties, . . . are subversive of all the peculiar obligations by which custom and law control counsel similarly situated" – that is, elite corporate counsel who knew company secrets. Barlow refused to submit to any judge "a hypothetical case, which might not, probably would not, contain the facts necessary for their proper determination." Instead, he appealed to Shearman's fee, reminding him that he and Field had collectively taken "out of the funds of the company over \$300,000, and apart from any strict rule of professional etiquette, this fact alone would in the judgment of the company be a sufficient reason why you should take no part" in further litigation.¹¹³

"The amount of fees received by me cannot possibly affect the questions under consideration," Shearman shot back, arguing that in all the time he spent on the railroad's affairs, he had never "received more than a fair and just compensation." Barlow having turned down the offer of submitting a "hypothetical" case, Shearman followed Field's rule and threatened to meet him in a real one.¹¹⁴ Shearman did indeed continue as Gould's chief counsel in subsequent litigation against Erie, a further episode in Gould's career as colorful as any other.¹¹⁵ Because Gould ultimately settled with

¹¹¹ Samuel L. M. Barlow, *Correspondence with Thomas G. Shearman* (1872), on file with the St. Louis Mercantile Library at the University of Missouri–St. Louis.

¹¹² *Correspondence with Thomas G. Shearman*, 3, 6–7.

¹¹³ *Correspondence with Thomas G. Shearman*, 6–8.

¹¹⁴ *Correspondence with Thomas G. Shearman*, 7, 10–11.

¹¹⁵ In short, Gould had embezzled some \$12 million from the Erie Railroad. To pay it back, he colluded with the new president of the railroad to announce their amicable settlement but then publicly broke off relations several times, each

the Erie, in-court appearances were few, and Barlow had no chance to lodge an objection to Shearman's representation. (Shearman tried to provoke Barlow into seeking an *ex parte* injunction, but Barlow seems not to have taken the bait.¹¹⁶) Now considered a textbook violation of professional canons, Shearman's representation against his former client was essentially sanctioned by silence—silence of the court procedurally, and silence of the bar professionally. Deregulation in its many forms had become an American rule.

time buying Erie stock as it dropped and selling it as it rose. See Trumbull White, *The Wizard of Wall Street and His Wealth, or The Deeds of Jay Gould* (1892), 79–87; *Proceedings of the Special Committee on Railroads (Hepburn Commission)*, 5 vols. (1879). For evidence of Shearman's continuing representation of Gould, see *New York Tribune*, November 25, 1872; *New York Herald*, December 6, 1872; December 20, 1872; December 21, 1872.

¹¹⁶ *Correspondence with Thomas G. Shearman*, 10–11.

Chapter 8

The Handmaid of Justice

Field's Code in the Federal Courts

In 1937 the dean of the Yale Law School, Charles E. Clark (1889–1963), offered tentative congratulations to the American Bar Association for having reformed American legal practice. At the time, Clark was forty-seven (see Figure 23)—five years older than Field had been when he started his code drafting, but far younger than Field when the latter had made his own self-congratulatory remarks to the bar. Clark's remarks were suitably understated, given that his code had not yet been formally enacted. But Clark was sanguine. He joined the ABA's open forum discussion on the newly proposed federal procedure code in order to counter recent suggestions that his code was merely "academic" and would not work "successfully or satisfactorily in actual practice."¹ For Clark, such criticism no doubt stung. He had practiced law for five years in New Haven, but he had spent most of his career as an academic proceduralist and legal historian before becoming dean at Yale in 1929.²

Clark insisted that his code was in line "with the whole trend of modern procedural reform"³—"modern" being Clark's highest term of approbation. Much of his procedural scholarship declared one or another device the leading edge of legal modernity. "No procedure can be considered really modern which does not strive for the union of law and equity actually obtaining in the more advanced code States," he pronounced in one article. In another, he defended his preference for

¹ Charles E. Clark, "The New Federal Rules of Civil Procedure: The Last Phase—Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure," 23 *ABA Journal* 976 (1937), 976.

² Peninah Petruck, ed., *Judge Charles Edward Clark* (Oceana 1991).

³ Clark, "The New Federal Rules of Civil Procedure," 976.

Figure 23.



Portrait of Charles Edward Clark, by Kaiden Kazanjian, taken around 1938, when Clark had just completed drafting the Federal Rules of Civil Procedure.

Legal Portrait Collection, Harvard Law School Library, olvwork176465.

pleading in the alternative as “the most modern view.”⁴ As these brief allusions suggest, Clark defined legal modernity not through high theory but through reference to practical procedural devices. So too before the ABA Clark professed to offer the “underlying philosophy” that “basic provisions” of his code shared with “all pleading reform of modern times.” But instead of discussing metaphysical principles of law or legality, Clark offered as his “basic philosophy” a description of mundane procedural devices only a lawyer could love: “the generality of allegation and the free joinder of claims and parties.”⁵ For Clark, modernity inhered in processes, not philosophies.

Although at one point in his remarks Clark replaced the word “modernity” and described his code as falling in line with “the universal trend of Anglo-Saxon procedural reform,” the “Anglo-Saxon” in Clark’s usage had lost the civilizational weight it bore for earlier codifiers. “Anglo-Saxon” was a historically accurate descriptor, Clark believed, because he was talking about procedures in England and America since the seventeenth century, but history showed only a series of accidents, not destiny. “Common law pleading in all its various aspects and details is to be explained in the light of history which brought it about,” he wrote, contrasting that history against “some inherent or fundamental necessity.” Elsewhere he explained that legal history’s “most important function is still perhaps to demonstrate the falsity of so much of what passes in its name.”⁶ Where earlier codifiers had surmised that the common law or civilian origins of a code could mark a disastrous departure down the path of servility, Clark maintained that modernity had no provenance. It instead inhered in the pragmatic experience of what worked and did not work in litigation over time. And for Clark, “the first modern system of practice,” the first instance of Anglo-Saxon practice really working efficiently, “was the Louisiana Code of Civil Procedure” as well as “the New York Code of 1848, the

⁴ Charles E. Clark, “Procedural Reform and the Supreme Court,” 8 *American Mercury* 445 (Aug. 1926), 447; Charles E. Clark, “The Code Cause of Action,” 33 *Yale Law Journal* 817 (1924), 826.

⁵ Clark, “The New Federal Rules of Civil Procedure,” 976.

⁶ Clark, “The New Federal Rules of Civil Procedure,” 977; Charles E. Clark, “The Challenge of a New Federal Civil Procedure,” 20 *Cornell Law Quarterly* 443 (1935), 444.

work of David Dudley Field and his associates, and the model of the code reform of pleading which has been adopted in a majority of American states.”⁷

Clark’s code, titled the Federal Rules of Civil Procedure, was enacted the following year, and like Field’s code, the Federal Rules enjoyed remarkable influence beyond their original jurisdiction. Many states adopted the Federal Rules system either by emulation or by straightforward copying.⁸ With revisions and, of course, interpretive twists and turns, Clark’s Federal Rules remain the governing regulations of federal suits in the United States today, the basis of all civil procedure taught in law schools, and the primary mode of litigation in most state courts. For that reason, the Federal Rules, and especially Clark’s philosophy of procedure have attracted significant scholarly attention. Among histories of procedure, Stephen Subrin’s leading account disputes Clark’s claim to have built his work upon the “modern” reforms he claimed to perceive in nineteenth-century state code practice. Instead, Subrin, argues that Clark “misled [students] about the relationship of the Field and the Federal Rules” and wrongly emphasized their continuity because “calling on the past” was a way of “reducing opposition” in the political present.⁹ “Although the Field Code of 1848 merged law and equity in addition to providing more general rules than the common law,” Subrin concludes, “it was not, contrary to its usual portrayal, a parent to the Federal Rules.”¹⁰

While Subrin is right that “Field’s nineteenth-century world and his codes are vastly different from the twentieth-century world and the Federal Rules of Charles Clark and the legal realists,” the word “vastly” is an overstatement. Much of the misdiagnosis of Subrin and other historians stems from an incomplete understanding of the complex and even contradictory aims of Field and the early codifiers explained in earlier chapters. This chapter shows how closely Clark shared those complex

⁷ Charles E. Clark, “The Handmaid of Justice,” 23 *Washington University Law Quarterly* 297 (1938), 305.

⁸ See John B. Oakley, “A Fresh Look at the Federal Rules in State Courts,” 3 *Nevada Law Journal* 354 (2003).

⁹ Stephen N. Subrin, “David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision,” 6 *Law & History Review* 311 (1988), 312–13.

¹⁰ Stephen N. Subrin, “How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective,” 135 *University of Pennsylvania Law Review* 909 (1987), 932.

and contradictory aims. In a centennial tribute to Field, Clark claimed his own code “represent[ed] a present-day interpretation and execution of what are at bottom the Field principles.”¹¹ This chapter takes that claim seriously, in part showing how the Field Code’s latent tensions between facts and law, law and equity, professionals and laymen, and above all, substance and procedure, were carried forward into Clark’s American legal modernity.

Though concluding with Clark and the Federal Rules, this chapter begins at the birth of the Republic. “Process” and the correlative term “procedure” had a remarkably early history in federal practice as the first Congress called on federal courts to look to state law both for the “rules” of their decisions and for the “processes” of vindicating those rules. That meant that, with some complications, the Field Code enjoyed a reception in the federal courts almost as soon as a few states enacted it. But the politics of defining “procedure” caused no less controversy at the federal level than it did among the states. This chapter surveys the key controversies that hindered Field’s goal of a national procedure code until well after his death and even the death of the codification theory he had propounded. The chapter then concludes with an examination of the Federal Rules and their Fieldian influences—in substance, as well as in the rushed and constitutionally dubious manner of their enactment.

The Process Acts: Federal Procedure in the Early Republic

A few days after creating the federal court system in the Judiciary Act of 1789, the First Congress passed what was intended to be a temporary measure “to regulate Processes in the Courts of the United States.” “Processes” went undefined, but the statute listed what appeared to be several synonyms of the term. It included “[a]ll writs and processes issuing from” federal courts, thus meaning in a basic sense, all the written paperwork and decrees of a court. Section 2 provided that

¹¹ Charles E. Clark, “Code Pleading and Practice Today,” in Allison Reppy, ed., *David Dudley Field: Centenary Essays* (NYU 1949), 64.

unless another federal statute controlled (the Judiciary Act, for instance, required equitable examinations to be orally taken in open court, as at common law), “the modes of process and rates of fees” in suits at common law should be the same as those used by the supreme court of the state in which the federal court sat. By contrast, “the forms and modes of proceedings” in equity and admiralty “shall be according to the civil law.” In this sense, process was a “mode” of litigating that included established forms.¹²

In 1793, Congress showed again what all could be included in “process” by empowering each federal court to make its own rules

directing the returning of writs and processes, the filing of declarations and other pleadings, the taking of rules, the entering and making up judgments of default, and . . . to regulate the practice of the said courts respectively, as shall be fit and necessary for the advancement of justice, and especially to that end to prevent delays in proceedings.

The “taking of rules” was a reference to the 34th section of the Judiciary Act, later known as the Rules Decision Act. It required that “the laws of the several states” were to be “regarded as the rules of decision in trials at common law in the courts of the United States in cases where they apply.” In sum, the nascent federal courts did not distinguish between substance and procedure, but between rules and process, including the processes for discerning the rules. And more fundamental than either of these distinctions was the entrenched distinction between law and equity, because only in common law cases did state rules or state practices matter.¹³ Like New York, the federal system distinguished between common law and equitable jurisprudence, but unlike New York’s early practice, federal law and equity were institutionally merged – the same judge presided over both systems but maintained separate trial calendars for each “side” of the court.

¹² Process Act of 1789, 1 Stat. 93–94 (1789). For the Judiciary Act’s regulation of equitable examinations, see 1 Stat. 73, 88–89.

¹³ 1 Stat. 335 (1793). The Rules of Decision Act was originally enacted at 1 Stat. 92 (1789) and is now codified at 28 U.S.C. § 1652 (1948).

The Process Act was supposed to be a temporary measure until Congress could fill out the details of federal practice, but Congress did not take up the task for another century and a half. Instead, legislators were content to define federal common law process by reference to local state practice. Three years later, in the Process Act of 1792, Congress reaffirmed the principle, but with an important qualifier that each federal court could make its own alterations to local practice, and that the Supreme Court could make alterations binding on all federal courts – in common law cases. Tautologically, the Act required that the forms of proceeding used “in [courts] of equity and in those of admiralty” would be the “rules and usages which belong to courts of equity and to courts of admiralty respectively, as contradistinguished from courts of common law.” District courts were not bound to apply local rules of equitable practice as they were in common law cases, but here too they were free to make their own rules, subject to the countermand of the Supreme Court.¹⁴

It was not until 1822 that the Supreme Court promulgated Rules of Practice in Courts of Equity. In no sense could that twelve-page document have been considered a code, especially coming a year before William Sampson had popularized the codification ideal. The thirty-three rules followed no logical sequence, and indeed, most of the practices of equity were assumed rather than stated in the rules. Rule V permitted a plaintiff to amend “his bill before the defendant or his attorney or solicitor hath taken out a copy thereof, or in a small matter afterwards, without paying costs; but if he amend in a material point after such copy obtained, he shall pay the defendant all costs occasioned thereby.” The distinction between attorneys and solicitors, the process for taking out a copy, the payment of costs, and the boundary between “small matters” and “material points” was nowhere defined. Instead of any systematic elaboration of process, the equity rules were ad hoc policies

¹⁴ Process Act of 1792, 1 Stat. 275–279 (1792). For a detailed legislative history of the Process Acts, see Julius Goebel, *History of the Supreme Court of the United States: Antecedents and Beginnings to 1801* (1971), 509–51. But see Peter C. Hoffer et al., *The Federal Courts: An Essential History* (2016), 64–65 (noting the tendency of early federal courts to follow state procedures in equity and criminal law).

directed to seasoned practitioners and meant to clear up disputes that had arisen over the finer points of federal equity.¹⁵

On the common law side, neither the Supreme Court nor the inferior courts made serious efforts to promulgate rules before the appearance of state procedure codes in the late 1840s. That was not to say that federal practice perfectly converged with state practice in common law cases. Rather, there were two main sources of divergence. First—and most bizarrely—the original Process Act required federal conformity with state common law practices “as are now used or allowed.” The revised Process Act clarified that “now” meant not the literal but the literary present of September 1789.¹⁶ Even as states amended their court processes through legislation or court decree, the federal courts adhered to Founding Era practices. Second, court “rules” could be something other than a quasi-legislative promulgation of enumerated regulations. A general pronouncement in a litigated case that, henceforth, a court would follow a certain practice became a “rule” for purposes of the Process Act. Indeed, because the Process Acts applied by terms only to the original thirteen states, district courts in newly admitted states usually received state practices by rule in their first common law cases. But like the Process Acts, these adoptions of state practices usually remained statically defined by practice on the date of admission or reception, not as practices would evolve.¹⁷

That disparity led to one of the great crises of federal institutions under the Marshall Court. The dispute over the Process Acts in the case of *Wayman v. Southard* has been overshadowed by the fight over the First National Bank, decided six years earlier in *McCulloch v. Maryland*. But the two controversies had a similar impetus and progress, and they were decided by the same logic of Chief Justice John Marshall.¹⁸

¹⁵ Rules of Practice for the Courts of Equity of the United States (1822). A more accessible version is available at 7 Wheat. v (1822).

¹⁶ Process Act of 1792, 1 Stat. 275–79 (1792).

¹⁷ See Charles Warren, “Federal Process and State Legislation,” pts. I & II, 16 *Virginia Law Review* 421, 546 (1930): 435–37. Even a federal court’s ignorance of a state practice could become a “rule” that the federal court adopted. See, for instance, *Palmer v. Allen*, 7 Cranch 556 (1813).

¹⁸ *Wayman v. Southard*, 23 U.S. 11 (1825); *McCulloch v. Maryland*, 17 U.S. 316 (1819).

Like the battle over the National Bank, *Wayman* arose out of resentment against the federal government's ability to bully wildcat banks and control monetary values by regulating the flow of notes backed by specie. Kentucky, the westernmost state at the time and the one hit hardest by the Panic of 1819, enacted numerous measures for the relief of debtors, becoming the first state to abolish imprisonment for debt (preceding New York by a decade). It reformed its civil execution statutes to forbid the foreclosure and sale of property at less than three-fourths of appraised value, effectively allowing bankrupt farmers to keep their mortgaged homes during bust cycles. Faced with unimprisonable debtors and un-forecloseable land, creditors were left with two options under Kentucky law: they could either accept the value of their loans in the (near worthless) currency of state banks and collect immediately, or they could accept a bond to collect on more valuable security (whether land or specie) after a two-year stay period.¹⁹

The Kentucky system would have afforded significant protection to indebted farmers if it had not been for the federal courts and federal remedies. The federal district court in Kentucky recognized none of these creative state inventions, and when a federal marshal proceeded to enforce Kentucky's currency-or-stay provision, a motion to quash was swiftly certified to the Supreme Court.

The opinion in *Wayman* bears Marshall's signature style of enthusiastic pedantry. The first question to confront was whether the case was covered by the Process Acts. Was enforcement of a judgment part of process? What, exactly, was "process" to begin with? The striking feature of Marshall's answer is that the term appeared novel to him. Congress' use of "process" was no term of art. There being no practical definition to rely on, Marshall paid close attention to the wording.²⁰ "Processes" used synonymously with "writs" in Section 1 implied that process meant papers. But the singular "process" in Section 2 therefore meant something different. "The change of the word

¹⁹ For the background to *Wayman*, see Warren, "Federal Process and State Legislation," 437-46.

²⁰ Goebel notes that the First Congress would have had available to it Giles Jacob's definition of *process* as *proceedings in actions from the beginning to the end*, an expansive sweep that Marshall's decision would ultimately agree with, and one that was not necessarily distinguished from *substance* or *right*. Goebel, *Antecedents and Beginnings*, 514 (quoting Giles Jacob, *Law-Dictionary*, 7th ed., 1756).

'processes' for 'process' seems to indicate that the word was used in its more extensive sense, as denoting progressive action." Based on this, Marshall decided "process" was an expansive term meaning "the progress of a suit from its commencement to its close," and therefore included enforcement of the judgment, the final termination of a suit's progress.²¹

Alternatively, Marshall reasoned that even if process meant only the paper writs, in this case, it was the paper writs that were at issue. Execution consisted "of the language of the writ, which specifies precisely what the officer is to do. His duty is prescribed in the writ, and he has only to obey its mandate." So counsel's argument that process was confined to form was thus futile, because when it came to writs of execution, "form in this particular, . . . has much of substance in it."²²

The next question, then, was whether Congress could legitimately delegate its power to make rules of process to the federal courts. If that delegation was unconstitutional, the lawyers argued, federal process had no true source of law, and only state law remained to fill the void. Marshall's answer here was cautious. The separation of powers in the federal government meant that Congress could not "delegate to the courts or to any other tribunals powers which are strictly and exclusively legislative." But certain actions blurred the lines between legislation and ministerial administration, and in that twilight zone "Congress may certainly delegate to others powers which the legislature may rightfully exercise itself." Marshall did not feel he had to elaborate these different categories because the lawyers mercifully made an admission that gave him an opening through the thicket. Counsel on both sides agreed that Congress' permission for courts to regulate their own practice was constitutional, since Anglo-American courts had always regulated their own practices to some extent. Since practice included the form of writs, and the form of writs included directions to officers on how to execute judgments, Marshall concluded that civil execution safely fell within the zone of ministerial practices legitimately delegated to the courts by Congress.

²¹ Wayman, 23 U.S. at 27-28.

²² Wayman, 23 U.S. at 27.

Marshall then turned the delegation argument against Kentucky's lawyers. If, as they contended, Congress could not delegate federal court rulemaking to the federal courts, it certainly could not empower "the state assemblies [to] constitute a legislative body for the Union." As he had in *McCulloch*, Marshall relied on the Necessary and Proper Clause. "Congress, at the introduction of the present government, was placed in a peculiar situation. A judicial system was to be prepared, not for a consolidated people, but for distinct societies, already possessing distinct systems and accustomed to laws which, though originating in the same great principles, had been variously modified." Thus, "it was proper" for Congress, in erecting a system of federal courts, both to instruct the courts to adhere to practices as they prevailed in 1789 and to permit the courts to change ministerial procedures at their own discretion.

On the other hand, Marshall reasoned, the states had no constitutional basis to assume power over federal institutions. The reserved powers of the Tenth Amendment were irrelevant, for although the states retained power to regulate their own court procedures, "the state assemblies [could] not constitute a legislative body for the Union." Congress had delegated rulemaking power to the federal courts, not the states. If that delegation was unlawful, federal courts were confined to the barebones provisions of the Judiciary Act, not to the practices of the states. Otherwise, it would be "extravagant to maintain that the practice of the federal courts and the conduct of their officers can be indirectly regulated by the state legislatures by an act professing to regulate the proceedings of the state courts and the conduct of the officers who execute the process of those courts. It is a general rule that what cannot be done directly from defect of power cannot be done indirectly."²³ This was the logic of *McCulloch*: Like the power to tax, the power of process was the power to destroy. If federal courts had to follow state law in executing federal remedies, federal remedies would cease to exist if state

²³ *Wayman*, 23 U.S. at 47-48, 49-50.

regulations of state court practices abrogated their enforcement. Whatever else process meant, it had to mean federal power over federal remedies.

Despite the unanimous Court ruling, Kentucky was not done with the fight. At the time, its brightest stars were future leaders of both national parties, Secretary of State Henry Clay of the Whigs and Senator Richard Mentor Johnson of the Van Burenite Democrats. Together, Clay, Johnson, and the rest of the state's congressional delegation pushed a bill through Congress that reversed Marshall in *Wayman*. The revised Process Act of 1828 substantially repeated the former Process Acts, including the requirement to use 1789 practices if no federal court rule provided otherwise, but Section 3 required that "writs of execution and other final process issued on judgment and decrees" were to be the same "as are now used in the courts of [each] state," unless by rule the federal courts chose "to conform the same to any change which may be adopted by the legislatures of the respective states for the state courts." That is, when it came to executions, Congress essentially took Marshall up on the offer to delegate rulemaking power to the states. Henceforth, federal courts could choose either to use those execution practices states had in place in 1828 or ones later adopted by the states in which they sat. No other options were permitted.²⁴

The battle over the Process Acts showed that by the 1830s, "process" in the federal courts was as yet undefined in its particulars. The one thing that the Marshall court had made clear – that process included the enforcement of remedies – the states acting in Congress had worked to obscure. The compromise worked out in 1828 was an odd one. Very few states had adopted Kentucky's full range of debtor relief, so pegging enforcement practices to 1828 helped only the one state advocating change. (In 1828, almost all other states still allowed imprisonment for debt.) Federal courts were not bound to keep up with future changes, but neither were they free to roll back the procedural clock to the eighteenth century. Unlike later conceptions of procedure, the Marshall Court understood process as

²⁴ Process Act of 1828, 4 Stat. 281 (1828).

distinct from “rules” but not from “substance.” As in common law practice generally, process still inhered in writs, and writs remained the fundamental unit of judicial power. Without them, the rules of property became unrecognizable and unenforceable. In that sense, nothing was more quintessentially substantive than process. But although process was power, and power over property, it was not a power the federal Congress was eager to regulate in detail or the federal courts eager to reform. As later decisions would illustrate, this reluctance may have stemmed in part from the fact that after 1820, questions of power and property were also, and often, questions about slavery.

These Experimental Codes: Conformity and Disunion

Robert Cooper Grier (1794–1870), one of only two justices whose tenure on the Supreme Court spanned the Mexican War, the Civil War, and the onset of Reconstruction, remains a comparatively obscure figure. An old Pennsylvania Democrat when he joined the Court, Grier loathed both secession and abolition with equal furor. One key to his jurisprudence appeared in an early Court opinion, when he upheld the rights of New York creditors against an insolvent Marylander, trenchantly ruling that Maryland could not “inflict her bankrupt laws on contracts and persons not within her limits.” Jurisdictional lines were paramount to Grier. It was those lines that both the secessionist and the abolitionist transgressed, each trying to inflict its view of the law on the other. By such reasoning, Grier became a pivotal Northernist vote for Chief Justice Roger Taney’s majority in *Dred Scott*. To Grier, the fugitive Scott owed his civil existence to Missouri, and no amount of line-crossing would change that jurisdictional fact.²⁵

Grier’s crusade for jurisdictional purity spurred him to oppose code procedure. It was not just that codes continued to spread where they did not belong, sprouting inferior civilian-style practice to repeal the “wisdom of ages” in former common law systems. The codes’ purported fusion of law and

²⁵ Frank Otto Gatell, “Robert C. Grier,” in Leon Friedman and Fred L. Israel, eds., *The Justices of the Supreme Court* (Chelsea House 1997), 2:435–445; *Cook v. Moffat*, 46 U.S. 295, 308 (1847). In this regard, Grier was at odds with both sides of the constitutional conflict James Oakes describes in *Freedom National: The Destruction of Slavery in the United States, 1861–1865* (Oxford 2014).

equity and the abolition of the forms of action were their greatest jurisdictional sins. In an 1857 opinion, Grier wrote for the Court that “this attempt to abolish all species” of pleading “and establish a single genus” known as the cause of action “is found to be beyond the power of legislative omnipotence. They cannot compel the human mind not to distinguish between things that differ. The distinction between the different forms of actions for different wrongs, requiring different remedies, lies in the nature of things.” The federal system had to tolerate a civilian outlier like Louisiana, but formerly common law states “cannot adopt these novel inventions, which propose to amalgamate law and equity by enacting a hybrid system of pleadings unsuited to the administration of either.”²⁶ To Grier, as to a host of common law lawyers in his time, common law practice was fundamentally about drawing jurisdictional lines and holding to them. The lines between law and equity, trover and assumpsit, were what constrained judicial discretion over powerful remedies in a Republic that refused ultimate power to any one branch. Grier’s review cited two cases as perfect illustrations of the principle.

Grier’s model cases were the first two opinions the Supreme Court issued dealing with state procedure codes, one opinion written by Grier and the other by Taney. They were both peculiar in that they did not arise in an actual code state. Both came up on appeal from Texas and were decided in 1850—meaning they were both originally litigated before the Field Code was even drafted. Formerly a civilian jurisdiction like Louisiana, Texas had almost immediately abandoned civilian codes for American common law after annexation. The one exception was in pleading and practice. While the Texas bar did not adhere to a procedure code, it also did not import a distinction between law and equity or a requirement to plead to single issue under the common law formulary system. The effect (and the timing of development) was more or less close to that achieved in the Field Code, albeit without a systematic set of written rules. Pleaders stated their cases briefly and factually, and

²⁶ *McFaul v. Ramsey*, 61 U.S. 523, 525 (1857).

courts enjoyed broad discretion to fashion the remedy to the harm identified, drawing on a jurisprudence that derived substantive rules and rights from an American case law that was otherwise obsessed with pleading requirements.²⁷

The other peculiar feature is that both cases involved transactions over slavery. *Randon v. Toby* was a routine debt collection case on a promissory note issued to purchase slaves. The defendant argued that the debt was void because the slaves it purchased had been imported from Africa in 1835, in violation of the laws banning the Atlantic slave trade. To Grier, as to any contract lawyer at the time, the defense was obviously meritless. Toby was a downstream good faith purchaser of the slaves. Even if the original contracts importing the slaves were void, Toby's own title was protected and he therefore received valuable consideration for his debt.²⁸

What concerned Grier was that under common law pleading, the case would have ended quickly and merited no attention. The plaintiff would have pleaded assumpsit for the debt, the defendant would have answered non assumpsit and quickly lost at trial. "But unfortunately," Grier reasoned anachronistically, "the district court has adopted [in 1847!] the system of pleading and code of practice of the state courts, and the record before us exhibits a most astonishing congeries of petitions and answers, amendments, demurrers, and exceptions—a wrangle of writing extending over more than twenty pages." The problem with those twenty pages was that "the true merits of the case are overwhelmed and concealed under a mass of worthless pleadings and exceptions presenting some fifty points, the most of which are wholly irrelevant and serve only to perplex the court and impede the due administration of justice." What was so perplexing about a case that Grier resolved easily on the record? The twenty pages of pleadings focused on the illegality of the slaves' importation and

²⁷ See William Dorsaneo, "The History of Texas Civil Procedure," 65 *Baylor Law Review* 713 (2013).

