Equity without Chancery: The Fusion of Law and Equity in the Field Code of Civil Procedure, New York 1846–76

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The Field Code of Civil Procedure – enacted in New York in 1848 and adopted by a majority of American jurisdictions thereafter – helped develop the modern American trial and influenced law reform in England. Leading accounts of the Code, however, ignore nineteenth-century New York practice which spurred its development, particularly the problems of fusing the separate systems of common law and equity. This article recovers that context and shows that despite scholarly claims to the contrary, the Code's drafters mainly sought to extend New York's equitable procedures to all civil cases. They expected, however, that equitable remedies and procedures could be divorced from the structures of chancery. In the Code, a paradigm of substantive rights and procedural remedies replaced the old division between law and equity. David Dudley Field's influential theory of fusion thus sought to expand the practice of equity, but without the courts of equity.

In 1848, New York enacted a code of civil procedure that powerfully influenced the common law world. The Field Code, named after one of its drafters, David Dudley Field, systematized New York's procedural law and combined the previously separate systems of common law and equity. In the following decades, thirty other American states and territories enacted versions of the Code, and English legal reformers studied New York's experience to inform their efforts at fusion.

Although scholars agree on this general outline, they differ regarding what the Code really accomplished.[1] Writing in 1948, the great opponent of formalism and 'mechanical jurisprudence' Roscoe Pound argued that the characteristics of the

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[1]See, for instance, Lawrence Friedman, *A History of American Law*, 3rd ed., New York, 2005, 293–297; Robert W. Millar, *Civil Procedure of the Trial Court in Historical Perspective*, New York, 1952, 54–55.

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modern Federal Rules of Civil Procedure '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 the spirit of maintaining historical continuity'. Pound particularly praised the 'equitable shortcuts' of the Code. The two main drafters of the Federal Rules, Charles Clark and Edson Sunderland, lent their support to Pound's claim.[2] More recently, Professor Stephen Subrin has contended that Pound's view was a 'myth'.[3] 'Equity conquered common law' only in the Federal Rules,[4] but the Field Code 'leaned as much, or more, toward the view of common law procedure as to equity'.[5]

Although this may seem an especially arcane debate over the minutia of legal procedure, what is at stake is the legacy of Progressive legal reform and Progressive historiography. By claiming the Field Code as their major precedent, Pound, Clark, and Sunderland claimed an American tradition for their own reforms. Their choice for managerial judges and lawyer-investigators did not directly favour European, 'inquisitorial' forms, but rather came from American equity practice. Had Field only been followed in his preference for equity, the Progressive agenda would have already been realized, the argument runs. Instead, common law formalism held on, even in the wake of the anti-formal Field Code, until the Realists and Progressives inaugurated a new era of equitable discretion and anti-mechanical jurisprudence.[6] Subrin, agreeing with the Progressives that formalism clung to code practice, objects that the Progressives were being too modest. In his assessment, formalism was written into basically every chapter of the Code. For political cover Progressives claimed American precedents for their work, but decades later we may finally drop the pretence.[7]

Neither side in this debate examined the historical sources closely, however. The Code consisted of multiple (sometimes inconsistent) drafts, but Pound and Subrin confined their analysis only to the first version enacted in 1848, a Code that the drafters believed incomplete and inadequate for their purposes.[8] Further, contemporary New York lawyers produced abundant commentary in over a dozen treatises,[9] form books,[10] and

[2]Roscoe Pound, 'David Dudley Field: An Appraisal', in Alison Reppy, ed., *David Dudley Field: Centenary Essays*, New York, 1949, 14. See Charles E. Clark, 'Code Pleading and Practice Today', in *Centenary Essays*, 55; Edson R. Sunderland, 'Modern Procedural Devices', in *Centenary Essays*, 83. See also Roscoe Pound, 'Mechanical Jurisprudence', 8 *Columbia Law Review* (1908), 605.

[3]Stephen Subrin, 'David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision', 6 *Law & History Review* (1988), 312.

[4]Stephen Subrin, 'How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective', 135 *University of Pennsylvania Law Review* (1987), 909.

[5]Subrin, 'Field and the Field Code', 337–338.

[6]See generally, Morton White, *Social Thought in America: The Revolt Against Formalism*, Oxford, 1976.

[7]Subrin, 'Field and the Field Code', 329–336.

[8]See section I.3 below.

[9]In addition to the treatises examined in detail below, see also Claudius Law Monell, *A Treatise on the Practice of the Supreme Court of the State of New York*, New York, 1849; John Townshend, *The New Practice in Civil Actions in the Courts of Judicature in the State of New York*, New York, 1848; George Van Santvoord, *A Treatise on the Principles of Pleading in Civil Actions Under the New York Code of Procedure*, New York, 1852.

[10]Commissioners of the Code, *Book of Forms, Adapted to the Code of Procedure*, New York, 1860; Henry Strong McCall, *Precedents or Practical Forms in Actions at Law in the Supreme Court of the State of N. York*, New York, 1852; Henry Whittaker, *Practice and Pleading Under the Code, Original and Amended, With Appendix of Forms*, 2 vols., 2nd ed., New York, 1854.

case reports,[11] all of which Pound and Subrin largely ignored. Instead, they speak in broad statements about, for instance, the 'hallmarks of equity practice at the time'.[12] A code by its comprehensive nature easily obscures its origins and influences, however, so a clear understanding of the Field Code must account for its multiple drafts, the contemporary literature, and prior New York practice.

Interest in the Field Code has arisen in new quarters after the recent *Twombly* and *Iqbal* decisions of the US Supreme Court ushered in a new standard of 'plausibility pleading'.[13] The Code's history received an oblique reference from the *Iqbal* majority and fuller treatment in Justice Stevens's *Twombly* dissent.[14] Prominent scholars of procedure have debated whether the decisions represent a revival of 'fact pleading' that 'arrived as part of the Field Code of 1848'.[15] These new concerns have largely followed the old paths of Progressive legal historiography. The Field Code is assumed to represent formalistic procedure, and debate is joined on to what extent the Federal Rules were designed to eradicate formalism, especially in pleading. Once again, however, a close study of historical development is missing.

By moving past Progressive assumptions and examining mid-nineteenth-century codes, pamphlets, and treatises, this article provides a fuller understanding of what Field and his fellow codifiers imagined they were doing in merging the systems of common law and equity. Before Field's Code, New York already had a significant history of fusing law and equity that becomes obscured when scholars too readily assign all the novelties of fusion to the Code. Pre-Code legislation granted common law courts equitable powers over document discovery and the administration of some equitable remedies; and the constitution of 1846 eliminated the Court of Chancery and established a uniform procedure for taking witness testimony at trial. Even so, the tradition that Field first systematically consolidated common law and equity procedure has some validity, because the Code contributed uniform procedures in pleading, discovery, and trial, and it sought to abolish the conceptual distinction between legal and equitable rights and remedies. Part I of this article traces this story of New York's pre-Code fusion efforts and the origins of the Field Code.

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[11]John Townshend, *Reports of Decisions on the Code of Procedure*, New York, 1852; Austin Abbott and Benjamin Vaughan Abbott, *Reports of Practice Cases, Determined in the Courts of the State of New York*, New York, 1855.

[12]Subrin, 'Field and the Field Code', 338. Among these hallmarks Subrin includes 'long, detailed pleadings; oath not required on all pleadings; broad joinder; emphasis on discovery; written, rather than oral testimony; judge instead of jury; heavy reliance on masters; extreme flexibility; and judicial discretion'. Ibid., 368 n.239. New York chancery, however, required succinct pleadings and preferred oral testimony. Moreover, common law practice in New York was not necessarily the reverse of Subrin's list. See section II below.

[13]*Ashcroft* v *Iqbal*, 129 S. Ct. 1937 (2009); *Bell Atlantic Corp.* v *Twombly*, 550 U.S. 544 (2007).

[14]*Iqbal*, 129 S. Ct. at 1950 ('the hyper-technical, code-pleading regime of a prior era'); *Twombly*, 550 U.S. at 574–575 (Stevens J dissenting).

[15]Kevin M. Clermont, 'The Myths about Twombly-Iqbal', 45 *Wake Forest Law Review* (2010), 1340. This article recovers the particular circumstances of nineteenth-century New York procedure that make modern ideas of a 'return' to the past problematic. The drafters of the Code had little conception of the use of discovery for pre-trial investigation, and they devoted significant attention to eliminating a distinction between law and equity while creating one between 'substantive law' and 'procedure'. *Twombly* and *Iqbal*, by contrast, are centrally concerned with abuse of investigation and take the substance/procedure divide for granted. If the past helps to illuminate the present, it does so only indirectly.

Most accounts of the Code focus on the supposed jury-enhancing and, by implication, democracy-enhancing provisions of the Code. This article argues that Field and his fellow draftsmen took inconsistent positions on the democratic value of the jury and its desirability for courtroom adjudication. Rather, Field's conception of pleading was central to his fusion project and furthered his democratic ideal of public, plainspoken truth in open court. Part II illustrates the importance of this type of pleading in the Code's intended reforms, and it surveys the effect of the Code's provisions in actual practice.

In basically every major aspect of fusion, the Code preferred equity as it was practised in New York over common law. Field expected, however, that equitable remedies and procedures could be divorced from the structures of chancery, which he was pleased to see the state constitution abolish. By defining remedies and jurisdiction as 'procedure', Field did not believe any 'substantive' difference remained between equity and common law. Accordingly a paradigm of substantive rights and procedural remedies could replace the old division between law and equity. Part III concludes by describing the influence of Field's theory of fusion, which sought to expand the practice of equity without the courts of equity.

I. EARLY EFFORTS AT FUSION AND THE DEVELOPMENT OF THE FIELD CODE OF PROCEDURE

The Field Code constituted the first attempt by a common law jurisdiction to transform procedural law from judicial precedent into a comprehensive statute. It was also the first attempt to fuse the two systems of courts and procedures that had operated in New York for over a century. Initially, these two objectives were unconnected: Some reformers pursued codification before fusion became a serious suggestion, and some supporters of fusion partially succeeded without a code. The Code drafters saw in each movement a common concern with cost and delay in the civil justice system, and they combined codification and fusion into a single programme of reform.

I.1 Changes in New York practice, 1820–46

Despite its colloquial name, the 'Field Code' was drafted by three men: David Dudley Field Jr., Arphaxad Loomis, and David Graham Jr. Each drafter had over twenty years of experience in New York legal practice before work on the Code began. Loomis (1798–1885) studied law privately and entered practice in New York in 1822. Before his work on the Code, Loomis served as both a surrogate (New York's probate judge) and a county court judge; he also was a New York State Assemblyman and a delegate to the state constitutional convention of 1846.[16]

Field (1805–94) belonged to a family that was said to have 'no parallel in [American] history except the Adams family'.[17] Among his immediate family were two Supreme Court justices, several prominent clergymen, and the creator of the trans-Atlantic telegraph. In 1825 Field began an apprenticeship with two prominent

[16]George Iru Todd and John Edwards Todd, eds., *The Todd Family in America*, New York, 1920, 255.
[17]Irving Browne, 'David Dudley Field', 3 *Green Bag* (1891), 49.

New York City lawyers, Henry and Robert Sedgwick. Field joined Robert as partner after Henry retired three years later. Both Field and Loomis were ardent Jacksonian democrats, members of New York's 'Barnburner' faction, which favoured laissez-faire economics and had a sizeable antislavery element.[18]

Graham (1808–52), a Whig lawyer and respected solicitor at chancery, became prominent at the New York bar for his *Treatise on the Practice of the Supreme Court of the State of New York*, which he published when he was twenty-four years old. Graham became the first professor of law at New York University in 1838, where he taught courses on pleading. In addition to his *New York Practice*, which concentrated on the courts of common law, Graham edited an American edition of John Sidney Smith's *Treatise on the Practice of the Court of Chancery*, and he wrote a book for students describing the jurisdiction of New York's many courts. Graham published a third edition of his *New York Practice* in 1847 – less than a year before he joined Loomis and Field on the drafting commission. Graham regretted producing a new edition 'at a period when so many … changes … are about to go into immediate effect', but by providing a detailed description of New York practice on the eve of the Field Code reforms, his treatise furnishes a useful benchmark for understanding the Code's departures.[19]

The New York civil justice system that Graham described followed the English model, in which separate courts of law and equity applied distinct procedures and remedies. The common law courts – which heard claims sounding in contract, tort, or property – used jury trial for fact-finding and awarded money damages for remedy. Common law pleading followed specific 'forms of action' that employed highly stylized and often fictitious language to present triable issues to the court. Lawyers examined witnesses in open court, but both parties and witnesses interested in the litigation were barred from testifying.

In the Court of Chancery – which heard claims regarding trusts, corporations, and guardianship issues – the judge made all findings of fact and rulings on law, and he administered specific remedies. Pleadings were typically straightforward, factual accounts of the controversy, and bills for discovery allowed a party to obtain statements from his adversary without breaching the rule of disqualification against party

[18]For biographies of Field, see Philip J. Bergan, 'David Dudley Field: A Lawyer's Life', in *The Fields and the Law*, San Francisco, 1986, 21; Michael Joseph Hobor, 'The Form of the Law: David Dudley Field and the Codification Movement in New York, 1839–1888', thesis submitted for the degree of Doctor of Philosophy, University of Chicago, 1975 (Field's codification efforts); and Daun Van Ee, 'David Dudley Field and the Reconstruction of the Law', thesis submitted for the degree of Doctor of Philosophy, Johns Hopkins University, Baltimore, 1974 (Field's legal practice); Henry Martyn Field, *The Life of David Dudley Field*, New York, 1898, 38. On the Sedgwicks, see Perry Miller, *The Legal Mind in America: From Independence to the Civil War*, New York, 1969, 135–136. On the Barnburners, see Sean Wilentz, *The Rise of American Democracy: Jefferson to Lincoln*, New York, 2005, 529–539, 564–566.

[19]'Obituary of John Graham', *New York Times*, 10 April 1894; David Graham, *A Treatise on the Organization and Jurisdiction of the Courts of Law and Equity in the State of New York*, New York, 1839 (hereinafter Graham, *Jurisdiction*); David Graham, *A Treatise on the Practice of the Supreme Court of the State of New York*, 3rd ed., New York, 1847, v (hereinafter Graham, *Practice*). Equally fortuitous for legal historians is that a clerk to New York's last chancellor, Reuben Walworth, produced a two-volume treatise on New York equitable practice in 1844. Oliver Law Barbour, *A Treatise on the Practice of the Court of Chancery*, 2 vols., New York, 1844 (hereinafter Barbour, *Chancery Practice*).

testimony. Originally, a court-appointed examiner questioned (again, disinterested) witnesses from written interrogatories prepared by the parties and their counsel, all of whom were barred from attending the examination. By the 1840s, New York allowed party attendance and oral questioning by counsel at witness examinations, and the examiner merely recorded testimony in writing, often over the course of multiple hearings.[20]

Into the nineteenth century, critics of the New York system concentrated not on the dual procedure system, but on the cost and delay in both branches of the courts.[21] Suits could take years to resolve, especially in New York's understaffed chancery system in which certain cases became as notorious as *Jarndyce* v *Jarndyce* in Charles Dickens's *Bleak House*. In one equity suit, a witness from Troy was summoned to appear before the chancellor in Saratoga; the case dragged on for so long that it was said the witness fell in love with a local, 'married her, and was a father before he left the stand'.[22] Such suits could be expensive. One lawyer later recalled a suit in which the pleading alone cost a defendant $13,000 in lawyers' fees.[23] Field estimated that chancery in a single year adjudicated about $9.2 million in claims at a cost of over $920,000. During the same year, according to Field, common law courts adjudicated $28.8 million in claims at a cost of $1.9 million in court and lawyers' fees.[24]

In response to the cost and delays of chancery, the New York legislature conducted a major reform in the 1820s that moved the state towards the institutional fusion of law and equity. In order to reduce the amount of litigation brought before the chancellor, the legislature allowed seven common law circuit judges to act as vice chancellors. These judges then assumed original jurisdiction in chancery cases and applied equitable procedures.[25] Over time, the legislature created additional vice chancellors in New York City, giving chancery a bench of eleven judges by the 1840s.[26]

At the time, these were notable changes in the common law world. England had, in addition to the chancellor, only one vice chancellor, whose office was a recent creation and who presided only over original matters.[27] Several American states never

[20]For details on New York practice before the Codes, see section II below.

