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Sect and Superstition: The Protestant Framework of American Codification

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ABSTRACT

Elite lawyers who debated codification in the nineteenth-century United States treated codification as inseparable from a liberal Protestant textualism that had taken hold in the early national era. Legislators declared codification to be the necessary final step of the Protestant Reformation and frequently characterized common law lawyers as beholden to 'superstition' and 'priestcraft'. Their opponents denounced the codifiers' idea that texts alone could adequately convey common meanings and delighted to point out the endlessly fracturing glosses on supposedly 'clear' texts that divided the positivists into an ever-increasing number of sects.

Many works have addressed the relationship between populism and positivism over the course of the codification debates in the United States. What these works have missed is the Protestantism. Understanding how lawyers of another generation approached these questions can help us to appreciate the varieties of American textualism, and the fact that today's textualism may be as foreign to textualisms of the past as to other methods entirely. Rather than the forerunners of a modern, rationalist 'Republic of Statutes', the codifiers were the literal and figurative sons of a post-Calvinist generation that was unquenchably optimistic about the clarity of texts and the common sense of individuals reading them. This lens also helps us better understand the defenders of the common law, who were not so much the retrograde servants of property rights and judicial supremacy as they are often presented, but were more often practically minded lawyers who understood the limits to which legislative texts could change the complex practices of law on the ground.

Codification, 'one of the set pieces of American legal history',[1] has long been understood as a staging ground for certain rivalries—sometimes simple, sometimes complex and overlapping. Debates over codifying the common law pitted Francophile admirers of the Code Napoleon against Anglophile defenders of Lord Coke; formalists against pragmatists,

* Kellen R. Funk, Michael E. Patterson Professor of Law, Columbia University, 435 W. 116th Street, New York, NY 10027. Email: krf2138@columbia.edu. This article has had a long preprint life. Its first draft was finished the week my son was born; its final revision the week he turns ten. To some degree it bears the marks of graduate student work, but it has elicited thoughtful conversations along its journey, and I'm grateful to the editors and anonymous reviewers who have helped complete its journey in print. Special thanks to Jim Whitman, Nicholas Parrillo, Michael Thate, Jane C. Manners, Dirk Hartog, Daniel T. Rodgers, and the Modern American Workshop and Religion and Public Life Workshop at Princeton University for helpful comments and direction at the early stages. Many thanks to Sam Bray, Jon Butler, John Witte Jr., Craig T. Green, Sarah A. Seo, and José Argueta-Funes for comments and criticisms all along the way.

[1] Lawrence M Friedman, *A History of American Law* (4th edn, OUP, Oxford 2019) 384.

conservatives against 'radicals', the defenders of property and judicial supremacy against legislative populists and democratic levelers.[2] These divisions were certainly ones recognized by commentators at the time. James Fennimore Cooper, for instance, organized his final novel *The Ways of the Hour* around one extended gripe about New York's Field Code of Procedure, which for Cooper symbolized the improvidence of populist lawmaking. '[T]ens of thousands voted for' codification yet 'did not know anything about it'. It was among the central tragedies of Cooper's novel that New York's legislature could not resist the popular drive towards codification and especially the disruptions of marital property and married women's estates that Cooper ascribed to Field's Code.[3] Legislators were needed who were 'honest enough or bold enough to get up and tell the people they are not all fit to be trusted'. But, lamented the protagonist, 'this is not the way of the hour'.[4]

Though largely forgotten today, *The Ways of the Hour* almost perfectly illustrated the political, regional, class, and even gendered divisions over codification at mid-century, but one admiring review saw something else in the work. Penned by the eccentric public intellectual Orestes Brownson in his eponymous journal, one of the few admiring reviews of Cooper's last work praised it for getting its *theology* right. A labor radical-turned-transcendentalist in his youth, Brownson had by the 1850s become one of America's notable cultural critics and an outspoken Roman Catholic apologist. Brownson figured Cooper's work would not be 'to the taste of the young, the giddy, the thoughtless, the sentimental', but he agreed with its thesis that popular sovereignty was poised to upend well defined legal rights by mere popular vote. Yet this, Brownson thought, was merely a symptom of an underlying problem: The root problem was heresy. 'The whole tendency we deplore', he concluded his review, 'results inevitably from Protestantism, which destroys the conservative influence of religion, by subjecting it to popular control'.[5]