²⁸ *Randon v. Toby*, 52 U.S. 493 (1850). Contract law long protected the buyer who, not knowing of any fraud or taint of title for the goods he is purchasing, pays ("for value") in "good faith," expecting to receive perfect title to the goods. As a matter of practice, it became a rule of pleading that a party could not plead fraud or defect of title if the other party was a bona fide purchaser. See Uniform Commercial Code § 2-403; John Norton Pomeroy, *A Treatise on Equity Jurisprudence* (1883), 2:193-243.

subsequent sale. This focus was irrelevant to Grier, because “the buying and selling of negroes, in a state where slavery is tolerated and where color is prima facie evidence that such is the status of the person, cannot be said to be an illegal contract, and void on that account.” But without the disciplined constraints of common law pleading, the defendant could keep arguing that it was.²⁹

In *Bennett v. Butterworth*, a Texas slaveholder actually employed the common law forms of action but put them to the wrong use. Bennett pleaded in trover for the loss of four slaves. All the classic elements were in the petition: he casually lost the slaves – as if they were inanimate objects dropped from his pocket – the defendant found them but refused to return them, and so forth. The problem was that the jury evaluated the worth of the slaves and calculated damages for the plaintiff at \$1,200 – a remedy that should have come in part through an equitable action for account after the jury limited itself to deciding which party had the superior claim to title. Taney ruled that the district court’s adoption of state practice could not entirely “govern the proceedings in the courts of the United States . . . as authorizing legal and equitable claims to be blended together in one suit.” The Court had issued rules for equity, and they did not include jury opinions on the value of slaves, while “if anything is settled in proceedings at law where a jury is empaneled to try the facts, it is that the verdict must find the matter in issue between the parties” – in this case title, not value.³⁰

The significance of *Randon* and *Bennett* was that in the first two cases of reformed procedure to reach the Supreme Court, juries had been asked to weigh the equities of slavery, from broad equitable questions about slavery’s very legality down to the particular remedies that sustained the system. In both, the future architects of *Dred Scott* held firm to the line separating law from equity. District courts might modify common law practices, but they could not modify them in such a way that juries were given equitable discretion. On his own, Grier could do nothing to keep the district courts from blending or abolishing the common law forms of action, but he could remind them of the

²⁹ *Randon*, 52 U.S. at 517, 520.

³⁰ *Bennett v. Butterworth*, 52 U.S. 669, 675 (1850).

stakes: by lessening the strictures of pleading, the Texas court had invited the parties to argue broadly about the very underpinnings of their social system. Process, that is, still had much of substance to it.

Grier was powerless over district court procedures because the Process Acts vested rulemaking authority at the district level, subject only to rules promulgated legislatively by the Supreme Court. The Court had re-issued slightly expanded Rules of Equity in 1842 along with its first set of Admiralty Rules, but although Grier got the other justices to sign on to his trenchant opinions attacking code procedure, the Court never promulgated a set of common law practice rules contravening the state codes.³¹

Grier continued to issue opinions grouching about code procedure, from non-slave states and even from actual code states. In an 1857 case out of Iowa, where the district court had implemented the procedural articles of the Iowa code, Grier noted — because he could do little else — that “this Court has endeavored to impress the minds of the judges of the district and circuit courts of the United States with the impropriety of permitting these experimental codes of pleading and practice to be inflicted upon them.” Grier spent much of the opinion explaining how common law pleading “matured by the wisdom of ages” had lately been “ruthlessly abolished in many of our states, who have rashly substituted in its place the suggestions of sciolists, who invent new codes and systems of pleading to order.” This discursus had nothing to do with the merits of the appeal, which Grier dismissed as frivolous in a single line at the end. So also, in a case from the stalwartly unreformed state of Illinois, Grier took occasion to warn the court not to let “the whims of sciolists and inventors . . . to allure the court to follow their example.”³²

Without Supreme Court rules to bind them in common law cases, each district court exercised its own discretion under the Practice Acts. Many sided with Justice Grier, more from a shared outlook

³¹ *Rules of Practice for the Courts of Equity of the United States* (1842); see also *Rules of Practice in Admiralty of the Courts of the United States and of the District Court of the United States for the Eastern District of Pennsylvania* (1847).

³² *Green v. Custard*, 64 U.S. 484 (1859); *Farni v. Tesson*, 66 U.S. 309 (1861).

on legal practice than from the force of his reasoning. But as district courts published their rules in the late 1850s and again after the Civil War, examples of every imaginable arrangement could be found. In antebellum Florida, a common law jurisdiction, the Northern District Court by rule succinctly adopted “the modes of proceeding and rules of practice which are now in use, and prevail in the State courts of Florida in common law cases.” The District of Iowa, a code state, enumerated in one long rule all the sections of the state practice code in force in the federal courts, essentially adopting the Field Code. The Northern District of Ohio, another code state, refused to implement that state’s code and instead promulgated fifty-two rules establishing a modified common law practice that retained forms for replevin and ejectment but otherwise required factual pleadings verified by oath. The Eastern District of Wisconsin likewise ignored the state’s code and advised pleaders to “consider the practice of the Courts of King’s Bench, and of Chancery, in England, as affording outlines for the practice of this court.” (The district courts of Michigan, a common law state, also adopted the “English rules prior to 1840” – this, in 1871).³³

No practitioner or scholar has yet attempted a complete collection, much less an analysis, of federal court rules before 1872, when the courts’ rulemaking authority under the Practice Acts was formally abolished. The first treatise on federal practice, Benjamin Vaughan Abbott’s *Treatise Upon the United States Courts*, appeared in 1869. Abbott’s second volume, covering pleading and practice, appeared in 1871, just in time to become obsolete. In it, Abbott instructed lawyers to use the “general” principles of common law pleading, being sure to check if those principles had been “modified by rule of court.”³⁴ As this brief sketch has illustrated, each district court was different, and each set of rules told a different story. Some adapted rules from local state practice, some from the general common law principles Abbott elaborated, and some from England limited to a definite point in that

³³ *Rules of Practice in the District Court of the United States for the Northern District of Florida* (1858), Rule 12; *Rules of Practice in the Federal Courts of Iowa* (1871), Rule 1; *Rules of Practice for the Northern District of Ohio* (1859); *Rules of Practice for the Eastern District of Wisconsin* (1871), Rule 3; *Rules for the Districts of Michigan in Cases at Law, In Equity, Admiralty, and Bankruptcy* (1871), Rule 14.

³⁴ Austin Abbott & Benjamin Vaughn Abbott, *A Treatise Upon the United States Courts* (1871), 2:52.

country's procedural history. In 1872, Congress unexpectedly brought federal court rulemaking to an end by passing the Conformity Act. As its name implied, the Act required that "the practice, pleadings, and forms and modes of proceeding" in federal court common law cases "shall conform, as near as may be," to their state counterparts. As in the Process Act of 1828, the enforcement of remedies was made to conform to state law on the date of the Act's passage. Court rulemaking was restricted only to updating enforcement procedures on a case by case basis as states changed their own rules.³⁵

Little is known about the impetus behind the Conformity Act. As one commentator noted, "there was singularly little debate on it in Congress—a short portion of one day being devoted to it in the Senate and also in the House. . . . No printed report was filed by either the Senate or House Judiciary Committee." Newspapers did little more than reprint the text of the bill as an item of interest to local lawyers. Commenting on its legislative history, the Supreme Court in 1875 suggested that the spread of code practice had made conformity an obvious necessity. A generation of lawyers had arisen who no longer knew the common law well enough to bring their cases in federal court without "studying two distinct systems of remedial law, and of practicing according to the wholly dissimilar requirements of both." The *American Law Review* mostly agreed. While a uniform federal code might be preferable, "it would be too much to expect the construction of a philosophic system from congress." The *Review* hardly approved of the codes state legislatures had come up with, but "they have at least the advantage of being known to the lawyers who practice in the particular district." As for a general common law practice at which many district courts aimed, the *Review* reasoned that "the common law has little to recommend it except its connection with substantive legal doctrines." That is, by 1872 enough lawyers had come to see the common law as a source of rules that could be extracted

³⁵ Conformity Act of 1872, 17 Stat. 196 (1872).

and divorced from the pleadings by which those rules had been made known. That extraction accomplished, the forms of the pleadings could be abandoned.³⁶

Although court rulemaking came to an end, little changed in practice under the Conformity Act. The trouble was its qualified language. Conforming “as near as may be” to state practice left a lot of room for judges to resist state-created procedures. The first Supreme Court case to construe the Act illustrates the point well. Illinois tightly regulated judicial interactions with the jury. Judges were not permitted to voice their opinion on the factual presentations of the lawyers. They could instruct the jury on the law to be applied, but those instructions had to be written, retained by the jury, and – the implications seems to be – preserved for appeal. But federal judges still retained their discretion to comment however they liked to the jury.³⁷

Nudd v. Burrows challenged this practice. The federal judge in a bankruptcy-related proceeding freely commented on his view of the evidence and refused to deliver his comments in writing, despite the mandates of the state Practice Act and the federal requirement for conformity. The Supreme Court affirmed the federal judge, dodging the clear aim of the Conformity Act by over-scrutinizing its every word. “The personal conduct and administration of the judge in the discharge of his separate functions is, in our judgment, neither practice, pleading, nor a form nor mode of proceeding within the meaning of those terms as found in the context,” the Court held. True enough, judicial comment was not pleading, and it was not “practice” in the sense of what lawyers did to prepare for litigation. “Mode” had no standard meaning as a term of art. But overall, it would be difficult to imagine something more procedural than the manner of a judge’s instruction to the jury.³⁸ By creating a category of “ministerial” conduct, the Court provided district courts an easy path to ignore state practices. State

³⁶ Warren, “Federal Process and State Legislation,” 562; *Nudd v. Burrows*, 91 U.S. 426, 441 (1875); Editor’s Note, 6 *American Law Review* 748 (1872).

³⁷ Renée Lettow Lerner has described in detail nineteenth-century movements among state bars to “silence” judicial commentary on the evidence as lawyers gained greater control over courtroom oratory. In this way, Illinois was no different from its neighbors, but it was different from federal practice. Renée Lettow Lerner, “The Transformation of the American Civil Trial: The Silent Judge,” 42 *William & Mary Law Review* 195 (2000).

³⁸ *Nudd*, 91 U.S. at 426.

rules, if treated as trivial, merely regulated “ministerial” conduct and escaped the conformity rule. But if state rules were serious and fundamental, then they were “substantive” and so also escaped the conformity rule.³⁹

In practice, that meant lawyers under the Conformity Act continued to practice as they had without it. Before the Act, federal practitioners had to, as Abbott advised, study the local court rules and read reports of local precedents to determine which practices applied in a given district court. Under the Act, lawyers continued to rely on case reports and treatises to inform them of which parts of a state’s code or common law the district court had adopted “as near as may be.” By 1889, one popular treatise organized itself as a code of enumerated sections. Many sections mimicked the Field Code or copied the language of its most widespread adaptations. Each section then went state by state to explain where state practices diverged, and then court by court to explain whether the federal district courts followed those divergences.⁴⁰ Probably the personalities of the judges often counted most. Then as now the federal bench remained comparatively small and compact relative to state judiciaries. For decades entire federal districts might be staffed by a single judge who was thereby the sole rulemaker of federal practice in his district. John F. Dillon told the American Bar Association that all that was needed to turn the district courts of Missouri from common law to code practice was his accession to the bench.⁴¹

The conformity principle had been in place for fifteen years when David Dudley Field, as president of the American Bar Association, called for a uniform federal procedure code. One might have expected, given Field’s boast that his system “has been followed in twenty-six states and

³⁹ By this time, the ruling in *Swift v. Tyson*, 41 U.S. 1 (1842), had long permitted a federal common law to supplant state law in most substantive areas, confining the Rules of Decision Act to state statutory enactments only.

⁴⁰ William G. Myer, *Federal Decisions Volume XXVI: Practice* (1889).

⁴¹ *Report of the Eleventh Annual Meeting of the American Bar Association* (1888), 76. Promising starts on federal district court histories include Harvey Bartle III, *Mortals with Tremendous Responsibilities: A History of the United States District Court for the Eastern District of Pennsylvania* (St. Joseph’s 2011); Mark Edward Lender, “*This Honorable Court*”: *The United States District Court for the District of New Jersey, 1789–2000* (Rutgers 2006); Wallace Hawkins, *The Case of John C. Watrous, United States Judge for Texas* (University Press of Dallas 1950).

territories of this Union,” that he favored conformity.⁴² On balance, the Conformity Act had brought code procedure to more federal courts than had been the case before 1872. But Field was galled by what he thought of as provincial holdouts, including his home state of New York. In Field’s telling, “As the code of procedure stood from 1848 to 1877, it was a simple well-known system, which everybody understood, and which nobody wished to change, except a few persons who got up a commission to revise the statutes” in New York.⁴³ Field considered the work of New York’s Throop Commission a repudiation of his code, and federal uniformity offered a handy tool to influence, and perhaps eventually override, local divergences from his ideal system. Disappointed with setbacks in the states, federal codification was a chance to start anew.

But starting anew meant re-opening the questions of codification’s purpose and methods that had come to an uneasy settlement across the code states. Field’s call for a uniform federal code would not be answered for another fifty years. By that time the corporatization of the American economy, the rise and fall of populism, and the ascendancy of technocratic progressivism had all left their mark on codification debates at the federal level. The resulting 1938 Federal Rules of Civil Procedure departed significantly from Field’s idea of a proper code. But the substance of the reforms – and their politically fraught enactment – strikingly recapitulated Field’s efforts of eighty years earlier.

Mere Machinery Retooled: The “Advanced American System”

Nothing came of Field’s lobbying efforts for procedural uniformity in the late 1880s. After his death in 1894, the drive for uniformity continued in the ABA but was carried on by a younger generation of accomplished administrator-lawyers who no longer shared Field’s Jacksonian vision of an artisan bar threatened by overwork and degrading fees. New technologies like the West digesting system and Frank Shepard’s citation indexing helped to guide practitioners through ever-multiplying

⁴² *Report of the Eleventh Annual Meeting of the American Bar Association* (1888), 69.

⁴³ *Report of the Ninth Annual Meeting of the American Bar Association* (1886), 66.

precedents,⁴⁴ while Field and Shearman had shown how lawyers could draw spectacular wealth from corporate clients in an unregulated fee system. As late as 1888, Field had insisted that, given the research burdens of legal practice, the chief virtue of codification would be the comprehension of all law on a given subject within a single volume.⁴⁵ But the loss of the Jacksonian language of law as artisan craftwork corresponded to a decreased interest in codification as a vehicle for comprehensiveness. Instead, for legal luminaries at the turn of the century such as Roscoe Pound (1870–1964), dean of Nebraska’s College of Law and future dean of Harvard Law, and Elihu Root (1845–1937), McKinley’s Secretary of War and Roosevelt’s Secretary of State, the lure of codification was its systemization of law at a higher level of abstraction, not its comprehension of the details.

Once again, New York assumed the curious position of leading the way on theory while lagging behind in practice. The Throop Code’s 4,000 sections satisfied hardly any practitioner, and new reform commissions devoted themselves to figuring out how to make the overdetailed and badly organized code workable in practice.⁴⁶ Reports from these commissioners were often cited and widely copied by ABA committees on uniform legislation, which were in turn reprinted in Congressional and Senate reports.⁴⁷ But the state did not pass a new Practice Act until 1920, decades after similar legislation had appeared in neighboring states like Connecticut.⁴⁸ In the federal debates, both sides pointed to New York as an example of a tedious system of practice combined with cutting-edge – yet unenacted – theories for reform.

⁴⁴ On the West digesting system, see Robert C. Berring, “Full-Text Databases and Legal Research: Backing into the Future,” 1 *High Tech Law Journal* 27 (1986): 29–33; on Shepard, see Patti Ogden, “Mastering the Lawless Science of Our Law: A Story of Legal Citation Indexes,” 85 *Law Library Journal* 1 (1993).

⁴⁵ David Dudley Field, *Legal Reform: An Address to the Graduating Class of the Law School of the University of Albany* (1855); Field, “The Study and Practice of the Law,” 14 *Democratic Review* 345 (1844): 345–47; *Report of the Eleventh Annual Meeting of the American Bar Association* (1888), 69 (“We mean by a code a condensed and classified collection of the general rules of law, settled or that should be settled, on a given subject or class of subjects.”).

⁴⁶ Note, 29 *Albany Law Journal* (1884), 142 (“Mr. Throop spoiled Mr. Field’s Code. Let us be careful to avoid another voluminous and obscuring glossary of this kind.”). Current Topics, 1 *Kansas Law Journal* (1884), 393.

⁴⁷ For a fantastically detailed legislative history of the Rules Enabling Act and its many false starts in Congress, including the influence of New York reform proposals, see Stephen B. Burbank, “The Rules Enabling Act of 1934,” 130 *University of Pennsylvania Law Review* 1015 (1982), 1035–36.

⁴⁸ *The Practice Act of the State of Connecticut* (1879); *The Civil Practice Manual of the State of New York* (1920).

For an ABA law reform committee in 1909, Pound drew up a guiding principle for turn-of-the-century codification: “Whenever in the future practice acts or codes of procedure are drawn up or revised, the statutes should deal only with the general features of procedure, . . . leaving details to be fixed by rules of court.”⁴⁹ In 1912, when the Supreme Court promulgated a new set of Equity Rules, Root issued a similar call: “The method [of code procedure] is wrong; the theory is wrong; and that the true remedy is to sweep from our statute books the whole mass of detailed provisions and substitute a simple Practice Act containing only the necessary, fundamental rules of procedure, leaving all the rest to the rules of Court.”⁵⁰

Pound, Root, and other codifiers generally credited the English Judicature Acts in the 1870s for their ideas on an ideal code system, but their proposals also sounded strikingly similar to the philosophy expressed in the great German civil code, the *Bürgerliches Gesetzbuch* (BGB), promulgated on the first day of the new century. In German legal theory, the point of a code was not to gather together all of the law currently in force – the early Anglo-American ideal shared by Field, William Sampson, and Jeremy Bentham – but to systematize the theory of law, to provide a framework and an outline, the details of which would only gradually be worked out later.⁵¹ General principles were the stuff of codification. Details – including detailed exceptions to the general principles – were better left to be enumerated elsewhere. In England’s Judicature Acts, the American codifiers thought they saw an early illustration of this approach. Shorter than any American code, the English acts had in a dozen pages outlined a procedural system and then consciously turned that system over to case law and ministerial regulation for further refinement.⁵²

⁴⁹ *Report of the Thirty-Fourth Annual Meeting of the American Bar Association* (1909), 595. For a biography of Pound that connects his common law reformism to the large-scale organization of litigation, see John Fabian Witt, *Patriots and Cosmopolitans: Hidden Histories of American Law* (Harvard 2007), 211–78.

⁵⁰ Elihu Root, “Reform of Procedure,” 34 *New York State Bar Association Report* 87 (1911), 89.

⁵¹ See Roger Berkowitz, *The Gift of Science: Leibniz and the Modern Legal Tradition* (Harvard 2010), 137–58.

⁵² The Supreme Court of Judicature Act, 36 & 37 Vict. c. 66 (1873); The Supreme Court of Judicature Act, 38 & 39 Vict. c. 77 (1875). See Roscoe Pound, “Some Principles of Procedural Reform,” 4 *Illinois Law Review* 388 (1910), 447; “The English Judicature Act and the American Codes,” 64 *Central Law Journal* 105 (1907), 105.

The codifiers preferred this route because in their view, the Field Code had failed precisely because it had aimed at comprehension of the law of practice. The New York jurist Learned Hand wrote in private correspondence that “I live in a State where the practice is as barbarous as could well be designed. . . . The truth is that judicial procedure is like history and that nation is happiest which has the least.” Throop’s attempt to consolidate the many amendments and interpretations of the original code only made matters worse by jumbling substantive categories and tediously describing every possible exceptional outcome to an otherwise clear rule. “The notion is at present thoroughly discredited I think in all responsible circles that procedure should be laid down in detail,” Hand concluded.⁵³

As these comments indicate, codifiers had paradoxically become disillusioned with legislation. Hand stated that “after repeated efforts,” it was clear “nothing can be done in the legislature.” Another lawyer wrote that “when the first codes of civil procedure were adopted they were comparatively short and simple.” But “the laymen have legislated for us until they have clothed every step in procedure, both civil and criminal, with a maze of technicality.” As one Seventh Circuit judge noted, the right legislation could take years of lobbying and still be derailed by horse trading politics: “Processes of legislation have become so complicated that changes, which from time to time should be made as experience may suggest, encounter much difficulty in securing legislative attention.”⁵⁴

Perhaps no reformer more adroitly combined an interest in codification with sharp criticism of legislators than Edson Sunderland (1874–1959), a law professor at Michigan who had studied in

⁵³ Judge Learned Hand, U.S. Court of Appeals for the Second Circuit, to U.S. Senator Thomas Walsh, May 25, 1926, Thomas J. Walsh Papers, Library of Congress Manuscript Division, Washington, D.C. See also *New York State Bar Association Report* 16 (1893), 51; J. Newton Fiero, “David Dudley Field and His Work,” 51 *Albany Law Journal* 39 (1895), 43.

⁵⁴ Hand to Walsh, May 25, 1926; C.L. Young, President of the North Dakota Bar Association, to U.S. Senator Thomas J. Walsh, May 21, 1926, Thomas J. Walsh papers; Judge Samuel Alschuler, U.S. Court of Appeals for the Seventh Circuit, to U.S. Senator Thomas J. Walsh, June 12, 1926, Thomas J. Walsh papers.

Berlin. Eventually one of the chief architects of the 1938 Federal Rules, in 1929 Sunderland began his advocacy for procedural codification by criticizing Field's naïve reliance on the legislature:

If David Dudley Field had been a more thorough student of the history of the common law, he would not have been so readily fascinated by the novel principle of legislative control of judicial procedure. It was a principle which seemed to offer unlimited possibilities of relief from burdens long endured. But those who hoped to bring the millennium through the magic of legislation, failed to appreciate the delicate adjustment of machinery necessary to an efficient administration of justice.⁵⁵

Sunderland's use of the machinery metaphor was remarkable but by no means unique. Thomas Shelton, the Senator in charge of crafting a congressional mandate for uniform legislation, claimed that his proposed bill would "leav[e] to the court the preparation of the detailed machinery but reserve[e to Congress] all fundamental and jurisdictional matters."⁵⁶ The Field commissioners had used the machinery image to safeguard control of procedural reform for the legislature. Now the architects of a federal code used the same imagery to wrest control *away* from a legislature. "Notwithstanding that bills dealing with legal procedure may be drawn by lawyer members, the political atmosphere of a legislative assembly is not friendly to the close and painstaking study of an intricate mechanism which is necessary for successful regulation," Sunderland explained. "Crude draftsmanship is characteristic of most of our legislation," but especially in procedure, crude drafting threatened "to disorganize the entire machinery of justice."⁵⁷

In Field's day, calling procedure "machinery" signaled its relative unimportance. As the "mere machinery" of the law, procedure was desacralized and left open to political experimentation on the legislative floor. Now "machinery" elevated procedure beyond the expertise of the legislature, and many codifiers cared little if removing legislative oversight sounded patently undemocratic. "The New York legislature believed that the courts could be entirely regulated by the clumsy and alien hand of the popular assembly, and yet suffer no loss either in technical skill or in capacity to respond

⁵⁵ Edson Sunderland, "The Regulation of Legal Procedure," 35 *West Virginia Law Quarterly* 301 (1929), 308.

⁵⁶ Hearings on ABA Bills Before the House Committee on the Judiciary, 63d Congress, 2d Session (1914), 22-23.

⁵⁷ Sunderland, "The Regulation of Legal Procedure," 305.

to the public demand for service," Sunderland sneered. Another wrote privately, "It has long seemed to me that a popular body such as a legislature or congress is not well adapted to formulate procedural rules for courts." But procedure-as-machinery lessened the antidemocratic sentiment, the lawyer supposed, because "procedural matters, involving, as they do, only the means for bringing controversies to issue and adjudication, and in no sense involving governmental policies or political principles, may well be left in the hands of the courts through which the law is applied."⁵⁸ Though the valence of machinery had reversed in seventy years, codifiers then and now agreed that only seasoned practitioners could control the regulation of legal practice. Supreme Court Justice Owen Roberts argued that "the whole genus of procedural things, from the start to the end of a litigation, ought to be in the hands of those who know best about it and who, from time to time, can make rules to meet situations as they arise in the actual practice of law."⁵⁹ Practitioners might now include academics such as Sunderland or certain well-informed judges, but when it came to reforming practice, the true expert remained the lawyer.

The culmination of the new codifiers' interests in Continental and English legal philosophy, combined with antidemocratic appeals to expertise and their abhorrence of legislators ended in a three-part system of codification. As spelled out in a 1915 New York commission report, procedure was best regulated through three devices. First, "substantive" law did not belong within the machinery of procedure, and should be left to the legislature to define and regulate. This included the jurisdiction of the courts as well as politically contentious rules such as executions of judgments. The New York report explained that the original Field Code had covered too many substantive topics in its quest for comprehension. But in the new rearrangement of the law, "so many provisions formerly

⁵⁸ Sunderland, "The Regulation of Legal Procedure," 310; Alschuler to Walsh, June 12, 1926.

⁵⁹ John Owen Roberts, "Trial Procedure – Past, Present and Future," 15 *ABA Journal* 667 (1929), 668.

in the code have been inserted in substantive statutes.” In the theorists’ view, all that would then remain was a depoliticized procedural machinery.⁶⁰

Second, procedure proper ought to be regulated in a relatively short set of simple, general principles or rules. Commentators frequently referred to this ideal device as a “practice act” to distinguish it from the congressional legislation that would otherwise regulate substantive law and make choices among policy alternatives. Whether such a practice act would ultimately require some sort of congressional sanction raised concerns among the constitutionally scrupulous, but most agreed that Congress was not the proper body to draft the act. Instead, codifiers hashed out their ideas in debates ranging from 1914 to 1934, largely settling on the proposal that the Supreme Court should once again be delegated rulemaking authority but should then in turn commission its own panel of experts to draft the practice code, perhaps with a final up-or-down vote of congressional approval.⁶¹

Finally, the details of practice – left open by the terse generalities of a practice act – were to be filled in either by case law or by local court rules. By this provision codifiers hoped to remedy the chief defect of legislation: rules could be quickly and easily repealed or replaced by the action of a single judge without the delays of politicking for new legislation and without the improvidence of a legislator’s disorganized drafting and tedious accumulation of unsystematic rules.⁶²

Reform commissions in New York and the ABA agreed that such a “new system of rules will preserve all the merit of the common law and of the code procedure. It will occupy a middle state between the two extremes.”⁶³ In 1912 the ABA created a committee to report on Uniform Judicial Procedure while New York simultaneously created a Board of Statutory Consolidation to report on the “simplification of the civil practice in New York.” William Hornblower, a critic of Field, sat on both the New York board and the ABA committee, where he joined Shelton and the future Supreme

⁶⁰ *Report of the Board of Statutory Consolidation on the Simplification of the Civil Practice in the Courts of New York* (1915), 1:176–177.