[21]See, e.g., Arphaxad Loomis, 'Historic Sketch of the New York System of Law Reform in Practice and Pleadings' (1879), 5–6 (describing the genesis of law reform within complaints about the New York fee system and the long delays of chancery).

[22]The originator of the anecdote, the prominent social reformer Henry B. Stanton, contended that such cases 'threw Jarndyce vs. Jarndyce of Bleak House fame quite into the shade'. Henry B. Stanton, *Random Recollections*, New York, 1885, 50.

[23]Charles Edwards, *Pleasantries About Courts and Lawyers of the State of New York*, New York, 1867, 30–31.

[24]David Dudley Field, 'Letter to Representative John O'Sullivan', in 5 *Documents of the Assembly of the State of New York*, 65th sess., no.81, 1842, 28–29.

[25]2 Revised Statutes of the State of New York 168, §2 (1829); see also Joseph Parkes, *The Statutes and Orders of the Court of Chancery and the Statute Law of Real Property of the State of New York*, New York, 1830, xxxvi–xxxix (recounting the history of equity reform in New York).

[26]Graham, *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. 'Civil Officers', *New York Evening Post*, 13 July 1846 (on file with the Beinecke Rare Book and Manuscript Library, Yale University).

[27]England appointed its first vice chancellor in 1813, but soon afterwards the chancellor ceased to hear original causes, so the English tradition of having only a single judge presiding over the entire chancery system

established separate courts of equity but allowed their common law courts to implement a few basic equitable rules.[28] Alone among the states, New York after 1828 maintained two sophisticated yet disparate procedural systems in the same tribunal, similar to practice in the federal courts.[29] If a plaintiff chose the wrong jurisdiction, the judge would non-suit the claim, assess costs, and send the plaintiff back to the beginning to re-plead.[30]

Field argued that simply merging the courts was an inadequate reform, because high fees and delay were symptoms of a deeper problem: the rapid expansion of legal regulation being developed in case reports and statute books. Although American legal printing was scarce at the turn of the century, by the 1840s New York lawyers had too much legal literature, rather than too little.[31] One practitioner in 1846 observed that a minimally adequate library should contain 800 to 1000 volumes; a good library would have upwards of 3000 volumes.[32] In Field's experience, 'The 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. It was therefore to have been expected that the law would become, what it really was, a vast irregular mass, without unity or assimilation.'[33] 'Who can guess what he may have to meet in a law suit', complained another attorney, 'as no lawyer can afford to buy or read all the [legal] books in the world?'[34] Field thought the 'multiplication of law-books' had increased the research work of the bar to unprecedented levels, and '[t]hose who [had] the best practice [were] tasked almost beyond endurance'.[35]

Besides the research burden on lawyers, Graham and other lawyers argued that advances in legal printing swelled the length of court filings, increasing cost and delay. Although New York regulated the fees that a lawyer could collect on filings, the calculation of lawyers' fees and court costs was based on page count. Acting on this incentive, lawyers drafted and courts accepted lengthy, expensive filings.[36]

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continued. Michael Lobban, 'Preparing for Fusion: Reforming the Nineteenth-century Court of Chancery', 22 *Law & History Review* (2004), pts.I and II, 389 and 565 respectively, cited matter on 393.

[28]Stanley N. Katz, 'The Politics of Law in Colonial America: Controversies over Chancery Courts and Equity Law in the Eighteenth Century', in Donald Fleming and Bernard Bailyn, eds., *Law in American History*, Cambridge, MA, 1971, 264–265.

[29]Amalia D. Kessler, 'Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial', 90 *Cornell Law Review* (2005), 1202–1207.

[30]Loomis, 'Historical Sketch', 9; see also, e.g., *Livingston* v *Van Ingen*, 15 Fed. Cas. 697 (1811).

[31]On the development of New York law reporting, see John H. Langbein, 'Chancellor Kent and the History of Legal Literature', 93 *Columbia Law Review* (1993), 573–584.

[32]Michael Hoffman, 'Letter on Reforms Necessary in the Body of Law, in the Written Pleadings, and in the Practice of the Courts', 21 March 1846, in Thomas Prentice Kettell, ed., 'Constitutional Reform in a Series of Articles Contributed to the Democratic Review' (1846).

[33]David Dudley Field, 'Reform in the Legal Profession and the Laws', in A.P. Sprague, ed., *Speeches, Arguments, and Miscellaneous Papers of David Dudley Field*, 3 vols., New York, 1884, vol.1, 507.

[34]Hiram P. Hastings, 'An Essay on Constitutional Reform' (1846), 27.

[35]David Dudley Field, 'Study and Practice of the Law', in *Speeches*, vol.1, 485.

[36]See, e.g., 2 *Revised Statutes*, 630–633, §§15 and 18 (allowing extra solicitors' and attorneys' fees 'for every folio' of work product). John W. Edmonds, 'An Address on the Constitution and the Code of Procedure' (1848), 16 (complaining that the legal 'practitioner became merely an expert seeker after precedents' to fill pleas with 'numerous fictions and precedents' instead of 'concise, and luminous aids in the investigation of truth').

Some practitioners turned to the burgeoning print industry to produce routine – and especially lengthy – form-type filings that required a clerk to fill in only a few blanks.[37] As New York judges more frequently and carefully wrote their opinions for printed case reports, delay increased further.[38]

One solution to the problems posed by the swift increase of regulation, some argued, was to codify the law. '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.'[39] Not only would a code simplify and organize research for practitioners, it would also cut away 'all temptation to indulge in useless verbiage', in the opinion of one common law judge.[40] The brief, simple statements of a code would be reflected in brief, less stylized pleadings.[41]

The profusion of regulation was not the only impulse for codification proposals in nineteenth-century New York. Theoretical critiques of the common law system also gave rise to interest in codification, and Field was involved in this movement from the beginning of his career. Henry Sedgwick, Field's mentor, was a critic of New York practice, which he perceived as needlessly more technical than the procedure in his home state of Massachusetts. At Sedgwick's urging, Field studied the writings of codifiers such as Jeremy Bentham, Edward Livingston, and especially the Irish émigré William Sampson.[42]

In 1823, Sampson delivered a widely noted address calling for the development of a distinctively American jurisprudence under a code in which 'the law [would] govern the decisions of the judges, and not the decisions the law'.[43] Sedgwick wrote a highly favourable review of the speech, endorsing Sampson's call for a code. Whereas William Blackstone had thought the early common law possessed a 'pristine vigor', Sampson and 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'. Sedgwick was particularly critical of

[37]These documents were popularly known as 'Law Blanks'. For example forms and catalogue 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* (2008), 189. A judge of the Supreme Court, John Worth Edmonds, complained that form pleadings and motions limited the educational value of apprenticeships, because they taught students 'no more of actual pleading than how properly to fill out blanks'. Edmonds, 'Address', 16.

[38]Graham, *Jurisdiction*, 151.

[39]David Dudley Field, 'Reasons for the Adoption of the Codes', in *Speeches*, vol.1, 371.

[40]Edmonds, 'Address', 17.

[41]Field, 'Reform in the Legal Profession and the Laws', 508 (comparing New York's law of real property which 'lies buried [in] the digests, old and new, the glosses and the text' of 'ponderous tomes' in contrast to the real property sections in the Code of Napoleon, which did 'not exceed a hundred' sections).

[42]David Dudley Field, 'A Third of a Century Given to Law Reform' (1873), 1; [Henry Sedgwick], 'The Common Law', 19 *North American Review* (1824), 411. For a discussion of the similarities between Livingston's Code of Procedure for Louisiana and the Field Code, see David S. Clark, 'The Civil Law Influence on David Dudley Field's Code of Civil Procedure', in Mathias Reimann, ed., *The Reception of Continental Ideas in the Common Law World, 1820–1920*, Berlin, 1993, 63.

[43]William 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), 38.

New York's perpetuation of English property law with its many fictions in trespass actions.[44] These and other ideas from Sampson and Sedgwick appear often in Field's later writings, although Field never advocated a total replacement of the common law by a code. Instead Field expected the law to alternate between periods of common law development and periods of consolidation in codes.[45]

Field's first public effort to change procedural law advised codification, but only by proper authors. In 1839, Field wrote to New York State Senator Gulian Verplanck opposing the creation of a code commission composed of the chancellor and three judges of the Supreme Court. Field argued that judges would be apathetic codifiers. Similar commissions had been attempted in the past, but judges had proven reluctant to 'report any vice inherent in the system in which they were the chief officers'.[46]

Field's movement towards fusion was likewise cautious. In 1842, Field wrote to John O'Sullivan, a member of the Assembly Judiciary Committee, proposing three bills to reform New York procedure. Although '[t]here will never be an administration of the law without delay, and without expense', Field conceded, '[a]ny system would be better than the present'. Field argued that delay in the common law courts was a result of the restrictive style of pleading, whereas the chancery court was overcrowded with actions for discovery. Field would have abolished the forms of action and replaced common law pleading with the simple, factual statements of equitable pleading; he also would have allowed parties and witnesses to testify on their own behalf at common law. By thus unifying standards for pleading and eliminating the need for discovery in service of common law cases – but otherwise leaving the dual system in place – Field hoped to address the chief causes of delay.[47]

At the time of Field's writing, Loomis chaired the Assembly Judiciary Committee and had prepared a reform bill of his own. His proposal continued to disqualify parties from testifying, but other features were similar to Field's, including simplified common law pleading.[48] The committee's final report attached Field's letter and his draft bills in an appendix, but the legislature ignored both Loomis's report and Field's proposals. Both men later blamed the legislature's inaction on the New York constitution,

[44][Sedgwick], 'The Common Law', 411, 422–423.

[45]See Field, 'Third of a Century', 1. Field frequently repeated Sedgwick's objections to the use of fictions. See, for instance, Field, 'Letter to O'Sullivan', 23, 34. Field also used Sampson's rhetoric against the common law at times. Field, 'Study and Practice of Law', 490 (describing the forms of action as 'old jingles of words, invented somewhere about the times of the Edwards'). For his view that the common law would continue to develop under a code, see Field, 'Reform in the Legal Profession and the Laws', 513; Field, *Life of Field*, 73–74.

[46]David Dudley Field, 'A Letter to Gulian C. Verplanck on the Reform of the Judicial System of this State' (1840), 68, 71. The letter was prompted by a speech Verplanck delivered and with which Field largely agreed. 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), 6–7.

[47]Field, 'Letter to O'Sullivan', 23–27, 42, 48–49, 51. To deal with expense, Field proposed calculating lawyers' fees based on the amount in controversy rather than by the number of pages of work product. Ibid., 68.

[48]See 'Report in Part of the Committee on the Judiciary in Relation to the Administration of Justice', in 5 *Documents of the Assembly of the State of New York*, 65th sess., no.81, 1842, 1 (hereinafter 1842 Judiciary Committee Report); see also Loomis, 'Historic Sketch', 8.

which implicitly required separate courts of law and equity with distinct jurisdictions and modes of trial.[49]

I.2 The constitution of 1846

Disappointed in their efforts in 1842, Field and Loomis saw their prospects improve as the decade progressed and New Yorkers became increasingly dissatisfied with the state constitution. Facing mounting state debt and the unrest of western farmers forming an anti-rent movement, the legislature summoned a constitutional convention to meet in 1846 to draft a replacement for the constitution of 1821.[50] Field ran for election to the convention, but failed to win a seat.[51] Other proponents of procedural change, including Loomis and the elderly Jacksonian lawyer Michael Hoffman, were elected.[52]

Both Loomis and Field recalled having influenced the new constitution. '[I]f I was not permitted to influence the Convention by my voice within its walls', Field wrote, 'I could influence it from without, and I did so to the utmost of my power, by conversation and correspondence with the members, and by articles in the newspapers.'[53] From January 1846 through the end of the convention in the autumn, Field published nearly twenty editorials in the *New York Evening Post* urging structural changes to the judiciary.[54] Loomis was appointed to the Judiciary Committee, where he sought to exert 'influence in favor of Law Reform in the protracted sessions and discussions'.[55] The constitution was completed by November and made significant steps towards fusion.

The constitution of 1846 unified the New York court system by abolishing the Court of Chancery and transferring cases in its jurisdiction to 'one supreme court,

[49]New York Constitution of 1821, art.IV, §12 (establishing the offices of master and examiner in chancery); art.V, §1 (establishing a Court of Errors composed of the chancellor and Supreme Court justices); art.V, §5 (requiring all equity matters be appealable to the chancellor); David Dudley Field, 'Re-Organization of the Judiciary: Five Articles Originally Published in the Evening Post on that Subject' (1846), 1.

[50]Charles W. McCurdy, *The Anti-Rent Era in New York Law and Politics, 1839–1865*, Chapel Hill, NC, 2001, 121–127; Charles Z. Lincoln, *The Constitutional History of New York from the Beginning to 1905*, New York, 1906, vol.2, 73.

[51]Although a Democrat, Field opposed slavery and the annexation of Texas, and tended to be unpopular as a politician. Field, *Life of Field*, 107–120.

[52]Jed Handelsman Shugerman, 'Economic Crisis and the Rise of Judicial Elections and Judicial Review', 123 *Harvard Law Review* (2010), 1085 n.143. Shugerman notes that a plurality of seats at the convention went to Barnburner Democrats – the laissez-faire wing of the Democratic Party, of which both Field and Loomis were members. The Barnburners, although a minority within the Democratic Party, were thus enabled to set the agenda of the convention and pass sweeping reforms in their effort to enact a 'People's Constitution'.

[53]Field, 'Third of a Century', 2.

[54]For the first five articles of 1846, see Field, 'Re-Organization'. Later in his career, Field recalled that 'the Evening Post alone had nine or ten articles from me' during the summer. Field, 'Third of a Century', 3. Three articles appear throughout the June issues of the *Evening Post* signed 'D.D.F.' on 1 June, 9 June, and 23 June. No other signed articles appear in 1846; however, nine unsigned articles appear later in the summer that are similar in style and placement to Field's June articles, and one such article (17 Aug.) refers back to a signed June article as coming from the same author. The unsigned articles appear on 31 July (pt.1), 1 Aug. (pt.2), 5 Aug., 13 Aug., 17 Aug., 8 Sept., 12 Sept., 23 Sept., and 29 Sept. One very short editorial appearing on 28 Aug. also appears to be written by Field. The 1846 issues of the *New York Evening Post* are on file with the Beinecke Rare Book and Manuscript Library, Yale University.