The 1851 review was not the hasty conclusion of a recent convert. Brownson returned to the themes of populism, positivism, and Protestantism two decades later, during what might be regarded as the heyday of codification in America. By then the elderly Brownson thought New York's experimentation with codes offered a perfect illustration of the follies of Protestant faith. As Brownson told the story, 'Our wise law reformers in this state, a few years since … attempted to codify the laws so as to supersede the demand for any knowledge of the Common Law to understand them'. But on this score, New York's code had proven a failure. '[T]he ablest jurors in the state find [its provisions] a puzzle, or nearly inexplicable, and our best lawyers are uncertain how to bring an action under the new Code of Procedure.' In fact, such a large number of interpretations had accreted upon the code that shortly after Brownson wrote, New York replaced its original 500 sections with a 3300-section tome that attempted to consolidate the judicial glosses.[6] So likewise, Brownson

[2] See generally, Lawrence M Friedman, 'Law Reform in Historical Perspective' (1969) 13 St Louis University Law Journal 351; Morton J. Horwitz, *The Transformation of American Law: The Crisis of Legal Orthodoxy, 1870–1960* (OUP, Oxford 1992) 117–21; Robert W Gordon, 'The American Codification Movement' (1983) 36 Vanderbilt Law Review 431; Brian Young, *The Politics of Codification: The Lower Canadian Civil Code of 1866* (Osgoode Society, Montreal 1994); Csaba Varga, *Codification as a Socio-Historical Phenomenon* (2nd edn, Szent István Társulat, Budapest [1991] 2011); Roger Berkowitz, *The Gift of Science: Leibniz and the Modern Legal Tradition* (Fordham UP, New York 2010); Gunther A Weiss, 'The Enchantment of Codification in the Common-Law World' (2000) 25 Yale Journal of International Law 435; Maurice Eugen Lang, *Codification in the British Empire and America* (Lawbook Exchange, Clark NJ 1924); Roscoe Pound, 'The French Civil Code and the Spirit of Nineteenth Century Law' (1955) 35 Boston Law Review 79.

[3] New York's first Married Women's Property Act was not a product of the Field Code commission, but was enacted by the same legislative authorities and was often treated as a byproduct of the code reforms of the era. See Richard H Chused, 'Married Women's Property Law: 1800–1850' (1983) 71 Georgetown Law Journal 1359. On the conflation of these reforms in Cooper's novel, see Charles Hansford Adams, *'The Guardian of the Law': Authority and Identity in James Fenimore Cooper* (Penn State UP, State College PA 1990) 135–48.

[4] James Fenimore Cooper, *The Ways of the Hour: A Tale* (Stringer & Townsend, New York 1856) 14, 83–5.

[5] Orestes Brownson, 'Cooper's *Ways of the Hour*' *Brownson's Quarterly Review* 5 (July 1851) 285.

[6] Orestes Brownson, 'Authority in Matters of Faith' *Catholic World* 14 (1871) 155. Montgomery H. Throop, *The Code of Remedial Justice, with Full Explanatory Notes* (Weed, Parsons, and Co, Albany NY 1876).

thought, '[t]he Protestant, reduced to the sacred text … would be reduced to the condition of the lawyer who should undertake to explain the statutes of any one of our states, in total ignorance of the Common Law'. He concluded that what both the lawyer and '[t]he Protestant needs, in order to interpret the sacred texts, [is] a knowledge of revelation which can neither be obtained from the text itself without interpretation nor supplied by private judgment'.[7]