⁶¹ *Report of the Board of Statutory Consolidation*, 173–75.

⁶² *Report of the Board of Statutory Consolidation*, 165–67.

⁶³ H.R. Rep. No. 462, 63d Congress, 2d Session (1914), 14–15.

Court Justice Louis Brandeis.⁶⁴ Although the new codifiers praised the English model of the Judicature Acts, they believed it could use improvement. The New York board's report proposed that a proper synthesis be made between Field's scheme and that of the English. It declared that "there are three systems of procedure in common use from which to select." The "statutory idea" was Field's: the legislature regulated even the "details of practice by statute," leaving to court rules only the most ministerial of decisions. The "English idea" went too far the other way, leaving to the legislature only the organization of the courts while making all procedure the subject of court rule. In between these the board described what it saw as a new system arising from the ashes of Field's failed attempt at comprehensiveness: an "intermediate procedural system which might be called the advanced American system of a legislative act dealing with the important matters of procedure, jurisdictional and otherwise, leaving the details of practice to court rules."⁶⁵

In 1917, with the support of the ABA, Senator George Sutherland (another future Supreme Court Justice) introduced a bill to bring this "American system" to the federal courts, but in a way that preserved Congress's power over "fundamental" matters in theory but not necessarily in effect. The bill gave to the Supreme Court authority to prescribe "the forms for and the kind and character of the entire pleading, practice, and procedure to be used in all actions, motions and proceedings at law," apparently sweeping in jurisdiction, remedies, execution, and all the other sub-departments of procedure that over the years had raised troubling substantive implications.⁶⁶ The ABA's Committee on Uniformity explained that Sutherland's bill "divides all judicial procedure into two classes, viz.: (a) jurisdictional and fundamental matters . . . and (b) the rules of practice." The first class, it argued, "may be denominated the legal machine through which justice is to be administered, as distinguished

⁶⁴ For Hornblower's critique of Field, see William B. Hornblower, *Is Codification of the Law Expedient? An Address Delivered before the American Social Science Association* (1888). An early proponent of procedural codification, Brandeis claimed to have changed his views after joining the Court (see below).

⁶⁵ *Report of the Board of statutory Consolidation on the Simplification of the Civil Practice in the Courts of New York* (1912), 23–24, 29–30.

⁶⁶ S. 4551, 64th Congress, 1st Session (1916); see also Burbank, "The Rules Enabling Act of 1934," 1066 n.228.

from the actual operation thereof and lies exclusively with the legislative department.” But the Committee defended Sutherland’s delegation of authority to the Court, on the ground that “Congress can repeal it at its pleasure and . . . the proposed rules will not have the effect of a statute.”⁶⁷ Thus, argued the ABA, the legislature would continue to safeguard the mere machinery of the law as it had, in theory, since the early days of the Field Code.

Although turn-of-the-century codifiers rejected Field’s aims for codification and much of the artisan craft language that had supported it, the potent image of procedure as machinery continued to have a double-edged meaning for legislative authority. Procedure as the mere machinery of the law continued to be an object of legislative overhaul, yet it simultaneously pointed up the inadequacies of amateur legislators to rework its tools. But where the mere machinery argument had helped propel New York from reform proposal, to enabling legislation, to enacting a draft code in less than two years, the federal system took much longer. Neither Sutherland’s bill, nor a substantially revised act by William Howard Taft (which threw the fusion of law and equity into the mix⁶⁸) became law, although the ABA continued to promote these efforts with annual statements of support during the 1920s.⁶⁹ Instead, the enabling legislation for the American system was continually stymied by a remarkable populist senator from the West, the heart of Field Code country.

The One Hundred Who Stay at Home: The Political Shape of Uniformity

Thomas J. Walsh (1859–1933) came from a true Field Code state. Not only had Montana operated under Field’s procedure code for nearly half a century when Walsh became a U.S. Senator in 1913, the state had also enacted (via California) the oeuvre of Field’s draft codes—civil, criminal, and political—in 1895.⁷⁰ Walsh was well aware of Field’s aspiration to promulgate the Code Américain,

⁶⁷ “Report of the Committee on Uniform Judicial Procedure,” 6 *ABA Journal* 509 (1920), 517.

⁶⁸ S. 2061, 68th Congress, 1st Session (1924); see also 65 *Congressional Record* 1074 (1924); Burbank, “The Rules Enabling Act of 1934,” 1075–1076.

⁶⁹ See Burbank, “The Rules Enabling Act of 1934,” 1069–1098.

⁷⁰ See Andrew P. Morriss et al., “Debating the Field Civil Code 105 Years Late,” 61 *Montana Law Review* 371 (2000).

a vision with which he sympathized. “Field entertained the hope that his code, or something modeled upon it, would come into universal use,” Walsh noted in a speech on procedural reform. “I have never been able to understand why it has not. Having been bred under it, I am convinced it approaches as near simplicity and perfection as any mere human work may.”⁷¹ But much as Walsh would have liked to see the states conform to Field’s proposals, he adamantly opposed Field’s plan to have the ABA lobby Congress into legislating a national uniform code.

Walsh arrived in the Senate just in time to thwart the best hope the ABA had had in years for enabling a federal code project. In 1915, Senator Shelton proposed a draft code of 381 sections – nearly the length of the original Field Code – to the judiciary committee.⁷² After the House’s version of the bill died in a Senate committee, code proponents shifted their tactics, proposing enabling legislation for the Supreme Court or some future advisory commission to craft the detailed sections of a code.⁷³ Changing strategies hardly helped, for Walsh continued to stymie the enabling legislation after it was introduced in 1917 and for the entire duration of his twenty-year career in the Senate. Walsh tried to play down his reputation for singlehandedly blocking federal codification through Senate procedures. As he wrote to one disgruntled lobbyist, “I have never conducted anything like a filibuster against the bill before the committee or sought at any time to delay its consideration.” Walsh protested that he came to hearings prepared with arguments against the proposal but each time “found there was no quorum present.”⁷⁴

Whether there was more than happenstance to Walsh’s missing quorums, the senator certainly devoted significant time to rallying opposition to a federal code. Walsh sent surveys to every federal district court and U.S. attorney’s office, as well as to appellate judges and the justices of the Supreme

⁷¹ Thomas J. Walsh, *Reform of Federal Procedure: Address Delivered at the Meeting of the Tri-State Bar Association at Texarkana* (April 23, 1926), 8. Walsh frequently referred correspondents to his Texarkana address to understand his foundational views on procedural reform and federal codification.

⁷² See H.R. 15,578, 63d Congress, 2d Session (1914); 51 *Congressional Record* 10,615 (1914).

⁷³ S. 2061, 68th Congress, 1st Session (1924); see also 65 *Congressional Record* 1074 (1924) – what Burbank refers to as the “Sutherland Bill.” Burbank, “The Rules Enabling Act of 1934,” 1075–1076.

⁷⁴ U.S. Senator Thomas J. Walsh to Charles B. Letton, May 27, 1926, Thomas J. Walsh papers.

Court. He carefully updated his tabulations as responses, such as they were, rolled in. Twenty-seven federal judges opposed codification, along with six responding U.S. attorneys, to the nineteen judges and one U.S. attorney favoring it.⁷⁵ Walsh received lengthy but shallow letters supporting codification from Supreme Court Justices Sutherland and McReynolds, but the letters in opposition were not much help. Justice Brandeis wrote back cryptically “I am unreservedly against the measure. Ten years ago – before my experience on the Court – I thought otherwise,” with no other explanation. Justice Holmes, mingling his characteristic deference to legislatures with his cynicism that any progress would thereby result, opined only that “I see the objection much more clearly than I can see the possible, I hesitate to say probable, advantages,” without stating what the objection was.⁷⁶

Walsh’s correspondents rehearsed the arguments against codification that had resounded through the debates of the past century. Codification required more skill than American legislators possessed, while delegating legislative authority contravened core principles of the separation of powers; procedure remained an undefined category, so a procedure code invited mischievous expansions of the codifiers’ mandate; procedural simplicity was a chimera – the simplest code would contain a host of ambiguities and gradually accrete hundreds of volumes of case law interpretations little better than the system the code was replacing.⁷⁷ Walsh had some sympathy with the separation-of-powers argument – his own state had not relied on an extralegislative commission either time it adopted Field’s codes – but as a supporter of codification in principle, Walsh’s objections to a federal code turned almost entirely on concerns about federalism. Walsh wrote to the prominent New York

⁷⁵ Answers Received from United States Judges and District Attorneys to Letters Sent Asking Their Opinion on the Procedural Bill S. 477, undated memorandum, Thomas Walsh papers.

⁷⁶ Justice George Sutherland, U.S. Supreme Court, to U.S. Senator Thomas J. Walsh, May 29, 1926; Justice Oliver Wendell Holmes Jr., U.S. Supreme Court, to U.S. Senator Thomas J. Walsh, May 22, 1926; Justice Louis D. Brandeis, U.S. Supreme Court, to U.S. Senator Thomas J. Walsh, May 14, 1926; Justice James Clark McReynolds, U.S. Supreme Court, to U.S. Senator Thomas J. Walsh, June 9, 1926; Justice Harlan F. Stone, U.S. Supreme Court, to U.S. Senator Thomas J. Walsh, May 17, 1926; Justice Willis Van Devanter, U.S. Supreme Court, to U.S. Senator Thomas J. Walsh, June 22, 1926, Thomas J. Walsh papers.

⁷⁷ See William L. Walls to U.S. Senator Thomas J. Walsh, October 26, 1927; Chester I. Long, President of the American Bar Association, to U.S. Senator Thomas J. Walsh, June 5, 1926; Judge George C. Scott, U.S. District Court for the Northern District of Iowa, to U.S. Senator Thomas J. Walsh, June 5, 1926.

attorney (and yet another future Supreme Court justice) Robert H. Jackson that “I have been opposing it, not on the ground that the legislature rather than the courts ought to prescribe the practice and procedure, but upon the ground that it would be an imposition to attempt to foist upon the public a system that would require ninety-nine out of every hundred lawyers to learn two procedures of practice.”⁷⁸ Procedure, as Walsh wrote to another lawyer, was “a subject which is, and should remain one, for local experiment in prompt effectiveness.”⁷⁹ From this concern for localism Walsh derived a populist slogan for which he became known: “I am for the one hundred who stay at home as against the one who goes abroad.”⁸⁰

Walsh repeatedly emphasized that for the lawyer who stayed at home, local procedure was all he knew and needed to know. Walsh’s adversaries turned this reasoning into an easy attack on Walsh’s localist populism. One Nebraska lawyer wrote to him that “I understand your opposition is based upon the fact that you fear the lawyers of the country who practice in the federal courts are so lazy or unintelligent that they cannot learn the new rules without great effort.”⁸¹ Lawyers were always learning new law as the case required, how could Walsh protest learning new procedural law as a particular case might require—especially if the federal code happened to copy the Field Code and therefore align with many local practices anyway?

Walsh’s public statements and personal correspondence never rebutted the charge that he treated his constituents as too stupid to learn federal procedure. But in his personal papers Walsh preserved unpublished editorials from ardent localist common law lawyers fiercely criticizing the politics of federal uniformity. As an adroit politician, Walsh may have understood better the times and places for articulating such arguments. One of the lengthier pieces was an editorial rejected—

⁷⁸ U.S. Senator Thomas J. Walsh to Robert H. Jackson, April 19, 1927, Thomas J. Walsh papers.

⁷⁹ U.S. Senator Thomas J. Walsh to S.R. Childs, June 25, 1926, Thomas J. Walsh papers.

⁸⁰ Walsh, *Reform of Federal Procedure*, 2. For an overview arguing for the “modernity” of a populism that both criticized centralization and corporatism but also emulated them for an effective politics, see Charles Postel, *The Populist Vision* (Oxford 2007).

⁸¹ Charles B. Letton to U.S. Senator Thomas J. Walsh, May 22, 1926, Thomas Walsh papers.

multiple times – from the ABA’s journal of record, penned by Connor Hall, a West Virginian lawyer. Hall was frustrated because “the sponsors of the [federal uniformity] bill, . . . speak of uniformity as if it were some excellence in itself, something transcendental and absolute; or at least as an undoubted blessing, as health, happiness, and virtue.” But Hall saw the political interests that stood to gain from uniformity. “Uniformity would further augment the importance of large aggregations of men and depress the individual,” he wrote. “Its tendency is toward centralization and the further destruction of local character and influence.” The mechanism of corporate centralization was easy to see if one paused for a moment to question the virtue of federal uniformity. “For instance, a firm in a great city may represent a railroad, or an industrial company doing business in many states, if the procedure in the Federal Courts is uniform this city firm can, itself, conduct the main parts of the litigation and reduce the local lawyers substantially to filing clerks and advisors on jurors.”⁸² Although Walsh and Hall disagreed on the virtues of codes, here their populist politics aligned. Transnational corporations looked to hire elite corporate firms. At least for now, those firms had to rely on local counsel to effectively litigate beyond their corporate headquarters, but once create a transnational system of courts with perfectly uniform practices across both the periphery and the metropole, and those elite corporate lawyers would be at home everywhere.

Within this critique, the craft language of legal practice from the Jacksonian era made a real if feeble revival. “Uniformity,” Hall contended, “increases the influence and importance of the great city firm, having at its head, perhaps, some business man masquerading as a lawyer” and “would correspondingly reduce local practice, local ability and local pride and drive the practice of law further on the downward road from a profession to a business.”⁸³ Hall’s fellow West Virginian, the U.S. district judge George McClintic wrote similarly that federal uniformity was “for the purpose of

⁸² Connor Hall, “Uniform Law Procedure in Federal Courts,” unpublished editorial sent to the *ABA Journal*, dated October 15, 1926, Thomas J. Walsh papers. See also Stephen N. Subrin, “Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns,” 137 *University of Pennsylvania Law Review* 1999 (1989).

⁸³ Hall, “Uniform Law Procedure in Federal Courts.”

centralization, that is, to permit the lawyers living at distances, and the large, almost corporate law firms, to keep the business to themselves, and not be under any obligation, or necessity, of dealing with any local law firms in the various states.”⁸⁴ A hundred years after Jackson, the language of degraded craftsmen, perpetual journeymen unable to earn a competency, had transformed into the progressive era horror of professionals managing their own expertise being turned into so many cogs in the machine of centralized Business.

If, as the West Virginians contended, uniformity was not an unalloyed good and had a political shape to it, so too did that ever expansive field of law known as “procedure.” Walsh especially was sensitive to category creep of procedure over time. Would a federal code prescribe statutes of limitation (periods of time beyond which an admittedly valid claim could no longer be brought)? Statutes of limitation were often classified as “substantive” because they were quintessentially policy judgments by local legislatures weighing the importance of claims against the efficiencies of resolution. But they were also usually included in the codes of procedure, which made eminent sense to Walsh, since they “appertain to the remedy and neither confer nor abridge any substantive right.”⁸⁵ So also remedies and enforcement proceedings: these were procedural under Marshall’s logic in *Wayman*, but important policy decisions lurked beneath the surface. Would imprisonment be an allowable remedy in civil cases, Walsh asked? Narrowly or broadly? On a party’s affidavit, or on actual evidence of intent to defraud? What about jurors – were women eligible to serve? In articulating national rules to answer these questions, would the national government be speaking with the voice of a progressive Congress or a conservative Court?⁸⁶ With regard to all these areas of pluralism among

⁸⁴ Judge George W. McClintic, U.S. District Court for the Southern District of West Virginia, to U.S. Senator Thomas J. Walsh, May 20, 1926, Thomas J. Walsh papers.

⁸⁵ Walsh, *Reform of Federal Procedure*, 7-8.

⁸⁶ See Judge Walter C. Lindley, U.S. District Court for the Eastern District of Illinois, to U.S. Senator Thomas J. Walsh, May 26, 1926, Thomas J. Walsh papers.

the states, Judge McClintic wrote that “certainly the congress has no business trying to override the state and change its policy.”⁸⁷

In answering Walsh some proponents of federal codification embraced the political characterizations offered by the populists. The U.S. attorney for Wyoming wrote Walsh that “as a rule those appearing in important matters in the federal court make federal court practice more or less of a specialty and appear in more than one district.” The federal attorney did not want to “handicap” these elite lawyers any longer with the Conformity Act.⁸⁸ Similarly, a district judge in Alabama, Henry Clayton, who had twice introduced unsuccessful procedure bills as a member of Congress earlier in his career, readily adopted the image of legal practice becoming more like big business. Such was the way of the “complex condition of modern society in our highly commercial age.” “The real answer to the objection of the quiddity practitioner is that he can just as easily master the simple rules promulgated by the Supreme Court as he can keep up with the various rulings on pleadings in which the reported cases do most abound,” Clayton argued. Like most of his contemporaries, Clayton freely used the word “modern” without defining it, but his remarks made clear that the essence of modernity was systemization and efficiency. The slow growth of rulings under the Conformity Act would eventually lead to some kind of system—“a system by evolution” Clayton called it—but the path could hardly be considered efficient. A modern system was one worked out with the least amount of social cost by a single rationalizer or small committee who codified the results of long-running legal experiments that no longer needed to be repeated.⁸⁹

What the federal codifiers disputed was the political importance of procedure. “We know that the substantive law is the very essence of government, and that . . . the adjective law is in theory, and ought always to be in fact, the efficient aid of the substantive law,” Clayton stated. Without bothering

⁸⁷ McClintic to Walsh, May 20, 1926.

⁸⁸ Albert D. Walton, U.S. Attorney for the District of Wyoming, to U.S. Senator Thomas J. Walsh, May 22, 1926, Thomas Walsh papers.

⁸⁹ Henry D. Clayton, *Uniform Federal Procedure: Address Before the State Bar Association of Missouri* (1916), 2, 19.

to answer the difficult questions of where substantive rights ended and procedural remedies began, Clayton offered further analogies to trivialize procedure. Procedure was, first, merely the rules of the game, not the rules of law itself, and it was the duty of courts “at the lowest practicable cost, and, in our American spirit and in our American schoolboy vernacular, to every man ‘a fair show for his white alley,’ where the game is square and according to just rules.” Second, if the “substantive law” was the “very essence of government itself,” then “the means employed for its determination and operation” were “no more than its hand-maiden.”⁹⁰

Clayton’s description of procedure as the handmaiden to the substantive law was little remarked when he offered it in 1916, at the beginning of Walsh’s struggle to defeat federal codification. The image enjoyed a much more widespread reception when it was used by Charles Clark as the title of an article on the eve of the federal code’s successful adoption in 1938. For Clark, the crucial contrast to procedure as handmaid of the law was procedure as “mistress” of the law – by which Clark meant a female master, not a lover.⁹¹ Procedure was to be subject to the rules of justice and not the other way around. Clark argued that he was not offering a new vision for procedure, but was describing what the law had always been. “Lawyers and judges in the old days might appear to worship form and obey formal rules,” he observed. “Yet they had a penchant for getting things done, and so they used the rules, with the aid now and then of some convenient fiction or subterfuge, to accomplish results without unnecessary trouble.”⁹² In “modern” times, lawyers and judges had lost their capacity to use fictions and technicalities to arrive at just results.

The solution, to Clark, was not to codify the rules of procedure as Field had done but to essentially deregulate procedure by turning codes into flexible maxims designed *not* to be taken literally. “Regular procedure is necessary to secure equal treatment for all,” he seemed to concede, but

⁹⁰ Clayton, *Uniform Federal Procedure*, 3, 16.

⁹¹ Charles E. Clark, “The Handmaid of Justice,” 23 *Washington University Law Quarterly* 297 (1938), 297.

⁹² Clark, “The Handmaid of Justice,” 309.

then he followed with: “it is necessary, too, for the quite as important factor of the *appearance* of equal treatment for all.”⁹³ A code of principles rather than rules kept up a semblance of order and maintained the pretense that like cases were decided alike and all received equal justice, but “the Court ought not to be so far bound and tied by rules, which are after all only intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case.”⁹⁴ Unlike the rules of justice, the rules of procedure were meant, like a servant, to bend and, if needed for the good of the household, to break.

Because a procedure code could consist of flexible rules, Clark thought it could actually achieve what had so long eluded the codifiers: simplicity. Here Clark retold the story of Walsh’s opposition not in terms of populist distrust of elite centralizers but as a matter of “a complicated metropolitan practice” being “forced upon the lawyers of various remote states in place of the simple practice they knew.”⁹⁵ But by treating procedure as a handmaid, Clark believed the new code had achieved the simplicity Walsh was said to desire. No need to write out every exception and exception to the exceptions for every rule as they arose in the case law. Let the articulated principle stand, and let judges honor it in the breach as they saw fit.⁹⁶ By advocating a code of general, malleable principle, Clark significantly departed from Field’s ideal for codification, but in his description of procedural law subordinated to a substantive law of right, Clark and Field could hardly have been in closer agreement, as the actual policy choices of Clark’s code demonstrated.

Private History: The Aim of Clark’s Code

Thomas Walsh died in March 1933. Proving how effective Walsh had been at halting federal codification, the Senate approved the Rules Enabling Act with an uncontroversial one-page report less than a year after Walsh’s passing. The Act—almost exactly the same words that had been proposed

⁹³ Clark, “The Handmaid of Justice,” 299.

⁹⁴ Clark, “The Handmaid of Justice,” 297, 308.

⁹⁵ Clark, “The Handmaid of Justice,” 319.

⁹⁶ Clark, “The Handmaid of Justice,” 308, 320.

since 1924⁹⁷—enabled the Supreme Court to promulgate rules of procedure in both common law and equitable causes—or to combine the two jurisdictions if the Court wished. The Act further permitted the Court to rely on an advisory committee to recommend rules, and it swiftly became apparent that the committee would be the actual architects of procedural law, much as the state commissioners had been a century before.⁹⁸ The key figure on the committee would be the reporter, and Clark lobbied for the job about as strenuously as Field had sought his commission in 1847.⁹⁹

The legislative history of the Federal Rules bears a striking resemblance to the state code commissions of the Civil War era, a history that had been largely forgotten by 1938. Although the Rules Enabling Act retained a formal role for Congress to approve the rules, the federal commissioners swiftly exalted their own expert authority over the legislature. Clark argued that “attempts at reform by legislative acts run all the risks of indifference and political manipulation which inhere in popular bodies, coupled with the peculiar difficulties that the general populace is not interested in technical details of pleading.” Once again, procedure was regarded as a domain that the legislature could delegate, because of its superficiality, and should delegate to experts because of its technicality. And yet the boundaries between procedural and substantive law remained unclear. Indeed, as late 1937 the Federal Rules advisory committee (see Figure 24) had only a working definition of procedure that seemed to be pragmatically based only on what they could get away with under Congress’s purview. As one member candidly wrote to another: “The general policy I have acted on is that where a difficult question arose as to whether a matter was substance or procedure and I thought the proposed provision was a good one, I have voted to put it in, on the theory that if the Court adopted it, the Court would be likely to hold, if the question ever arises in litigation, that the matter is a procedural one.”¹⁰⁰

⁹⁷ See Burbank, “Rules Enabling Act of 1934,” 1097–98.

⁹⁸ Rules Enabling Act, 48 Stat. 1064 (June 19, 1934), codified at 28 U.S.C. § 2072.

⁹⁹ See Charles Hoffer et al., *The Federal Courts*, 300–01.

¹⁰⁰ Letter from William D. Mitchell to the Hon. George Wharton Pepper (December 19, 1937), quoted in Burbank, “Rules Enabling Act,” 1134 n.530.

Figure 24.



Portrait of the Federal Rules of Civil Procedure Advisory Committee in November 1935, by Harris & Ewing. The photographer boasted that it was the first picture taken inside the new Supreme Court building, the same occupied by the Court today. The location was well chosen. Both the new building and the new federal rules had been projects spearheaded by Chief Justice Taft as part of his career-long effort to aggrandize the federal judiciary.

From left to right, seated: Edson R. Sunderland; Charles E. Clark; William D. Mitchell; Edgar B. Tolman; and George W. Wickersham.

From left to right, standing: the clerks, James Wm. Moore, Ferdinand Stone, and Edward C. Jaegerman; George Donworth; A.M. Dobie; Warren Olney Jr.; Robert G. Dodge; Monte N. Lee Lemman; Edmund M. Morgan; Wilber H. Cherry; S.M. Loftin; and two unidentified clerks.

Library of Congress Prints and Photographs Division, Harris & Ewing Collection, Film Reproduction No. LC-DIG-hec-39641.

The time for drafting the Federal Rules was similarly as constrained as it had been for the state codes. The advisory commission was named in June 1935 and had produced a draft code for revision in 1936 after sporadic meetings of the advisors working part-time. Clark, for instance, retained his deanship and teaching responsibilities while serving as reporter. When the draft came before Congress in the spring of 1938, Senator William King opposed it, much as New York senators had in 1850, because of the lack of time Congress and interested parties had to examine the code. Former Attorney General William D. Mitchell, one of the advisors, testified indignantly that the committee's work "was not a star chamber process." He insisted the committee had spent three-and-a-half years of labor on the code and that "thousands of copies were printed" so that "every class of lawyers" and "every bar association" could review them.¹⁰¹ King continued to press for a deeper examination of the rules, calling expert witnesses such as the Georgetown professor Charles Keigwin to testify on the doubtful constitutionality of the proposed Rules because, under the guise of regulating mere procedure, they had the potential to cause real impairments of state-conferred rights and obligations.¹⁰² Ultimately, Congress adjourned without taking action on the Rules—but there the genius of the Rules Enabling Act took effect. Under the Act, Congress had to affirmatively block the rules or they would go into force at the end of the session. Because Congress adjourned, ostensibly for lack of time to finish its consideration of the code, the Federal Rules took effect at the end of the first congressional session of 1938 without having received formal approval by the legislature.¹⁰³

As reporter, Clark was chiefly responsible for collating the committee's drafts and incorporating amendments and revisions to satisfy the whole. Every committee member contributed something, but the discussions were usually led by Clark, and any suggestion Clark thought wrong

¹⁰¹ Rules of Civil Procedure for the U.S. District Courts, Hearing Transcript, Subcommittee of the Committee on the Judiciary, U.S. Senate, April 18, 1938, 2–8.

¹⁰² Rules of Civil Procedure for the U.S. District Courts, Hearing Transcript, 20–24.

¹⁰³ Hoffer et al., *The Federal Courts*, 298–310.

did not survive his veto.¹⁰⁴ Clark, more than any other advisor, had also laid the intellectual foundations for the new Rules. Almost the entirety of Clark's academic work from the 1920s and '30s had focused on the history of code pleading and remedies. Clark especially tried to rescue what he understood as the codifiers' aims in pleading a "cause of action" and in defending their views on the fusion of law and equity.¹⁰⁵ Indeed, Clark grasped Field's aims better than many present-day commentators have, and accounts that portray Clark as "revolutionizing" practice overlook Clark's deep and nuanced explications of code practice and unjustifiably discount his claim that the Federal Rules largely elevated the Field Code to the federal level.

On the two points Clark described as the basic "underlying philosophy" of the Rules – "generality of allegation and the free joinder of claims and parties" – Clark echoed the Field commission almost verbatim. Where the Field Code abolished the forms of action and the distinction between law and equity and declared that "hereafter," there would be "one form of action, denominated the civil action," Federal Rule 2 declared simply, "There is one form of action – the civil action," a committee note explaining that "reference to actions at law or suits in equity in all statutes should now be treated as referring to the civil action prescribed in these rules."¹⁰⁶ Rule 8's requirement of a "short and plain statement of the claim showing that the pleader is entitled to relief" differed little from the Field Code requirement of "a statement of the facts constituting the cause of action, in ordinary and concise language, without repetition, and in such a manner as to enable a person of

¹⁰⁴ Advisory committee papers are housed both at the Administrative Office of the Federal Courts and in Clark's personal papers at the Yale University Archives. Correspondence between committee members and Clark is significantly more abundant in the latter archive. For a humorous example of Clark's editorial control, see his annotated copy of recommendations from committee member Major Edgar Tolman, with whom Clark frequently disagreed, penciling in the margins "No," "Perhaps," and "Hell!" Charles Clark Papers, Series IV, MS 1344, Box 106.