[55]Loomis, 'Historic Sketch', 12.

having general jurisdiction in law and equity'.[56] All at once both the chancellor and over 350 masters and examiners found themselves without an office or commission (including the narrator of Herman Melville's famous 'Bartleby the Scrivener').[57] The constitution did not, however, abolish the distinction between legal and equitable procedure. Thus, just as seven circuit judges had exercised joint jurisdiction before 1846, so now thirty-two first-instance judges would apply distinct procedures from law or equity in one tribunal. By thus increasing the number of judges available to dispose of equity cases, the convention sought to address in a structurally unified court system critics' complaints about the delays of chancery.[58]

In addition to merging the court systems, the convention fused the procedures of common law and equity with regard to the collection of witness testimony. The constitution declared that 'testimony in equity cases shall be taken in like manner as in cases at law'.[59] Even some convention delegates admitted that the exact meaning of this provision was unclear. By this time, New York had departed from English tradition, as counsel orally conducted almost all equity examinations while an examiner recorded and summarized written answers to be submitted to the adjudicator.[60] It appears the delegates wanted to require oral testimony in open court before the final adjudicator in all cases – thus removing the examiner and his written summaries and allowing the fact-finder to observe a witness under scrutiny. Nevertheless, many delegates did not wish to expand the use of the jury to equity cases, a move that Field had encouraged in his pre-convention articles. Ultimately, the delegates decided that the requirement's wording meant only that examinations had to be conducted orally in court.[61] A separate clause preserved jury trial 'in all cases in which it has been heretofore used'.[62] Common law and equity thus retained separate modes of adjudication, though they gained a uniform method of witness examination.

Although Field encouraged the convention to consider codification or, on other occasions, fusion, an early proposal by Campbell White, a New York City merchant,

[56]New York Constitution of 1846, art.VI, §3; art.XIV, §8 (abolishing offices of chancellor, vice chancellor, and master and examiner in chancery); art.XIV, §5 (transferring former chancery business to the new Supreme Court).

[57]At the time of the convention, New York employed 168 chancery examiners and 188 masters. 'Civil Officers', *New York Evening Post*, 13 July 1846, 2. By comparison, England had only ten masters. Lobban, 'Preparing for Fusion', 393. Herman Melville, 'Bartleby the Scrivener: A Story of Wall Street', in *Piazza Tales*, New York, 1856.

[58]Loomis, 'Historic Sketch', 10. The convention also replaced the Court of Errors – which comprised the chancellor, three Supreme Court justices, and New York's thirty-three member senate – with a Court of Appeals composed of eight judges, thus eliminating the office of the chancellor and removing the legislature from the court system. New York Constitution of 1846, art.VI, §2.

[59]New York Constitution of 1846, art.VI, §10.

[60]Barbour's 1844 treatise noted, 'It is not the practice in this state to make use of written interrogatories before examiners, as is done in England; although there is nothing in the state or rules to prohibit it'. He later noted that examinations in matters referred to masters continued to use written interrogatories. Barbour, *Chancery Practice*, vol.1, 281, 485–487. See generally Kessler, 'Our Inquisitorial Tradition'. In the 1820s, an English commission had rejected the idea of allowing *viva voce* testimony at chancery, reasoning it would only exacerbate delay and expense by requiring a larger corps of judges. England did not mandate common law-style examination for chancery until 1861. Lobban, 'Preparing for Fusion', 411, 589.

[61]William G. Bishop and William H. Attree, *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of New York*, Albany, 1846, 781–784.

[62]New York Constitution of 1846, art.I, §1.

first explicitly linked these reforms.[63] White's proposal would have required the governor to assemble a commission to 'reduce into a written and systematic code, the laws of this state, and also the civil and criminal procedure'. In the process of codification, the commissioners were to advise the legislature on 'amendments and alterations' to the law, including 'the abolition of the distinct forms of action at law' and the creation of 'an uniform mode of pleading, without reference to the distinction between law and equity'.[64]

White's plan encountered opposition not only from delegates who wished to leave common law pleading unchanged, but also from delegates who thought the clause attempted too much by requiring both codification and sweeping reform. White eventually withdrew his proposal, and the convention compromised by adopting a clause that empowered a three-member commission to 'revise, reform, simplify, and abridge the rules of practice, pleadings, forms and proceedings of the courts'.[65] The constitution thus required procedural change but left the details – including the extent of codification and fusion – to a future legislative commission.

Field hoped to be named to the constitutionally mandated Practice Commission and shape procedural reform.[66] In 1847, before the appointment of the commission, Field published a tract provocatively titled 'What Shall Be Done with the Practice of the Courts? Shall It Be Wholly Reformed?' Large portions of the document were copied from his 1842 letter to O'Sullivan and combined with more expansive rhetoric. '[G]reat changes in legal proceedings are now inevitable', Field declared, 'and … in making them it is as easy to build anew from the foundation, as to add to and repair what is old.' By 1847, Field demanded what his earlier proposal had only cautiously hinted at: '*nothing less than a uniform course of proceeding, in all cases, legal and equitable*'.[67]

I.3 The practice commission and the code of procedure

After the publication of his tract early in 1847, Field drafted a memorial to the legislature proposing specific instructions for the practice commissioners. The constitution offered few details on what form procedural change should take, so Field sought to turn

[63]D.D.F., 'The Convention', *New York Evening Post*, 1 June 1846; 'The Convention – Reports of the Judiciary Committee', *New York Evening Post*, 13 Aug. 1846.
[64]Bishop and Attree, *Report of the Debates and Proceedings of the Convention*, 838.
[65]New York Constitution of 1846, art.VI, §24. Years later, Field declared that this clause 'owed [its] existence very much to my voice and pen'. Field, 'Third of a Century', 3. Field's influence over the constitutional convention should not be overstated. Cf. Gunther A. Weiss, 'The Enchantment of Codification in the Common-Law World', 25 *Yale Journal of International Law* (2000), 505. Although several reforms aligned closely with Field's advice – including the abolition of chancery, the reorganization of the Court of Errors, and the requirement that all witness testimony be taken orally in court – the convention ignored other proposals of Field's, most notably by instituting an elective judiciary. See D.D.F., 'Officers and the Appointing Power', *New York Evening Post*, 23 June 1846, 2.
[66]Field, 'Third of a Century', 4. The constitution of 1846 mandated that the legislature establish two commissions: one to reform practice and procedure, and one to consider the feasibility of codifying the substantive law. New York Constitution of 1846, art.I, §17; art.VI, §24. Field eventually served on both commissions, and drafted multiple codes both as a Practice Commissioner and a Code Commissioner. This article, however, concerns only the Practice Commission, and 'commission' refers solely to that body.
[67]David Dudley Field, 'What Shall Be Done with the Practice of the Courts: Shall it be Wholly Reformed?' (1847), 7, 37 (hereinafter Field, 'Practice of the Courts').

the commissioners' legislative mandate towards his ideal of reform. '[D]eclare', 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.' Fifty prominent members of the New York City bar signed Field's memorial.[68]

Political compromise among the legislators disappointed Field. Critics of common law pleading gained enough votes to adopt Field's memorial as the mandate for the Practice Commission virtually word for word.[69] However, the commission appointments were subject to party politics. In exchange for appointments elsewhere, Whigs allowed the Democrats to name two practice commissioners. The Barnburner faction chose the more senior and politically accomplished Loomis who, although an advocate for simpler pleading standards, had focused his criticism on lawyers' fee structures. In his earlier reform proposals Loomis had made clear that he was 'too conscious of the immense benefits derived from [the] usages, known as the common law, to seek to abrogate them'.[70] The anti-Barnburner faction chose a member of New York's small appellate bar, Nicolas Hill, who was indifferent to procedural reform in the trial courts. For their part, the Whigs appointed Graham, who repeated Sir Edward Coke in referring to the common law as 'the perfection of human reason' in the course of his lectures.[71] Neither Field nor any signatories of his memorial – most of whom were Barnburners – were appointed to the commission. Further, the legislature gave the commission only a little over a year to finish its work and provided such meagre compensation that the commissioners had to maintain their law practices concurrently with their committee work.[72]

In light of the 'public sentiment' expressed in Field's memorial, however, Graham and Loomis decided they had been instructed to draft a code of procedure that would 'possess the redeeming merit of being neither superficial [n]or inadequate'.[73] Finding his views ignored, Hill resigned in September 1847, informing the Senate that he refused to participate in 'so purely experimental' a project.[74] The anti-Barnburners having thus squandered their appointment, their rivals in the Democratic Party were able to secure their second choice, and on Loomis's recommendation the legislature officially appointed Field to the Practice Commission the same week.[75]

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[68]'Memorial of Members of the Bar in the City of New York Relative to Legal Reform', in 2 *Documents of the Assembly of the State of New York*, 70th sess., no.48, 1847.
[69]1847 New York Laws 67–68.
[70]1842 Judiciary Committee Report, 2.
[71]David Graham Jr., 'The Practice of the Law', in E.B. Clayton, ed., *Inaugural Addresses Delivered by the Professors of Law in the University of the City of New York*, New York, 1838, 60.
[72]1847 New York Laws 68.
[73]'Report of the Commissioners on Practice and Pleadings', in 7 *Documents of the Assembly of the State of New York*, 70th sess., no.202, 1847, 3.
[74]N. Hill, 'Letter to Albert Lester, President of the Senate, Sep. 20, 1847', in *Journal of the Senate of the State of New York* (1847), 679; Loomis, 'Historic Sketch', 15 ('[Hill] was influenced by advice from a high judicial source, not to connect his name and impair his high standing at the bar, by being a party to the sweeping changes proposed, which it was believed would never come into practice').
[75]Loomis, 'Historic Sketch', 15.

The commissioners agreed that each would draft a version of a procedure code and meet in Albany in January 1848 to amalgamate their drafts and finalize a report for the legislature. When they re-convened, the commissioners agreed to use Field's draft as their working copy, to which each commissioner then proposed amendments.[76] The commission sent to the legislature a report which contained a proposed code of 391 sections, supported by explanatory notes. Intending to enlarge and amend their work in the coming year, the commission emphasized that the Code was 'but a report in part'.[77] Nevertheless, the Code contained many of the changes that Field and Loomis had promoted earlier, including the abolition of common law forms of action and a restructured cost system; in addition, the Code contained uniform provisions for trial, discovery, witness examination, and multi-issue and multi-party joinder (detailed below).[78] The legislature, eager especially to adopt the new cost system offered by the Code, deliberated upon the proposed code for three weeks, made minor amendments, and voted to enact the Code. The initial Code of Procedure (hereinafter the 1848 Code) went into effect on 1 July 1848.[79]

The commissioners returned to their practices but carefully watched the Code's enforcement in the courts. Early in 1849, the commissioners drafted three more reports for the legislature. The Second Report contained forty pages of proposed amendments to the Code with explanatory notes; most of the proposals, the report explained, sought to resolve 'various [differing] constructions of the same rule by different judges', such as the extent to which pleadings could be amended. The report further indicated that some differing constructions came from 'eminently conservative' judges and practitioners who 'still pore[d] over the musty volumes of antiquity in search for *precedent*' – precedent that the Code was supposed to have overridden.[80] The Third Report contained over a hundred pages of new proposals for codification, mostly clarifying the jurisdiction of the courts and instituting new procedures to replace prerogative writs. The Fourth Report supplied a procedural code for criminal trials.[81]

The legislature accepted most of the proposals in the Second Report and re-enacted an amended version of the Code that ran to 473 sections (hereinafter the 1849 Amended Code).[82] Neither house, however, took any action on the Third or

[76]Ibid., 17 ('Mr. Field presented a chapter and requested that it be taken up as the basis for the Board to commence upon. His wishes were acceded to by his colleagues') and 22 ('I believe that more of Mr. Fields' [sic] manuscripts than those of either of the other Commissioners were used as the basis of the action of the board from day to day').
[77]First Report of the Commission on Practice and Pleadings (1848), iv.
[78]Because neither the Constitution of 1846 nor the legislature had delineated the jurisdiction of New York's new court system, the Practice Commissioners took it upon themselves to perform this task in Part I of the Code, covering fifty-three sections, 1848 New York Laws 497, 498–510 (hereinafter 1848 Code). For the reforms fusing legal and equitable procedure, see section III below.
[79]1848 Code, 497.
[80]Second Report of the Commissioners of Practice and Pleadings (1849), 7, 10 (on file with the Rare Books Collection, Lillian Goldman Law Library, Yale University).
[81]Third Report of the Commissioners of Practice and Pleadings (1849); Fourth Report of the Commissioners of Practice and Pleadings (1849) (on file with the Rare Books Collection, Lillian Goldman Law Library, Yale University).
[82]1849 New York Laws 613 (hereinafter 1849 Amended Code).

Fourth Reports, but the legislature did extend the Practice Commission to the end of 1849.[83] Field, Loomis, and Graham thus had an additional seven months to complete their work and persuade the legislature to enact a complete codification of procedural law.

The commissioners did not finish their final drafts until late in the day on 31 December 1849. The commissioners' Final Report, printed in January 1850, contained a revised and expanded Code of 1884 sections (hereinafter the 1850 Final Draft) – over 1400 sections longer than the 1849 Amended Code.[84] In the 1850 Final Draft, the commissioners incorporated many of the reforms from their Third Report, and codified the law of evidence. In addition, the Final Report offered a Code of Criminal Procedure, running to some 1000 sections.[85]

The New York legislature took no action on the 1850 Final Draft. By some accounts, the commissioners had been too successful in their earlier revisions, and most legislators were content with the 1849 Amended Code.[86] One commentator has argued that the Final Draft alienated lawyers in the legislature by lowering lawyers' fees from the levels set in the Amended Code.[87] Moreover, the sheer length of the Code allowed the legislature to take no action for want of time even to read the report.[88] The Code fared no better in subsequent legislative sessions; the state never enacted Field's final Code of Civil Procedure.[89]

The New York Code of Procedure thus appeared in several versions from 1848 to 1850.[90] Since the nineteenth century, lawyers and scholars have used the term 'Field Code' loosely to refer to the original 1848 Code of Procedure,[91] the 1849 Amended Code,[92] and sometimes the un-enacted 1850 Final Draft.[93] Later in his career, Field joined commissions to codify New York's substantive law, producing a civil code,

[83]1849 New York Laws 453.

[84]'Final Report of the Commissioners on Practice and Pleadings', in 2 *Documents of the Assembly of New York*, 73rd sess., no.16, 1850 (hereinafter 1850 Final Draft).

[85]See 3 *Documents of the Assembly of New York*, 73rd sess., no.18 (1850). To ensure the two Codes became the sole source of procedural law, the commission proposed a bill to repeal the Revised Statutes and subsequent session laws that conflicted with either Code, an action the legislature had not taken with the previous codes. 3 *Documents of the Assembly of New York*, 73rd sess., no.19 (1850).

[86]John T. Fitzpatrick, 'Procedural Codes of the State of New York', 17 *Law Library Journal* (1924), 16.

[87]Hobor, 'Form of the Law', 253–254.

[88]'Report of the Committee on the Code', in 6 *Documents of the Assembly of the State of New York*, 73rd sess., no.149, 1850, 6 (reporting that the Assembly Judiciary Committee had perused only 635 sections of the 1884-section Code of Civil Procedure and none of the Code of Criminal Procedure).

[89]The legislature made minor amendments to the Code nearly every year after enactment. *General Index of the Laws of the State of New York*, New York, 1859, 193. When a set of amendments were passed in 1851, the legislature reprinted the Code in full with the 1851 amendments inserted. 1851 New York Laws 3. Unlike the 1849 Amended Code, the 1851 amendments did not make substantial changes to the Code's major reforms (the amendments dealt primarily with the jurisdiction of the courts), nor were the amendments suggested by the Code's drafters.

[90]One other version of the Field Code should be mentioned. In 1853, Loomis was once again elected to the legislature, and Field supplied him with a slightly shorter version of the 1850 Final Draft. 'An Act to Establish the Code of Civil Procedure', in 3 *Documents of the Assembly of the State of New York*, 76th sess., no.55, 1853, 1. Loomis was unable to generate sufficient interest in the legislature to pass the Code. J. Newton Fiero, 'David Dudley Field and His Work', 51 *Albany Law Journal* (1895), 42.