Many works have addressed the complex relationship between popular sovereignty and positive legislation over the course of the codification debates in the United States. What these works have missed, this article contends, is the Protestantism. Although few were as explicit in their analysis, most of the elite lawyers who debated the wisdom and desirability of codification in the nineteenth-century United States were fully aligned with Brownson's premise that codification was inseparable from a kind of liberal Protestantism that had taken hold in the early national era. Codifiers like David Dudley Field, author of the code attacked in the *Ways of the Hour*, declared codification to be the necessary final step of the Protestant Reformation. He and his allies frequently characterized common law lawyers as beholden to 'superstition' and 'priestcraft' as medieval Europe had been. Field's opponents, meanwhile, denounced the codifiers' simple-minded reliance on the idea that texts alone could adequately convey common meanings. Like the popular Catholic polemicists of their day, the common law apologists who opposed codification delighted to point out the endlessly fracturing glosses on supposedly 'clear' texts that divided the positivists into an ever-multiplying number of sects.

Recapturing this intellectual history of recrimination between the 'sectarians' and the 'superstitious' helps us to better understand the politics of codification and law reform in the nineteenth century, as it demonstrates how the apostles of legislation might remain staunch opponents to legislative-driven reforms while Jacksonians like James Fenimore Cooper might be troubled about the democratic excesses of popular legislation. What the policies of the law should be was a different question from what the law essentially was, and that inquiry raised troubling questions of authority that law itself could not answer. Understanding how lawyers of another generation approached these questions can help us to appreciate the varieties of American textualism that were worked out over time, and the fact that today's textualism may be as foreign to textualisms of the past as to other methods entirely.[8] Rather than the forerunners of a modern, rationalist 'Republic of Statutes',[9] the codifiers were the literal and figurative sons of a post-Calvinist generation that was unquenchably optimistic about the clarity of texts and the common sense of individuals reading them. This lens also helps us better understand the defenders of the common law, who were not so much the retrograde servants of property rights and judicial supremacy as they are often presented, but were more often workaday lawyers who understood the limits to which legislative texts could change the complex practices of law on the ground.[10]

I. THE COURSE OF AMERICAN CODIFICATION

Contests over codification in America date back to the very beginning of colonization. The earliest Puritan settlers of Massachusetts Bay strenuously debated whether and how written

[7] Brownson, 'Authority' (n 6) 155.

[8] For recent forays into the history of textualism, see, eg Tara Leigh Grove, 'The Misunderstood History of Textualism' (2023) 117 Northwestern University Law Review 1033; Jonathan Gienapp, 'Written Constitutionalism, Past and Present' (2021) 39 Law & History Review 321–60; Farah Peterson, 'Expounding the Constitution' (2020) 130 Yale Law Journal 2–84. For standard accounts of textualism in the present, see Caleb Nelson, 'What Is Textualism?' (2005) 91 Virginia Law Review 347; Tara Leigh Grove, 'Which Textualism?' (2020) 134 Harvard Law Review 265; John F Manning, 'Second-Generation Textualism' (2010) 98 California Law Review 1287.

[9] William N Eskridge and John Ferejohn, *A Republic of Statutes: The New American Constitution* (Yale UP, New Haven 2013).

[10] For theoretical guides to understanding and interpreting craft practices and legal rituals, see Charles Taylor, 'To Follow a Rule … ' in Richard Shusterman (ed), *Bourdieu: A Critical Reader* (Blackwell, Oxford 1999) 29–44; Ronald L Grimes, *The Craft of Ritual Studies* (OUP, Oxford 2014); Bernard E Harcourt, *Critique & Praxis* (Columbia UP, New York 2020).

law could constrain the discretion of local magistrates, and how to keep any resulting code 'in accordance' with English law, as mandated by the charters.[11] Ultimately the 1641 Body of Liberties, which enumerated a declaration of rights in a style that would become very familiar in American constitutionalism, triumphed over a draft code that confined itself to strictly repeating Old Testament scriptures.[12]