¹⁰⁵ See, e.g., Charles E. Clark, "The Code Cause of Action," 33 *Yale Law Journal* 817 (1924); Charles E. Clark, "Union of Law and Equity," 25 *Columbia Law Review* 1 (1925); Charles E. Clark, "History, Systems, and Functions of Pleading," 11 *Virginia Law Review* 517 (1925); Charles E. Clark, "The Complaint in Code Pleading," 35 *Yale Law Journal* 259 (1926); Charles E. Clark, "Trial of Actions Under the Code," 11 *Cornell Law Quarterly* 482 (1926); Charles E. Clark, "The Challenge of a New Federal Civil Procedure," 20 *Cornell Law Quarterly* 443 (1935); Charles E. Clark, "Addresses on the Proposed Rules of Civil Procedure," 22 *ABA Journal* 787 (1936).

¹⁰⁶ Clark, "The New Federal Rules of Civil Procedure," 976; Federal Rule of Civil Procedure 2 & cmt. 2 (1938). Compare with 1849 N.Y. Laws 630–631 § 59.

common understanding to know what is intended.”¹⁰⁷ (On the Rule’s omission of the word “facts,” see below.)

On joinder, Clark’s desire “that all matters in dispute between litigants be brought to issue and settled as quickly and directly as possible” repeated Field’s aim that “the plaintiff should be left free to unite, in the same action, all his controversies with the same parties.”¹⁰⁸ Though Clark shared Field’s aim, he believed the latter’s drafting might be improved. Clark believed Field’s attempt to prevent pleading in the alternative through the rules of joinder had the unintended consequence of needlessly restricting the free joinder of claims. Clark also thought that pleading in the alternative should be allowable—indeed, was a positive good. Clark therefore advocated abandoning Field’s joinder provisions, but only in order to better realize Field’s aim.¹⁰⁹

In the fusion of law and equity Clark shared both Field’s outlook and his specific prescriptions. Clark agreed with Field’s nominalism, regretting that it was “unfortunate to continue to speak of law and equity, since that naturally tends to preserve old distinctions.” Clark regretted that the constitutional right to a jury trial preserved a formal distinction between jury-able cases and bench trial cases, and like Field, he strongly advocated the waiver of jury trial so that the right “by no means [gained] more scope than it actually deserves.” Above all, Clark repeated the fusionist argument that nothing made the “old distinctions . . . inherent in the nature of things,” and he believed that codes read in good faith replaced “law and equity as distinct systems” with the modern distinction between “substantive rights” and “procedural forms.”¹¹⁰ Clark further agreed with the Field commissioners that they had “reform[ed] and simplif[ied] the old common law system . . . in the main by the application of the more flexible equity principles.”¹¹¹

¹⁰⁷ Federal Rule of Civil Procedure 8 (1938). Compare with 1849 N.Y. Laws 645 § 142.

¹⁰⁸ Clark, “The New Federal Rules of Civil Procedure,” 977; David Dudley Field, *The Administration of the Code* (1852), 24.

¹⁰⁹ See Clark, “The Code Cause of Action,” 826.

¹¹⁰ Clark, “Union of Law and Equity,” 5, 7, 10. Compare with Chapter 6 above.

¹¹¹ Clark, “The Code Cause of Action,” 819.

But perhaps the ground on which Clark and Field were most in agreement was in their theory of pleading, a claim doubted by most proceduralists today. From their inception, the Federal Rules were understood to implement a regime of “notice pleading” – pleading that suffices so long as it merely puts the opposing party on notice that she is being sued over some particular event – as against the Field Code’s “fact pleading” with its highly technical distinctions between evidence, legal theory, and “ultimate” facts. The triumph of Clarkian notice pleading over Fieldian fact pleading was a cornerstone of Supreme Court doctrine for half a century, and the Field Code’s last citation in a Supreme Court case came in 2007 and 2009 dissents that criticized the majorities for mistakenly resurrecting fact pleading in the Federal Rules – a charge echoed by numerous other proceduralists.¹¹²

To a significant extent, the perception of a dramatic break between Clark’s notice pleading and Field’s fact pleading was cultivated by Clark himself. Clark’s academic work was highly critical of New York’s implementation of the code. One of his favorite quotations came from Chief Justice John B. Winslow of Wisconsin, who wrote of the “cold, not to say inhuman, treatment which the infant code received from the New York judges.”¹¹³ Clark was careful in his writings, especially before the enactment of the Rules, to make sure he was not understood to be elevating New York procedure to the federal system, leading him occasionally to conflate New York practice with the New York commissioners in his criticism (one mark against Subrin’s contention that Clark claimed the Field Code as political cover). As often as he could, Clark claimed Livingston’s Louisiana code or the English judicature and practice acts as progenitors of his work – or, more often, he combined both of them with the Field Code into his provenance-less “modern” procedure.¹¹⁴ Other times, Clark sought to divorce criticism of New York from criticism of the New York code system. “New York is often

¹¹² See *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (“Rule 8 marks a notable and generous departure from the hypertechnical, code-pleading regime of a prior era.”); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 574–75 (2007) (Stevens, J., dissenting). Kevin M. Clermont, “The Myths about *Twombly-Iqbal*,” 45 *Wake Forest Law Review* 1337 (2010).

¹¹³ *McArthur v. Moffet*, 143 Wis. 564, 567, 128 N.W. 445 (1910). Quoted, for instance, in Clark, “Addresses on the Proposed Rules of Civil Procedure,” 787; Clark, “Union of Law and Equity,” 2–3.

¹¹⁴ See Clark, “History, Systems, and Functions of Pleading,” 531–537; Clark, “Handmaid of Justice,” 305; Charles E. Clark & James Wm. Moore, “A New Federal Procedure – I. The Background,” 44 *Yale Law Journal* 387 (1935), 394.

pointed to as an example of the lack of success of the code system," he wrote. "But it is not actually one, for the . . . statutory enactments and diverse rulings of the court, have led to the unfortunate procedural uncertainty which exists there but does not exist throughout the state as a whole." Instead, "the success of such widely divergent states as California, Minnesota, and Connecticut indicates the real effectiveness of [code] procedure."¹¹⁵

Clark directly criticized Field and the other codifiers for their modernist view of facts, but Clark's own theory of fact pleading was not so much a departure from Field's ideas as a refinement of them. He wrote that "the codifiers and the courts failed to appreciate that the difference between statements of fact and statements of law is almost entirely one of degree only."¹¹⁶ Echoing a frequent argument of common law lawyers, Clark insisted that "facts do not easily disentangle themselves from conclusions or from details." Like "individuals generally," any given pleader "may be garrulous or he may be taciturn, he may be talkative or he may be reticent. That is to say, he may put in all the details and thus give 'evidence'; or he may state only broad conclusions and pass final judgments of guilt or error, and thus plead 'law.'" And such category errors might not be consistent from case to case. *A is married to B* might in one case be an uncontroversial background fact, but in another case (such as a prosecution for bigamy) it would be the ultimate legal judgment to be supported with a host of other factual evidence.¹¹⁷ But where common law lawyers drew the conclusion that pleading had to be guided by formulary systems gradually worked out by the peculiar reasoning of the common law, Clark saw the solution as simply less insistence on the factuality of the facts, to — as he put it — "expect less of pleading."¹¹⁸ Nevertheless, Clark's lowered expectations for pleading read much like the pleading advice Field had offered in his 1850s pleading manual.

¹¹⁵ Clark & Moore, "A New Federal Civil Procedure," 393-394.

¹¹⁶ Clark, "History, Systems, and Functions of Pleading," 534.

¹¹⁷ Clark, "The Complaint in Code Pleading," 264-265.

¹¹⁸ Clark, "History, Systems, and Functions of Pleading," 542.

The problem with code pleading, Clark argued, was not fact pleading itself but fact pleading done poorly—pleading *just* facts. “We thinks of ‘facts’ as things definite and concrete, as representations of past events now a part of history and thus fixed and unchangeable,” he explained, before countering: “Actually the stating of facts involves a mental process of *selecting* from among observed phenomena those which are important *in view of our particular purpose*, and *interpreting them in the light of that purpose*.” Field too recognized that facts did not select and arrange themselves in a proper pleading, so how was one to know which facts to plead in what order for a proper complaint? When pressed, Field weakly responded that skilled lawyers knew what was relevant and would plead accordingly. Now, after eighty years of pleading requirements gradually migrating into a “substantive” law of right, Clark could articulate a clearer answer. “Now the lawyer’s selection is obviously made to back up some legal theory,” he explained, a theory created and organized by the substantive elements of a legal right.¹¹⁹

Clark agreed with the codifiers that merely stating legal conclusions did not make for appropriate pleading. In that sense, Clark had no use for notice pleading if one meant simply giving notice to the other party that she was being sued on some legal ground and not another. But there was nothing mystical about the law-fact distinction. In criticizing a pleading for stating too much law, “what we are really saying is . . . that he ought to give us more data, i.e., his allegations are too general.”¹²⁰ Elsewhere Clark explained that “we are helped, rather than hindered, by thinking of our problem as simply giving a bit of past history,” what Clark also called “a segment of private history between the litigants.”¹²¹ In essence, skillful pleading in Clark’s ideal system would perfectly combine public law with private history. The public law of substantive rights gave pleadings their analytical organization and guided lawyers as to which facts from a private encounter between parties needed

¹¹⁹ Clark, “The Complaint in Code Pleading,” 264–265; David Dudley Field, *A Short Manual on Pleading under the Code* (1856), 12–13

¹²⁰ Clark, “The Complaint in Code Pleading,” 265.

¹²¹ Clark, “The Code Cause of Action,” 832; Clark, “Union of Law and Equity,” 5.

to be included. *A negligently breached his duty of care and damaged B* stated only the public elements and was insufficient (even if it gave B pretty clear notice of the grounds of a law suit). *Jack, while driving his car blindfolded on June 15, struck Lucy on the knee; her knee immediately required \$10,000 of surgery to repair* tracked those same elements with case-specific facts.

But a private history of Jack's antics and Lucy's knee could be told in a thousand variations of more or less detail. Would the statement given above be a sufficient pleading? Would it be better to specify where the collision occurred? If Lucy were in the road, or given a warning, that might weigh against Jack's negligence. Did it need to be stated that Lucy had never before had problems with her knee, so that the adjudicator could better infer that the surgery was entirely necessitated by the injury? Clark's answer was indefinite. To Clark, there was "no absolute definite definition, no mathematical test to be applied as a rule of thumb." There was "no royal road to pleading for either bench or bar."¹²² Like Field, Clark believed reformed procedure had to be essentially formless. But what then would constrain the pleaders, keeping them from being too taciturn and withholding crucial details or being too prolix and wasting the court's time? Like Field, Clark trusted the judiciary to police the pleadings. "We still must decide how specific the plaintiff's recital must be, and how much of the story we shall expect to hear from the defendant rather than the plaintiff," he noted, concluding that the task would fall to judges to "work[] out in each case pragmatically with an idea of securing convenient and efficient dispatch of trial business."¹²³

Clark lamented that it was "somewhat depressing, to observe the gradual development of an involved and technical practice from the piling up of precedents on an originally simple code." To him, "the moral seems clear. The ministers of justice must be eternally on the job of keeping their tools keen and bright. It is not a misfortune for a code of procedure to require revision; it is its nature."¹²⁴ Clark believed that by wresting control of procedure from the legislature and putting it into the hands

¹²² Clark, "The Code Cause of Action," 830-831.

¹²³ Clark, "The Code Cause of Action," 832, 837.

¹²⁴ Clark, "History, Systems and Functions of Pleading," 545.

of a more adroit rules commission, and by limiting the requirements of pleading to two terse rules, he had found a solution. What Clark never seemed to realize was that the cure he prescribed was the very cause of his problems, for it had been the same solution Field offered eighty years earlier. Seeking to decide like cases alike, jurists launched tens of thousands of opinions explaining what a “plain” statement of facts ought to look like in particular kinds of cases. In this they were even guided by Field and Shearman’s book of forms, despite the codifiers’ claims to have invented a formless procedure. Clark’s advisory committee too offered a book of forms.¹²⁵ And so in the twentieth century, as in the nineteenth, a formless procedure of fact pleading only resulted in multiplying the forms of action, from the common law’s twelve or so “technical” devices of fiction and flexibility to the hundreds and thousands of causes of action under modern American litigation, each now with its own generic – and no less “technical” form – for stating one’s private history before the public tribunals.¹²⁶

Conclusion

While the term “procedure” found early usage at the federal level, its boundaries were no more definite than when the term was used in 1850s New York. Rather than defining procedure as an opposite pole from “substance,” the Marshall Court defined it as the entirety of a litigation, from commencement to execution, including the finding of “rules” to decide a case, the rules themselves being the one substratum of nonprocedural law. That definition was strongly contested, first by Congress, then by the Taney Court, both of whom understood that execution, law and equity, and the host of things that early procedure codes were classifying as procedural had “much of substance to [them],” to use Marshall’s phrase.¹²⁷ But the definitional flexibility of procedure gave individual

¹²⁵ See *Book of Forms Adapted to the Code of Procedure* (1860); Federal Rule of Civil Procedure 84 & cmt. (“Rule 84 clarifies that each form is sufficient, meaning that a paper that follows a form will meet the requirements of the corresponding rule. Of Course, Rule 84 speaks to procedural sufficiency, not substantive sufficiency; a paper that follows the form ‘to the letter’ may still be defective in its substance.”).

¹²⁶ For a short and humorous “parable” making much the same point, see Samuel L. Bray, “The Parable of the Forms,” unpublished manuscript (May 24, 2018), <https://dx.doi.org/10.2139/ssrn.3178122>.

¹²⁷ *Wayman*, 23 U.S. at 27.

district courts the power—even when instructed to follow state practices—to decide their own procedures, with some embracing code procedure and others adamantly clinging to English-style common law.

Thanks in part to the tireless efforts of the populist Senator Thomas Walsh, procedural codification took far longer and was much more politically contested at the federal level, precisely because it was a federal codification. While the same arguments for and against codification itself were bandied about, Walsh based his opposition on a populist critique of centralization and nationalization, which he and other commentators believed would serve the interests of an elite corporate bar at the expense of local litigators. Only after the passing of Walsh—and of populism—did the arguments for procedural uniformity as a natural good succeed in creating the Rules Enabling Act and the advisory committee on the Federal Rules of Civil Procedure.

Those Rules, this chapter has argued, strikingly mirrored the procedural codification controversies the states had experienced a century before. Legislators and laymen complained about the delegation of such foundational law to unelected and democratically irresponsible commissioners, but were rebuffed by the claims that procedure was both uniquely trivial, thus appropriate for delegation, yet so sophisticated that it required experts to control. The code that resulted was drafted in little more than a year of part-time meetings, rushed through the legislature amid complaints about insufficient time, and never received a vote of approval.

The policy choices of the codes were the same as well. The Federal Rules sought to replace the law-equity distinction with the substance-procedure divide, and on much the same reasoning as the Field Code, implemented equitable devices of joinder, discovery, and remedy. For pleading, the chief draftsman Charles Clark sought to distance himself from the work of the New York commissioners, though he almost entirely agreed with them in theory, proposing a formless, transubstantive fact pleading that would all but require judges to formulate new genera of pleadings to match each substantive right of action under the federal system.

But 1938 was not 1848. The Federal Rules were much closer in ideology and structure to the Field Codes than modern commentators have perceived, but there were still significant differences. The science of the codifiers had traded comprehension (Field's ideal) for systemization, resulting in an even shorter, terser (and more ambiguous) code than Field's original draft. And with the change in codification came a subtle but foundationally important change in the professional valence of the federal code. Field, as a consummate trial lawyer, had written his code to and for lawyers. His ideal of comprehension had been aimed at helping practitioners by condensing all relevant and useful rules to a convenient volume. The collection of rules in all their details (exceptions to exceptions included) would insure that the litigator never missed a required step. When he disliked how practice was actually unfolding in the early years under his code, Field wrote a manual to his fellow lawyers, patiently and genially explaining and correcting what he perceived to be their misapprehensions. At the same time, he wrote an anonymous tract excoriating judges as so many dunderheads unable to read and apply simple language.¹²⁸

Clark's professional sympathies were entirely reversed. Clark described pleading from the lawyer's perspective as a "game where you try to catch the other fellow in an admission caused by his saying too much while you say as little as you can."¹²⁹ Such strategic cynicism pervades Clark's writings about lawyers—what little there is. For, in the main, Clark usually imagined his reading audience as the judiciary. Clark was not yet a judge when he drafted the federal rules, but his twenty-year tenure on the Second Circuit—during which he relished instructing trial courts on how to improve their procedure—gives some indication of his early temperament. With Clark, the Field Code in substance became elevated to the federal level, but it was no longer a lawyer's code. Clark proposed that "the rules may be reframed to indicate the purpose sought to be achieved. They may give the *guiding principle* to the court, but this must be worked out by the court itself, and a large measure of

¹²⁸ See Chapter 4 above. See also Field, *Administration of the Code*; Field, *A Short Manual on Pleading Under the Code* (1856).

¹²⁹ Clark, "The Handmaid of Justice," 314.

discretion is necessary.”¹³⁰ The new theory of codification went hand-in-hand with this outlook. A code of general principles was a code designed for judges. The structures of litigation might be imported from a nineteenth-century world of litigators, but it could not help but be transformed in a coming age of managerial judges.¹³¹ Whether or not procedure under the Federal Rules would become the handmaid of justice, Clark’s code would have it become the handmaid of the judiciary.

¹³⁰ Clark, “History, Systems and Functions of Pleading,” 551.

¹³¹ See Judith Resnik, “Managerial Judges,” 96 *Harvard Law Review* 374 (1982); Steven S. Gensler, “Judicial Case Management: Caught in the Crossfire,” 60 *Duke Law Journal* 669 (2010). And because Clark so insistently pitched the Federal Rules as a judicial project, rather than a lawyerly one, I see a sharper break in the continuity of “adversarial” procedure than Kessler does. See Amalia D. Kessler, *Inventing American Exceptionalism: The Origins of American Adversarial Legal Culture, 1800–1877* (Yale 2017), 323–54.

THE LAWYERS' CODE

CONCLUSION

In the law schools the study of procedure in the past has been pushed into a corner as dull, uninteresting, and unimportant, whereas it is most necessary for the understanding of what has gone on in the past, not to speak of the social need of knowing what effective law administration is.

—Charles Edward Clark, *The Handmaid of Justice* (1938)

In 1838, when David Graham Jr. earned his appointment to the law school at New York University, the newly formed legal program had three departments, with three professors. Reflecting Blackstone's division of the law, Benjamin F. Butler taught "the Law of Real Property," William Kent taught "the Law of Persons and Personal Property," and Graham, the future co-commissioner with David Dudley Field, taught "the law of Pleading and Practice."¹ This division was typical of American law schools during the nineteenth century, though the "substantive" law categories expanded over time to include contracts, sales, partnerships, and equity. Virtually every law school into the 1900s maintained a course on practice and pleadings—usually with the shortened title "Pleading"—as a part of the core curriculum.²

Legal scholars have sometimes mistakenly assumed from the name that "pleading" courses were much narrower than "modern" procedure courses which also cover jurisdiction, trial procedures, joinder, and enforcement of remedies.³ But a nineteenth-century course on pleading not only included joinder and jurisdiction (as pleaded elements), it could also include a substantial amount of trial procedure and execution (as things accomplished by pleading), the practical details of

¹ See *Inaugural Addresses Delivered by the Professors of Law in the University of the City of New York at the Opening of the Law School of That Institution* 51 (E.B. Clayton ed., 1838).

² See Mary B. McManamon, "The History of the Civil Procedure Course: A Study in Evolving Pedagogy," 30 *Arizona State Law Journal* 397 (1998).

³ See McManamon, "The History of the Civil Procedure Course," 407.

litigation from initiation by summonses or arrest and bail, and the elements necessary for bringing claims on contracts, property, and trusts. Only in the twentieth century would many of those elements be reclassified as “substantive” law.⁴ As a synonym of “practice” (so much so the terms ceased to be used together, as if they were redundant), “pleading” courses came closer to teaching the entirety of law.

The Field Code energized the gradual reconstruction of law from a series of writ-based pleading rules to freestanding elements of a claim of right, but as with the abolition of formulary systems, the diminishment of the legal oath, and the fusion of law and equity, legal education lagged far behind Field’s new orthodoxy. Until the twentieth century, the standard textbook for pleading courses at basically all American law schools remained Henry John Stephen’s treatise on (English) pleading written twenty years before the Field Code.⁵ Although revised for an American audience and annotated to keep pace with current developments, the treatise continued to teach the importance of the writ system for carefully sequencing the “public adjustment” of litigants’ claims. So far as scholars are aware, no course on code pleading or practice was offered in an American law school until the 1870s, nearly thirty years after the Field Code had become positive law in a significant number of jurisdictions.⁶

That initial offering came under the auspices of the famous reformer of American legal education, Christopher Columbus Langdell (1826–1906). Upon assuming the deanship of Harvard Law School in 1870, Langdell made Pleading – along with Contracts – one of the first courses to adopt his “case method” of rigorously Socratic legal education.⁷ Langdell retitled the Pleading course Civil Procedure at Common Law, apparently the first time “procedure” as a term entered the law school

⁴ See Bruce A. Kimball & Pedro Reyes, “The ‘First Modern Civil Procedure Course’ as Taught by C.C. Langdell, 1870–78,” 47 *American Journal of Legal History* 257 (2005), 272–73.

⁵ McManamon, “The History of the Civil Procedure Course,” 407; Kimball & Reyes, “The ‘First Modern Civil Procedure Course,’” 259. On Stephen’s treatise, see Chapter 1.

⁶ McManamon, “The History of the Civil Procedure Course,” 413; Kimball & Reyes, “The ‘First Modern Civil Procedure Course,’” 267.

⁷ Kimball & Reyes, “The ‘First Modern Civil Procedure Course,’” 266–67.

curriculum.⁸ Until the fall of 1874, Langdell and his protégé James Barr Ames assigned individual cases while Ames compiled and edited a case book. That fall, Langdell reverted to teaching Stephen's treatise in the civil procedure course, but over the next two years Langdell offered electives of his own devising, one on Process, Arrest, and Bail, and another on Civil Procedure under the New York Code. Langdell taught his code procedure course the next few cycles, then dropped the class after 1878, never to resume it.⁹

By that time, other schools were still more than two decades away from developing courses in code procedure. The prolific digester Austin Abbott appears to have been the first to publish a case book on code pleading, which he used to teach code procedure at New York Law School in 1893.¹⁰ Not until the first decade of the twentieth century would the code find its pedagogical heyday, with case books appearing for instruction at law schools in the code states of Ohio, Missouri, and New York (for students at Columbia Law School).¹¹ In 1913, Edson Sunderland authored one of the more prominent code pleading case books (in the decidedly uncodified state of Michigan) for his four-part procedure curriculum on common law pleading, code pleading, trial practice, and appellate practice.¹²

Code practice was not entirely absent from institutional legal education until the twentieth century. John Norton Pomeroy's treatise, often known by its shorthand title *Code Remedies*, became the foundation for the modern remedies course in law schools, and was a major vehicle for teaching the Field Code, especially in western states.¹³ But creating a new course on remedies was quite a different

⁸ Kimball & Reyes, "The 'First Modern Civil Procedure Course,'" 266.

⁹ Kimball & Reyes, "The 'First Modern Civil Procedure Course,'" 267-68.

¹⁰ Austin Abbott, *Select Cases on Code Pleading with Notes* (2d. rev. ed., 1895).

¹¹ Charles M. Hepburn, *A Selection of Cases and Statutes on the Principles of Code Pleading* (1901); Edward W. Hinton, *A Selection of Cases on the Law of Pleading Under Modern Codes* (1906); Henry S. Redfield, *Selected Cases on Code Pleading and Practice in New York* (1903).

¹² Edson R. Sunderland, *Cases on Procedure Annotated: Code Pleading* (1913).

¹³ John Norton Pomeroy, *Remedies and Remedial Rights by the Civil Action, According to the Reformed American Procedure* (1876). See also Douglas Laycock, ed., *Modern American Remedies: Cases and Materials* (Wolters Kluwer, 4th ed., 2010), 1-2.

thing from displacing or replacing common law pleading and practice, which had been the code's major aim. That replacement did not come about until long after Field's death.

Langdell's pedagogy shows one key way in which that transformation happened. Thanks to painstaking work by Bruce Kimball and Pedro Reyes, who reviewed handwritten lecture notes by Langdell as well as notes taken by his students, we have a fairly detailed idea of how Langdell taught his pleading-turned-procedure course.¹⁴ Whenever he taught civil procedure, Langdell in his opening lecture announced that he would "confine myself wholly to" English practice before the King's Bench and "fix upon 1830 as the standard" for analysis. That is, Langdell picked a jurisdiction and period that was deliberately outmoded, since the English Uniformity Process Act of 1832 began to streamline the common law forms of action in preparation for further reforms and fusion in the 1850s and 1870s.¹⁵ Kimball and Reyes demonstrate that Langdell did not confine himself "wholly" to King's Bench but rather remarked frequently on how modern practice and especially the New York code differed from the primary system he was describing.¹⁶ But that strategy too was in keeping with Langdell's theory of pedagogy, which he articulated in one draft opening to his first lecture:

In order to teach or study practice to any purpose, it is necessary to have [a] fixed and definite system. In studying for practice, one's great object should be to acquire a knowledge of a system as such; every separate question should be considered with reference.¹⁷

Thus, Langdell taught legal practice from King's Bench in the 1820s to law students in 1870s Boston precisely because the system he described was foreign, but not too remotely so. Langdell described the practices he taught as "uniform," meaning they were confined to a single court in a single jurisdiction, and "fixed," meaning they were frozen by history, standing still long enough for the student to observe them. To use Charles Taylor's phrasing, the practices of King's Bench in the

¹⁴ Kimball & Reyes, "The 'First Modern Civil Procedure Course.'"

¹⁵ Quoted in Kimball & Reyes, "The 'First Modern Civil Procedure Course,'" 271, 278.

¹⁶ Kimball & Reyes, "The 'First Modern Civil Procedure Course,'" 272, 284.

¹⁷ Quoted in Kimball & Reyes, "The 'First Modern Civil Procedure Course,'" 279.

1820s were remote enough to American observers in the 1870s that the formerly unarticulated logics could now be articulated as practices passed from actual praxis into representations of practice.¹⁸

Code practice underwent a similar pedagogical transition on nearly the same time frame. Code practice had been in force in a majority of American jurisdictions for nearly forty years before casebooks and handbooks finally made it the subject of their representational accounts in the first decades of the twentieth century. Charles Clark's 1928 *Handbook of the Law of Code Pleading* opened with an expression of regret that "except for local and semi-local practice and form books, one must go back to the early days of the codes to find any attempts to set forth the subject as a unified whole." Clark aimed to provide that unified whole "notwithstanding the chance intervention of state lines." That is, although Clark claimed a focus on "the code system of pleading which followed the New York Code reform of 1848," he was essentially describing code practice as a disembodied system, the practice of nowhere in particular. It was a construction of his own making so that students could grasp a sense of the system *as* system but also recognize the sense of Clark's own preferred "modern" innovations.¹⁹

Clark opted to use the older term "pleading" in place of "procedure." The work omitted material on jurisdiction, trial, and enforcement, yet exhibited the resilient capaciousness of "pleading" by covering summonses; remedies; "particular actions" such as those for debt, negligence, fraud, and title; and all manner of joinder actions, including class actions. Clark gratefully acknowledged "the increasing attention now given by many law schools to the careful study of procedural subjects," citing a burgeoning literature on "procedure" throughout the work.²⁰

Another forty years later, Clark's system of federal practice became the fixed representation of civil procedure, at least among the elite East Coast schools. Richard H. Field and Benjamin Kaplan's

¹⁸ Charles Taylor, "To Follow a Rule . . ." in Richard Shusterman, *Bourdieu: A Critical Reader* (Blackwell 1999), 39–40.