[91]Subrin, 'Field and the Field Code', 317.

[92]Fitzpatrick, 'Procedure Codes', 15.

[93]Millar, *Procedure of the Trial Court*, 54–55.

penal code, and political code;[94] and even these works have been called the 'Field Code' as well.[95] Distinguishing between the 1848, 1849, and 1850 versions of the Code of Procedure is important, because despite assertions to the contrary,[96] significant changes in the fusion of law and equity appear from version to version, as will be demonstrated below.

I.4 The fusion project after 1850

The commissioners' project to fuse law and equity in a code gained wide attention outside New York. Missouri adopted a version of the original 1848 Code less than a year after New York.[97] California was the first state to enact the Final Draft as its Code in 1851,[98] and by the end of the century, more than twenty-five states and territories had enacted one or another version of the Code.[99] Four states were drawn more to codification than to fusion and thus maintained separate procedures for law and equity in their codes.[100] The English, on the other hand, were more interested in fusion. After hosting an address by Field in 1850, the Law Amendment Society created a committee to consider the possibility of fusion in England.[101] Under the direction of Lord Brougham, the Society surveyed New York lawyers during the 1850s on their reaction to fusion.[102]

As interest in fusion spread, New York nearly abandoned the project. In 1870, the New York legislature appointed a commission under the direction of Montgomery Throop to 'revise, simplify, arrange, and consolidate' New York's procedural

[94]'The Political Code of the State of New York Reported Complete by the Commissioners of the Code' (1859); 'The Civil Code of the State of New York Reported Complete by the Commissioners of the Code' (1865); 'The Penal Code of the State of New York Reported Complete by the Commissioners of the Code' (1865); 'The Code of Evidence of the State of New York Reported Complete by the Commissioners' (1889) (reproducing many of the sections on evidence proposed in the 1850 Code of Civil Procedure). See generally Charles M. Cook, *The American Codification Movement: A Study of Antebellum Legal Reform*, Westport, CT, 1981, 187–195. Still later in his career, Field attempted to codify international law as well. David Dudley Field, 'Draft Outlines of an International Code' (1872).

[95]Andrew P. Morriss et al., 'Debating the Field Civil Code 105 Years Late', 61 *Montana Law Review* (2000), 280.

[96]Millar, *Procedure of the Trial Court*, 54; Fitzpatrick, 'Procedure Codes', 16; Mildred V. Coe and Lewis W. Morse, 'Chronology of the Development of the David Dudley Field Code', 27 *Cornell Law Quarterly* (1942), 242.

[97]1849 Missouri Laws 73. For a general history of the spread of the Field Code around America, see Charles M. Hepburn, *The Historical Development of Code Pleading in America and England*, New York, 1897.

[98]1851 California Laws 51. Field's brother Stephen introduced the code to the California legislature to which he had recently been elected. William Wirt Blume, 'Adoption in California of the Field Code of Civil Procedure: A Chapter in American Legal History', 17 *Hastings Law Journal* (1966), 701.

[99]The code states (and territories), by date, were Missouri (1849), California (1850), Iowa (1851), Minnesota (1851), Kentucky (1851), Indiana (1852), Ohio (1853), Washington (1854), Nebraska (1855), Wisconsin (1856), Oregon (1854), Kansas (1859), Nevada (1861), Dakota (1862), Idaho (1864), Arizona (1864), Montana (1865), North Carolina (1868), Wyoming (1869), Florida (1870), South Carolina (1870), Utah (1870), Colorado (1877), Arkansas (1868), Oklahoma (1890), New Mexico (1897), and Alaska (1900); see Millar, *Procedure of the Trial Court*, 54–55; for citations to the various statutory codes, see Hepburn, *Historical Development*, 93–113.

[100]The states were Arkansas, Kentucky, Iowa, and Oregon. Millar, *Procedure of the Trial Court*, 54–55.

[101]Lobban, 'Preparing for Fusion', 584; Field, *Life of Field*, 53–55.

[102]See note 175 below.

law.[103] The commission produced a new code that restored distinct procedures for law and equity with regard to pleading, joinder, and trial.[104] After public outcry – particularly from Field – the legislature revised the 'Throop Code' the following year to remove the explicit distinctions between law and equity.[105] This revised Throop Code thus left the substance of the 1848 reforms intact within its 3300 provisions.[106]

Field's declining reputation in New York probably contributed to the overthrow of the Code associated with his name. During the 1860s, Field became counsel to a number of notorious tycoons and politicians, including Jay Gould, Jim Fisk, and William 'Boss' Tweed.[107] Over time, aggravation with Field and his clients transferred to Field's codes as well. In 1882, the *New York Times* declared one of Field's substantive codes to be a 'Code with a purpose: more help for the elevated railroads'.[108] Thomas Nast, the political cartoonist, targeted Field in many of his Tweed Ring cartoons. In one, Field throws the Hounds of Justice 'off the scent' by tying their necks in red tape and scattering large books of procedural law in their path.[109] To several practitioners, Field appeared to exploit weaknesses in his Procedure Code by locking up litigation with injunctions and counter-injunctions issued from multiple district courts.[110]

The enactment of the Throop Code occurred while Field was defending Tweed.[111] 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. Nevertheless, many of the changes were purely formal, and Field speculated that these changes had been made only 'so that [the Code] should not appear to be the same thing as before'.[112] Field's minister

[103]1870 New York Laws 109. Because New York never repealed the Revised Statutes that governed procedure, judges were left to decide how the Code and the Revised Statutes were to be enforced together, leading to confusion. David Dudley Field, 'The Latest Edition of the New York Code of Civil Procedure' (1878), 10.

[104]Loomis, 'Historic Sketch', 27; *The Code of Remedial Justice, Submitted to the Legislature by the Commissioners to Revise the Statutes, and Passed June 2, 1876*, New York, 1876, 161–162, §484.

[105]William Wait, *The Code of Civil Procedure of the State of New York, Enacted 1876, and Amended 1877*, New York, 1877, 151–154.

[106]Scholars sometimes compare the Throop Code unfairly with the 1848 Code – which had only 391 sections – as evidence of prolixity and over-complication. Subrin, 'Field and the Field Code', 940. One must keep in mind that the 1848 Code was only a partial report. The 1850 Final Draft ran to 1885 sections, so although the Throop Code was significantly longer than the Field Code, it was not ten times longer as is sometimes reported.

[107]George Martin, *Causes and Conflicts: The Centennial History of the Association of the Bar of the City of New York, 1870–1970*, New York, 1970, 142–157.

[108]*New York Times*, 20 June 1882.

[109]Thomas Nast, 'Off the Scent', *Harper's Weekly*, 14 Aug. 1875, 656.

[110]Michael Schudson, 'Public, Private, and Professional Lives: The Correspondence of David Dudley Field and Samuel Bowles', 21 *American Journal of Legal History* (1977), 194–195.

[111]A few years before the Throop Commission, Field had caused an uproar in New York by helping Tweed reduce a criminal sentence from twelve years to one; at the time of the Commission, Field was defending Tweed's civil suits. Martin, *Causes and Conflicts*, 142–157.

[112]Field, 'Latest Edition', 14–21. Ironically, it was the Throop Code that gave the Field Code its popular name. The label first appeared as a term of derision, but it stuck through the debates between the supporters of the 'Throop Code' and those of the 'Field Code'. '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* (1885), 393 ('The Field code of my youth has given way to the Throop code of my later life – a tiny pop-gun supplanted by a mighty cannon'). By the time of the Throop Code, Loomis had retired from public life, and Graham had died in 1852, so only Field continued to hold public notoriety as a procedural codifier.

brother, whose biography of Field bears no mention of Field's notorious clients, explained simply that '[a] prophet is not without honor save in his own country'.[113] Thus, whereas some thirty jurisdictions had adopted the Field Code by 1900, New York was no longer among them.

II. FUSION IN THE FIELD CODE

The constitution of 1846 specified the procedures for taking witness testimony at trial and preserved the right to jury trial 'in all cases in which it has been heretofore used'.[114] The legislature's instructions to the Commission required the abolition of common law forms of action, but the commissioners were otherwise free to adopt the procedures they considered best suited to provide civil remedies with less expense and delay. In general, the commissioners favoured equitable procedure, a trend that New York lawmakers had already begun in previous decades with regard to document discovery and the administration of civil remedies. Pleading reform was at the heart of Field's conception of fusion, and Field's views of pleading influenced every other major area of fusion.

II.1 Pleading in New York before the Code

To initiate a suit in New York's chancery system, a plaintiff had only to provide a direct statement of the relief desired and the 'material facts … plainly yet succinctly alleged' justifying such relief.[115] Because a party could amend an equitable bill or answer rather freely, missteps in the initial pleadings were not fatal to the case.[116] Moreover, no oath or form of verification was required at the pleading stage, except for the answer to a bill of discovery (discussed further below). The complainant could attach a series of interrogatories to any bill which, if sufficiently related to the alleged controversy, the court would compel defendants to answer in their written pleadings.[117]

New York procedural rules at common law required a plaintiff to use one of ten forms of action.[118] In theory, the common law adhered to traditional maxims that 'pleadings must not be double' and 'pleadings must not be in the alternative'.[119] In

[113]Field, *Life of Field*, 68.
[114]New York Constitution of 1846, art.I, §1.
[115]Barbour, *Chancery Practice*, vol.1, 38–39. It was the chancellor's duty to order a solicitor to pay any costs 'occasioned by … unnecessary prolixity' in the solicitor's pleadings. 2 Revised Statutes, 175, §47. Joseph W. Moulton, *The Chancery Practice of the State of New York*, New York, 1829, vol.1, 174 ('[T]here can be no allowance … for repetition of statements … or any unnecessary or improper matter').
[116]A plaintiff was free to amend the bill at any time before answer; after answer, a material change to the pleadings required a supplemental bill rather than an amendment. Moulton, *Chancery Practice*, vol.1, 235–236.
[117]Ibid.; Barbour, *Chancery Practice*, vol.1, 130–135. Field, 'Practice of the Courts', 9 ('The bill is itself made much longer than it would be if it were intended merely as a statement of the plaintiff's case'). In all equity pleadings besides bills for discovery, the complainant could waive the oath requirement. 2 Revised Statutes, 175, §44.
[118]Graham, *Practice*, 395–396; First Report, 139.
[119]Henry John Stephen, *Treatise on the Principles of Pleading in Civil Actions*, New York, 1824, ch.2, §1; cf. Alexander M. Burrill, *Treatise on the Practice of the Supreme Court of the State of New York*, New York, 1846, vol.1, 196; Field, 'Practice of the Courts', 15–16.

Field's experience, these maxims had little force in practice. Because a discrepancy between the facts proved at trial and the original plea would result in a non-suit, plaintiffs offered – and courts accepted – multiple pleas arising from the same incident or transaction.[120] By Field's day, a plaintiff or defendant could supplement a specifically pleaded action or defence with a general plea, in which the plaintiff vaguely alleged wrongdoing on the part of a defendant, or the defendant generally denied any wrongdoing whatever.[121] Nevertheless, even the most specific claim in the pleadings could be fictional. For example, using trover, a plaintiff claimed to have possessed goods, lost them, and then discovered that the defendant had found the goods and converted them. '[T]he conversion is the gist of the action, the remainder being a mere fiction', explained Graham's treatise.[122]

Common law pleading thus gave court and parties notice of litigation, but the precise nature of a claim was usually obscured. One judge admitted that he no longer read the pleadings at trial, '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 defence to it'.[123] Because parties could not be certain what proofs would emerge at trial, the impulse according to Loomis was to plead a 'multiplicity of words to meet every possible contingency of testimony'.[124] After proofs were developed at trial, the judge would then non-suit pleas the facts did not support.[125]

II.2 Pleading under the Code

The Field Code adopted equitable pleading with some modification. Like typical equity procedure, the Code required of the plaintiff only a succinct statement of the facts constituting the cause of action and a request for relief, 'in such a manner as to enable a person of common understanding to know what is intended'.[126] Common law forms of action were explicitly abolished.[127] Like an equitable bill for discovery, all pleadings had to be verified under oath, but the Code did not allow interrogatories to be attached to the complaint.[128] The Code expanded beyond equity's practice by allowing even material amendments to the pleadings, noting there was 'little danger of the courts going too far, in allowing amendments'.[129]

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[120]In the 1820s, legislation explicitly permitted defendants to enter multiple pleas. 2 Revised Statutes, 352, §9.
[121]Field, 'Re-Organization', 14–24.
[122]Graham, *Practice*, 172.
[123]Edmonds, 'Address', 14.
[124]Loomis, 'Historic Sketch', 6. The rule disqualifying parties from testifying caused litigation frequently to turn on a party's ability to produce disinterested witnesses. Because of the vagueness of common law pleading, a party frequently had to secure 'the attendance of many witnesses', unsure of whose testimony would actually be necessary at trial. 1842 Judiciary Committee Report, 6.
[125]Field, 'Re-Organization', 14–24.
[126]1848 Code, 521, §120; 1849 Amended Code, 645, §142; 1850 Final Draft, 263, §639. The Code placed a similar requirement on the defendant. 1848 Code, 522, §128.
[127]1848 Code, 521, §118; 1849 Amended Code, 645, §140; 1850 Final Draft, 262, §636.
[128]1848 Code, 523, §133; 1849 Amended Code, 648, §157; 1850 Final Draft, 461, §1092.
[129]Second Report, 30, 44 ('It was supposed, that the power of amendment, given by the code, was so ample, that no doubt could be entertained about this case'). Although the 1848 Code followed equity practice in requiring that an amendment 'shall not change substantially the cause of action or defence', 1848 Code,

The commissioners' expressed purpose for pleading was to supply necessary admissions and prevent surprise at trial.[130] Because the constitution of 1846 mandated that proof had to be taken orally in court, it was essential for the new procedural system to allow parties to prepare adequately before trial. New York's former system of common law pleading was, in its way, intended to prevent surprise,[131] but Field thought that this goal could be reached more easily and with less guesswork if the forms of action were abolished and 'the story … told in the ordinary language of life, in the only language intelligible to the juries who are to decide the causes'.[132] By requiring all pleadings to be verified by oath, fictions would be eliminated, and pleadings would have 'at least the same regard to truth, that prevails between members of society, in their daily communications with one another'.[133] Field's democratic politics thus intersected with New York's commercial culture at the heart of his procedural reform. The 'plain speaking' valued by Jacksonian democrats had become the language of the marketplace and was now made the language of the law. These plainspoken, businesslike pleading standards, Field argued, would inform parties for trial, and 'enable them to dispense with unnecessary proofs, and to be prepared with those which are necessary'.[134]

Though he hoped to democratize courtroom rhetoric, Field nevertheless intended to grant judges more power and discretion to manage litigation at its inception. He thought the ideal method of pleading was the oral pleading conducted during the time of the English yearbooks (c.1292–1535), which had been successful because of the judge's early involvement in framing the case. 'When the presence of the judge was withdrawn, [pleading] lost an essential part of its original character. The substitute for that now is the trial', Field argued.[135] Under the Code, Field intended the judge to force parties to be candid about their controversy from the outset: the 1849 Amended Code allowed a court to require amended pleadings that removed 'irrelevant and redundant matter' and made claims 'definite and certain'.[136] In a manual written in 1856, Field admonished judges to be more active in amending prolix and evasive pleadings, as well as those which were insufficiently detailed.[137] So long as the judge actively supervised the early stage of litigation, clear, thorough, and definite

526, §149; Moulton, *Chancery Practice*, vol.1, 289, the 1849 Code dropped this language after the commissioners found that judges were interpreting the provision narrowly. 1849 Code, 650, §173; Second Report, 29–30. The official comments to the 1849 amendments made clear that 'the intention of the commissioners [was] to allow and encourage amendments of every kind'. Second Report, 30, contra Subrin, 'Field and the Field Code', 331 ('Although the court might allow amendments "in furtherance of justice," this could only be done "whenever the amendment shall not change substantially the cause of action or defense" – a limitation that does not appear in the Federal Rules').