The Revolution left American law on an uncertain foundation, prompting a number of commentators to suggest either that America's break with England required a break with English common law, or that American lawyers needed at least some written guidance about which statutes and precedents were to remain in force.[13] Virginia led the way, both in reorganizing its statutes and codifying its criminal law while leaving other fields to common law development. (Ever after, jurists on all sides believed that criminal law ought to remain positive law.)[14] On this project of legislative organization even fierce political opponents like Thomas Jefferson and Joseph Story could agree.[15]

The course of codification sharply turned in 1823, when the Irish (Protestant) émigré lawyer William Sampson called for a complete abolition of the common law in favor of a distinctively American code. Sampson's address before the New-York Historical Society gained national attention and significantly politicized the idea of codification. Sampson's well-known defense of labor organizers in New York led observers to associate his interest in codification with democratic radicalism, especially after a number of Jacksonian Democrats voiced their own support for codification in the following years. New York organized and revised its statutes in the 1810s and 1820s, but common law defenders like former Chancellor James Kent ensured these 'Revised Statutes' did not significantly encroach upon the state's common law of property or contract.[16]

Into the 1840s, codifiers offered a more moderate proposal than Sampson's. Rather than adopting a code to the total abrogation of the common law, most codifiers insisted on culling together and systematizing only well-established principles from the common law reports (which, after a burst of American publishing, were growing at an unmanageable rate). Such a half measure would ease research burdens for basic matters while allowing cycles of common law development and recodification to continue into the future. A leading proponent of this position was David Dudley Field, the Manhattan lawyer whose name became synonymous with American codification. Another was Field's fellow New Yorker, Edward Livingston, who oversaw the project to merge Spanish and French codes with common law institutions like the jury in civilian Louisiana.[17]

[11] See Mary Sarah Bilder, *The Transatlantic Constitution: Colongial Legal Culture and the Empire* (Harvard UP, Cambridge MA 2004) 40–6; George Lee Haskins, *Law and Authority in Early Massachusetts* (Macmillan, New York 1960); Scott A McDermott, 'Body of Liberties: Godly Constitutionalism and the Origin of Written Fundamental Law in Massachusetts, 1634–1666' (PhD diss, Saint Louis University, 2014). For a survey of Massachusetts law from Puritanism to procedural reforms that substituted for codes in the nineteenth century, see William E Nelson, *Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760–1830* (rev edn, Georgia UP, Athens GA 1994).

[12] See Daniel R Coquillette, 'Radical Lawmakers in Colonial Massachusetts: The "Countenance of Authoritie" and the Lawes and Libertyes' (1994) 67 New England Quarterly 179, 187. John Cotton's unenacted draft code, entitled 'Moses his Judicialls', was based heavily on the Bible, deriving from scriptural sources the government's authority 'for all regulation of property rights, commerce, military affairs and punishment' (ibid 188).

[13] A common example of a polemic calling for a radical break is Robert Rantoul Jr, *An Oration Delivered before the Democrats and Antimasons, of the County of Plymouth; at Scituate* (Beals & Greene, Boston 1836). Joseph Story's moderate response has also become a classic. Joseph Story, 'An Address Delivered before the Members of the Suffolk Bar on the 4th of September, 1821' (1829) 1 American Jurist and Law Magazine 1–32.

[14] See, for instance, James Coolidge Carter, *Provinces of the Written and the Unwritten Law* (Banks & Brothers, New York 1889) 16.

[15] See Charles M Cook, *The American Codification Movement: A Study in Antebellum Legal Reform* (Greenwood Press, Westport CT 1981) 33–49.

[16] Pishey Thompson (ed), *Sampson's Discourse and Correspondence with Various Learned Jurists upon the History of the Law* (Gales & Seaton, Washington DC 1826); Farah Peterson, 'Interpretation as Statecraft: Chancellor Kent and the Collaborative Era of American Statutory Interpretation' (2018) 77 Maryland Law Review 712–73.