¹⁹ Charles E. Clark, *Handbook of the Law of Code Pleading* (West 1928), iii.

²⁰ Clark, *Handbook of the Law of Code Pleading*, iii–viii.

Materials for a Basic Course in Civil Procedure focused entirely on practice under the Federal Rules in the federal courts. As one commentator notes, “reviewers praised this move because it gave the students a sense of direction. The advantages of using the federal system were also recognized: it was simple, and it was influencing the procedure of the states.”²¹ Of course, federal practice could vary significantly from judge to judge, district to district, circuit to circuit. What Field and Kaplan offered was not procedure as practiced but a representation of what procedure could be, a construction of uniform and simplified rules, conventions, and presumptions with an articulable, if not always articulated, logic. A survey conducted in 1999 found that current procedure textbooks are “updated but fundamentally unchanged version[s] of the 1953 Field & Kaplan course.”²²

* * *

Code practice thus reigned in the law schools from about 1903 when Columbia adopted a code pleading case book to about 1953 when Field and Kaplan published their Federal Rules case book. The code’s half-century of dominance in American legal education is one of the primary features justifying the subtitle of this study as the “transformation” of American legal practice. Much of this study has been devoted to showing how little legal practice in the United States changed in the century after the Field Code. Early modern, even medieval, structures of thought and habit continued to tether civil remedies to writ-based reasoning, Euro-American Christian theology, and a conceptual distinction between generalized law and case-specific equity. These structures persisted not just in the face of the code’s explicit abolitions, as a matter of resistance from the profession, but rather inhered in the code’s foundational assumptions, as a matter of background practical logic. Even the code’s more enduring changes, to lawyers’ fees and cost-shifting, sprang unexpectedly from the codifiers’ adherence to traditional dogmas about the justice of losers paying for a litigation. And when the codifiers sought

²¹ McManamon, “The History of the Civil Procedure Course,” 436.

²² Paul D. Carrington, “Teaching Civil Procedure: A Retrospective View,” 49 *Journal of Legal Education* 311 (1999), 329.

to elevate their system to a uniform practice in the national courts, they continued to carry these latent habits and modes of thought with them.

But in time—and in the law schools—code practice eventually became the bedrock of subterranean habits and modes of thought. Students now learn about Charles Clark’s standards for “notice pleading” against the background of nineteenth century “fact pleading,” rather than of the common law writs. Code pleading is the original fact, the before-time, while the writs recede from view.²³ Fusion of law and equity is spoken of as accomplished fact, the only debate being whether it was accomplished in the Field Code or the Federal Rules, a debate that has to assume the codifiers’ definitions of equity as mere procedure and remedy even to be legible.²⁴ Most significantly, the pedagogy of code procedure has shrunk the domain of “pleading” so that scholars today conceive of it only as a narrow sub-department of “procedure” rather than the all-encompassing structure of legality nineteenth-century pleading contained.²⁵

The code’s bedrock grounding in legal thought did not totally displace the medieval English common law, which to this day continues to structure much of American legal practice. But as many of the code’s innovations and heterodoxies became an assumed part of the fabric of legality itself (to the generation of Clark, Field, and Kaplan) they became endowed with a much weightier pedigree that obscured their novelty (to the subsequent generations of critics). Indeed, the critical merit of this study lies not in attacking the naturalness of the substance-procedure distinction. That has been a project of academic proceduralists since at least the 1960s when the Supreme Court began a more rigorous and often futile policing of the substance-procedure divide.²⁶ But much of that critical

²³ See, e.g., Kevin M. Clermont, “Three Myths about Twombly-Iqbal,” 45 *Wake Forest Law Review* 1340 (2010). As Chapters 4 and 8 have shown, the modern construction of “fact pleading” bears almost no resemblance to what either Field or Clark meant by the term.

²⁴ See, e.g., Stephen N. Subrin, “How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective,” 135 *University of Pennsylvania Law Review* 909 (1987).

²⁵ See, e.g., McManamon, “The History of the Civil Procedure Course,” 407.

²⁶ The critical commentary largely arose after *Hanna v. Plumer*, 380 U.S. 460 (1965). As John Hart Ely recalled, “We were all brought up on sophisticated talk about the fluidity of the line between substance and procedure.” John Hart

literature supposes an origin of the substance-procedure distinction in the deep past of classical legal thought established, if not by the time of Bentham and Blackstone, then at least around the time of the American Revolution.²⁷ What this study has argued instead is that the substance-procedure distinction was a far more recent creation, less a hoary ancient myth being exploded by the critics than a recently completed project of the critics' own law professors. The substance procedure-divide was the creation of political arguments in the 1840s, whose reach expanded during Reconstruction, but which gained almost no purchase in actual legal practice until several decades after the promulgation of the Field Code – and no widespread purchase until after the promulgation of Clark's code in 1938.

This thesis agrees with the recent work of Amalia Kessler in arguing for the novelty of the substance-procedure divide, and for the prominence of the Field Code in this history.²⁸ But whereas Kessler describes adversarialism as the essential feature of American procedural culture, this study has avoided picking one element of procedure as essential. It has, instead, followed the advice of ritual theorists to “circumambulate” around legal practice and ritual to map it from multiple vantage points, exploring arguments from the authors of the codes of procedure, attending to the complaints from both professional and lay receivers of the codes, and reconstructing – to whatever limited degree – the practices and practical logics that took shape under the codes.²⁹

What these materials show is that from 1828 to 1938, procedure's most enduring feature was its surprising (given the law's discursive obsession with precision) ability to evade precise definition. It was, to some, the “adjective,” the “machinery,” the “handmaid,” of the law: a tool to apply

Ely, “The Irrepressible Myth of Erie,” 87 *Harvard Law Review* 693 (1974). See also Jay Tidmarsh, “Procedure, Substance, and Erie,” 64 *Vanderbilt Law Review* 877 (2011) (reviewing the post-Ely literature).

²⁷ See, e.g., William E. Nelson, *Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760–1830* (Georgia, rev. ed., 1994), 69–88; Charles Donahue Jr., “‘The Hypostasis of a Prophecy’: Legal Realism and Legal History,” in Matthew Dyson & David Ibbetson, eds., *Law and Legal Process: Substantive Law and Procedure in English Legal History* (Cambridge 2013), 12–16; Daniel J. Hulsebosch, “Writs to Rights: ‘Navigability’ and the Transformation of the Common Law in the Nineteenth Century,” 23 *Cardozo Law Review* 1049 (2002).

²⁸ Amalia D. Kessler, *Inventing American Exceptionalism: The Origins of Adversarial Legal Culture, 1800–1877* (Yale 2017), 10–12.

²⁹ Ronald L. Grimes, *The Craft of Ritual Studies* (Oxford 2014), 73–75.

substantive rules without drawing attention to itself. To others procedure was indeed form, but the very form of justice itself, methods of vindicating rights that were inseparable from vindication itself. Procedure as machinery became the dominant paradigm of the period, providing an effective political argument for severing procedure from “the law” that had to be respected and preserved in its observance from time immemorial. Machinery could be improved and experimented on, tinkered with, but only by the expert machinists. Thus procedure as machinery was politically double edged. It was both safe *for* democracy – it could be legislated in an age that distrusted legislation – but it also had to be saved *from* democracy, entrusted to expert lawyers to keep the overall mechanism running.

By mapping the politics of procedure in this way, it may be tempting to follow some of the adherents of critical legal studies who contend that procedure had no content at all: that it was only an instrumental tool to get one thing done in 1848 and another in 1938. The substance-procedure differentiation, in this line of argument, was meaningless, a pseudo-dichotomy that only mystifies and obscures the realities of power.³⁰ But following that line would be a mistake. For one thing, it gives an incomplete account of the codifiers’ good faith arguments. Except for a stray cynical remark here or there, the codifiers genuinely believed they were tracing a natural distinction that only in the act of codifying turned out to be so surprisingly capacious. A second objection to the critics’ calculation is that, in terms of legal practice, it makes for poor history, and is barely even critical. Of course procedure, however defined, is reducible to power. Procedure, even in its machinist and handmaiden formulations, is the very power of the law to work in actual cases. What we are left to wonder is why configurations of power have taken the shape they have over time. Why are certain formulary systems, remedies, even theologies excluded from legal practice at one time, only to be invited – or to sneak – back in later?

³⁰ See, e.g., Duncan Kennedy, “Form and Substance in Private Law Adjudication,” 89 *Harvard Law Review* 1685 (1976); Paul Brest, “The Substance of Process,” 42 *Ohio State Law Journal* 131 (1981); Mark Tushnet & Jennifer Jaff, “Critical Legal Studies and Criminal Procedure,” 35 *Catholic University Law Review* 361 (1986).

I again propose that legal scholars follow the theorists of religion for an appreciation of how procedure (and the ritual practices it points to) can be so simultaneously real and determinate yet incapable of precise definition. Since the third century, church historians have been fond of affirming the maxim that “the rule of prayer is the rule of faith.” Among other things, the maxim helps to remind them that Christianity, like most religions, is first of all embodied in practices before it is articulated in doctrine—beliefs such as Christ’s divinity begin as a matter of worship long before they become a matter of creeds. The maxim therefore also provides for the “conflict of laws” when practices on the ground appear to deviate from the script (or scripture): the received practices govern in such a case. Ultimately, the maxim affirms that praxis is, quite apart from formal theology, both a source of knowledge and a way of knowing. What is religious belief? Look at how religionists pray, and what they pray for.³¹

The transfer of this methodology to law should by this point be clear. In Anglo-American legality, law as a system of substantive rules followed well behind law as a set of practices whose logic became articulable only gradually over time. What is procedure? It is both something to know about the law and a way of knowing law. Prayers, after all, are not objects only of religion. The word “pleading” originates from religious supplication, and across the Anglo-American legal tradition to this very day a primary component of pleading is the “prayer for relief.”³² In procedure, the rule of prayer is literally the rule of law. What is the law? Look at the how lawyers pray, and what they pray for.

³¹ On the maxim in the history of Christian doctrine, see Jaroslav Pelikan, *The Christian Tradition, Vol. 3: The Growth of Medieval Theology (600–1300)* (Chicago 1978), 66–80.

³² The Federal Rules followed the Field Code in exchanging “prayer” for “demand.” See 1848 N.Y. Laws 521 § 120; Federal Rule of Civil Procedure 8 (1938). But the habitual expression continues in use in the case reports, as any Westlaw search can show, and it was often used by the New York code commissioners in their commentary. See, for instance, *Final Report of the Commissioners on Practice and Pleadings*, in *Documents of the Assembly of the State of New York*, 73d sess., No. 16 (1850), 2:8–9. During my clerkship in the Southern District of Texas in 2017, a pro se plaintiff mistakenly took the guidance for a “prayer for relief” literally—he inscribed a Psalm-like supplication to the Christian God at the end of his pleading. See ECF Document No. 1, Case 4:17-cv-02177, Southern District of Texas, July 14, 2017.

With their unrelenting faith in positivism, the codifiers of procedure frequently overlooked this crucial dimension to knowing—and changing—the law. Like theology students sneering at the people in the pews, the codifiers genuinely believed that procedure could easily be cabined off and subordinated to a legal theory of rights and correlative duties, and practitioners would fall in line.³³ But the entanglement of procedure with practice, and practice with the actual workings of the law, made procedure at once more capacious than the codifiers expected and exceedingly difficult to change on the ground. In the Anglo-American tradition of practice, pleadings inhered so closely to remedies that both became defined as procedural in the codes. Yet remedies hewed so closely to substantive rules that procedure expanded far beyond the boundaries within which the codifiers' political arguments promised it would stay confined. At the same time, the prayers of the lawyers could not remain formless. Over the run of cases, categories of remedies seemed to naturally elicit certain kinds of prayers, and so the forms of the action and the distinction between law and equity lived on in the lawyer's prayers, even as they were abolished from the law books. But the law books were not the only, or for most lawyers even the primary, way of knowing the law.

* * *

The institutionalization of procedure in the law schools thus also highlights the centrality of lawyers in establishing the field's metes and bounds. From the time that Langdell introduced sequenced courses in American legal education, law schools have usually required students to take procedure as a first-year course. This requirements stands in stark contrast to English and continental legal education, where procedure is either omitted from the curriculum entirely or held off until post-graduate apprenticeships.³⁴ In part, this requirement demonstrates the continuing constitutive power

³³ For two contending theories of how legal rights could operate apart from the procedures that vindicated them, see Pomeroy, *Remedies and Remedial Rights by the Civil Action*; and Wesley Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning," 23 *Yale Law Journal* 16 (1913). Clark expressed himself partial to Hohfeld's account. Charles E. Clark, "The Code Cause of Action," 33 *Yale Law Journal* 817 (1924), 828.

³⁴ See Robert Stevens, *Law School: Legal Education in America from the 1850s to the 1980s* (UNC 1983), 41.

of procedure in American legal thought,³⁵ but it also shows the prominence of the lawyer-as-litigator paradigm that arose in the years after trial lawyers promulgated the code that redefined American legal practice. The code imagined its primary audience to be the practitioners using it rather than the judges administering it. So too did the earliest civil procedure courses. Langdell defined civil procedure in his inaugural course as defined by five topics: “1) getting the defendant into court, 2) pleading, 3) trial, 4) judgment, and 5) execution of the court’s decision,” a sequence geared to teaching students litigation tactics well after most elite law practice had become law-office lawyering.³⁶

In 1938, the year the Federal Rules went into force, Charles Clark expressed regret at how intensely the procedure curriculum focused on litigators navigating a single case. In his view, procedure pedagogy needed to incorporate more of the history of procedure as a system with many component parts, because it was “most necessary for the understanding of what has gone on in the past, not to speak of the social need of knowing what effective law administration is.” As in his codification efforts generally, Clark was turning his pedagogy to focus on judges. Clark worried that too many judges, trained to think like litigators with their horizons limited to the case before them, were making “expedient” rules against technicality, creating disastrously more technical practices elsewhere in the system.³⁷

Although Clark directed his codification and pedagogical efforts towards the judiciary, his insistence that legal history held one key to “the social need of knowing what effective law administration is” helps to illuminate one final consequence of the lawyers’ code that governed American practice from 1848 to 1938. Sean Farhang and others have recently argued that an exceptional feature of the United States is that what other countries regulate through robust

³⁵ On the “mutually constitutive” relationship between law and society, see Robert W. Gordon, “Critical Legal Histories,” 36 *Stanford Law Review* 57 (1984); Susanna L. Blumenthal, “Of Mandarins, Legal Consciousness, and the Cultural Turn in US Legal History,” 37 *Law & Social Inquiry* 167 (2012).

³⁶ Kimball & Reyes, “The ‘First Modern Civil Procedure Course,’” 272. On the turn towards office lawyering, see John H. Langbein et al., *History of the Common Law: The Development of Anglo-American Legal Institutions* (Aspen 2009), 1021–28

³⁷ Charles E. Clark, “The Handmaid of Justice,” 23 *Washington University Law Quarterly* 297 (1938), 304.

administrative regimes, the United States shunts off into private litigation for enforcement. Farhang begins with the Civil Rights Act of 1964 as the “foundations” of his story.³⁸ What this study argues is that these foundations are far broader, far deeper, and for that reason far more intractable, running back to the time that Americans put litigators in charge of writing the rules of litigation. By the time of the 1964 Act, there had been more than a century of structured habits of thought that made it seem possible and even desirable for Congress to look to private litigation as the best way to vindicate civil rights. The long reign of the lawyers’ code gave the United States a deep tradition of relying on litigators as a primary mode of civil governance, a tradition that itself would not be easily effaced, even with the changing of the codes.

³⁸ Sean Farhang, *The Litigation State: Public Regulation and Private Lawsuits in the U.S.* (Princeton 2010); Martha Minow, “Public and Private Partnerships: Accounting for the New Religion,” 116 *Harvard Law Review* 1229 (2003); Trevor W. Morrison, “Private Attorneys General and the First Amendment,” 103 *Michigan Law Review* 589 (2005). Farhang’s thesis is reminiscent of an older literature focusing on the United States’ administration by litigation rather than by bureaucrat. See Louis L. Jaffe, “The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff,” 116 *University of Pennsylvania Law Review* 1033 (1968); Abram Chayes, “The Role of the Judge in Public Law Litigation,” 89 *Harvard Law Review* 1281 (1976).

Appendix A

The Codifiers of Procedural Law

What follows is a compendium of code commissioners and committee members in the nineteenth-century United States. I have compiled the list of codifiers from legislative journals, code commission reports, and the sessions laws that appointed and compensated the commissioners. As Chapters 2 and 3 detailed, codification could take a variety of legislative forms. In rare circumstances, jurisdictions commissioned a full codification of the law with at least the implied intent of converting common law jurisprudence into the straightforward application of a statute.¹ More commonly, states and territories commissioned a compilation or a light-handed “revision” of their existing statutes. As part of these broader compilation or codification efforts, legislatures commissioned the reform and simplification of civil practice.² Sometimes, revisers and compilers slipped in a novel procedure code even without this mandate.³ On other occasions, legislatures established a commission specifically to reform or codify procedural law on its own.⁴ In a significant number of western jurisdictions, judiciary committees or special joint committees within the legislature introduced procedure codes without resorting to a commission.⁵ This appendix supplies biographical details for many of these commissioners, codifiers, and legislative committee members, including their political affiliation and practical legal experience prior to their codification efforts.

Principles of Selection

The clean uniformity of a chart should not obscure the fact that this project, like all collections of historical data, required broad judgment in selection. There were many more legislative commissions in the nineteenth-century United States than are presented here. To compile the profiles of procedural “codifiers,” I have selected those commissioners that consciously changed the law of civil practice in their jurisdictions and so thought of themselves as code lawyers. A great number of later commissions to compile statutory laws would have necessarily reprinted the procedure codes in force, but unless they consciously revised the procedure codes—as did some revision commissions who adopted a more up-to-date version of Field’s New York code—they are not included here. (For a fuller list of such compilations and reenactments, see Appendix C.)

In addition, who counts as a commissioner requires some discretion in cases in which the original appointees resigned—not an uncommon occurrence, especially for elite lawyers contemplating the thankless task of churning out a code in a matter of months. As the story of the original New York practice commission illustrates—where the Hunker appellate lawyer Nicholas Hill was replaced by the Barnburner trial lawyer David Dudley Field—such resignations and replacements could significantly alter the balance of partisan affiliation and practical experience on a code commission.⁶ While including original appointees might have some probative value for discerning the partisan and professional composition of legislative commissions, I have decided to include only those who fulfilled their commissions and signed on to the final report of the code. This

¹ See, for instance, California (1872) and Dakota Territory (1877), below.

² See, for instance, Alabama (1852) and Mississippi (1857), below.

³ See, for instance, District of Columbia (1857), below.

⁴ See, for instance, New York (1848), Wisconsin (1856), and Arkansas (1869), below.

⁵ See, for instance, Nevada (1861), Utah (1870), and Colorado (1877), below.

⁶ See Chapter 2, above.

selection allows the commissions to be treated more consistently, since it is not always possible to track all the resignations and re-appointments over the course of a commission.

This principle of selection also helps to make clear a peculiar feature of American legislative history: the strong reliance on three-member commissions. No matter whether the commission was expected to produce a 100-page code of procedure or a multivolume codification of the common law, no matter whether the commission was expected to finish its work within a three-month legislative session or over the course of half a decade, three-member commissions remained the norm. In all, the following charts document 31 three-member commissions among the 39 legislative commissions included in this study.⁷

Where the sources indicate that one commissioner was substantially or solely responsible for crafting the procedure code, I have marked his name with an asterisk (*).⁸ Where the sources indicate that a commissioner did not contribute to the work of the commission, usually because of illness or death, I have marked him with a dagger (†). In the case of legislative committees, I have included only the member who introduced the code where the legislative record makes clear who that was. Otherwise, I list all the members of the legislative committee tasked with preparing a code of procedure.

Profile of the Codifiers

In many ways, of course, the extraordinarily wealthy and prolific codifier David Dudley Field was unique among American lawyers. But taken all together, the “average” American codifier closely resembled Field in professional and political experience. The average age of the codifiers at the time of their commission was 42, exactly Field’s age when he completed his first draft of the New York code. Most, like Field, had some mix of college courses and apprenticeship or self-instruction in the law. A substantial number had some legislative experience, but the vast majority had only been trial lawyers before their commission. Out of 134 codifiers listed here, only 24 had any judicial experience, and even then, most of those judges had served short terms as federal appointees to the territorial courts—that is, their judicial experience was a temporary step in advancement of their careers as lawyers, involving little if any actual judgment over cases.

Outside of Utah, which was a special case owing to the dominance of Mormon pioneers, only three laymen sat on code commissions, and five others sat on code committees within a legislature. Some of the earliest legislative commissions in America required members to be “learned in the law,” and later commissions occasionally adopted the same requirement.⁹ Some states instituted an even more restrictive requirement that commissioners had to have practiced law within the jurisdiction for at least two years.¹⁰ But most left it to the discretion of the appointing body—usually either the governor or the legislative assembly—to make suitable appointments. Laymen appointed to code commissions either had extensive legislative experience, such as George Carr, a tanner who presided over Indiana’s constitutional convention of 1851, or else were skilled editors or publishers and could be expected to supervise the technical production of the sprawling codes.

Politically, the codifiers affiliated with every major party, from the Federalists and Jeffersonian Republicans of the Early Republic, to the Whigs and Jacksonian Democrats, to the

⁷ Note that although the 1856 Wisconsin Code of Procedure was ultimately produced by a single commissioner, the enabling legislation called on the governor to appoint three members to a commission. All three members resigned in view of the short amount of time they had to complete the work. See 1856 Wisconsin Laws 76; Journal of the Assembly of the State of Wisconsin (1856), 855–56.

⁸ Commissions ordered to codify or revise all of a jurisdiction’s statutes often divided up the work by giving one commissioner the penal laws, one the civil laws, and one procedural law. See, for instance, the examples of Texas (1855), Georgia (1860), and North Carolina (1868), below.

⁹ See, for instance, 1832 Massachusetts Laws 103.

¹⁰ See, for instance, 1884 Wyoming Laws 147.

postbellum Liberal Republicans, Populists, and Goldbug Democrats. Of the 134 codifiers listed, 65 at some point affiliated with the Republican Party, and 57 with the Democrats. But the apparent political diversity at the quantifiable level of party affiliation obscures the more unified political outlook of the codifiers. Most Democrats, like Field in his youth, were free-labor nationalists and staunch unionists. Republicans, like Field in his middle age, typically adhered to the party's liberal wing and supported the expansion of a national economy even to the exclusion of the freedmen's rights or Confederate penalties demanded by the party's radical wing. Outside of three commissions in the postbellum South, whose memberships were consciously designed to balance these partisan positions, no codifier supported secession or nullification, and no codifier joined the ranks of the Radical Republicans. As evidenced by the 16 codifiers who switched between the Republican and Democratic parties—including Field himself—party affiliation among the codifiers had more to do with matters of local patronage and the shifting fortunes of nationalism within the Democratic Party. As a matter of policy, the codifiers were largely unified around policies of nationalist state-building but paired—however paradoxically—with limited federal regulation of economic rights and commercial expansion. One could hardly find a better archetype than Field, a man who bolted the Democratic Party to join the Free Soilers on antislavery principles but then used his trial skills to systematically undercut federal Reconstruction policy by arguing for the inviolable rights of property.¹¹

So far, in describing “the codifiers,” I have limited the discussion to those codifiers who advanced some version of the Field Procedure Code. There were several other legislative commissions in nineteenth-century America that either repudiated Field's code or blazed their own path. I have gathered the most notable examples in Table 3, all from either New England or the American South. The place of codification in the South is severely understudied. The lack of scholarly attention is regrettable because southern codification poses a striking paradox. In the usual telling, codification is a mark of legal modernity, a necessary enterprise for nation-building, bureaucratization, and commercial expansion over territories where localized, often religiously rooted legalities must give way to a centrally formed legal rationalism.¹² Yet it was in the putatively premodern American South that codification found its most widespread success. Years before Field could even attempt a codification of the common law—an attempt that would never succeed in modern New York—a solid line of southern states from Georgia to Louisiana not only made the attempt but achieved it. And unlike the Field codifications which proceeded piecemeal through the law over the course of decades, the southern codes represented complete codifications: penal, civil, and procedural law all in one—enormous—volume.

The comparison between the Field Code lawyers and the southern codifiers is striking and instructive. Where the Field commissions were dominated by trial lawyers, the southern commissions were composed almost entirely of judges. The few judges that sat on Field commissions tended to be temporary federal appointees on their way to other legal pursuits. The southern code judges, on the other hand, spent nearly their entire careers on the bench at both the trial and appellate levels. The political differences are also stark. Southern commissioners were full

¹¹ On Field's shifting partisan loyalties, see generally Philip J. Bergan, “David Dudley Field: A Lawyer's Life,” in *The Fields and the Law* (Federal Bar Council, 1986). Field was the successful Supreme Court lawyer in *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866) (holding the trial of civilians by military commission unconstitutional), *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1867) (striking a loyalty oath as unconstitutional), and *United States v. Cruikshank*, 92 U.S. 542 (1875) (enforcing the Fourteenth Amendment only against “state action”), among others.

¹² See, for instance, the accounts offered in Gunther A. Weiss, “The Enchantment of Codification in the Common-Law World,” *Yale Journal of International Law* 25 (2000): 435; Maurice Eugen Lang, *Codification in the British Empire and America* (Lawbook Exchange 1924); Csaba Varga, *Codification as a Socio-Historical Phenomenon*, 2nd ed. (Akadémiai Kiadó 2011 [1991]); Roger Berkowitz, *The Gift of Science: Leibniz and the Modern Legal Tradition* (Fordham 2010); Robert A. Yelle, *The Language of Disenchantment: Protestant Literalism and Colonial Discourse in British India* (Oxford 2012).

of jurists who became ardent secessionists and went on to high-ranking positions in the Confederacy. The difference in political outlook shows in the very structure of the texts the southern commissions adopted. Unlike the Field commissions, there is no significant borrowing of texts among the southern codes, no “text family” in the South. Although Alabama (1852), Mississippi (1857), and Georgia (1860) all drafted codes within a decade of each other, none relied on the work of the others. The distinction highlights the choice that codifiers faced. Codification could be a path to linking one jurisdiction to a broader commercial state, uniting or harmonizing one jurisdiction’s law with that of New York. Or it could serve the opposite function by marking jurisdictional difference and re-centering the focus of a jurisdiction’s law at the state level at the expense of the national.

What all codifiers had in common, southern or nationalist, lay or lawyerly, appointed or elected, is their elitism. The very fact that I could compile biographical data on all of them is one indication of their prominence. In most cases, there are other indications as well. Many held high office either in state governments or on the national stage. Some were appointed law professors at a time when there were very few professorships. Many were the sons, brothers, or nephews (or equivalent, by marriage) to presidents, governors, and supreme court justices. And some simply made a lot of money as local lawyers of renown. They were all men, as were their secretaries and clerks. With the exception of the free black lawyer William Whipper and the half-Cherokee editor John Adair, they were all white. As professionals, they largely exemplified the nineteenth-century American trend Michael Grossberg has identified as a shift from the lawyer as a man of letters to the lawyer as the combative legal mechanic of unquestionable masculinity.¹³ A few of the early codifiers published their attempts at poetry. Field and his successors did not.