[130]Second Report, 11 (describing that pleading had 'been accordingly reduced to a few plain and explicit rules, carefully guarded to prevent surprise').

[131]Although precision was obscured, the forms of action set the boundaries of a dispute and allowed lawyers to prepare for several possible contingencies.

[132]Field, 'Practice of the Courts', 17.

[133]First Report, 153.

[134]On Jacksonian 'plain speaking', see Kenneth Cmiel, *Democratic Eloquence: The Fight over Popular Speech in Nineteenth-century America*, Berkeley, 1990, ch.2. Field, 'Practice of the Courts', 22.

[135]Field, 'Practice of the Courts', 24.

[136]1849 Amended Code, 648, §160.

[137][David Dudley Field], 'A Short Manual on Pleading Under the Code' (1856), 30.

pleadings would fully inform each side of the controversy without the need for equity's written interrogatories.[138]

The commissioners' project to reform New York pleading was largely successful in practice. Between 1852 and 1860, treatise writers – including Field's law partner Thomas G. Shearman – produced several 'books of forms' supplying model pleadings for practitioners. The books presented brief complaints and answers and made no reference to common law forms of action. Before the Code, basic litigation such as an action to recover a debt could take up several pages of a form book. After 1850, a similar model complaint required only two or three paragraphs.[139]

Some practitioners and judges resisted the Code's oath requirement for all pleadings. One treatise writer argued that, despite the language and intention of the drafters, it was not necessary for parties to verify their pleadings on oath.[140] John Townshend, compiler of case reports arising from the Code, asserted that requiring an oath for pleadings was unconstitutional, and in subsequent cases judges struggled to enforce both the Code's requirement and the constitution's prohibition of self-incriminating statements.[141] The commissioners responded in 1849, stating that the oath requirement was 'of indispensible [sic] necessity in the system adopted by the code' because it helped to reveal 'the real question of fact in controversy'.[142] Nevertheless, the legislature in 1849 essentially made the oath verification optional.[143]

II.3 Multi-issue and multi-party joinder in New York before the Code

New York equity encouraged joinder. 'It [was] a general object of equity', commented one treatise, 'to prevent a multiplicity of suits, by determining in one the rights of all persons legally and beneficially interested in the subject.' A chancery court could bring in as a party anyone who had a material interest in a suit and would be affected by the outcome, and in most cases such joinder was mandatory. If the number of people having an interest in a case was excessively large, the chancellor could allow a class action. Regarding joinder of issues, the chancellor could in one trial hear all actions in 'a connected series of acts of the same nature, tending to the same injury, and in which all the defendants were more or less concerned'. New York chancellors applied this standard broadly to resolve all controversies between the same parties in a single suit.[144]

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[138]Field, 'Practice of the Courts', 25. See also 1850 Final Draft, 275–276, §655.
[139]Compare Burrill, *Practice of the Supreme Court*, vol.2, 268–272, and John V.N. Yates, *A Collection of Pleadings and Practical Precedents with Notes Thereon*, New York, 1837, 455–456 with Commissioners of the Code, *Book of Forms*, 22–26, and Whittaker, *Practice and Pleading*, vol.2, 408.
[140]Townshend, *New Practice in Civil Actions*, 28.
[141]1 Code Rep. 2 (1848); New York Constitution of 1846, art.VI, §6 (no one compelled to be a witness against himself). On the troubled case law regarding the oath requirement and the threat of criminal prosecution, see Van Santvoord, *Principles of Pleading in Civil Actions*, 584–589.
[142]Second Report, 12.
[143]1849 Amended Code, 648, §157. The language adopted for §157 was not the language suggested by the commissioners, who, on the contrary, made the oath requirement all the more explicit and forbade the use of civil pleadings 'in a criminal prosecution against the party, as proof of a fact admitted or alleged in such pleading'. Second Report, 28.
[144]Moulton, *Chancery Practice*, vol.1, 98–100.

New York common law mandated joinder of parties in certain cases. A plaintiff was required to name all interested parties to a contract in a suit arising from the contract. In certain tort claims, a plaintiff had to name those jointly interested in injuries to property, but plaintiffs suffering similar personal injuries arising from the same incident could not be joined. The plaintiff had the option to join multiple defendants in a tort action.[145] Any deviation from these rules allowed a defendant to plead misjoinder or nonjoinder and so dismiss the suit.[146]

Causes of action 'of the same nature' could be joined in common law suits arising out of the same transaction between the same parties. Typically this rule meant that forms of action arising in contract could be joined to other contract claims, but forms of contract could not be joined to forms of tort, for instance.[147]

II.4 Joinder under the Code

The Commission intended 'to allow … great latitude in respect to the number of parties who may be brought in' to a suit.[148] It therefore adopted 'the rules which prevailed in equity … with scarcely any modification'.[149] Specifically, the Code provided that '[a]ll persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs', and that '[a]ny person may be made a party defendant, who has an interest in the controversy, adverse to the plaintiff'.[150]

A key objective of the Code's rules relating to parties was to eliminate the widespread use of fiction in common law pleading. The Code required that only 'real parties in interest' be the named parties in a suit, thus preventing fictional assignments often used at common law.[151] Further, with an attitude that seems out of place in modern practice, the commissioners disapproved of arguing in the alternative, viewing the practice as an avenue through which fictions might return to pleading. '[A]s there can be but one true statement of one transaction, and as the Code requires the pleadings to be true' – and verified by oath – 'it should seem to follow, that different ways of stating the same claim are no longer permissible', explained Field in a manual on pleading.[152]

Through joinder rules, the commissioners sought to balance broader joinder with more restrictive pleading in the alternative. The Code enumerated seven categories of actions and explained, somewhat confusingly, 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 the [enumerated] classes'.[153] A plaintiff thus could

[145]Graham, *Practice*, 457–461 ('the rule is, that wherever, from the nature of the injury, two or more are jointly prejudiced, they must be joined: but two persons cannot join in an action for false imprisonment, assault and battery, or slander, except for slander of title').
[146]Burrill, *Practice of the Supreme Court*, vol.1, 64–69.
[147]Graham, *Practice*, 463–464. Graham remarked that the most common joinders were debt with assumpsit, and trover with case. Non-joinable categories included trespass with trover, or assumpsit with case.
[148]First Report, 123.
[149]Whittaker, *Practice and Pleading*, vol.1, 58.
[150]1848 Code, 516, §§97–98; 1849 Amended Code, 639, §§117–118; 1850 Final Draft, 248, §§608–609.
[151]1848 Code, 515, §91; 1849 Amended Code, 638, §111; 1850 Final Draft, 247, §597.
[152]Field, 'A Short Manual on Pleading', 13.
[153]1848 Code, 525, §143. The seven classes were contract, injuries by force, injuries without force to person or property, injuries to character, claims to recover real property, claims to recover personal property, and claims against a trustee.

not allege both a breach of contract and a breach of trust arising from the same transaction with the same party and join the two claims – effectively arguing in the alternative. The commissioners did intend that a plaintiff could claim a breach of contract against one party and join it to a claim against the party's trustee, for example.[154]

Some judges used the complicated joinder provision to restrict joinder of issue. In a contract-trust suit in which Field appeared as counsel, one Judge Barculo, a former vice chancellor well-acquainted with equity procedure, forbad the joinder of actions on the ground that the Code was 'merely an embodiment of the rules of pleading as they existed' at common law. Shortly after, Field publicly condemned the decision and responded 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', just as the practice had been at equity.[155] In 1852 the New York legislature amended the joinder section of the Code to reflect the commissioners' intentions. The Code as clarified provided that plaintiffs could join 'several causes of action, whether they be such as have been heretofore denominated legal or equitable, or both'.[156]

II.5 Discovery and examination in New York before the Code

Both common law and equity prohibited testimony from a party or witness interested in the outcome of the case.[157] The answer to an equitable bill for discovery, however, was supplied by a party in writing and verified by oath, and the opposing party could then use the sworn statement in an equity suit or admit it into evidence at common law.[158] In contrast to modern practice, nineteenth-century discovery had a narrow purpose: to compel a defendant's admission to a material element of a case, particularly when other evidence was unobtainable. Equity courts intended discovery 'to enable the applicant to prove his case: not to get information as to whether he had a case, much less to explore his adversary's case'.[159] It was the task of the pleadings to prove that a requested discovery (or an interrogatory attached to any equitable bill) was material and necessary and not 'a mere fishing bill'.[160] Discovery thus served the purpose of admission, not investigation.

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[154][David Dudley Field], 'Administration of the Code' (1852), 21–24.

[155]Ibid., 24 ('Is [Judge Barculo] ignorant, that there are other rules of pleading than those of the common law? Is he, who was once Circuit Judge and Vice-Chancellor, ignorant, that, in the late court of Chancery, all the causes of action mentioned by him might have been united in the same bill, if they had arisen out of connected transactions?').

[156]1852 New York Laws 655, §167.

[157]There were a few narrow exceptions; see Barbour, *Chancery Practice*, vol.1, 254–265. George Fisher, 'The Jury's Rise as Lie Detector', 107 *Yale Law Journal* (1997), 657 (noting that civil parties and interested persons 'remained ineligible to testify in every jurisdiction' of the Anglo-American legal world through the mid-nineteenth century).

[158]Moulton, *Chancery Practice*, vol.1, 181.

[159]Austin Abbott, *New Cases Selected Chiefly from the Decisions of the Courts of the State of New York*, New York, 1877, vol.1, 333; see generally Christopher Columbus Langdell, *A Summary of Equity Pleading*, Cambridge, MA, 1877, 196.

[160]Moulton, *Chancery Practice*, vol.1, 182–183. Joseph Story provided a classic definition of a fishing bill as the effort of a plaintiff to 'file a bill, and insist upon knowledge of facts wholly impertinent to his case, and thus compel disclosures in which he had no interest, to gratify his malice or his curiosity or his spirit of oppression'. Joseph Story, *Commentaries on Equity Jurisprudence as Administered in England and America*, Cambridge, MA, 1836, vol.2, 822.

In answering a bill for discovery, a party spoke only through the written pleadings. One party requested specific information in the bill, and the other party had to provide the information under oath, or else dispute the bill as immaterial to the case.[161] If the requesting party believed the answer was insufficient, or if objections arose over materiality, a master would determine how much information had to be provided, but no direct opportunity for cross-examination was allowed.[162]

A chancery official could compel a party to deliver to the court 'books, deeds, letters, accounts, and other papers relating to the matters at issue' for the other party's pre-hearing inspection.[163] At times a plaintiff requested document discovery after asking the defendant in the original bill for discovery about the existence of any relevant documents. Relevance depended on a party having an 'interest' in the document, for instance if the party were named in a deed or receipt of payment, or if he sought the accounting books for a business in which he was a partner. For documents held by a non-party witness, either party could request a subpoena *duces tecum* ordering a witness to produce the documents for examination by a master or chancellor, but neither the documents nor any non-party witness was made available for examination by parties before the hearing.[164]

With regard to discovery of documents, New York had achieved fusion before the Field Code. Under the Revised Statutes of 1828, common law judges had discretion to compel pre-trial discovery of documents between parties, guided by 'the principles and practice of the court of chancery in compelling discovery'.[165] A defendant could request discovery even before filing the reply in order to furnish admissions for his pleading; after joinder of issue, either party could seek discovery of documents from the other party in order to prepare for trial.[166]

For witness testimony, a common law court could permit the deposition of a disinterested witness likely to be absent at the time of trial (a conditional deposition, or deposition *de bene esse*), either because of travel or illness.[167] This procedure, like the inspection of documents, originated in and migrated over from the Court of Chancery – another example of fusion in the later 1820s.[168] The deposition was supposed to be taken orally under oath and administered by a judge, who would record the testimony in the presence of parties and counsel.[169] In actual practice, the examining party's counsel was usually the one who conducted and recorded the deposition,

[161]Moulton, *Chancery Practice*, vol.1, 182–183, 283; see generally Langdell, *Summary of Equity Pleading*, 99–100.
[162]Only after a party's third failure to comply with the master's instructions would an examiner be allowed to conduct a deposition to complete the discovery. Moulton, *Chancery Practice*, vol.1, 292–294, 297. Depositions were conducted in the same manner as equitable examinations of witnesses, see below.
[163]Barbour, *Chancery Practice*, vol.2, 431.
[164]Ibid., vol.1, 229–232, 279–280.
[165]2 Revised Statutes, 199–200, §§21–27.
[166]*Rules of Practice of the Supreme Court of the State of New York at Law and Equity*, New York, 1847, 12, Rules 27–28.
[167]2 Revised Statutes, 392, §5.
[168]Moulton, *Chancery Practice*, vol.1, 94; Barbour, *Chancery Practice*, vol.1, 279–280; 2 Revised Statutes, 398–399, §§35–41.
[169]2 Revised Statutes, 392, §5.

usually outside the presence of the judge; objections from an adverse party were reserved for the judge to resolve at trial.[170]

Despite the 1820s fusion of these few aspects of discovery, common law litigants did not gain the ability to question parties and offer their statements into evidence. For this purpose, a separate suit initiated in chancery (a bill of discovery) was still required.

II.6 Discovery and examination under the Code

Because courts of law and courts of equity already had comparable powers of document discovery, the commission made only minor changes.[171] The 1848 Code perpetuated the process of subpoena *duces tecum*, as did the 1850 Final Draft, which dropped the term (as part of a general pruning of Latin phrases, including even the revered *habeas corpus*).[172] A significant change was instigated by judges, who extended document discovery to cases in which a plaintiff needed a document for the initial complaint, a limited form of pre-action discovery. The commissioners favoured the change in their 1850 Final Draft.[173]

The 1848 Code declared that '[n]o action to obtain discovery under oath in aid of [either party] shall be allowed', except in one circumstance. To make up for the loss of equity's bill of discovery, the 1848 Code tentatively followed reform efforts in neighbouring Connecticut by partially lifting the disqualification of party testimony. The 1848 Code allowed a party to be examined at trial only by opposing counsel. In order to procure necessary admissions, the examining party could make its examination in a pre-trial deposition instead of calling the party to the stand, but, as at common law, the examination was conducted by lawyers instead of a court-appointed examiner (thus the Code extended to all phases of examination the constitutional mandate that 'testimony in equity cases shall be taken in like manner as in cases at law', that is, through oral, party-conducted examination at a hearing before the adjudicator).[174] The commissioners drew back from completely abolishing the

[170]A party could take a deposition in a judge's chambers or at any other location agreeable to both parties. See Whittaker, *Practice and Pleading*, vol.1, 632. Although Whittaker concentrates on practice under the Code, he states that the particulars of conditional depositions differed little from prior practice.

[171]Contra Subrin, 'Field and the Field Code', 333 ('unlike the comparable Federal Rules, the opposing side did not have to produce [the document], the only penalty being that the court could, if it wanted, on motion, "exclude the paper from being given in evidence"'). The 1848 Code includes the words 'or punish the party refusing, or both'. 1848 Code, 558, §342. Exclusion of favourable evidence was only one sanction available for the court to punish an uncooperative party, not the sole sanction.