[17] For the clearest explication of Field's approach to the theory of codification, see David Dudley Field, 'Reform in the Legal Profession and the Laws' (1855) in AP Sprague (ed), *Speeches, Arguments, and Miscellaneous Papers of David Dudley Field* (Appleton & Co, New York 1884) 1:513. On Livingston's codification in Louisiana, see Kent A Lambert, 'An Abridged

In 1848, the codifiers achieved a signal victory with New York's adoption of Field's Code of Procedure. Over the next several decades, the code won acceptance in nearly 40 other American jurisdictions and influenced procedural reform even in England.[18] During the 1860s, Field persisted in drafting penal, political (constitutional), and civil codes for New York, and even an international code in the following decade.[19] A couple of western states adopted these codes, but the effort to enact the Civil Code in New York provoked an articulate defense from the common law lawyer James Coolidge Carter, who argued against the code before the city bar association and the state legislature. Carter managed to defeat enactment year after year—twice by securing governors' vetoes—until the state senate finally voted the project down in 1888.[20]

Carter's victory over Field became a familiar tale in American legal history, not only because of the personalities involved—two of America's wealthiest and most influential corporate attorneys—but also because of the apparent pyrrhic quality of Carter's triumph. Less than two decades later virtually every state had organized its statutes into nominal codes. While these codes may have lacked the comprehensiveness that Field (and European jurists) hoped to achieve, they nevertheless arranged vast areas of law and grafted together new 'super statutes' regulating industry, corporations, and inheritance.[21] Common law jurisprudence remained central to academic legal education, but America became increasingly governed by statutes, and courts increasingly concerned with statutory construction.[22]

With the rise of legal realism, skepticism towards both the common law and the 'law on the books' consigned the codification debates to the nineteenth century. Legislation multiplied exponentially while systematic organization of statutory law continued apace. Although twentieth-century statutes did not codify the common law in the most technical sense, the American Law Institute's Restatements, Model Penal Code, and Uniform Commercial Code achieved comparable effects. Positive law has increasingly become the only thinkable law, such that attempts to valorize *A Common Law for the Age of Statutes*, to cite one example, sound increasingly dissonant.[23]

II. CODIFICATION IN INTELLECTUAL HISTORIES OF AMERICAN LAW

From the 1960s to the early 1980s, it seemed as if historians of nineteenth-century legal thought wrote exclusively about codification. Codification was the organizing theme of Perry Miller's *Legal Mind in America* and a central part of arguments about American jurisprudence offered by Morton Horwitz, Maxwell Bloomfield, and Lawrence Friedman.[24] Raising as it did questions about the nature of law and the responsibilities of democratic

History of the Absorption of American Civil Procedure and Evidence in Louisiana' in Vernon Valentine Palmer (ed), *Louisiana: Microcosm of a Mixed Jurisdiction* (University of North Carolina Press, Chapel Hill 1999) 105–15; John W Cairns, *Codification, Transplants, and History: Law Reform in Louisiana (1808) and Quebec (1866)* (Talbot, Clark NJ 2015) 427–76.

[18] Kellen Funk and Lincoln A Mullen, 'The Spine of American Law: Digital Text Analysis and U.S. Legal Practice' (2018) 123 American Historical Review 132–64. Patricia I McMahon, 'Field, Fusion and the 1850s: How an American Law Reformer Influenced the Judicature Act of 1875' in PG Turner (ed), *Equity and Administration* (CUP, Cambridge 2016) 424–62.

[19] Julie Rocheton, *The Genesis of Nineteenth-Century Civil Codes in the United States* (Brill, Leiden 2023).

[20] See George Martin, *Causes and Conflicts: The Centennial History of the Association of the Bar of the City of New York, 1870–1970* (Fordham UP, New York 1970) 142–57.

[21] The phrase 'super statutes' was popularized by Eskridge and Ferejohn (n 9).

[22] On the aversion to code instruction in leading law schools, see especially Daniel R Coquillette and Bruce A Kimball, *On the Battlefield of Merit: Harvard Law School, the First Century* (Harvard UP, Cambridge MA 2015) 179, 346–7.