Their professional identity and elite standing meant that many of the codifiers were familiar with one another. Indeed, familial and professional connections were what helped the New York code migrate so fast. Judge Robert Wells received the 1848 Field Code from Field’s co-commissioner David Graham in time to adapt it and see it enacted in Missouri less than a year after its adoption in New York.¹⁴ Field’s nephew personally delivered Field’s codes to Albion Tourgée in North Carolina within a month of the latter’s appointment to a code commission.¹⁵ Field’s brother Stephen carried the 1850 draft of the New York Code to California and saw it enacted there by the end of 1851.¹⁶ When Field finished drafts of a penal, political, and civil code, Stephen again oversaw their enactment in California, supervising a three-man commission there in 1872.¹⁷ The secretary of that commission, Cameron King, later joined a commission to enact the revised code in Arizona. Through such connections, a handful of men—half of them named Field—covered nearly half a million square miles of territory, including places as diverse as the postbellum South, the mining Southwest, and the most populous commercial port in the Northeast, with the same legislation governing the practice of law.

¹³ Michael Grossberg, “Institutionalizing Masculinity: The Bar as a Man’s Profession,” in Mark Carnes and Clyde Griffen, eds., *Meanings for Manhood: Masculinity in Victorian America* (University of Chicago 1990), 133–51.

¹⁴ R.W. Wells, *Law of the State of Missouri Regulating Pleadings and Practice* (1849), 2.

¹⁵ Field to Tourgee, July 30, 1868 (confirming receipt of codes sent with Field’s nephew Fisk Brewer “some weeks ago”), Albion Tourgée Papers, Chautauqua County Historical Society, Westfield, NY.

¹⁶ William Wirt Blume, “Adoption in California of the Field Code of Civil Procedure: A Chapter in American Legal History,” 17 *Hastings Law Journal* 701 (1965).

¹⁷ *Master Hands in the Affairs of the Pacific Coast* (1892), s.v. “Cameron Haight King.”

Table 3A: Original Enactments of the Field Code

Code	Codifier	Life	Education	Party	Pre-Code Work	Notoriety
New York 1848 <i>prac. commission; legislature-appointed; 24 mos.; \$2,000¹</i>	David Dudley Field* ²	1805–1894	college & apprenticeship (New York)	Democrat/ Liberal Republican	lawyer	brother to Justice Stephen J. Field, Cyrus West Field
	David Graham Jr. ³	1808–1852	apprenticeship (New York)	Whig	lawyer; law professor	brother to eminent criminal lawyer John Graham
	Arphaxad Loomis ⁴	1798–1885	self-read (New York)	Democrat	probate judge; state assemblyman	judiciary committee member at 1846 convention
Missouri 1849 <i>extra-legislative proposal⁵</i>	Robert William Wells ⁶	1795–1864	self-read (Ohio)	Democrat/ Unionist	lawyer; state assemblyman; state attorney general; federal district judge	trial judge in <i>Dred Scott</i>
California 1850 <i>senate judiciary committee member⁷</i>	Elisha Oscar Crosby ⁸	1818–1895	apprenticeship (New York)	Democrat/ Republican	lawyer	delegate to 1850 convention
Kentucky 1851 <i>prac. commission; governor-appointed; 12 mos.; \$1,000⁹</i>	Madison C. Johnson ¹⁰	1807–1886	college & Transylvania Law School	Whig/ Unionist	lawyer	nephew of Vice President Richard Mentor Johnson
	James Harlan ¹¹	1800–1863	self-read (Kentucky)	Whig/ Unionist	U.S. congressman; state prosecutor, attorney general, & secretary of state	father of Justice John Marshall Harlan
	Preston S. Loughborough ¹²	1802–1852	college & self-read (Kentucky)	Democrat	U.S. attorney; state secretary of state; law school dean	professor of pleading & practice, Louisville Law School
Iowa 1851 <i>code commission; assembly-appointed; unspecified; \$1,000¹³</i>	William Woodward ¹⁴	1808–1871	college & self-read (Massachusetts)	Whig/ Republican	lawyer	son of Dartmouth's William H. Woodward
	Stephen Hempstead ¹⁵	1812–1883	college & apprenticeship (Illinois)	Democrat	soldier, lawyer, state assemblyman	elected governor as code was being reported
	Charles Mason* ¹⁶	1804–1882	college & self-read (New York)	Democrat	U.S. attorney; territorial appellate judge	first in West Point class over Robert E. Lee

Code	Codifier	Life	Education	Party	Pre-Code Work	Notoriety
Minnesota Territory 1851 <i>revis. commission; legislature-appointed; 90 days; \$12/day¹⁷</i>	Morton S. Wilkinson ¹⁸	1819–1894	self-read	Free Soil/Republican	lawyer; territorial assemblyman	
	L. A. Babcock ¹⁹	1837–1864	unknown (probably Iowa)	Republican	lawyer; territorial assemblyman	
	William Holcombe ²⁰	1804–1870	layman	Democrat	steamboat captain	first lt. governor of Minnesota
Indiana 1852 <i>prac. commission; assembly-appointed; 4 mos.; \$5/day²¹</i>	Walter March ²²	1814–1883	college & Harvard Law School	Democrat/Republican	lawyer	delegate to 1850 convention
	Lucien Barbour ²³	1811–1880	college & self-read (Massachusetts)	Democrat/Republican	U.S. attorney	
	George Carr ²⁴	1807–1892	layman	Democrat/Republican	tanner	president of the 1850 convention
Ohio 1853 <i>prac. commission; governor-appointed; 12 mos.; \$1,800²⁵</i>	William Kennon ²⁶	1798–1881	college & apprenticeship (Ohio)	Democrat/Republican	lawyer; U.S. congressman; state trial judge	judiciary committee member at 1851 convention
	Daniel Morton ²⁷	1815–1859	college & apprenticeship (Ohio)	Democrat/Unionist	lawyer; mayor; U.S. attorney	brother of Vice President Levi Morton
	William Groesbeck ²⁸	1815–1897	college & apprenticeship (Ohio)	Democrat/Liberal Republican	lawyer	impeachment counsel to President Andrew Johnson
Oregon Territory 1854 <i>code commission; legislature-appointed; 10 mos.; \$6/day²⁹</i>	James K. Kelly ³⁰	1819–1903	college & Dickinson Law School	Democrat	lawyer; territory councilman	chief justice of Oregon supreme court
	Daniel Bigelow ³¹	1824–1905	college & Harvard Law School	Republican	lawyer	led movement to create Washington Territory
	Reuben Boise ³²	1819–1907	college & apprenticeship (Massachusetts)	Democrat	lawyer; territory assemblyman	
Washington Territory 1854 <i>code commission; assembly-appointed; 90 days; \$3/day³³</i>	Edward Lander ³⁴	1816–1907	college & self-read (Indiana)	Unionist Democrat	soldier; state & territorial appellate judge	captain under Zachary Taylor in Mexican War
	Victor Monroe ³⁵	1813–1855	self-read (Kentucky)	Democrat	territorial trial judge	
	William Strong ³⁶	1817–1887	college & self-read (New York)	Democrat	territorial appellate judge	

Code	Codifier	Life	Education	Party	Pre-Code Work	Notoriety
Nebraska Territory 1855 <i>governor recommendation</i> ³⁷	Mark Izard ³⁸	1799– 1866	layman	Democrat	politician; state senator; state speaker of the house, U.S. marshal	second governor of Nebraska Territory
Wisconsin 1856 <i>prac. commission; governor-appointed; 6 mos.; \$2.50/day</i> ³⁹	James C. Hopkins ⁴⁰	1819– 1877	apprenticeship (New York)	Whig/ Republican	postmaster; lawyer; state senator	
District of Columbia 1857 <i>code commission; president-appointed; 24 mos.; \$3,000</i> ⁴¹	Robert Ould ⁴²	1820– 1882	William & Mary Law Department	Democrat	lawyer	lost <i>Sickles</i> case on first known use of insanity defense
	William B. B. Cross ⁴³	1823– 1880	unknown (Maryland?)	Democrat	lawyer	
Tennessee 1858 <i>code commission; assembly-appointed; 12 mos.; unspecified</i> ⁴⁴	William F. Cooper ^{*45}	1820– 1909	college & apprenticeship (Tennessee)	Democrat	lawyer	nominated to Confederate Supreme Court
	Return J. Meigs III ⁴⁶	1801– 1891	self-read (Kentucky)	Whig/ Unionist	state attorney general; U.S. attorney; state senator	
Kansas Territory 1859 <i>assembly judiciary committee member</i> ⁴⁷	Robert Byington Mitchell ⁴⁸	1823– 1882	apprenticeship (Ohio)	Democrat	soldier; lawyer; mayor	governor of New Mexico Territory
Nevada Territory 1861 <i>council judiciary committee member</i> ⁴⁹	William M. Stewart ⁵⁰	1827– 1909	college & self-read (California)	Republican	miner; lawyer; state attorney general	leading senator during Reconstruction

Code	Codifier	Life	Education	Party	Pre-Code Work	Notoriety
Dakota Territory 1862 <i>assembly committee</i> ⁵¹	Moses K. Armstrong ⁵²	1832–1906	layman	Democrat	surveyor; editor	author, <i>Early Empire Builders of the Great West</i>
	Albert W. Puett ⁵³	1833–c.1889	unknown (probably in Indiana)	Republican	lawyer; miner	
	George Waldron ⁵⁴	1821–1896	law department, Bowdoin College	Republican	lawyer; land speculator	
Idaho Territory 1864 <i>joint-legislative committee</i> ⁵⁵	William R. Keithley ⁵⁶	1825–1904	unknown (probably in Missouri)	unknown	lawyer; miner	
	Samuel C. Parks ⁵⁷	1820–1917	college and self-read (Illinois)	Republican	state legislator; territorial judge	justice of supreme court in Idaho, Wyoming, & New Mexico
	William C. Rheem ⁵⁸	1834–1903	self-read (Pennsylvania)	Republican	lawyer	father of Standard Oil president
Arizona Territory 1865 <i>code commission; governor-appointed; 90 days; \$2,500</i> ⁵⁹	William T. Howell ⁶⁰	1810–1870	self-read (New York)	Democrat/Republican	lawyer; state senator; probate judge; territorial appellate judge	
Montana Territory 1865 <i>special joint committee</i> ⁶¹	Charles S. Bagg ⁶²	1816–1892	layman	Democrat	miner; postmaster	
	Frank M. Thompson ⁶³	1833–1916	layman	Whig/Republican	miner; land commissioner	
	Washington J. McCormick* ⁶⁴	1835–1889	Ashbury (DePauw) Law School	Democrat	lawyer; city booster	father to renowned Congressman and relative of James G. Blaine
	Alexander E. Mayhew ⁶⁵	1830–1914	college & apprenticeship (Pennsylvania & Kansas)	Democrat	lawyer; prosecutor	speaker of the Montana house

Code	Codifier	Life	Education	Party	Pre-Code Work	Notoriety
North Carolina 1868 <i>code commission; convention- appointed; 90 days; \$200/mo.</i> ⁶⁶	Albion Tourgée* ⁶⁷	1838– 1905	college and self-read (New York & Ohio)	Radical Republican	lawyer; state trial judge	bestselling author, <i>A Fool's Errand</i>
	Victor Barringer ⁶⁸	1827– 1896	college & apprenticeship (North Carolina)	Democrat	lawyer	first American judge to sit on an international court
	William B. Rodman ⁶⁹	1817– 1893	college & apprenticeship (North Carolina)	Democrat/ Republican	lawyer; state appellate judge	
Arkansas 1869 <i>prac. commission; convention- appointed; 15 mos.; \$800</i> ⁷⁰	John N. Sarber* ⁷¹	1837– 1905	self-read (Arkansas)	Republican	soldier; lawyer	delegate to 1867 convention
	Benjamin Franklin Rice* ⁷²	1828– 1905	self-read (Kentucky)	Liberal Republican	lawyer; state assemblyman; soldier; judge advocate	U.S. Senate chairman on mines and mining
	Milton L. Rice ⁷³	1824– 1890	self-read (Kentucky)	Republican	lawyer	
	Norval W. Cox ⁷⁴	1825– 1896	layman	Whig/ Republican	printer; clerk of state supreme court	
	John Whytock ⁷⁵	1835– 1898	self-read (New York)	Republican	soldier; U.S. attorney	
Wyoming Territory 1869 <i>house judiciary committee member</i> ⁷⁶	Benjamin Sheeks ⁷⁷	1842– 1929	Michigan Law School and apprenticeship (Nebraska)	Democrat	lawyer; territorial assemblyman	non-Mormon counsel to Mormon church in Supreme Court cases
South Carolina 1870 <i>code commission; assembly-appointed; 12 mos.; \$3,500</i> ⁷⁸	William J. Whipper ⁷⁹	1834– 1907	self-read (Ohio)	Radical Republican	lawyer; state assemblyman	first black lawyer to file an action of record in SC
	Charles Montgomery ⁸⁰	c.1822 –1899	unknown (probably South Carolina)	Republican	magistrate	
	David T. Corbin* ⁸¹	1833– 1905	college & apprenticeship (Vermont)	Republican	U.S. attorney; state senator	Lt. Governor of Reconstruction SC

Code	Codifier	Life	Education	Party	Pre-Code Work	Notoriety
Florida 1870 <i>prac. commission; governor-appointed; 12 mos.; \$500</i> ⁸²	Robert M. Smith ⁸³	c.1835 - c.1888	unknown (either New York or Florida)	Republican	lawyer; customs agent	
Utah Territory 1870 <i>council and house judiciary committees</i> ⁸⁴	Abraham O. Smoot ⁸⁵	1815- 1895	layman	Mormon	Mormon elder; mayor	
	Leonard E. Harrington ⁸⁶	1816- 1883	layman	Mormon	Mormon elder	
	William Jennings ⁸⁷	1823- 1886	layman	Mormon	merchant; Mormon elder	
	George Q. Cannon ⁸⁸	1827- 1901	layman	Mormon/ Republican	printer; soldier; Mormon apostle	First President of Mormon Church
	Lorenzo Snow ⁸⁹	1814- 1901	layman	Mormon	teacher; Mormon apostle	President of the Mormon Church
	Erastus Snow ⁹⁰	1818- 1888	layman	Mormon	Mormon apostle	
	Lorin Farr ⁹¹	1820- 1909	layman	Mormon	Mormon elder; mayor	
	Franklin D. Richards ⁹²	1821- 1899	layman	Mormon	Mormon apostle	
	Jonathan C. Wright ⁹³	1808- 1880	self-read (Utah)	Mormon	probate judge; prosecutor	
	Albert K. Thurber ⁹⁴	1826- 1888	layman	Mormon	miner	
	Silas Smith ⁹⁵	1830- 1910	self-read (Utah)	Mormon	U.S. marshal; probate judge; bishop	
Colorado 1877 <i>joint special committee member</i> ⁹⁶	Joseph Church Helm ⁹⁷	1848- 1915	University of Iowa Law Department	Republican	soldier; lawyer	

Code	Codifier	Life	Education	Party	Pre-Code Work	Notoriety
Oklahoma Territory 1890 <i>special council committee</i> ⁹⁸	John Foster* ⁹⁹	1848–1911	college & Albany Law School	Republican	lawyer; land claimer	
	William A. McCartney ¹⁰⁰	1856–1921	college & apprenticeship (Pennsylvania)	Republican	lawyer	
	Charles Brown ¹⁰¹	1853–c.1907	self-read (Illinois)	Republican	lawyer	first attorney general of Oklahoma
	James L. Brown ¹⁰²	1840–1923	college & Miami University Law School	Republican	soldier; lawyer	compiled the Oklahoma Annotated Code
	Leander G. Pitman ¹⁰³	1853–1938	college & self-read (Illinois)	Democrat	lawyer; clerk of court	delegate to 1890 territorial convention
New Mexico Territory 1897 <i>bar association committee</i> ¹⁰⁴	Andrieus A. Jones ¹⁰⁵	1862–1927	college & self-read (New Mexico)	Democrat	U.S. attorney; mayor	President of the New Mexico Bar
	L. Bradford Prince ¹⁰⁶	1840–1922	Columbia Law School	Republican	lawyer; territorial supreme court chief judge; territorial governor	New Mexico Territorial Governor
	Gideon D. Bantz ¹⁰⁷	1854–1898	apprenticeship & St. Louis Law School	Democrat	lawyer; territorial judge	
	Granville Richardson ¹⁰⁸	1860–1937	college & University of Michigan Law School	Democrat	lawyer; territorial councilman	
	William B. Childers ¹⁰⁹	1854–1908	Washington and Lee School of Law	Democrat/Republican	U.S. attorney	
Alaska Territory 1900 <i>U.S. Senate Committee on Revision of the Laws</i> ¹¹⁰	Julius C. Burrows ¹¹¹	1837–1915	self-read (Ohio)	Republican	soldier; state prosecutor	Michigan U.S. Senator
	Jeter C. Pritchard ¹¹²	1857–1921	self-read (North Carolina)	Republican	journalist; lawyer	North Carolina U.S. Senator
	John M. Thurston ¹¹³	1847–1916	Wayland University Law Department	Republican	lawyer; state assemblyman	Nebraska U.S. Senator
	John W. Daniel ¹¹⁴	1842–1910	University of Virginia Law School	Democrat	lawyer; state senator	Virginia U.S. Senator
	Stephen Mallory Jr. ¹¹⁵	1848–1907	college and self-read (Louisiana)	Democrat	naval officer; lawyer; state assemblyman	Florida U.S. Senator

Table 3B: Significant Revisions and Re-Enactments of the Field Code

Code	Codifier	Life	Education	Party	Pre-Code Work	Notoriety
California 1851 <i>senate judiciary committee member</i> ¹¹⁶	Stephen J. Field ¹¹⁷	1816–1899	college & apprenticeship (New York)	Democrat	lawyer	U.S. Supreme Court justice
Nebraska Territory 1857 <i>joint code committee</i> ¹¹⁸	Charles T. Holloway	? – c.1876	unknown	Republican	lawyer; mayor	
	Jonas Seely	? – 1890	unknown (Michigan?)	Democrat	lawyer	
	Andrew J. Hanscom ¹¹⁹	1828–1907	layman (brother-in-law to Seely)	Democrat	soldier; merchant	
	George L. Miller ¹²⁰	1830–1920	layman	Democrat	doctor; publisher	
	Allen Alexander Bradford	1815–1888	self-read (Missouri)	Republican	lawyer; state district judge ¹²¹	
Wisconsin 1858 <i>digest commission; governor-appointed; 28 weeks; \$2.50/day</i> ¹²²	David Taylor ¹²³	1818–1891	college & apprenticeship (New York)	Republican	lawyer; state senator; state circuit court judge	Wisconsin supreme court justice
	Samuel J. Todd ¹²⁴	1821–1902	apprenticeship (New York)	Republican	lawyer	
	Frederick S. Lovell ¹²⁵	1815–1878	college & apprenticeship (New Hampshire)	Republican	lawyer; soldier; territorial councilman	delegate to 1846 constitutional convention
Minnesota 1859 <i>revision commission; legislature-appointed; 24 mos.; \$400</i> ¹²⁶	Moses Sherburne ¹²⁷	1808–1868	self-read (Maine)	Democrat	lawyer; postmaster; state assemblyman; territorial judge	
	Aaron Goodrich ¹²⁸	1807–1887	self-read (Tennessee)	Republican	state assemblyman; territorial supreme court justice	
	William Hollinshead ¹²⁹	1820–1860	self-read (New Jersey)	Whig	lawyer; case reporter; compilation editor	

Code	Codifier	Life	Education	Party	Pre-Code Work	Notoriety
Kansas Territory 1859 <i>revision commission; legislature-appointed; 24 mos.; \$400</i> ¹³⁰	James McCahon ¹³¹	1833– 1871	self-read (Pennsylvania)	Republican	lawyer; case reporter	
	William McKay ¹³²	1813– 1859	self-read (Iowa)	Whig	lawyer; state district judge; land commissioner	
	Edward S. Lowman ¹³³	1832– 1863	apprenticeship (New York)	Republican	lawyer	associate of Rufus King
Iowa 1860 <i>revision commission; legislature-appointed; 6 mos.; unspecified (\$1,500/\$3,000)</i> ¹³⁴	Charles Ben Darwin ^{*135}	1823– 1901	college & self-read (Tennessee)	Republican	lawyer; teacher; state assemblyman	
	Winslow T. Barker ¹³⁶	1825– 1872	college & apprenticeship (New York)	Democrat	lawyer	
	William Smyth ¹³⁷	1824– 1870	apprenticeship (Iowa)	Republican	merchant; lawyer; state trial judge	
Oregon 1862 <i>revision commission; legislature-appointed; unspecified (24 mos.); unspecified (\$400)</i> ¹³⁸	James K. Kelly	1819– 1903	see above (Oregon 1854)	see above	see above	see above
	Addison C. Gibbs ¹³⁹	1825– 1886	self-read (New York)	Republican	lawyer; territorial assemblymen; customs agent	governor of Oregon
	Matthew Deady ^{*140}	1824– 1893	apprenticeship (Ohio)	Democrat	state councilman; state judge; federal judge	trial judge in <i>Pennoyer v. Neff</i>
Nevada 1869 <i>prac. commission; legislature- appointed; 12 mos.; \$3,000</i> ¹⁴¹	J. Neely Johnson ¹⁴²	1825– 1872	apprenticeship (Iowa)	American	lawyer; state assemblyman; governor	governor of California

Code	Codifier	Life	Education	Party	Pre-Code Work	Notoriety
California 1872 <i>revision commission; legislature-appointed; 24 mos.; \$3,000¹⁴³</i>	Creed Haymond ¹⁴⁴	1836– 1893	apprenticeship (California)	Republican	soldier; lawyer	chief general counsel of Southern Pacific Railroad
	John C. Burch ¹⁴⁵	1826– 1885	apprenticeship (Missouri)	Democrat	miner; district attorney; state assemblyman; state senator; U.S. congressman	
	Charles Lindley ¹⁴⁶	1822– 1882	Yale Law School	Republican	county judge; lawyer	
Dakota Territory 1877 <i>code commission; governor-appointed; 24 mos.; \$800¹⁴⁷</i>	Peter C. Shannon ¹⁴⁸	1821– 1899	apprenticeship (Pennsylvania)	Democrat/ Republican	lawyer; territorial supreme court justice	trial judge in the hanging of Jack McCall
	Granville Bennett ¹⁴⁹	1833– 1910	college & self-read (Iowa)	Republican	soldier; state senator; territorial supreme court justice	
	Bartlett Tripp ¹⁵⁰	1839– 1911	Albany Law School	Democrat	lawyer	president of 1883 constitutional convention
Utah Territory 1884 <i>revision commission; legislature-appointed; 24 mos.; \$4/day¹⁵¹</i>	Philip H. Emerson ¹⁵²	1834– 1889	self-read (Vermont)	Republican	lawyer; state senator; territorial supreme court justice	
	John T. Caine ¹⁵³	1829– 1911	layman	Democrat	politician; publisher	
	Arthur L. Thomas	1851– 1924	layman	Republican	politician; territorial secretary	member of Utah Commission (anti- polygamy registration board)
	Samuel R. Thurman ¹⁵⁴	1850– 1941	Michigan Law School	Democrat	lawyer; mayor	

Code	Codifier	Life	Education	Party	Pre-Code Work	Notoriety
Wyoming Territory 1886 <i>revision commission; governor-appointed; 24 mos.; \$1,200¹⁵⁵</i>	William W. Corlett ¹⁵⁶	1842– 1890	Union Law College (Ohio)	Republican	law professor; lawyer; U.S. congressman	
	Isaac P. Caldwell ¹⁵⁷	1834– 1916	self-read (Missouri)	Republican	lawyer; quartermaster; probate judge	
	Clarence D. Clark ¹⁵⁸	1851– 1930	University of Iowa Law School	Republican	lawyer	U.S. senator
Arizona Territory 1887 <i>revision commission; governor-appointed; 3 mos.; \$15/day¹⁵⁹</i>	Cameron King ¹⁶⁰	1844– 1911	apprenticeship (California)	Democrat	miner; clerk; lawyer	secretary to California 1872 commission
	Benjamin Goodrich ¹⁶¹	1839– 1923	Austin College Law Department	Democrat	soldier; lawyer; territorial attorney general	
	Edmund W. Wells ¹⁶²	1846– 1938	apprenticeship (Arizona)	Republican	clerk; lawyer	wealthiest citizen of Arizona when he ran for governor in 1911
Montana 1895 <i>code commission; governor-appointed; 24 mos.; \$4,000¹⁶³</i>	Decius S. Wade ¹⁶⁴	1835– 1905	apprenticeship (Ohio)	Republican	lawyer; probate judge; territorial supreme court justice	nephew of Ohio Senator Benjamin Wade
	Frederick W. Cole ¹⁶⁵	1837– 1895	self-read (New York)	Democrat	lawyer; state trial court judge	
	B. Platt Carpenter ¹⁶⁶	1837– 1921	college & apprenticeship (New York)	Republican	lawyer; state senator; county judge	Montana governor
Washington 1896 <i>private production¹⁶⁷</i>	Frank Pierce ¹⁶⁸	1864– 1947	Michigan Law School	Republican	lawyer	

Table 3C: Un-Enacted Commissions of the Field Code

Code	Codifier	Life	Education	Party	Pre-Code Work	Notoriety
Texas 1855 <i>code commission; governor-appointed; 18 mos.; \$1,500/yr¹⁶⁹</i>	Oliver Cromwell Hartley* ¹⁷⁰	1823– 1859	college & apprenticeship (Pennsylvania)	Democrat	soldier; lawyer; state assemblyman; court reporter; digest editor	
	John W. Harris ¹⁷¹	1810– 1887	University of Virginia Law School	Union Democrat	lawyer; state assemblyman; state attorney general	first attorney general of Texas
	James Willie ¹⁷²	1823– 1863	self-read (Texas)	Democrat	state assemblyman; lawyer	attorney general of Texas
Utah Territory 1859 <i>code commission; legislature-appointed; 6 mos.; \$3/day¹⁷³</i>	George A. Smith ¹⁷⁴	1817– 1875	layman	Mormon	Mormon apostle	First President of Mormon Church
	Seth M. Blair ¹⁷⁵	1844– 1867	self-read (Tennessee)	Mormon	soldier; U.S. attorney	
	Hosea Stout* ¹⁷⁶	1810– 1889	self-read (Utah)	Mormon	lawyer; police chief; Mormon missionary; territorial assemblyman; territorial attorney general	first lawyer admitted to Utah bar
Utah Territory 1867 <i>prac. commission; appointed; 11 mos.; unspecified¹⁷⁷</i>	Hosea Stout*	1810– 1889	see above	see above	see above	see above
	Albert Carrington ¹⁷⁸	1813– 1889	self-read (Pennsylvania)	Mormon	publisher; Mormon apostle & missionary	First President of Mormon Church