[172]1850 Final Draft, 779, §1853. Over Graham's dissent, Field and Loomis changed the term *habeas corpus* to 'deliverance from jail'. 1850 Final Draft, 533, §1266; Dissent of Mr. Graham, 2 *Documents of the Assembly of New York*, 73rd sess., no.17, 1850, 53. The changes were based upon the legislative instructions to the commission, which, in addition to the provisions drafted by Field, also called for 'the abandonment of all Latin and other foreign tongues, so far as the same shall by them be deemed practicable'. 1847 New York Laws 68. 'They tell me it was proposed to call the old process of "*ne exeat*" a writ of "no go"', joked the novelist James Fenimore Cooper. James Fenimore Cooper, *The Ways of the Hour: A Tale*, New York, 1850, 183.

[173]*Rules of Practice of the Supreme Court of the State of New York*, New York, 1849, 15–16, Rules 8–9. The conventional standard of relevance on party 'interest' applied, and pre-action discovery was not granted 'without strong affidavits, showing its necessity to enable the plaintiff to obtain redress'. Whittaker, *Practice and Pleading*, vol.1, 613. 1850 Final Draft, 517, §1224.

[174]1848 Code, 559–560, §§343–345; Whittaker, *Practice and Pleading*, vol.1, 631–632. For a history of the party disqualification rule, see Fisher, 'Jury's Rise as Lie-detector'. Other common law jurisdictions were

disqualification, however. Among the many reforms Field had proposed, allowing party testimony at trial had the least support among even the reform-minded segment of the legal profession.[175]

Reformers had long argued that interrogatories bloated chancery bills, and the enormous time taken to record examinations over multiple sessions had given chancery its legendary reputation for cost and delay. Accordingly, the commissioners in the early draft of the Code focused on creating a more efficient way to secure party admissions by using common law-style depositions. If admission had been the main function of the equitable bill for discovery, Field wondered why it was 'necessary to go through with this troublesome, dilatory, and expensive process, simply to ask one's adversary a question?'[176] Further, once a deposition had been taken for purposes of party admission, it appeared to the commissioners unnecessary to call the party again for examination at trial. With efficiency as the goal, depositions were unnecessary, or worse. The official comment to the Code explained that 'if the examination be once had, we would not permit it to be repeated, else it might become the means of annoyance'.[177] Given the commissioners' attempts to make parties plead candidly, anything beyond one examination seemed excessive.

By 1850, however, the commissioners were less concerned with efficiency than they were with completely abolishing the disqualification of party testimony. Dismissing concerns that interested examinees might lie or mislead the adjudicator, the commission argued that fact-finders could sufficiently account for the temptations of interest. 'Admission is the rule here', they explained, 'exclusion is the rule of the common law. Let in all the light possible, we ask. Not 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.'[178] Accordingly, the 1850 Final Draft treated all witnesses alike – including interested witnesses and parties – for purposes of testimony and examination. Pre-trial deposition of a party was still available to secure admissions, but now such pre-trial deposition did not preclude examining the party again at trial.[179] What remained consistent through the drafts was Field's insistence that

abolishing the exclusion rule around this time. England permitted civil parties to testify in minor causes in 1846, and in all causes in 1848. Michigan allowed interested witnesses to testify in 1846, and Connecticut allowed party testimony in 1848. In 1855 Field wrote a law reform tract compiling favourable reviews on the abolition of the exclusion rule in Connecticut, Vermont, Ohio, and Minnesota, all states that had dropped the rule between 1848 and 1851. [David Dudley Field], 'Competency of Parties as Witnesses for Themselves' (1855), 4–6. New York Constitution of 1846, art.VI, §10.

[175][David Dudley Field], 'Evidence on the Operation of the Code' (1852). *Evidence on the Operation of the Code* was the second in a series of 'Law Reform Tracts' produced by Field in the early 1850s to encourage the adoption of the 1850 Final Draft. This tract reproduces a survey conducted by the English Law Amendment Society. The society's president, Lord Brougham, sent inquiries to twenty prominent members of the New York bench and bar seeking their opinions on the new Code. The reviews were generally favourable and at times highly enthusiastic. The one question that divided the supporters of the Code was number nine: 'Does the experience you have had of the admission of the evidence of interested witnesses lead you to desire that the principle should be carried to its full extent by making parties competent to give evidence in their own behalf?' Most of the answers, even among Code supporters, were negative. Ibid., 11–13.

[176]Field, 'Practice of the Courts', 10.

[177]Ibid., 11; First Report 244–245, notes to §350.

[178]1850 Final Draft, 714–720, notes to §§1707–1708.

[179]Ibid., 767–768, §1821, 770–771, §§1829–1830.

pleading would adequately inform adversaries of each other's case and supply necessary admissions of fact. Although Field believed that equitable discovery had been valuable for this purpose, he maintained that the fact-laden, oath-verified pleadings required by the Code obviated the need for extensive pre-trial examination. So long as the judge saw to it that the pleadings were properly conducted, the pleadings would 'bring before the court, and to the knowledge of one's adversary, the precise questions in dispute, and … insure truthful allegations by the sanction of an oath'.[180] A deposition could help to force admissions, but ideally even that limited effort at pre-trial investigation would be unnecessary.

The assumptions behind Field's faith in fact pleading make sense in their nineteenth-century context, when most litigation concerned breach of contract; such cases lent themselves to straightforward factual recitations in pleading, parties themselves could inform one another through admissions, and document discovery was adequate for pre-trial preparation.[181] Field's thinking was shared by Lord Brougham's Law Amendment Society in England, which noted in a contemporaneous report that 'the real circumstances are usually best known, and are often only known, to the litigating parties themselves' – an assumption that accords best with contract litigation.[182]

Practice under the 1848 Code actually drew somewhat near what the 1850 Final Draft envisioned. Judges interpreted the Code narrowly to forbid only the use of a deposition for impeachment of a party at trial.[183] Under this interpretation, lawyers could conduct pre-trial depositions of adverse parties for admissions that could inform their pleadings but still call parties to the stand at trial. There, the previous examination merely became a 'nullity, and, even if [the examinee were] called to testify on one point only, the whole ground [had to] be gone over again'.[184] The Federal Rules would later expand lawyers' powers of pre-trial investigation – by, among other developments, instituting a broad standard of relevance[185] – but early

[180][Field], 'Administration of the Code', 17; Field, 'Practice of the Courts', 11. In a note attached to the 1850 Final Draft, the commissioners discussed and reproduced other reports on the interaction of discovery and party testimony. Throughout the note, both the commissioners and their correspondents assume that both parties have a relatively clear idea of the underlying facts and use discovery only to secure confession from their adversaries, not to inform themselves. 1850 Final Draft, 715–725. In this regard, the design of the Field Code was the reverse of the Federal Rules, in which, as Charles Clark explained, extensive pre-trial discovery paired with generalized pleading did 'away with "surprise" as a tactical advantage in litigation'. Charles E. Clark, 'Edson Sunderland and the Federal Rules of Civil Procedure', 58 *Michigan Law Review* (1959), 11.

[181]One study of state Supreme Court business has found that over half of all cases in the 1870s dealt with contract, debt, or real property, compared to only ten percent of cases in tort, and ten percent in criminal law. Robert A. Kagan et al., 'The Business of State Supreme Courts, 1870–1970', 30 *Stanford Law Review* (1977), 133–135.

[182]1850 Final Draft, 719; Society for the Promoting the Amendment of the Law, Report of the Committee of Common Law on Evidence of Parties (1848), 3.

[183]Whittaker, *Practice and Pleading*, vol.1, 434 ('At the actual trial, however, the adverse party may, it would seem, be called as a witness, in all cases; though, if so called, his previous examination cannot then be used'). The same treatment did not develop towards non-party witnesses, because of proof of impending absence was required to initiate a deposition. Ibid., 586.

[184]Ibid., 586. A literal reading of the Code overlooks this development in practice. Cf. Subrin, 'Field and the Field Code', 333 ('In contrast to the Federal Rules, the Code deposition was in lieu of calling the adverse party at trial'); Kessler, 'Our Inquisitorial Tradition', 1235 n.291.

[185]Federal Rule of Civil Procedure 26(b)(1).

practice under the Field Code nevertheless resembled modern American pre-trial practice.

II.7 Trial in New York before the Code

Once chancery pleadings were complete, a vice chancellor or a master could refer specific tasks of evidence-gathering to an examiner.[186] A master or examiner could subpoena documents and direct the parties to develop the written record in the case. Counsel conducted oral examinations which the examiner recorded and summarized in writing, preserving objections for review by the master.[187] Examination of witnesses proceeded over the course of as many sessions as necessary; indeed, a common complaint against the chancery system was that the absence of a jury allowed equity courts a less disciplined schedule, inviting delay.[188] At the conclusion of examinations, an equity judge at a final hearing decided all issues of fact and law; by the 1840s, masters served as a de facto corps of trial judges, whereas the chancellor and vice chancellors acted mostly as appellate judges.[189]

After the pleadings closed, common law trial proceeded in the form that remains familiar today. Beginning with the plaintiff, each party presented the proofs for his or her case, most often through witnesses testifying under oath and subject to cross-examination. At the close of the case, each party's lawyer presented a summary of the evidence and a closing argument for his client.[190]

Only the jury was responsible for findings of fact. The judge could charge the jury on 'the legal results of the evidence', according to Graham's treatise, but 'he [was] not authorized to give them any positive direction' on questions of fact. A jury could return either a special verdict stating the facts found, or, if instructed on the law by the judge, it could return a general verdict on the whole case.[191] A single judge presided over the jury trial, whereas a panel of three judges would hear arguments and rule on disputed issues of law.[192] Parties could motion a trial court for a new trial, and such motions were granted in cases of jury misconduct, misdirection of the judge, discovery of new evidence, and jury findings against evidence or against law.[193]

II.8 Trial under the Code

The commissioners were bound by the 1846 constitutional provision that declared 'testimony in equity cases shall be taken in like manner as in cases at law'.[194]

[186]Moulton, *Chancery Practice*, vol.2, 164–165.
[187]Ibid., vol.1, 43–45; Kessler, 'Our Inquisitorial Tradition', 1225–1226; see note 58 above.
[188]Field, 'Letter to O'Sullivan', 25–26 (demonstrating that a master's discretion to hold as many proof-taking conferences as he liked could drag out a basic case for more than five years); Stanton, *Random Recollections*, 50 (ridiculing the examination schedule conducted by Chancellor Walworth, New York's last chancellor).
[189]Field, 'Re-Organization', 4–5.
[190]Graham, *Practice*, 731–737, 742.
[191]Ibid., 772.
[192]First Report, 185–186, notes to §210. With the number of masters and examiners factored in, the workforce available in both common law and equity appears roughly equal, as each system had about 370 officers to take testimony and issue rulings, from the county courts to the Court of Errors. 'Civil Officers', *New York Evening Post*, 13 July 1846, 2.
[193]Burrill, *Practice of the Supreme Court*, vol.1, 468.
[194]New York Constitution of 1846, art.VI, §10. Neither the 1848 Code nor the 1849 Amended Code included specific provisions for in-court examination; instead the constitutional provision and any related acts by the

Even apart from this mandate, the commissioners explained, '[W]e should still prefer … oral examination. A written deposition taken in private, is not the best means of eliciting the truth'.[195] Elsewhere, Field explained his preference for *viva voce* testimony subject to cross-examination: 'He must be a dull person indeed', observed Field, 'who, when he has written questions to answer [as in equity proceedings in England] and ample time for it, cannot contrive to conceal as much as he discloses'.[196] Moreover, Field estimated that out-of-court examinations over multiple sessions could last over five years if the parties took full advantage of equity's scheduling provisions and interlocutory appeals to the chancellor. By adopting common law examination, the commissioners expected the civil justice system to run more efficiently.[197]

As regards adjudication, the Code in all its iterations from 1848 to 1850 contained two provisions for making determinations of fact. In any case in which the remedy envisioned was money damages or the recovery of real property, the default mode of trial was to a jury.[198] Bench trial pertained in other cases by default,[199] but in all cases the parties were free to choose either mode of trial by mutual consent.[200] The commissioners' commentary explained their intent to expand the right to a jury over more types of cases, but in another section, the commissioners surmised that bench trial would become much more popular, and the report welcomed this development.[201] Renée Lerner argues that American jurisprudence has long been ambivalent about maintaining the right to a civil jury trial while simultaneously expediting courtroom trials and reducing costs. The 1848 Code provisions and commentary seem to illustrate this ambivalence well.[202]

Nevertheless, several scholars have interpreted the Code as being centrally concerned with promoting the jury, one consequence, they argue, of Field's democratic politics.[203] Such accounts tend to misunderstand the role of Field's political ideology

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legislature were left to guide practitioners. The 1850 Final Draft, as part of the project to codify the law of evidence, included detailed provisions for examination at trial. 1850 Final Draft, 773–777, art.6.

[195]First Report 244, notes to §350.

[196]Field, 'Practice of the Courts', 10.

[197]Ibid., 10; Loomis, 'Historic Sketch', 10 ('[T]he delays of justice, more especially in the court of chancery, were a subject of universal complaint'); Stanton, *Random Recollections*, 50 (remarking that in one complex case 'years rolled away till the constantly accumulating testimony reached thousands of folios'). First Report 178 (noting the 'rapid examination which takes place on common-law trials before the juries').

[198]The parties could waive jury trial. 1848 Code, 536, §208; 1949 Amended Code, 666, §253; 1850 Final Draft, 318, §761.

[199]1848 Code, 536, §209; 1949 Amended Code, 666, §254; 1850 Final Draft, 319, §762.

[200]1848 Code, 536, §209 (court permitted to refer whole issue to jury), 538, §221 (parties can consent to bench trial); 1949 Amended Code, 666, §254 and 668, §266; 1850 Final Draft, 319, §762, 332, §796.

[201]First Report, 185, §208 ('We propose an extension of the right of trial by jury to many cases, not within the constitutional provision [i.e. beyond formerly common law cases]'); 189–190, §221 ('If that burthen [of jury service] can be lessened, by the plan proposed … we shall regard it as a great benefit').

[202]Renée Lettow Lerner, 'The Failure of Originalism in Preserving Constitutional Rights to Civil Jury Trial', 22 *William & Mary Bill of Rights Journal* (2014), 811.

[203]Millar, *Procedure of the Trial Court*, 52; Kessler, 'Our Inquisitorial Tradition', 1234; Pound, 'David Dudley Field', 8; Subrin, 'Field and the Field Code', 318. At times, populist rhetoric infused Field's writings, especially in his calls for law reform. 'Causes are determined upon technical reasons so often, that a plain man may almost despair of justice', wrote Field in an article published – appropriately – in the *Democratic Review*. Field, 'Study and Practice of Law', 490. In the introduction to the 1850 Final Draft, Field and the

in his procedural reform, and they overlook the fact that though the Code expanded the *right* to jury trial to more cases, it simultaneously made the use of a jury *waivable in every case*, a novelty in the common law world.[204] Lawrence Friedman writes of the Field Code that 'the root ideas' were to make procedure 'so simple and rational that the average citizen could do it on her own', while Stephen Subrin argues that Field sought to involve 'the community in the important process of trying to help deliver rights to citizens'.[205] Field did not have so high a view of democracy, or of the jury, however. 'Justice is attainable only through lawyers', Field wrote later in his career. 'Only a few men, set apart for that particular calling, and devoting to it the best part of their lives', could learn and apply the law. Juries, on the other hand, were 'popular bodies, subject to popular influences, and always liable to be swayed by an eloquent address'.[206] Despite the fact that states had been abandoning property requirements for jurors two decades before the Code, the commissioners retained these requirements in the 1850 Final Draft, an unusual step if the goal were to promote democracy through the expansion of the jury.[207]

Field thought his plain speaking requirement for pleadings supported popular sovereignty by informing the observing public of the real issues at stake in a litigation, but the plainspoken ideal was always to be in the service of professional officers and not a functional replacement of them. Adequately informed by lawyers' pleadings and judges' instructions, the jury offered an advantage of collegiality among multiple adjudicators. With regard to questions of law, Field thought New York judicial structure before 1846 was the reverse of what it should have been: Three-judge panels presided at common law trial while in equity only a single judge heard appeals on complex questions. Field argued that only a single judge was needed at trial, where most cases were easy to decide. A case that posed a difficult question of law would naturally be appealed, and it was then that 'several judges are safer than one'.[208] Similarly for findings of fact, Field was apprehensive about trusting a single adjudicator. For bench trials, Field argued that a trial judge should not be granted full deference in fact-finding and that a more searching level of review was appropriate to ensure that multiple adjudicators considered and determined the facts.[209] A jury's virtue was

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other commissioners concluded that '[i]n a country where the people are sovereign, where they elect all officers, even the judges themselves, where education is nearly universal, it was not long possible, to keep the practice of the courts enveloped in mystery'. Accordingly, '[t]he Commissioners ha[d] never lost sight of these considerations' and crafted the Code so that 'no person need have occasion to witness a legal proceeding, read a pleading, or render a verdict, the meaning of which, he does not comprehend'. 1850 Final Draft, v. Such statements, however, must be considered along with Field's speeches before law students and bar associations in which Field expressed less optimism about the abilities of common jurors.