[23] On the Restatements as code substitutes, see James Gordley, 'European Codes and American Restatements: Some Difficulties' (1981) 81 Columbia Law Review 140. Guido Calebresi, *A Common Law for the Age of Statutes* (Harvard UP, Cambridge MA 1982).

[24] Friedman (n 1) 384. Perry Miller (ed), *The Legal Mind in America: From Independence to the Civil War* (Anchor, New York 1962); Morton J Horwitz, *The Transformation of American Law, 1780–1850* (Oxford, OUP 1977) 258–9; Maxwell Bloomfield, *American Lawyers in a Changing Society, 1776–1876* (Harvard UP, Cambridge MA 1976).

legislatures, codification seemed to hold the key to understanding all of American political economy. Legal historians asked 'why is there no codification in the United States' with the same polemical tone—and substantive import—as Werner Sombart's *Why Is There No Socialism in the United States?*[25] Interest in American codification has subsided since then, even as codification remains the major organizing theme of European legal history.[26]

Instead, historians of legal thought in recent decades have reversed course and focused almost exclusively on the defenders of common law jurisprudence. Where codification is broached at all, as in Horwitz's later work, the focus has remained on the thought and motivations of codification's *opponents*, especially James C Carter. Historians following Horwitz have judged the common law lawyers harshly for trying to cloak their 'conservative' politics—meaning, above all, a stance against redistribution—in the mystifications of a legal science which they alone understood. Recent work by David Rabban, Kunal Parker, and Lewis Grossman has considerably revised this thesis. These studies have shown that Carter and his associates supported redistributive policies such as progressive taxation but feared that legislation would be an improper means of securing progressive reform. Frequently the counsel of corporate litigants, the common law lawyers understood the pervasive influence corporations exerted on legislators, and they trusted judicial common law to counteract the self-dealing of corporate lobbyists and captured legislatures.[27]

These works provide greater clarity as to why lawyers like Carter were so influential and esteemed by the American public.[28] Nevertheless, their purview remains strikingly limited. Following in the track of Horwitz's critique, each proceeds on the assumption that the defense of the common law was so peculiar a position that it requires careful explanation, while codification was a straightforward, sensibly progressive reform whose aims can remain unstated. Such a position uncritically accepts the codifiers as the forerunners of modern lawyers and bureaucrats, comfortable with wide-ranging statutory law. The codifiers, however, were products of their own time. Their modes of thought and assumptions came not from the twentieth-century administrative apparatus, but from nineteenth-century governance, not least of all from a liberalized Protestant establishment.

The common law lawyers deserve the nuanced treatment they have recently received, but in giving sole attention to the intricate defense of the common law, historians have lost sight of what the common law was being defended *from*. Carter, for instance, insisted that he thought little about the nature of jurisprudence until Field's civil code roused him from his dogmatic slumber. According to Carter, all his jurisprudential writing was a direct response to Field's philosophy, yet the most recent attempts to explain Carter's jurisprudence rarely even mention Field.[29] Attempting to tell the history of common law thought without accounting for the provocations of the codifiers is—to pick a contemporaneous example—like

[25] Werner Sombart, *Why Is There No Socialism in the United States?* (ME Sharpe, Armonk NY [1906] 1976). See especially Horwitz (n 24) 160–201, 265–6. Gordon (n 2). Despite the ubiquity of statutory law in the US, the failure to totally abrogate the common law with a comprehensive code has led (especially European) commentators to skip over the US as having no significant codification to speak of. See especially RC Van Caenegem, *Judges, Legislators and Professors: Chapters in European Legal History* (CUP, Cambridge 1987).

[26] For comparative and international interest in American codification, see Mathias Reimann, 'The Historical School against Codification: Savigny, Carter, and the Defeat of the New York Civil Code' (1989) 37 American Journal of Comparative Law 95; 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* (Duncker & Humblot, Berlin 1993) 63.