Table 3D: Other Significant Procedure Codification Commissions

Code	Codifier	Life	Education	Party	Pre-Code Work	Notoriety
Louisiana 1825 <i>revision and prac. commission; unspecified (3 yrs.); \$1,000¹⁷⁹</i>	Edward Livingston ¹⁸⁰	1764–1836	college & apprenticeship (New York)	Democrat	lawyer; U.S. congressman; U.S. attorney; mayor	President Jackson's Secretary of State
	Louis Moreau-Lislet	1766–1832	University of Paris Law Department	Democratic-Republican	lawyer; colonial judge	
	Pierre Augustin Derbigny ¹⁸¹	1769–1829	Bibliothèque Sainte-Geneviève	Whig	lawyer; state supreme court judge	governor of Louisiana
Massachusetts 1835 <i>revision commission; governor-appointed; 24 months; none¹⁸²</i>	Charles Jackson ¹⁸³	1775–1855	college & apprenticeship (Massachusetts)	Federalist	lawyer; state supreme court judge	
	Asahel Stearns ¹⁸⁴	1774–1839	Harvard Law Department	Federalist	law professor; state senator; U.S. congressman	
	John Pickering ¹⁸⁵	1777–1846	college & self-read (Massachusetts)	Federalist	lawyer; linguist	
Maine 1840 <i>revision commission; governor-appointed; 12 mos.; unspecified (\$2,500 total)¹⁸⁶</i>	Prentiss Mellen ¹⁸⁷	1764–1840	college & apprenticeship (Massachusetts)	Federalist	lawyer; U.S. Senator; state supreme court judge	
	Samuel E. Smith ¹⁸⁸	1788–1860	college & apprenticeship (Maine)	Democrat	state assemblyman; state appellate judge; governor	governor of Maine
	Ebenezer Everett ¹⁸⁹	1788–1869	college & apprenticeship (Massachusetts)	Federalist/Republican	lawyer; master in chancery	
Maryland 1855 <i>prac. commission; assembly-appointed; unspecified; unspecified (\$2,000 total)¹⁹⁰</i>	William Price ¹⁹¹	1794–1868	college & apprenticeship (Maryland)	Unionist	lawyer; state senator	drafter of Maryland's "Treason Bill"
	Samuel Tyler ^{*192}	1809–1877	college & apprenticeship (Maryland)	Democrat	lawyer; man of letters	friend and biographer of Chief Justice Roger Taney
	Frederick Stone ¹⁹³	1820–1899	college & apprenticeship (Maryland)	Democrat	lawyer	defense counsel in Lincoln assassination case

Code	Codifier	Life	Education	Party	Pre-Code Work	Notoriety
Alabama 1852 <i>code and prac. commission; legislature-appointed; 24 mos.; \$2,000¹⁹⁴</i>	John J. Ormond ¹⁹⁵	1795–1866	self-read (Virginia)	Whig	lawyer; planter; state assemblyman; state supreme court judge	
	George Goldthwaite ¹⁹⁶	1809–1879	self-read (Alabama)	Democrat	state appellate judge	U.S. Senator
	Arthur P. Bagby ¹⁹⁷	1794–1858	self-read (Alabama)	Democrat	state senator; governor; U.S. Senator; U.S. diplomat	governor of Alabama
Mississippi 1857 <i>code and prac. commission; judicially appointed; 24 mos.; unspecified¹⁹⁸</i>	William L. Sharkey ¹⁹⁹	1798–1873	self-read (Mississippi)	Whig	state assemblyman; state supreme court judge	provisional Reconstruction governor of Mississippi
	Henry T. Ellett ²⁰⁰	1812–1887	Princeton Law Department	Democrat/Secessionist	U.S. congressman; lawyer; state senator	Postmaster General of the Confederacy
	William L. Harris ²⁰¹	1807–1868	college & self-read (Georgia)	Secessionist	state appellate judge	
Georgia 1860 <i>code commission; legislature-appointed; 24 mos.; \$4,000²⁰²</i>	David Irwin* ²⁰³	1807–1886	apprenticeship (Georgia)	Whig/Unionist	lawyer; state trial judge	
	Thomas R. R. Cobb ²⁰⁴	1823–1862	college & apprenticeship (Georgia)	Secessionist	lawyer; case reporter; Confederate congressman	founder of University of Georgia School of Law
	Richard H. Clark ²⁰⁵	1824–1896	apprenticeship (Georgia)	Secessionist	lawyer; state senator; state appellate judge	
New York 1876 <i>revision commission; governor-appointed; unspecified (7 yrs.); \$5,000/yr²⁰⁶</i>	Montgomery H. Throop* ²⁰⁷	1827–1892	college & apprenticeship (New York)	Democrat	lawyer	partner of Roscoe Conkling
	Alexander S. Johnson ²⁰⁸	1817–1878	college & apprenticeship (New York)	Democrat/Republican	lawyer; state supreme court judge	Second Circuit judge
	Sullivan Caverno ²⁰⁹	1807–1882	college & apprenticeship (New York)	Democrat	educator; lawyer; master in chancery	

Code	Codifier	Life	Education	Party	Pre-Code Work	Notoriety
Cherokee Nation 1881 <i>compilation commission; chief- appointed; 12 mos.; \$3,000²¹⁰</i>	John Lynch Adair ²¹¹	1828- 1896	layman	Cherokee	clerk; editor	

Table Notes:

- ¹ 1847 New York Laws 66–68; see also Chapter 2 above.
- ² Philip J. Bergan, “David Dudley Field: A Lawyer’s Life,” in *The Fields and the Law* (Federal Bar Council 1986).
- ³ “Obituary of John Graham,” *New York Times*, April 10, 1894.
- ⁴ George Iru Todd & John Edwards Todd, eds., *The Todd Family in America* (New York 1920), 255; Arphaxad Loomis; *Historic Sketch of the New York System of Law Reform in Practice and Pleadings* (1879).
- ⁵ R.W. Wells, *Law of the State of Missouri Regulating Pleadings and Practice* (1849).
- ⁶ William Van Ness Bay, *Reminiscences of the Bench and Bar of Missouri* (1878), 538–44.
- ⁷ *Troy Daily Whig*, October 20, 1849.
- ⁸ Elisha Oscar Crosby, *Reminiscences of California and Guatemala from 1849 to 1864*, ed. Charles Albro Barker (Huntington Library, 1945).
- ⁹ *Report of the Commissioners Appointed to Prepare a Code of Practice* (Kentucky 1850), i–vi; 1850 Kentucky Laws 28; 1852 Kentucky Laws 361.
- ¹⁰ Lewis Collins and Richard Collins, *Collins’ Historical Sketches of Kentucky* (1892), 2:205; William Henry Perrin, *History of Fayette County, Kentucky* (1882), 637–38.
- ¹¹ William B. Allen, *History of Kentucky* (1872), 266–67; *Lawyers and Lawmakers of Kentucky* (1896), 120.
- ¹² Kentucky National Guard History sub nom. Preston S. Loughborough, <http://kynghistory.ky.gov/Our-History/Our-People/Pages/default.aspx>, accessed October 2, 2016.
- ¹³ 1848 Iowa Laws (Special) 42–44.
- ¹⁴ Clifford Powell, “History of the Iowa Codes of Law,” *10 Iowa Journal of History and Politics* 3 (1913), 12–14.
- ¹⁵ “Stephen Hempstead,” 1–3 *Iowa Historical Record* 3 (1887), 3–12.
- ¹⁶ Emlin M’Clain, “Charles Mason — Iowa’s First Jurist,” *4 Annals of Iowa* 595 (1899), 595–609.
- ¹⁷ *The Revised Statutes of the Territory of Minnesota* (1851), vii–viii; *Journal of the House of Representatives of the Territory of Minnesota* (1851), 43.
- ¹⁸ C. L. Hall, *Memoirs of the State Officers of the Nineteenth Legislature of Minnesota* (1877), 21–22.
- ¹⁹ William Bell Mitchell, *History of Stearns County, Minnesota* (1915), 1:42–43.
- ²⁰ Lucius Hubbard et al., *Minnesota in Three Centuries: 1655–1908* (1908), 3: 58–59, 74, 80.
- ²¹ *Report of the Commissioners: Indiana Code of Pleading and Practice in Civil Actions* (1852), Indiana State Library, Archives and Special Collections; 1851 Indiana Laws 99–100.
- ²² *A Biographical History of Eminent and Self-made Men of the State of Indiana* (1880), 1:51–52.
- ²³ Oliver H. Smith, *Early Indiana Trials and Sketches* (1858), 561–70; Leander John Monks, *Courts and Lawyers of Indiana* (1916), 2:415, 434, 503.
- ²⁴ Jacob Piatt Dunn, *Indiana and Indianans* (1919), 1:442.
- ²⁵ *Report of the Commissioners on Practice and Pleadings* (Ohio 1853); 1852 Ohio Gen. Laws 115–16.
- ²⁶ “William Kennon,” *2 Ohio Law Journal* 279 (1882), 279–280.
- ²⁷ Josiah Granville Leach, *Memoranda Relating to the Ancestry and Family of Hon. Levi Parsons Morton* (1894), 36–39.
- ²⁸ George Irving Reed, et al., eds., *Bench and Bar of Ohio* (1897), 1:263–267.
- ²⁹ 1853 Oregon Laws 57–58.
- ³⁰ Elwood Evans, *History of the Pacific Northwest: Oregon and Washington* (1889), 2:402–03.
- ³¹ Lancaster Pollard, *A History of the State of Washington* (New York 1937), 3:5–8.
- ³² Charles Erskine Wood, *History of the Bench and Bar of Oregon* (Portland 1910), 259–61.
- ³³ 1854 Washington Laws 451; *History of the Pacific Northwest* (1889), 2:590–93.
- ³⁴ Guide to the Lander Family Papers, Green Library Special Collections, Stanford University.
- ³⁵ Herman de Bachellet Seebold, *Old Louisiana Homes and Family Trees* (Pelican 2004), 1:77.
- ³⁶ *History of the Pacific Northwest* (1889), 2:590–93.
- ³⁷ Julius Sterling Morton, *Illustrated History of Nebraska* (1911), 1:212–13.
- ³⁸ Julius Sterling Morton, *Illustrated History of Nebraska* (1911), 1:212–13.
- ³⁹ 1856 Wisconsin Laws 76.
- ⁴⁰ Parker McCobb Reed, *The Bench and Bar of Wisconsin* (1882), 83–84.
- ⁴¹ 1855 U.S. Statutes at Large 642–643. It is unclear what force the procedure code in the revised laws had. The revision was to take effect upon acceptance by the District of Columbia aldermen, not an act of Congress. One codifier testified in 1890 that he believed the code had not gone into effect at all. See *The Sunday Herald* (Washington, D.C.), July 27, 1890.
- ⁴² Clement Ansel Evans, *Confederate Military History* (1899), 1:630–31.
- ⁴³ 1857 Revised Statutes of the District of Columbia, preface.

- ⁴⁴ W.F. Cooper, Report on the Revisal of the Statutes, *Senate Journal of the State of Tennessee* (1857), 2:185–96; 1852 Tennessee Laws 735 (apportioning for compensation “the balance remaining unexpended of the amount recovered by the State against Smith Cridle”).
- ⁴⁵ Guide to the Cooper Family Papers, Tennessee State Library and Archives, Nashville, Tennessee (1969).
- ⁴⁶ Joshua W. Caldwell, *Sketches of the Bench and Bar of Tennessee* (1898), 92–93.
- ⁴⁷ *Journal of the House of the Territory of Kansas* (Extra Session 1857 [1861]), 159, 198; *Journal of the Council of the Territory of Kansas* (Extra Session 1857 [1861]), 117.
- ⁴⁸ W. A. Mitchell, “Historic Linn,” *16 Collections of the Kansas State Historical Society* (1925), 632–37.
- ⁴⁹ *Journal of the Council of the Territory of Nevada* (1861), 37–38.
- ⁵⁰ Russell R. Elliott, *Servant of Power: A Political Biography of Senator William M. Stewart* (Nevada 1983).
- ⁵¹ *House Journal of the Legislative Assembly of the Territory of Dakota* (1862), 150.
- ⁵² “Moses K. Armstrong,” *The American Government: Biographies of Members of the House of Representatives* (1875), 3:311.
- ⁵³ *South Dakota Historical Collections* (1920), 3:124–25.
- ⁵⁴ George Washington Kingsbury, *History of Dakota Territory* (1915); passim; *South Dakota Historical Collections* (1920), 10:398; Doane Robinson, *History of South Dakota* (1904), 2:1440–41.
- ⁵⁵ 1864 Idaho Laws 449; *Boise News*, February 13, 1864.
- ⁵⁶ Marie Elliott, *Gold and Grand Dreams: Cariboo East in the Early Years* (Horsdal & Schubert 2001), 52–53.
- ⁵⁷ John Palmer, ed., *The Bench and Bar of Illinois: Historical and Reminiscent* (1899), 2:1006.
- ⁵⁸ “President’s Address,” *Proceedings of the Montana Bar Association from 1885–1902* (n.d.), 171.
- ⁵⁹ *Journals of the First Territorial Legislature of Arizona* (1865), 63; 1865 Arizona Laws 19, 60.
- ⁶⁰ John S. Goff, “William T. Howell and the Howell Code of Arizona,” *11 American Journal of Legal History* 221 (1967).
- ⁶¹ *Journal of the House of the Territory of Montana* (1865), 27.
- ⁶² Frederick Allen, *A Decent, Orderly Lynching: The Montana Vigilantes* (Oklahoma 2013), 177–81.
- ⁶³ Kenneth N. Owens, *A Tenderfoot in Montana: Reminiscences of the Gold Rush, the Vigilantes, and the Birth of Montana Territory*, by Francis M. Thompson (Montana Historical Society 2004).
- ⁶⁴ Papers of Washington J. McCormick, University of Montana, Mansfield Library Archives and Special Collections.
- ⁶⁵ *Illustrated History of the State of Idaho* (1899), 714.
- ⁶⁶ *First Report of the Code Commissioners* (North Carolina 1868).
- ⁶⁷ Otto H. Olsen, *Carpetbagger’s Crusade: The Life of Albion Winegar Tourgée* (Johns Hopkins 1965), 131–145; Mark Elliott, *Color-blind Justice: Albion Tourgée and the Quest for Racial Equality* (Oxford 2006).
- ⁶⁸ Anna Barringer, “The First American Judge in Egypt” (manuscript biography of Victor C. Barringer), Barringer Family Papers, University of Virginia Library, Special Collections.
- ⁶⁹ Charles Henry Jones, *Genealogy of the Rodman Family, 1620–1886* (1886), 93.
- ⁷⁰ *Journal of the Senate of the State of Arkansas* (1868), 199; 1869 Arkansas Laws 145–147; *Code of Practice in Civil and Criminal Cases for the State of Arkansas* (1869), 3–4.
- ⁷¹ Mary Frances Hodges, *John Newton Sarber and Sarber County, Arkansas* (AuthorHouse 2009).
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- ¹⁷⁰ *The Texas Reports* (1882), 21:x–xiii.
- ¹⁷¹ James D. Lynch, *The Bench and Bar of Texas* (1885), 369–81.
- ¹⁷² Lynch, *The Bench and Bar of Texas*, 208–10.
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Appendix B

Methodology of Text Reuse Analysis

The aim of the project underlying Chapter 3 is to compare texts of procedural statutes and codes to one another as one indication of a jurisdiction's influence on the laws of another jurisdiction. Of course, jurisdictions can influence one another in many ways beyond transmission of a statute, and in practice, copied texts might well become dead letters. The broader dissertation project accounts for other factors in its analysis of influence, but "borrowed" legislation is one crucial element in this analysis.

When the texts at issue run for hundreds of pages and come from over thirty jurisdictions, tracing the precise "reuse" of texts is impossible through traditional methods. Successful attempts at similar problems, such as Douglas Hay and Paul Craven's study of master-servant legislation in the British Empire, tend to focus on smaller amounts of legislation and employ large teams of assistants and data processors.¹ This project, however, was carried out by only two researchers, one to collect and curate a corpus of legislation and one to program the computations. I am supremely grateful to Lincoln Mullen for supplying his programming expertise to this project.

Natural language processing and text reuse are well known problems in computer science, shared across humanities disciplines as well as natural sciences and engineering. Natural language processing in some studies has relied on clean, hand-keyed and proofread documents.² Other projects, such as Viral Texts, have successfully used even the very low quality texts created by optical character recognition (OCR) software run on the *Chronicling America* dataset from the Library of Congress.³ Most nineteenth-century statutes have been digitally scanned into one repository or another but have not been re-keyed, making this project more akin to Viral Texts. Viral Texts examines a corpus that is many times larger and searches for reprinted texts of unknown and highly disparate lengths. Their problem, though similar, requires a different approach than the one employed here. The goal here is to create a set of processes that can accurately detect text reuse despite noisy OCR, one that can be shared with and verified by other scholars working on similar problems, and one that does not require intensive resources of computing capacity or personnel.

The corpus comprises 222 documents of about 18 million words. Curating a corpus to answer a question is an important difference from the way that digital history work often describes itself. Speaking in broad terms, digital historical work can either begin with a set of sources or a question. Digital history often emphasizes that it can begin with large datasets – the so-called "big data" which recently achieved the level of buzzword – such as the Google Books or Hathi Trust corpora.⁴ But it is less apparent that historians can apply digital history methods to questions that they have already

¹ Douglas Hay & Paul Craven, eds., *Masters, Servants, and Magistrates in Britain and the Empire, 1562–1955* (UNC 2004), 1–26. Hay and Craven's team collected 695 pieces of legislation totaling some 1.2 million words and re-keyed them by hand. *Ibid.*, 15 n.50. For comparison, this procedural code project is analyzing 222 statutes totaling 18 million words – a corpus fifteen times larger spread over one-third as many statutes – which makes re-keying unfeasible.

² The sterling example of this, within the domain of legal history, is the Old Bailey project. See Tim Hitchcock and William J. Turkel, "The Old Bailey Proceedings, 1674–1913: Text Mining for Evidence of Court Behavior," *34 Law and History Review* 1 (2016).

³ See <http://viraltxts.org/>.

⁴ Prominent examples of big data history include Shawn Graham et al., *Exploring Big Historical Data: The Historian's Macroscopic* (Imperial College 2015); Matthew L. Jockers, *Macroanalysis: Digital Methods and Literary History* (Illinois 2013); Franco Moretti, *Distant Reading* (Verso 2013); <http://www.culturomics.org/>.

formed, or that “distant reading” methods of the digital humanities can work at less than the absolute largest scales.⁵ This method, which might unimaginatively named “medium data” is a useful way for legal historians to proceed, by finding a corpus which is bounded by a particular problem.

A medium data approach makes sense for this project for several reasons. First, the amount of data is sufficiently large that a historian could not simply read the texts. This is not just a function of size but also of the quality of the corpus: the point of reading an entire, largely repetitious corpus is not to read closely for meaning, but to find patterns which close reading would not reveal. Second, the data did not require any specialized computing power: a single laptop is adequate for the methods laid out below. Yet the data was sufficiently large and complex that a naive approach to computation, even on the most powerful hardware, could not compute the matches in a reasonable time (that is, in minutes instead of weeks). This exercise required a combination of algorithms developed by computer scientists and, in one case, geneticists, to compute the matches in a reasonable time. Third, unlike big data, these middle data corpora are amenable to a hybrid method, using the tools of digital research but combining them with traditional historical methods of conducting close readings on heterogeneous sources, thus allowing both methods to inform one another.

Preparing the Corpus

The corpus for this project is composed entirely of statutes or proposed statutes from the nineteenth century Atlantic world and Hawaii, though the focus is primarily on state and territorial jurisdictions in the United States (for details on the curation of the corpus, see Appendix C). Almost all of these statutes appear in high quality scans in digital repositories such as HeinOnline’s session laws dataset or GaleGroup’s various Making of Modern Law databases. Many of these statute books were housed in law libraries scanned for the Google Books project and are thus publicly viewable and downloadable from Google Books or the HathiTrust. Although the quality of the scan sometimes drops on Google Books, I favored public domain sources where available both for reasons of speed (downloading a large statute is quicker from Google’s servers than from GaleGroup’s) and reproducibility (most of this project can be replicated without subscription databases).

In each instance I downloaded an entire volume of session laws, statutory compilations, or single-volume codes of procedure and then cropped out all other pages but the code or relevant statute itself. I then ran OCR software on the remaining pages. After several trials of various implementations of Tesseract (open source) and I.R.I.S. (proprietary), I determined that Nitro Pro PDF, which relies on I.R.I.S. software, offered the best OCR tool for this project. I.R.I.S. provides slightly more accurate readings of nineteenth-century typefaces than Tesseract, and Nitro Pro’s implementation makes words, not characters, the fundamental unit of output. It thus became easier to crop out other irrelevant material, such as marginalia and footnotes, without distorting the words that remained, even if the partial characters were lopped off. The remaining page displayed only the text of the statute itself which could be copied to a plain text file. Hyphenated line breaks were programmatically removed from all texts, and spelling was standardized for key legal terms that evolved over the nineteenth century (e.g., “indorsement”).

In three instances a code was re-keyed by hand. The first two were draft codes that were never enacted and consequently never disseminated to libraries or digital archives. One was a manuscript code from Utah. The other was a draft code from Texas, printed on cheap paper not meant to last longer than the legislative session – scanning the work may well have destroyed it and produced only middling OCR at best. The third re-keyed code was the main draft of the Field Code presented to the New York legislature in 1850. I re-keyed working off an OCR-produced text, which allowed me to

⁵ On the difference between beginning with sources or beginning with questions, see Stephen Robertson, “The Differences Between Digital Humanities and Digital History,” in Matthew K. Gold and Lauren F. Klein, eds., *Debates in the Digital Humanities* (Minnesota 2016). For a recent example of the latter, see Cameron Blevins, “Space, Nation, and the Triumph of Region: A View of the World from Houston,” 101 *Journal of American History* 122 (2014).

identify common OCR misreadings that could be programmatically corrected across all other texts. (For instance, *ff* or *fi* ligatures were frequently rendered incorrectly, but in predictable ways. So in every text *otticer* and *oflicer* could be corrected to *officer*).

Most digital text reuse projects would stop here in the preparation of a corpus, but statutes lend themselves to further refinement.⁶ Basically all nineteenth-century statutes were subdivided into sections, although naming conventions differed across time and jurisdiction. Typically, a long statute might be called a “code” or digest, divided into broad topics called “titles” and perhaps further subdivided into “articles” or “chapters” before each “section” stated the actual regulation. In tracing borrowings within the law, then, the most interesting unit of analysis is not words (as if one were considering the influence of *Moby Dick*) or articles (as in the Viral Texts project), but sections. After all, all procedural legislation, whether borrowed or not, used similar wording to describe courts and juries, plaintiffs and defendants, summonses and subpoenas, so analyzing words to determine borrowings would generate false positives. On the other hand, a “code of procedure” might include, in addition to trial practice, hundreds of pages on divorce, probate, foreclosure, or any number of topics not considered procedural by other jurisdictions. Determining the influence of the Field Code in such a case, based on sheer percentage of borrowed phrases, would generate false negatives. For instance, the final, complete draft of the New York code was over 150,000 words long, whereas California’s code was just over 50,000 words long. Those rather disparate lengths mean that comparing all of the California code to all of the New York code is a less meaningful comparison than comparing each section in the California code to each section in the New York code, where matching sections will be a similar length.

A corpus comprising not statutes but sections lends precision to measures of extent and degree of borrowed legislation. Taking stock of sections can reveal how a long code of otherwise original material incorporated the Field Code within its midst. And even in cases where every section was given a slight change in wording, the sheer number of highly similar sections can reveal which codes a commissioner had in hand while drafting. Making sections the fundamental unit of text not only makes programmatic sense, it is historically likely that it is how commissioners went about their work, evaluating previous legislation section by section in determining what should go into the new code. (See, for instance, Figure 5 in Chapter 3, showing how Senator William Morris Stewart interjected particular sections within California’s code.)

Accordingly, the corpus of 222 statutes was programmatically subdivided into a corpus of 180,000 sections, or laws. This required some additional preparation of the texts. Most statutes signaled the beginning of a new section with *sec.* or §, so legislation that used *articles*, *art.*, or plain digits to begin sections were changed by hand, and OCR mistakes of *sec.* and § were corrected (often find-and-replace functions could automate much of this work). An additional benefit of splitting statutes into sections is that irrelevant header material – titles and tables of contents – could now be ignored or discarded and only the actual law – material appearing between section markers – could be analyzed.

Calculating a Similarity Matrix

The next step was to compare sections to one another and measure the similarity between them. To continue the New York-to-California example, consider the following pairs of sections. The first pair is from the final draft of the New York Field Code. These sections completely abolish prior practice and begin to rebuild the procedure system from the ground up:

⁶ So far digital analysis of legal history texts have adhered to conventional digital history methods. Hay and Craven use a keywords-in-context method, searching for keywords like “servant” and then tokenizing a surrounding context of twenty-one words. Hay & Craven, *Masters, Servants, and Magistrates*, 16. Eric C. Nystrom & David S. Tanenhaus, “The Future of Digital Legal History: No Magic, No Silver Bullets,” 56 *American Journal of Legal History* 150 (2016), use session law pages as their unit of context.

§ 554. The distinction between actions at law and suits in equity, and the forms of all such actions and suits, heretofore existing, are abolished ; and, there shall be in this state, hereafter, but one form of action, for the enforcement or protection of private rights and the redress or prevention of private wrongs, which shall be denominated a civil action.

§ 555. In such action, the party complaining is known as the plaintiff, and the adverse party as the defendant.

California had no chancery practice or forms of action to abolish, so the code began more simply:

§ 1. There shall be in this State but one form of Civil Action, for the enforcement or protection of private right, and the redress or prevention of private wrongs.

§ 2. In such action the party complaining shall be known as the plaintiff, and the adverse party as the defendant.

The pairs are obviously related to one another, both in terms of their legal force and the actual words used.⁷

A well-known method for measuring the similarity of two documents involves dividing texts up into “tokens” of consecutive words and calculating a Jaccard score, defined as the ratio between the number of tokens that the two document have in common to the total number of tokens that appear in both documents.⁸ This project used five-word tokens and “shingled” them, meaning that for the New York sections above, the first token was “the distinction between actions at,” the second token was “distinction between actions at law,” and so on. These tokens each contain more meaning than a single word, yet because they are shingled they are robust to changes in the text or noisy OCR. A Jaccard score will always produce a number between 0 (complete dissimilarity) and 1 (complete similarity).⁹

Comparing the section pairs above produces the following matrix of scores, with identities and anachronisms removed:

	NY1850-554	NY1850-555	CA1851-001	CA1851-002
NY1850-554		0.0	0.14	0.0
NY1850-555			0.0	0.41
CA1851-001				0.0
CA1851-002				

⁷ *Final Report of the Commission on Practice and Pleadings*, in *Documents of the Assembly of the State of New York*, 73rd Sess., No. 16 (1850), 2:225-26; 1851 California Laws 51.

⁸ In set notation, $J(A, B) = \frac{|A \cap B|}{|A \cup B|}$, where A and B are the sets of tokens in each document. See A. Z. Broder, “On the Resemblance and Containment of Documents,” in *Compression and Complexity of Sequences* (SEQUENCES 1997), 21-29.

⁹ Set similarity counts each token only once for each time it appears in a set; while bag similarity counts duplicated token more than once. In practice the difference between bag and set similarity had no effect on this analysis, since $n = 5$ meant that there were very few duplicated tokens in each document.

As one might expect, the first respective sections (New York § 554 and California § 1) have a score of 0.14, which indicates that they are similar but have significant differences, while the second sections (New York § 555 to California § 2) have a higher similarity score since the sections hardly differ. Just as important, the first section of New York compared to the second section of California generates a score of 0; the two sections are nothing like each other.