[204]England did not provide for any waiver of the right to jury trial until 1854. Lerner, 'Rights to Civil Jury Trial', 860–863.

[205]Friedman, *History of American Law*, 297; Subrin, 'Field and the Field Code', 344.

[206]Field, 'Reform in the Legal Profession and the Laws', 499–500.

[207]John H. Langbein et al., *History of the Common Law: The Development of Anglo-American Legal Institutions*, New York, 2009, 533; 1850 Final Draft, 110, §251.

[208]Field, 'Re-Organization', 4. ('[T]o dispose of those questions of law which involve no real difficulty, after both the parties have heard and answered each other … , one judge is enough.') The Code accordingly specified that '[a]ll issues, whether of law or fact, triable by a jury or by the court, shall be tried before a single judge'. 1848 Code, 536, §210; 1849 Amended Code, 666, §255; 1850 Final Draft, 319, §763.

[209]First Report, 178–179.

that it already necessarily involved a multiplicity of decision-makers to decide questions of fact.[210]

The commissioners' expectation that open court examination would be more rapid than equity's proceedings proved accurate in practice. One judge wrote to Field, 'I often try at the circuit, in a few hours, an equity cause that would have occupied several days before the Examiner, under the old system'.[211] Another wrote of a particular case: '[U]nder the old mode, several days would have been spent in the Examiner's 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'.[212]

Although the Code's provisions for adjudication did not mention law or equity, practitioners mostly assumed that jury trial applied to formerly common law-type cases, whereas bench trial was the default in formerly equity-type cases, even equity cases seeking money damages. Occasionally, a court followed the commissioners' construction of the Code and used jury trial in the latter case.[213] More often, however, lawyers chose to opt out of jury trial.[214]

II.9 Remedies in New York before the Code

New York chancery administered a broad array of remedies. Equity courts had jurisdiction over claims regarding trusts, mortgages, corporations, divorce, and a variety of guardianship issues. Equity courts also granted relief in cases in which common law courts refused to hear claims of fraud, accident, or mistake. Chancery granted remedies in the form of money damages, specific performance, or declaration. Judges could exercise discretion to equitably divide funds and lands between partners and could take custodial care over corporations and estates through receivership. One of the most powerful tools of chancery was the injunction. Graham explained that whereas a common law court 'could only punish' in its remedial system, equity could 'both punish and prevent' injustice through its injunctive decrees.[215]

Common law historically granted fewer types of remedies than equity, but in mid-nineteenth-century New York, this distinction was collapsing. Common law courts exercised jurisdiction over real property, contracts, and torts. 'Damages, are in most cases, the sole object of [a common law] action', wrote Graham, although judges could grant specific relief in certain actions for the recovery of real property

[210]Field, 'Re-Organization', 4 (advocating a jury to decide questions of fact and a panel of judges to decide appeals on law).
[211]Letter of Amasa J. Parker, Justice of the New York Supreme Court, Third District, to David Dudley Field, 8 May 1850, in David Dudley Field, 'The Completion of the Code: Five Articles Re-published from the New York Evening Post' (1851), 6.
[212]Letter of Lewis H. Sandford, Judge of the Superior Court of New York City, to David Dudley Field, 10 May 1850, in Field, 'Completion', 6–7.
[213]Whittaker, *Practice and Pleading*, vol.1, 659–661.
[214]Amasa Letter, 6 ('Very few such causes are tried by a jury. The counsel generally waive a jury, and try the cause before the court'); Lerner, 'Rights to Civil Jury Trial', 835–836.
[215]See generally Graham, *Jurisdiction*, 366–568; Barbour, *Chancery Practice*, vol.1, bk.3.

and chattels.[216] By the 1830s, common law courts had 'greatly relaxed the strictness of their proceedings, by assimilating them to those of equity' in several instances. Consequently, both circuit and county courts exercised concurrent jurisdiction with equity courts over certain claims in which the remedy was typically declaratory, such as partition, waste, and dower. When common law courts compelled document discovery, they did so through this same petition procedure.[217] In such a case, a party was not required to use the forms of action but instead requested relief by petition, whose form and operation were similar to a bill in equity.[218]

II.10 Remedies under the Code

The Code empowered a court to grant 'any relief consistent with the case made by the complaint', thus allowing judges to exceed even the remedy that the plaintiff requested.[219] Neither the 1848 Code nor the 1849 Amended Code specified what causes of action a plaintiff could litigate or what remedies a court could grant, although both Codes detailed the procedures for issuing an injunction and entering a judgment.[220] The commissioners left it to whatever statutes were already in place or a possible future civil code to define what rights a court could vindicate.[221] The 1850 Final Draft provided detailed procedures on a number of 'proceedings for special cases', most of which were formerly equitable actions, but the commentary insisted that the general 'form of civil actions under the code, is in its nature adapted to almost every case requiring the interposition of judicial authority'.[222]

The commissioners were particularly concerned about the dismissal of claims for being misfiled in either law or equity. Loomis claimed to know of cases 'prosecuted with ability and in good faith for several years' that were non-suited on final appeal because they 'belonged to the other branch of jurisprudence'. A statute of limitations continued to run if litigation were begun in the wrong court, so some parties that were non-suited late in litigation were foreclosed from any remedy.[223] Non-suiting claims for mistake of jurisdiction appears to have been a central strategy for some lawyers, 'whose favorite argument appears to be', according to Field, 'either that the plaintiff

[216]See generally Graham, *Practice*, 406–453, 779–784; First Report, 77. The jury calculated money damages in all cases. Juries were bound by a liquidated damages clause in a contract, but they otherwise enjoyed wide discretion and were free to include punitive damages in tort actions. Ibid., 779–784.

[217]Graham, *Jurisdiction*, 364, 564–568 (partition); 573–575 (waste); 556–557 (dower); 490–491 (document discovery).

[218]Graham, *Practice*, 408 (petition procedure for partition); Moulton, *Chancery Practice*, vol.1, 17–21 (describing petitions).

[219]1848 Code, 540, §231; 1849 Amended Code, 670, §275; 1850 Final Draft, 314, §751.

[220]Injunction: 1848 Code, 533–535, §§191–199; 1849 Amended Code, 658–660, §§218–226; judgment: 1848 Code, 540–541, §§230–237; 1849 Amended Code, 669–671, §§274–282.

[221]The 1850 Final Draft, for instance, re-codified a portion of the Revised Statutes on special proceedings, mainly for the sake of simplicity, with the understanding that the Revised Statutes had been a sufficient complement to the Codes of 1848 and 1849. 1850 Final Draft, 378, note to tit.11. Along with the Practice Commission, New York had established a Code Commission to 'reduce into a written and systematic code the whole body of the law of this State'. New York Constitution of 1846, art.I, §17. The Code Commission proceeded slowly at first; in 1857 Field became a member of a restructured Code Commission, and by 1865 he had completed a draft of a Civil Code.

[222]Such proceedings included mortgages, partition, corporations, and probate. 1850 Final Draft, 378–492, tit.11.

[223]Loomis, 'Historic Sketch', 9–10.

has mistaken the forum, or that the defendant, if he has a defence, can assert it only in another court'.[224]

To address the problem of over-frequent dismissal, the 1850 Final Draft would not have allowed a court to dismiss or non-suit a plaintiff's complaint at all, except for the plaintiff's voluntary withdrawal. Under no circumstances could a complaint be dismissed with prejudice. Every case was to have a resolution, either with a remedy or a determination that no remedy was deserved. 'If [the plaintiff] insist on having his case decided finally in the action, it is his right to do so', declared the official comment.[225]

Field recalled that before the reforms, he litigated an insurance case which he nearly lost for filing in assumpsit rather than covenant. Only because 'the judge looking at [the policy] without his glasses said he could see no seal' did Field manage to win his suit.[226] He concluded from such experiences that the main problem with New York's justice system was that the availability of remedies depended upon the form of pleading and not upon the underlying rights of the parties.[227] Previously, the remedy courts had offered to vindicate a right, and the procedures by which they had secured that remedy constituted the very definition of a legal right.[228] Bentham had first distinguished between 'substantive' law and 'procedural' (or 'adjective') law in the 1830s. Field used the same terms but, unlike Bentham, wedded them to a much older rights–remedies paradigm. In Field's scheme, substantive law – in legislation or judicial precedent – defined rights, and procedural law offered a menu of remedies from which parties and judges could choose. Pleading still formed the bridge between rights and remedies, but it was now a bridge that connected any given right to the entire array of remedies, there being no necessary connection between any particular right or remedy.[229] Any given right might be vindicated by diverse remedies; conversely, distinct forms of action – such as assumpsit

[224]Field, 'Practice of the Courts', 32. Another concern of Field's was efficiency: a case could require recourse to both courts, and for Field, '[e]very [equitable] bill that is filed in aid or defense of a suit at law is a reproach to our legal system'. Although chancery ostensibly could grant common law remedies and 'do perfect justice' to parties having mixed legal and equitable claims, in Field's experience, 'there [were] numerous instances in which a party [was] sent back to law after having got all a court of equity could give him'. Ibid., 33.

[225]1850 Final Draft, 471–472, §1114. Besides voluntary withdrawal, a judge could dismiss a case if the plaintiff failed to show up at the appointed time or if the plaintiff filed in the wrong county, but in both cases, the plaintiff was free to re-file suit.

[226]David Dudley Field, 'Law Reform in the United States and Its Influence Abroad', 25 *American Law Review* (1891), 518.

[227]Field, 'Practice of the Courts', 37 ('[E]quitable relief, as distinguished from legal, has been made necessary only because of the fixed forms of the common law; [and] those forms do not in any degree conduce to the attainment of justice, but are a hindrance and a snare'); Loomis, 'Historic Sketch', 27 ('Why should justice be obstructed by … form? [The Code] was designed to abolish all forms and technicalities which obstruct justice and prevent a speedy trial on the merits, … by a plain and direct method of ascertaining the truth and application of the law'). Contra Subrin, 'Field and the Field Code', 329 ('Field did not want procedure to get out of the way of substance, because he did not see procedure as an impediment').

[228]See F.W. Maitland, *Equity and the Forms of Action at Common Law: Two Courses of Lectures*, Cambridge, 1910.

[229]Jeremy Bentham, 'Principles of Judicial Procedure with the Outlines of a Procedure Code', in John Bowring, ed., *The Works of Jeremy Bentham*, Edinburgh, 1843, vol.2, 1; Thomas C. Grey, *Formalism and Pragmatism in American Law*, Leiden, 2014, 203–204.

and covenant – had really been vindicating only the same right (to have a contract enforced).[230]

Ultimately the fusion of law and equity in the Code consisted in the commissioners' attempts to replace one binary of jurisprudence – chancery and common law – with another – substantive rights and procedural remedies. Throughout his career Field frequently argued that the 'separation of law and equity has no foundation in the nature of things. Its existence is accidental'.[231] There were 'legal rights and equitable rights; but, strictly speaking, these mean only that a certain class of one's rights are cognizable in a court of law, and another class in a court of equity'. Having thus defined jurisdiction and remedies as 'procedure', Field was convinced there was no substantive difference remaining between rights adjudicated at law or equity. Only abolish the jurisdictional difference, and the distinction itself would disappear.[232]

Some lawyers and judges resisted the Code's provisions for a fused remedial system. One judge even declared that the Code left 'the principles of pleading … untouched, and that the forms [of action] are affected only where they are inconsistent with some positive enactment of the code', a standard he applied to dismiss a case for failing to conform to any of the old forms of action.[233] The former practice of classifying claims as legal or equitable persisted; one treatise-writer asserted that '[a]lthough … 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'.[234] Loomis complained as late as 1879 that bench trial and jury trial calendars still bore the law and equity nomenclature.[235] 'They tend to keep up a distinction that no longer exists', Field wrote about New York judges in 1878, 'and go far to confuse and mislead.'[236]

The distinction between law and equity did not collapse as swiftly as Field expected, nor were the boundaries of substantive and procedural law so easy to demarcate. The 1850 Final Draft itself revealed complications. Was the legal effect of a seal a matter of substantive law or procedure? Field, perhaps remembering his dimly lit

[230]'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, 74–75.
[231][David Dudley Field], 'The Convention', *New York Evening Post*, 13 Aug. 1846.
[232]David Dudley Field, 'Legal System of New York' (1866), in *Speeches*, vol.1, 338, 340; see also David Dudley Field, 'Law and Equity' (1878), in *Speeches*, vol.1, 573, 579. Such a theory distinguished Field Code fusion from earlier practical efforts to merge legal and equitable practice in America, including in pre-Code New York. Such efforts tended to culminate in legislation that expanded a court's jurisdiction to offer equitable remedies, but the legislation specified particular procedures and permitted those remedies to vindicate only certain rights. The Field Code appears to be the first attempt in a common law jurisdiction to achieve trans-substantive procedure that made all remedies independent of particular rights. For an illuminating comparison with 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 online at: http://digitalcommons.law.yale.edu/student_legal_history_papers/2
[233]Field, 'Administration of the Code', 16 (quoting *Dolliner* v *Gibson*, 3 Code Rep. 153 (1850)).
[234]Whittaker, *Practice and Pleading*, vol.1, 56.
[235]Loomis, 'Historic Sketch', 26; 23 *New York State Reporter* (Stover) 92 (1889).
[236]Field, 'Law and Equity', 583.

assumpsit trial, addressed it in the procedure code.[237] Graham meanwhile dissented from the 1850 Final Draft's inclusion of the law of evidence. Too much of the field of evidence was implicated in the law of substantive right, Graham argued, so that he believed Field and Loomis had exceeded their commission by codifying it in a remedial code.[238] As many other American jurisdictions adopted versions of the Code, they agreed with the philosophy in principle, abolishing a distinction between law and equity and recognizing one between a 'code of procedure' (the most frequently used title) and substantive law. What these codes included, however, varied widely. Some encompassed the jurisdiction and structure of the courts, some the law of evidence, and some even the entire law of wills and estates.[239]

As the latter example illustrates, many lawyers continued to think that certain rights naturally and necessarily required certain remedies, and these particular right–remedy relations entailed their own unique procedures. Even the 1850 Final Draft grudgingly admitted it was 'following the beaten track already enlightened by the judicial consideration to which the code has been subjected' and included 'special proceedings' for actions regarding mortgages, corporations, and legacies, among others.[240]

III. EQUITY WITHOUT CHANCERY

The commissioners largely adapted equitable procedure for their fused system, but they expected this equitable procedure to operate without the structures of chancery. Pre-Code fusion in New York encouraged their belief that fact-pleading under oath could replace chancery's massive investigative staff that had been empowered to 'sift the conscience' of a party or witness. New York's piecemeal codification of procedure, however, largely frustrated the commissioners' design to create a more efficient system of equity without chancery.