[27] Horwitz (n 2) 117–21; David M Rabban, *Law's History: American Legal Thought and the Transatlantic Turn to History* (CUP, Cambridge 2013) 322–77; Kunal M Parker, *Common Law, History, and Democracy in America, 1790–1900: Legal Thought before Modernism* (CUP, Cambridge 2011) 230–41; Lewis A Grossman, 'James Coolidge Carter and Mugwump Jurisprudence' (2002) 20 Law & History Review 577–629.

[28] On Carter's public renown, see Lewis A Grossman, 'From Savigny through Sir Henry Maine: Roscoe Pound's Flawed Portrait of James Coolidge Carter's Historical Jurisprudence' (2009) American University, WCL Research Paper No. 2009-21, 1–4.

[29] ibid 2–4.

writing a history of the American Whigs while ignoring Andrew Jackson and the Democrats: we are given the rebuttal without hearing the opening argument.

This one-sided approach obscures the ferocity of the century-long codification debate as well as the chief mystery of how lawyers who shared the same social class and culture could divide so bitterly over legal philosophy. Carter and Field were both among Manhattan's elite corporate lawyers. They co-founded the first modern bar association in New York City and even shared the same clients, such as the presidential candidate Samuel Tilden. Antislavery men before the Civil War, in the postbellum years Field and Carter both drifted to the moderate center of 'Liberal' and 'Mugwump' Republicanism—factions willing to bolt their party in favor of economic issues but unwilling to press civil rights for freedmen. Most importantly, both retained a Jacksonian outlook on law and legislation: statutory law was not to favor special interests nor to 'divide property among those who have not earned it', as Field argued.[30]

Broadening the scope beyond Field and Carter, one finds much the same shared culture among the elite lawyers—both in New York and around the nation—who published works on the codification question. Class and political affiliation, clients and lawyerly vocations—rarely did these divide elite lawyers.[31] Instead, most shared a Jacksonian regard for popular sovereignty but argued about the best means to safeguard it, whether through a scientific codification of general laws or through the empowerment of a legislatively independent cadre of judges.[32] Nevertheless, division over the sources and structure of law remained deep and trenchant.

To be sure, I do not seek to minimize the influence or effects of forces that have attracted significant attention in the codification debates. Industrialization and the coming of the market revolution, democratization and the status anxiety it elicited, antislavery mobilization and military occupation, professionalization and the search for order—all of these movements swirled around and flowed through the lawyers' debates, and each could divide 'brother from brother', as it were, at least at the margins.[33] Still, overall trends remain elusive. When the Spanish comparativist Aniceto Masferrer surveyed the American codification debates, he reluctantly concluded that though the debates were quite 'passionate', nothing of substance divided the codifiers from their common law antagonists.[34] My own account is in large agreement, except in one respect. Religious affiliation and its discursive tropes formed one remarkably constituent cultural fault line between the proponents of codification and the defenders of the common law, from the turn of the nineteenth century to the demise of Field's Civil Code in the 1880s.

Basically every proponent of codification who published nationally prominent tracts, treatises, or addresses on the issue adhered to one of the forms of what this article refers to as 'liberal Protestantism', a pan-denominational expression of Christianity that became popular in the early national era. Many outspoken code proponents including David Dudley Field, as well as Henry Sedgwick, Francis Wharton, Jesse Higgins, the southerner Thomas Smith

[30] See, for instance, James Coolidge Carter, *The Proposed Codification of Our Common Law: A Paper Prepared at the Request of the Committee of the Bar Association of the City of New York, Opposed to the Measure* (Evening Post Printing Office, New York 1884) 37; Carter (n 14) 36. David Dudley Field, 'Corruption in Politics' (1877) in *Speeches of Field*, 2:136. As economic and political 'conservatives', Miller concludes, the codifiers were hardly distinguishable from their common law-favoring opponents. Perry Miller, *The Life of the Mind in America: From the Revolution to the Civil War* (Harcourt, Brace & World, San Diego 1965) 259.

[31] For one attempt at a comprehensive survey of US codifiers, see Kellen Richard Funk, 'The Lawyer's Code: The Transformation of American Legal Practice, 1828–1938' (PhD dissertation, Princeton University, 2018) app A, 446–69.