Note that even low scores can indicate what an ordinary reader would think is a close borrowing. In the second respective sections, California only changed “is” to “shall be.” That change, coupled with a stray OCR error dropped the score to 0.41. Low scores are a tradeoff of shingling the tokens. Shingling significantly raises the number of tokens in the denominator of the score while lowering the number of matching tokens in the numerator – instead of the changed “is” mismatching one token, it mismatches five. But it is this attribute of shingling that helps to “read around” small changes and OCR errors to return a positive score and avoid the result of false negatives between sections that actually do match quite closely. The point is that a Jaccard score is not a measurement of the amount borrowed but of the similarity of borrowings. The .41 score between California and New York does not mean that California borrowed 41% of the New York section, but it does indicate that its similarity to New York is sufficiently high it almost certainly borrowed the entire section, perhaps with trivial changes. In practice, a threshold similarity score of 0.15 appeared sufficiently likely to indicate a genuine borrowing.

The larger aim, then, was to create a triangular matrix like the one above, but with approximately 180,000 rows and 180,000 columns, containing the similarity scores for each possible pair of sections. While this is easy enough to conceptualize, such a matrix is actually quite large, containing about 16.2 billion comparisons. The difficulty is that the number of comparisons to be made grows geometrically with the number of documents.¹⁰ Calculating each of those similarities would take an unreasonable amount of computation time, and most of these comparisons would be unnecessary, since each section has no relationship to most other sections (like the matrix above, most scores will be zero). While one could compute something like ten thousand comparisons per second for documents of the length of an average regulation, that still would require nearly a week of unceasing computation on a typical modern computer processor. Even these “middle data” therefore required a non-naive approach.

Using a minhash/locality sensitive hashing (LSH) algorithm to detect candidate pairs helped to reduce the computation time, down to about an hour. First, each five-word token from every section was hashed – translated into a unique integer much the same way cryptographic programs handle passwords – since a million numbers requires less space and processing power than a million sets of five-word strings. The LSH algorithm works by extracting a set number of random tokens from each document, allowing the documents to be represented uniformly and compactly. Then those random tokens are grouped into subsets known as “bands.” If any two documents have matching hashes within a band, the two documents become a candidate pair: that is, there is a non-trivial chance the documents significantly match because the text of one was borrowed from the other. The Jaccard score can then be calculated for all candidate pairs, without having to calculate a true score for the billions of pairs likely to return only zeroes. The LSH algorithm thus operates in a similar fashion to political polling – instead of investigating every token of every section, it queries a random but statistically significant number of tokens to predict matching values. It requires a computation for each document rather than each pair of documents, so the computation time grows linearly, not geometrically. And by controlling various parameters, one can set a threshold similarity score above which one is unlikely to find a spurious match. This project used 120 hashes in 60 bands, meaning it had a roughly 50% of

¹⁰ The exact number of comparisons to be made is given by $\binom{d^2-d}{2}$ where d is the number of documents.

detecting all matches with a Jaccard score of 0.1 to 0.2, and a 99.9% chance of detecting all matches with a score above 0.3.¹¹

The result was a matrix of similarly matching sections, with over 45,000 genuine matches. This matrix required filtering based on historical knowledge about the actual process of codification in each jurisdiction. Often, codes appearing in the same year could not have borrowed from each other, since there was too little time between the promulgation of the earlier code and the drafting of the later code—but that was not always the case. Missouri, which adopted a procedure code in 1849, did indeed borrow its text from New York’s 1849 version of the code, as Missouri’s codifier admitted in his report to the legislature.¹² So for codes appearing the same year, anachronistic pairings had to be more precisely defined. Furthermore, in chains of borrowing (e.g., NY1850 → CA1851 → CA1868 → CA1872 → MT1895) the latest section might have a high similarity to all of its parents, but it was in fact borrowed only from the most recent or most local parent. If a section had multiple matches, the matrix retained the match from the chronologically closest code, giving preference to codes from the same state, unless there was a substantially higher match from a different code.

This matrix is the basis for the heat maps, choropleths, and network graphs rendered in Chapter 3 above. All of the data analysis and visualization were created using the R programming language.¹³ As should be evident from the various shortcuts described above, the visualizations will be more reliable at higher levels of generality like the network graphs rather than more specific renderings like the heat maps. Locality-sensitive hashing introduces a measure of approximation into matching sections, which means that occasionally two matching sections may not have been compared and scored. Further, OCR clutter could render a lower Jaccard score, which may have caused the matrix to improperly rank the most likely source for a section that had multiple possible sources. Especially where a visualization shows borrowings from two codes from the same state, I suspect it may be assessing OCR quality more than a commissioner’s workmanship. Nevertheless, the visual renderings in the aggregate show an impressive ability to track slight linguistic nuances over significant lengths of legislation, so that, for instance, the division of labor between the commissioners in Washington is quite clear. (See Figure 9 in Chapter 3.) Parameters for “counting” a match were kept higher than strictly necessary in order to avoid false positives. So if the heat maps are inaccurate, it is because there was likely *more* borrowed legislation across more contiguous sections than the visualizations actually render.

¹¹ For the technical details of how MinHash and locality-sensitive hashing works, see Jure Leskovec et al., *Mining of Massive Datasets* (Cambridge 2011), ch. 3.

¹² R. W. Wells, *Law of the State of Missouri Regulating Pleadings and Practice* (1849), vi (“Most of the details are by no means original. Some of are borrowed from or own Statutes; some of them from late English Statutes, many from the Statutes of sister States. To the Reports of the talented and enlightened Commissioners of the State of New York, kindly furnished me by one of those gentlemen, David Graham, Esq., I am greatly indebted.”).

¹³ See <https://github.com/ropensci/textreuse>. Professor Mullen has released three repositories with all the code used for this project. Lincoln Mullen, “textreuse,” R package version 0.1.4 (2015–), <https://github.com/ropensci/textreuse>, includes our implementation of LSH and other algorithms suitable for use by other scholars. Lincoln Mullen et al., “tokenizers,” R package version 0.1.4 (2016–), <https://github.com/ropensci/tokenizers>, contains general-purpose tokenizers. These packages were peer-reviewed by rOpenSci, a collective of academic developers who use the R programming language. Another repository contains all of our code specific to the migration of the Field Code: “Text Analysis of Civil Procedure Codes,” <https://github.com/lmullen/civil-procedure-codes/>. These are the most essential software packages that we used: R Core Team, “R: A Language and Environment for Statistical Computing,” R Foundation for Statistical Computing (Vienna, 2017), <https://www.R-project.org/>; Hadley Wickham and Romain François, “dplyr,” R package version 0.4.3 (2016), <https://CRAN.R-project.org/package=dplyr>; Hadley Wickham and Winston Chang, “ggplot2,” R package version 2.1.0 (2016), <https://CRAN.R-project.org/package=ggplot2>; Hadley Wickham, “stringr,” R package version 1.0.0 (2016), <https://CRAN.R-project.org/package=stringr>; Wickham, “tidyr,” R package version 0.4.1 (2016), <https://CRAN.R-project.org/package=tidyr>; Gábor Csárdi and Tamás Nepusz, “The igraph Software Package for Complex Network Research,” *InterJournal, Complex Systems* 1695 (2006), <http://igraph.org>.

Clustering and Tracking Textual Evolution

So far the analysis has retained the context of the surrounding sections within a particular code. But since the fundamental unit of comparison is section to section, a technique called clustering can “deform” the text to group sections based on their similarity to one another, regardless of which code they came from. There are numerous clustering algorithms available, but this project used the affinity propagation clustering algorithm because its assumptions aligned with the characteristics of the transmission problems being explored here. That algorithm finds an “exemplar” item which is most characteristic of the other items in the cluster. That assumption fits nicely with borrowings from the Field Code, where a single section (likely from a New York code) had many borrowings, but where there could also be innovative sections from other states that might be more influential.¹⁴

The clustering algorithm was run on the same corpus of codes after it had been broken down into sections. The result was a set of approximately 6,300 clusters which contained at least five sections, although this probably overstates the number of innovative, *ur*-sections in the corpus. The biggest cluster, which described the difference between law and facts, contained 118 sections, meaning over one hundred codes contained the same section on the law-fact distinction, or one substantially like it. Within each cluster, the sections were organized chronologically to illustrate the development of the law from jurisdiction to jurisdiction over time. This method provides historians with a way of noticing small changes in the wording and substance of the law.¹⁵

The final result of such an analysis is on display in Chapter 5, illustrating the transmission and evolution of racialized strictures on witness testimony. (See Table 1 in Chapter 5 above). That table was generated entirely by the clustering program without resorting to a manual search of witness provisions in any of the codes. Like the text similarity package, the clustering algorithm can be adjusted for different thresholds as to what counts as sufficiently similar to be joined in a cluster. For this project, I erred on the side of keeping the threshold low to guarantee the elimination of false positives at the risk of more false negatives. Setting the threshold lower would increase the chance of clustering all testimonial qualifications in a single cluster, since they all relate to and share common words having to do with witness proofs. But, if the inquiry is focused on *racial* qualifications, a clustering threshold set too high would increase the risk of clustering related but irrelevant provisions such as spousal testimony qualifications. In the witness testimony table, the sections presented there were grouped by the algorithm into five distinct clusters, which was a useful approximation of the different “families” witness testimony provisions.

Word Association and Word Frequency in Legal Treatises

During the course of the project, a second corpus became available through a lending license between Gale Group and George Mason University, the home department of the scholar who assisted me with the public domain text reuse analysis. Gale Group owns and licenses a digitized database of legal treatises called the *Making of Modern Law*. The database spans from 1800 to 1926 and includes practically every published legal treatise from Britain or America in that time period. The license permits the production and display of data analysis on the corpus so long as the corpus and associated

¹⁴ Brendan J. Frey and Delbert Dueck, “Clustering by Passing Messages Between Data Points,” 315 *Science* 972 (2007); Ulrich Bodenhofer et al., “APCluster: An R package for Affinity Propagation Clustering,” 27 *Bioinformatics* 2463 (2011). Even though the affinity propagation algorithm did not fully converge with our dataset, it did an adequate job clustering the documents. Because there was an exemplar section for each cluster, we were able to merge clusters whose exemplars had a high Jaccard similarity score.

¹⁵ Lisa Samuels and Jerome McGann, “Deformance and Interpretation,” 30 *New Literary History* 25 (1999); Mark Sample, “Notes toward a Deformed Humanities,” May 2, 2012, <http://www.samplereality.com/2012/05/02/notes-towards-a-deformed-humanities/>; Stephen Ramsay, *Reading Machines: Toward an Algorithmic Criticism* (Illinois 2011), 32–57.

metadata itself remains undisclosed by George Mason affiliates. That restriction makes the corpus somewhat less desirable than the public domain corpus compiled from Google Books, but the tradeoff is that as a commercial database, *Making of Modern Law* has extensive hand-coded metadata identifying texts by title, author, topic, length, and place of publication with a precision unmatched by Google's machine processes.

Making of Modern Law's dataset contains an XML file for each volume in the database. Contained within the file is all the bibliographic information one would find in a law library card catalog, including precise designations of the field of law covered in the volume, the page length, and whether the volume is a subsequent edition or volume of an earlier work. The database allowed for the creation of the two charts displayed on Chapter 4 on the relative importance of "procedure" within American legal literature over the course of the nineteenth century. (See Figure 16 in Chapter 4 above.)

Although much of the work of compiling a corpus is already taken care of by using a field-specific database, the *Making of Modern Law* corpus had to undergo some additional refinements to generate reliable visualizations. First, although treatises predominate in the database, *Making of Modern Law* contains a number of extraneous texts, including judicial biographies and shorter reform tracts. The former could be excluded programmatically because the XML files indicate which works are biographical. The latter works could be excluded by setting a page threshold above 100 pages – longer than almost any reform tract but shorter than almost any treatise.

Second, multivolume works were treated as a single volume with a total page count so as to not double-weight multivolume titles and to accurately represent the total pages dedicated to a single treatment.

From there, it requires only simple arithmetic functions to find treatises with keywords such as "practice" or "procedure" in the title and to count up the number of volumes or pages published under that title in a given year. Although legal publishing dramatically increased over the nineteenth century, the so-called golden age of the legal treatise, the count of titles within a year could be small and could wildly fluctuate from year to year based on the publication of a landmark work (or the work's republication in a newly annotated edition).¹⁶ To account for average change over time, I instituted a ten year rolling average in the visualizations, meaning that each year's figure is graphed as the mean of the five years before and five years after the actual figure.

¹⁶ For the rise of treatises in America generally, see G. Edward White, *The Marshall Court and Cultural Change, 1815–1835* (1988) and A. W. B. Simpson, "The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature," in *Legal Theory and Legal History: Essays on the Common Law* (Hambledon Press 1987), 273–320.

Appendix C

Corpora of Procedural Legislation

Like most bodies of law in the Anglo-American world, procedure was regulated both by judge-made precedents and by legislative statutes. In addition, judges could prescribe so-called “court rules” that declared the timing or sequence of actions in litigation and sometimes defined the scope of judicial powers to subpoena evidence and arrange a jury trial.¹ The balance between precedent, statute, and court rules shifted over time and from jurisdiction to jurisdiction, but generally in nineteenth-century America, procedure was a body of law governed by statute.² During the Early Republic, few states could replicate the complex practices, institutions, and jurisdiction of English courts in their entirety, so early American statutes (or constitutions) often defined, at least at a cursory level, the litigation practices of state courts. Such laws might incorporate English practice by reference, for instance by defining “the powers of the court of chancery” in New York as “co-extensive with the powers and jurisdiction of the court of chancery in England,” but often these laws altered English practice, simplifying the forms of action, encouraging orality in chancery proceedings, or permitting equitable remedies in non-chancery courts.³ Adoptions or adaptations of the Field Code sometimes incorporated these earlier state statutes, and indeed, the original Field Code re-codified material from New York’s 1828 Revised Statutes. States that resisted codification still published a number of these procedural statutes over time, and even the closest adherents to common law traditions modified their practices over time through such legislation.

Thus, in order to trace textual borrowings and analyze the influence of the Field Code outside New York, several discrete corpora have to be assembled. First of course is the codes themselves, including major revisions and re-enactments within each jurisdiction that adopted a procedural code. For reliable results on state-to-state influence in codification, it is most important that this corpus be comprehensive—every major code should be included. The second corpus is all the major procedural legislation or collections of procedural statutes in each American jurisdiction, whether drafted before or apart from the procedure codes. Comprehensiveness here is impossible without a large research team—there are simply too many particular statutes scattered across a century’s worth of sessions laws in around fifty jurisdictions. Statutory compilations, however, can provide a shortcut to a corpus that is substantial enough to indicate the originality of each code in its jurisdiction—that is, how much earlier state law was incorporated into a code versus how much material was borrowed from New York (or elsewhere). Finally, to ensure the project does not overlook potential foreign borrowings, significant non-American statutes such as French and British codes of procedure must be included.

For the main corpus—enactments and re-enactments of the codes—treatise literature can provide helpful citations, though most treatises describe only the latest iterations of each state’s statutes and obscure the historical development behind them. Fortunately, at the end of the nineteenth century, the Indiana law professor Charles McGuffey Hepburn published an impressive study of procedural codes that accurately identified the original enactment of the Field Code in each state and

¹ Michigan’s fifty pages of court rules, for instance, covered nearly all the same topics as the original enactment of the Field Code, sometimes in much greater detail. See *Rules of the Supreme Court and Law and Chancery Rules of the Circuit Courts of the State of Michigan* (1853).

² On the shift of institutional sources of law, see James Willard Hurst, *The Growth of American Law: The Law Makers* (Little Brown 1950), 73–77, 90–93.

³ *Revised Statutes of the State of New York* (1829), 2:173.

also discerned between simple re-enactments of the same text and major revisions.⁴ The only codes that Hepburn missed, understandably, were manuscript drafts that failed to gain final passage in a legislature (see below).

As for a broader corpus of American procedural law, Hepburn included some examples of major legislation apart from the codes, but his interest lay in code pleading. This project thus required a complete “fifty state survey” like those conducted by law students or early career attorneys to compile all American law on a particular point. The difference here is the historical element: I needed to find not just the procedural law of a given state, but how that law changed over time. As is common for fifty state surveys, I consulted legal research databases such as HeinOnline and Westlaw, searching for keywords like *pleading*, *practice*, *civil proceedings*, *chancery*, *subpoena*, etc. in each state across the nineteenth century. As far as practicable, however, I would like this project to be reproducible by those who may not have access to these resources, so my searches always started with the publicly accessible digitized holdings in Google Books and the fair use repository HathiTrust.

Table 4 compiles the “significant” legislation turned up by digital keyword searching. Of course, significance is a matter of judgment. In most cases it generally means lengthy. But in some instances I deemed very short statutes significant if they seemed to work major transformations of legal practice in the state. This table is by no means an exhaustive account of “the law on the books” regulating nineteenth-century civil practice. I passed over many small statutes and amendments. However, most states undertook statutory compilation efforts every one or two decades, and by extracting the procedural regulations from those, one can at least obtain a broad view of legal change across the decades. What this table provides, then, is a general guide to the contours of American practice. By referring to it as an index, one could fairly accurately determine how civil proceedings were conducted at any particular time and place in America, although the actual practice on the ground may have varied in some details, especially as one draws closer in time to a fresh statutory compilation.

Compiling Table 4 helped to confirm Hepburn’s research on significant codifications of procedural law and also turned up two manuscript codes that were never enacted: A draft code of practice composed by three Mormon lawyers for Deseret in 1859 and a long printed draft code of civil procedure considered by the Texas legislature in 1855.⁵ These drafts, along with two unenacted drafts composed by the Field commission in New York, are included in the corpus for textual comparisons.

Regarding foreign codes of procedure, although the French civil code was translated into English by 1806, the French *code de procédure civile* never appeared in English translation during the nineteenth century. Nevertheless, Livingston’s code for Louisiana included both a French and English edition, as did the 1866 code for Lower Canada. Thus, I included the French edition of all three of these codes to compare the similarity of their texts.⁶ From the British, the corpus includes the major reform statutes of 1852 and 1854, as well as the Judicature Acts of the early 1870s, and the code of procedure prepared for India in 1859.⁷ I selected these texts with reliance on Hepburn, other treatise

⁴ Charles McGuffey Hepburn, *The Historical Development of Code Pleading in America and England* (W. H. Anderson 1897).

⁵ See Utah Territory Legislative Assembly Papers, 1851–1872, MS 2919, Box 3, Folder 17, LDS Church History Library, Salt Lake City, Utah; The Code of Civil Procedure of the State of Texas, Rare Books Collection, Tarlton Law Library, University of Texas, Austin, Texas.

⁶ *Code de Procédure Civile: Édition Originale et Suel Officielle* (1806); *Code of Civil Procedure of Lower Canada* (1867); *Code of Practice in Civil Cases for the State of Louisiana* (1825).

⁷ Common Law Procedure Act, 15 & 16 Vict., c. 72 (1852); Court of Chancery Procedure Act, 15 & 16 Vict., c. 86 (1852); Common Law Procedure Act, 17 & 18 Vict., c. 125 (1854); Chancery Amendment Act, 21 & 22 Vict., c. 27 (1858); Supreme Court of Judicature Act, 36 & 37 Vict., c. 66 (1873); Supreme Court of Judicature Act, 38 & 39 Vict., c. 77 (1875); *The New Procedure of the Civil Courts of British India* (1860).

literature, and my own research in each jurisdiction as the broader dissertation project unfolded.⁸ Table 4 contains the list of every statute included in the corpus for digitized comparison.

Table 4: Corpus of Procedural Law Prepared for Textual Analysis

<i>Date</i>	<i>Jurisdiction</i>	<i>Source</i>	<i>Pages</i>
1828	Alabama	Digest of Laws	453-500
1843	Alabama	Digest of Laws	306-358
1852	Alabama	Code of Alabama	403-557
1867	Alabama	Code of Laws, Part III	509-679
1876	Alabama	Code of Laws, Part III	682-860
1887	Alabama	Code of Laws, Part III	573-789
1900	Alaska Territory	Code of Civil Procedure	14-193
1865	Arizona Territory	Howell Code	297-388
1877	Arizona Territory	Compiled Laws	409-507
1887	Arizona Territory	Revised Statutes	165-267
1901	Arizona Territory	Revised Statutes	425-478
1838	Arkansas	Revised Statutes	616-646
1868	Arkansas	Code of Practice	19-255
1874	Arkansas	Digest of Laws	794-841
1884	Arkansas	Digest of Laws	966-1019
1894	Arkansas	Compiled Statutes	1262-1320
1859	British India	Code of Civil Procedure	1-117
1850	California	Session Laws	428-456
1851	California	Session Laws	51-153
1858	California	Practice Act	33-270
1868	California	Practice Act	1-617
1872	California	Code of Civil Procedure	3-610
1880	California	Code of Civil Procedure	28-669
1868	Colorado Territory	Revised Statutes	passim ⁹
1877	Colorado	Code of Civil Procedure	3-161
1884	Colorado	Code of Civil Procedure	5-238
1896	Colorado	Code of Civil Procedure	2-757
1824	Connecticut	Compiled Statutes	passim ¹⁰
1854	Connecticut	Compiled Statutes	51-153
1879	Connecticut	Practice Act	1-224
1908	Connecticut	Practice Book	2-286
1857	District of Columbia	Revised Code	321-506
1852	Delaware	Revised Statutes	368-443
1874	Delaware	Revised Statutes	633-731

⁸ Useful treatises on compiling a corpus of statutory law include John L. Tillinghast & Thomas G. Shearman, *Practice, Pleadings, and Forms in Civil Actions in Courts of Record in the State of New York . . . Adapted Also to the Practice in California, Missouri, Indiana, Wisconsin, Kentucky, Ohio, Alabama, Minnesota, and Oregon* (1865); William Angus Sutherland, *A Treatise on Code Pleading and Practice: Also Containing 1900 Forms Adapted to Practice in California, Alaska, Arizona, Idaho, Montana, Nevada, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, Washington, and Other Code States* (1910); John Norton Pomeroy, *Remedies and Remedial Rights by the Civil Action* (1876).

⁹ 42-44, 50-65, 91-102, 263-269, 272-281, 309-316, 359-361, 370-391, 437-441, 448-452, 482-483, 490-494, 498-520, 535-541, 634-637.

¹⁰ 33-62, 70-72, 80-94, 142-145, 191-200, 262-268, 337-339, 433-434.

1893	Delaware	Revised Statutes	775-891
1862	Dakota Territory	Session Laws	49-156
1868	Dakota Territory	Code of Civil Procedure	1-120
1877	Dakota Territory	Code of Civil Procedure	509-641
1887	Dakota Territory	Code of Civil Procedure	840-972
1839	Florida	Compiled Laws	passim ¹¹
1847	Florida	Digest of Laws	320-488
1870	Florida	Code of Civil Procedure	3-112
1892	Florida	Revised Statutes	353-596
1806	France	Code de Procédure Civile	1-136
1821	Georgia	Compiled Laws	passim ¹²
1851	Georgia	Digest of Laws	264-363, 446-718
1860	Georgia	Code of Laws, Part III	580-810
1882	Georgia	Code of Laws, Part III	814-1132
1896	Georgia	Code of Practice	977-1782
1852	Great Britain	Common Law Procedure Act	653-728
1854	Great Britain	Common Law Procedure Act	1309-1332
1873	Great Britain	Supreme Court of Judicature Act	191-222
1875	Great Britain	Supreme Court of Judicature Act	513-605
1859	Kingdom of Hawaii	Civil Code	264-280
1897	Kingdom of Hawaii	Compiled Laws	479-568
1864	Idaho Territory	Session Laws	77-233
1875	Idaho Territory	Compiled Laws	79-236
1881	Idaho Territory	Session Laws	1-226
1887	Idaho Territory	Revised Statutes	413-701
1901	Idaho	Code of Civil Procedure	1-578
1866	Illinois	Compiled Laws	138-166, 209-274
1933	Illinois	Civil Practice Act	3-54
1838	Indiana	Revised Statutes	passim ¹³
1843	Indiana	Revised Statutes	622-958
1852	Indiana	Revised Statutes	27-359
1878	Indiana	Revised Statutes	32-371
1881	Indiana	Revised Statutes	240-390
1894	Indiana	Compiled Statutes	74-536
1839	Iowa Territory	Session Laws	130-141, 370-381
1851	Iowa	Code of Laws	231-348
1859	Iowa	Revised Code of Laws	439-719
1878	Iowa	Code of Civil Procedure	1-569
1888	Iowa	Code of Laws (Part III)	861-1230
1897	Iowa	Code of Laws (Part III)	1233-1878
1859	Kansas Territory	Session Laws	82-184
1868	Kansas	General Statutes	630-819
1879	Kansas	Compiled Laws	601-733
1889	Kansas	Code of Civil Procedure	2:1171-1660

¹¹ 48-50, 89-113, 128-161, 235-237, 273-282, 389-393.

¹² 30-32, 69-73, 133-134, 288-301, 339-396, 530-531.

¹³ 69-88, 161-207, 260-262, 272-287, 358-397, 407-409, 438-463, 472-477, 601-603.

1851	Kentucky	Session Laws	106-212
1854	Kentucky	Code of Civil Procedure	1-419
1867	Kentucky	Code of Civil Practice	1-250
1888	Kentucky	Code of Civil Practice	17-367
1902	Kentucky	Code of Civil Practice	1-497
1825	Louisiana	Code of Practice	2-400, even
1825	Louisiana	Traité des Actions Civiles	3-401, odd
1844	Louisiana	Code of Practice	1-392
1855	Louisiana	Code of Practice	70-374
1875	Louisiana	Code of Practice	39-251
1882	Louisiana	Code of Practice	1-294
1867	Lower Canada	Code of Civil Procedure	3-457, odd
1867	Lower Canada	Code de Procédure Civile	2-456, even
1833	Maine	Session Laws	passim ¹⁴
1840	Maine	Revised Statutes	479-623
1857	Maine	Revised Statutes	492-646
1871	Maine	Revised Statutes	611-804
1895	Maine	Revised Statutes	415-474
1855	Maryland	Report of the Commissioners	167-241
1859	Maryland	Code of Laws	513-548
1888	Maryland	Code of Laws	1092-1160
1836	Massachusetts	Revised Statutes	498-713
1851	Massachusetts	Acts and Resolves (Session Laws)	698-730
1858	Massachusetts	Revised Statutes	3-390
1902	Massachusetts	Revised Statutes	1373-1739
1839	Michigan	Court Rules	3-35, 3-17, 3-20
1847	Michigan	Court Rules	3-35, 3-15
1853	Michigan	Court Rules	3-34, 1-15, 1-7
1896	Michigan	Court Rules	7-191
1851	Minnesota Territory	Revised Statutes	328-487
1859	Minnesota	Public Laws	530-700
1866	Minnesota	General Statutes	447-592
1891	Minnesota	General Statutes	204-398
1848	Mississippi	Code of Laws	799-934
1850	Mississippi	Session Laws	57-64
1857	Mississippi	Revised Code	471-569
1871	Mississippi	Code of Laws	102-328
1892	Mississippi	Code of Laws	passim ¹⁵
1835	Missouri	Revised Statutes	506-522
1849	Missouri	Session Laws	73-109
1856	Missouri	Revised Statutes	1216-1302
1879	Missouri	Revised Statutes	591-694
1865	Montana Territory	Session Laws	43-175
1881	Montana Territory	Revised Statutes	41-287
1895	Montana	Code of Civil Procedure	757-1026

¹⁴ 213-217, 290-415, 434-456, 464-482.

¹⁵ 123-158, 162-165, 210-277, 303-311, 454-469, 584-601, 654-662, 675-677, 767-797, 821-828, 950-959, 967-971.

1855	Nebraska Territory	Session Laws	231-348
1857	Nebraska Territory	Session Laws	41-127
1859	Nebraska Territory	Session Laws	109-214
1866	Nebraska	Revised Statutes	394-591
1881	Nebraska	Code of Civil Procedure	741-870
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