III.1 The Code's preference for equity

Could their ideals be realized, the commissioners expected that factual pleadings drafted according to standards of 'plain speaking' would provide all the relevant information a party knew about a dispute. Depositions could force admissions as a last resort, but if judges actively edited the pleadings early in the process, and if parties sufficiently feared committing perjury in filing their statements under oath, pre-trial discovery would be largely unnecessary. In such well-informed disputes, preparation for and trial of a case would be relatively swift, and judges – whether sitting with a jury or not – would have discretion to craft remedies that best addressed pleaded harms and an injured party's expectations.[241]

[237]The 1850 Final Draft attempted to abolish the legal significance of a seal, in fact. 1850 Final Draft, 740, §§1749–1753.
[238]Dissent of Mr. Graham, 4–6.
[239]See, for instance, concerning jurisdiction and structure of the courts: North Carolina Code of Civil Procedure (1868), California Practice Act (1858); law of evidence: 1869 Nevada Laws 196, 255, 1870 Utah Laws 17, 85; law of trusts and estates: 2 Revised Statutes of the State of Indiana 245–320 (1852).
[240]1850 Final Draft, 378.
[241]See especially, for instance, Field, 'Practice of the Courts', 22; Field, 'Re-Organization', 4; Second Report, 11, 30, 44.

As recounted above, the commissioners generally relied on equitable procedure for this model. The Code's pleading provisions followed equity by requiring succinct statements of fact, and by allowing liberal powers of amendment. The commissioners adopted equity's expansive permission for joinder, as well as the entire range of remedies available at chancery. 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. 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'.[242] 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'.[243]

Field expected Code procedure to so facilitate litigation that he expressed indifference as to whether it might also encourage more litigation. Field argued that ultimately, codification of the substantive law would decrease litigation, because it would make citizens better informed about their rights and duties. '[I]n our opinion', he wrote, 'the legitimate means of lessening the number of suitors in the courts, is not by obstructing their passage thither, but by removing the occasions for their going; taking away the temptation to do wrong or to resist a just demand, by making the redress speedy, certain, and easy to be obtained.'[244]

The commissioners inclined toward equitable procedure because they believed that chancery posed fewer procedural barriers to vindicating substantive rights. In their Second Report, the commissioners explained that 'the basis' for their reforms 'was substantially that upon which courts of equity were originally founded', because in equity, 'the means to be used are directed solely by the end to be attained, without regard to the forms of action'.[245] The First Report of the commissioners admonished courts to 'be hereafter confined in their adjudications to questions of substantial right, and not to the nice balancing of the questions, whether the party has conformed himself to … arbitrary and absurd' procedures.[246]

[242]Field, 'Law and Equity', 579.
[243]Loomis, 'Historic Sketch', 25–26. Critics noted the choice as well. In James Fenimore Cooper's last novel, *The Ways of the Hour*, protagonist Thomas Dunscomb is '"emphatically" a common-law lawyer' who 'was not at all "agreeable" to this great innovation on the "the perfection of human reason"'. 'Some of the forms of pleadings are infernal, if pleadings they can be called at all', complains Dunscomb, 'I detest even the names they give their proceedings – complaints and answers!' Cooper, *Ways of the Hour*, 13–14.
[244]Field, 'Administration of the Code', 33–34; David Dudley Field, 'The Duty of the Lawyer to the Law: Address to the Law School of the University of New York, April 7, 1884', in *Speeches*, vol.2, 507.
[245]Second Report, 7.
[246]First Report, 87. Accordingly, I disagree with Professor Subrin's thesis that the Field Code was fundamentally oriented more towards common law process. Subrin, 'Field and the Field Code', 337–338. Subrin gives pride of place to the 1848 Code, but I find the 1850 Final Draft more indicative of the commissioners' views. The 1850 Final Draft overruled much of what Subrin found constricting in the original Code, including

In this regard, Roscoe Pound was correct that the Field Code foreshadowed the reforms of the Federal Rules in America.[247] Not only did the Code commissioners favour equity practice, they sought to make that practice the basis for a trans-substantive set of rules that governed 'procedure' as a field of law distinct from substantive rights, what the Federal Rules draftsmen likewise sought to accomplish.[248] The Code was not the Federal Rules come eighty years early, however. Few judges altered their habits to police pleading as Field had expected, and parties and counsel increasingly relied on depositions to extract information from their adversaries.[249] Rather than correct what Field would have seen as these deficiencies, the Federal Rules encouraged them, making provision for 'notice pleading' and investigative discovery practices that went remarkably far beyond code practice or traditional equity powers.[250]

III.2 The Code's replacements for the structures of chancery

Although they favoured equitable procedure, the commissioners insisted they could do without the structures and institutions of New York chancery. They expected that equitable procedure would displace not only common law procedure, but also any need to have a chancellor, vice chancellors, and New York's staff of 370 masters and examiners. They further denied that chancery offered a unique approach to vindicating rights, one that was more concerned with doing justice according to conscience. New York's pre-Code steps towards fusion convinced Field that chancery had no distinct methods of defining substantive rights or rendering judgments upon them, a key reason for keeping these movements towards fusion in mind when assessing the work of the Code commission.

After the 1846 constitution abolished chancery, Field expected that pleading reform could largely replace 'the cloud of masters and examiners' sent out of office.[251] By the 1840s, 'examiners' seemed misnamed; reforms had by then reduced them to the functions of stenographers. Party counsel conducted oral

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powers of amendment, joinder, and pre-trial party examination, as outlined in sections II.1–II.6 above, nor do I find the Field Code so favourable to the jury, for reasons stated in section II.8. The Code was supposed to allow judges broad discretion to elicit and edit information in the pleadings, and then to fashion a suitable remedy. Subrin is correct that discovery under the Code differed markedly from provisions in the Federal Rules. Subrin, 'Field and the Field Code', 332–333. This fact does not, however, make the Code any less equitable in its orientation, for contemporary treatise literature reveals that the Code followed New York equity rather closely in mode and manner of pre-hearing investigation. See sections II.5–II.6 above. It was the Federal Rules that significantly departed from the traditions of equity, in ways that Subrin himself later identified. Stephen Subrin, 'Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules', 39 *Boston College Law Review* (1998), 691.

[247]See note 2 above.

[248]Robert M. Cover, 'For James Wm. Moore: Some Reflections on a Reading of the Rules', 84 *Yale Law Journal* (1975), 718.

[249]See notes 192–193 above; Field, 'Administration of the Code', 7–9, 15–20.

[250]See Subrin, 'Fishing Expeditions Allowed'; Field and the other commissioners saw in both pleading and discovery the value only of admission – that is, informing the court and the adverse party of what one already knows. They appeared to have little appreciation of the modern value of discovery for investigation – informing oneself of what one does not know. In a note attached to the 1850 Final Draft, the commissioners discussed and reproduced other reports on the interaction of discovery and party testimony. Throughout the note, both the commissioners and their correspondents assume that both parties have a relatively clear idea of the underlying facts and use discovery only to secure confession from their adversaries, not to inform themselves. 1850 Final Draft, 715–725.

[251][David Dudley Field], 'The Convention', *New York Evening Post*, 8 Sept. 1846.

examinations, adjusting their questions to the answers given and engaging in cross-examination. The examiner merely recorded the proceedings. Masters still conducted questioning from pre-written interrogatories and had some discretion to go beyond the writings and 'sift the conscience' of the examinee with aggressive questioning, but the commissioners expected that requiring oaths on pleadings and lifting the ban on party testimony (and cross-examination) would be adequate replacements.[252]

Field had travelled widely in the 1830s, visiting England and several jurisdictions on the Continent, and he concluded that the French system with its institutionally integrated courts was superior to Anglo-American models.[253] Again, early steps towards fusion in New York convinced him the state could achieve institutional fusion, English objections notwithstanding. In his study of English fusion, Michael Lobban describes two significant barriers that forestalled fusion in England. First, the English bar was largely divided between 'equity men' and 'common lawyers' who rarely litigated in one another's systems and viewed each other with suspicion. Second, many worried that increasing the number of chancery judges would split the law of equity into disparate paths, causing confusion and incoherence.[254] In New York, however, the bar was neither large nor ancient enough to have divided into separate professional cultures. Graham, after all, was both a respected solicitor and the leading professor of common law pleading.

Moreover, New York's experiment with appointing common law circuit judges as vice chancellors appeared to Field evidence that equity, for all the talk of justice rendered according the conscience of the chancellor, retained its coherence using the same means as common law. By the nineteenth century, Field thought equity had fallen into the same 'rigid adherence of the common-law Judges to form'; chancery judges – far from exercising the discretion that 'conscience' implied – merely followed written precedents until they were overruled by legislation.[255] The same was true of the common law system, thought Field, so that 'when analysed, the difference between the two is found to be nothing but a difference in the forms of proceeding'.[256] Ten vice chancellors had not created ten different systems of equity in New York, and decisions even by the chancellor could be appealed to the Court of Errors (comprising the New York senate), so the idea that one man held the integrity of the system together seemed wrongheaded to Field.[257]

Accordingly, neither a single chancellor, nor the concept of extraordinary jurisdiction, nor even the traditional focus on 'conscience' and 'justice' had to follow equitable procedure into the reformed system. '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.'[258] For over a decade common

[252]See sections II.5–II.7 above. On masters' powers to 'sift the conscience', see Barbour, *Chancery Practice*, vol.1, 485–487.
[253][Field], 'The Convention' ('Nor have we any objection to the amalgamation of law and equity. On the contrary, we are persuaded that the system of the civil and of the French law is very far superior to the motley and discorded fabric which we have introduced in a servile spirit of imitation of English precedents'). On Field's travels, see Van Ee, 'David Dudley Field', 18.
[254]Lobban, 'Preparing for Fusion', 404, 426.
[255]'The Civil Code of the State of New York', xxvi–xxvii.
[256][Field], 'The Convention'.
[257]Field, 'Re-Organization', 3.
[258][Field], 'The Convention'.

law judges had administered equitable remedies, increasingly doing so without the pretence that they were sitting in equity, a move that convinced Field that the distinction between law and equity 'grows [only] out of legal procedure; it does not spring from distinct, inseparable rights'.[259] The commissioners thus set out to remove the 'burden' of 'a double system of jurisprudence' yet to make 'all law … conformable to equity'.[260] Their ideal system adapted equitable procedure but discarded the Court of Chancery, its judicial officers, its investigative staff, and its philosophy that equitable remedies were ancillary and supplemental to law.

III.3 The ideal and the actual in New York fusion

The fact that the Code appeared in three major versions from 1848 to 1850 helps us to see what the commissioners intended. The 1848 Code and commentary demonstrated their reliance on equity to design a trans-substantive remedial law.[261] The 1849 Amended Code and commentary emphasized their concern for liberal amendments to pleadings and the sanction of the oath, which they thought the legislature was failing to appreciate.[262] Although the 1850 Final Draft was never enacted in New York, it provided the clearest indication of how the commissioners expected the various components of their Code to work together. In it, active and engaged management of the pleadings was required of judges. Pre-trial depositions could force admissions, but parties were made fully competent to testify at trial, which the commissioners hoped would obviate the need for extensive pre-trial investigation and preparation. Once again, the commissioners insisted on the oath and amendable pleadings, this time all but disallowing motions to dismiss.[263] Access to court was to be easy, trial efficient, and choice of remedies flexible.[264]

New York's piecemeal codification through these multiple drafts also reveals why this vision was largely unrealized in practice. By restructuring fees and costs and insisting upon simplified pleading in the first draft Code, the commissioners addressed the reforms New Yorkers most desired. Subsequent drafts that furthered the commission's experiments and completed their system thus held fewer attractions that could overcome political resistance.[265] Consequently, reforms about which the commissioners were most insistent were not enacted at the time, including oath requirements, liberal joinder and amendment, total abolition of party disqualification, and restrictions on dismissal.

The 1850 Final Draft reversed the common law rule that statutes in derogation of the common law were to be strictly construed, and the commissioners included a comprehensive repealing statute designed to ensure that the Code became the only positive law in the state regulating procedure and remedies.[266] By ignoring both provisions, the

[259] See sections II.9–II.10 above; Field, 'Legal System of New York', 340.
[260] Second Report, 5.
[261] See notes 235–237 above.
[262] See notes 129 and 143 above.
[263] See notes 138–139, 183, 128, 242 above.
[264] See note 242 above.
[265] See notes 86–88 above.
[266] 1850 Final Draft, 4–10, §3 and accompanying note; 3 *Documents of the Assembly of New York*, 73rd sess., no.19 (1850).

legislature left judges to harmonize a partial code with the 1829 Revised Statutes and with judicial precedent. Judges and lawyers who wished to resist Field's logic of separating substantive law from remedies and to keep alive traditional distinctions between legal and equitable rights thus found many opportunities to do so.[267]

Even if the 1850 Final Draft had been the first and only code enacted by New York, the commissioners' expectation that the distinction between law and equity would completely disappear from legal thought and language seems doubtful. Even the 1850 Final Draft, unsullied by legislative amendment, preserved distinctions between actions seeking the recovery of real property or money damages – which carried specific procedures in regard to timing, summons, and mode of trial – and all other actions, a distinction between legal and equitable traditions in all but name.[268] Many states did enact close versions of the 1850 Final Draft, and the 1938 Federal Rules of Civil Procedure likewise sought to obliterate 'references to actions at law or suits in equity'.[269] Nevertheless, American jurisprudence to this day continues to rely on the traditional categories to determine whether certain rights or remedies are available to litigants, such as the Seventh Amendment right to a civil jury trial, or the application of laches in the absence of a statute of limitations.[270]

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'.[271] Ashburner's views were influential around the world, especially in Australia, where jurists insisted Americans were pursuing a 'fusion fallacy'.[272] Ashburner had little influence in his native country, however. In America, trans-substantive procedure became the dominant paradigm; even as academic lawyers wrangled over the legitimacy of the theory, they tended to brush off seemingly law- or equity-specific procedures as anomalies.[273] Such a posture goes back to the early days of the Field Code. The persistence of special proceedings for the vindication of certain rights may have annoyed Field and contradicted his ultimate goals, but it represented a remarkable reversal of Sir Henry Maine's famous aphorism: After the Field Code, action-specific procedures had the look of being gradually secreted in the interstices of a substantive law of rights.[274]

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[267]See notes 141–142, 154–156, 254–256 above.
[268]1850 Final Draft, 227–233, 318–319.
[269]California largely adopted the 1850 Final Draft as its own code, and most jurisdictions in the American West adapted their own codes from California's; Federal Rule of Civil Procedure 2, advisory note 2.
[270]James Oldham, *Trial by Jury: The Seventh Amendment and Anglo-American Special Juries*, New York, 2006, 5–24; Samuel L. Bray, 'A Little Bit of Laches Goes a Long Way: Notes on *Petrella v. Metro-Goldwyn-Mayer, Inc.*', 67 *Vanderbilt Law Review En Banc* (2014), 1.
[271]Walter Ashburner, *Principles of Equity*, London, 1902, 23.
[272]See especially Michael Tilbury, 'Fallacy or Furphy? Fusion in a Judicature World', 26 *University of New South Wales Law Journal* (2003), 357.
[273]For both the history and critique of trans-substantive procedure in America, see Cover, 'For James Wm. Moore'. On paradigms and anomalies, see Thomas Kuhn, *The Structure of Scientific Revolutions*, 4th ed., Chicago, 2012.
[274]Cf. Sir Henry Sumner Maine, *On Early Law and Custom*, London, 1890, 389.