[32] See Rabban (n 27) 12–14, 31–9, 96–101, 490–2.

[33] For a detailed examination of the Field Code along each of these dimensions, see Kellen Funk, *Law's Machinery: Reforming the Craft of Lawyering in America's Industrial Age* (OUP, Oxford 2024).

[34] Aniceto Masferrer, 'The Passionate Discussion Among Common Lawyers about Postbellum American Codification: An Approach to Its Legal Argumentation' (2008) 40 Arizona State Law Journal 211–12 and 233–6.

Grimké, and the westerner WA Scott were devout members and leaders in New School Presbyterian or liberalized Episcopalian and Unitarian churches. Others like William Sampson, George Hoadly, and Joseph Rantoul waned in their commitment to church attendance, but as sons, brothers, or business partners of prominent ministers and evangelical philanthropists, they could hardly escape the cultural influence of the so-called 'empire of benevolence', and they shared many of its intellectual assumptions.[35]

The leading common law defenders, by contrast, were more religiously diverse but generally shared an antipathy towards liberal Protestantism. A significant number, including James C Carter, Francis Lieber, and R Floyd Clarke were religiously unorthodox (even by Unitarian standards) or outspokenly irreligious. Carter's law partner and mentor, the renowned New York lawyer Charles O'Conor, was Roman Catholic. And some, like Gulian Verplanck, John Pickering, and William Hornblower, adhered to conservative Protestant denominations (often proudly bearing the name 'Old School') that rejected new theologies of a liberalizing Protestantism.[36]

Spanning the nineteenth century, the codification question intersected with the emergence of democratic politics of the Second and Third Party Systems, the transition of labor practices to industrialization and commercial finance, the religious upheavals of the 'Second Great Awakening', and—involved in all of these—the increasingly pervasive language of science, whether 'political science', 'scientific management', or the 'science of revival'. In framing their arguments, however, leading jurists across the century relied on religious analogies and logics with a frequency that has been obscured in the historical accounts.[37] '[T]heology admits of a closer comparison with the [law], than any other science does', wrote the common law lawyer John Pickering in 1834. Later in the century, R Floyd Clarke agreed: 'The Religious Code [the Bible] of earlier centuries is as truly the work of man, as any Code of laws ever made by man; and the analogy between them is, therefore, perfect.' As the Bible had 'codified' primitive science, so legal codification would improvidently freeze the law at an imperfect state of understanding.[38] The Old School Presbyterian Pickering, the irreligious Clarke, the Catholic Brownson—each made his rebuttal by analogy to theology. But against what were they arguing?

III. THE PROTESTANT STRUCTURE OF AMERICAN CODIFICATION

The codification debates provoked wide-ranging arguments and diverse approaches from legal commentators. No two codifiers—or common law lawyers—agreed on all points, but debate centered most frequently and most heatedly on several themes: the locus of legal authority, the nature and interpretation of legal texts, the means of knowledge, and the sacredness of the common law heritage. Before these issues sharpened in the 1820s, many had

[35] On the culture of the so-called benevolent empire, see Michael P Young, 'Confessional Protest: The Religious Birth of U.S. National Social Movements' (2002) 67 American Sociological Review 660–88; Lori D Ginzberg, *Women and the Work of Benevolence: Morality, Politics, and Class in the Nineteenth Century* (Yale UP, New Haven 1990).

[36] On the New School–Old School distinction, see Bradley J Longfield, *Presbyterians and American Culture: A History* (Westminster, Louisville 2013). For a suggestion of O'Conor's influence on Carter's jurisprudence, see 'Current Topics' (1885) 31 Albany Law Journal 161. On O'Conor's renown as an elite Catholic lawyer in New York, see Cynthia Nicoletti, *Secession on Trial: The Treason Prosecution of Jefferson Davis* (CUP, Cambridge 2017) 49–62.

[37] On the political, economic, and cultural contexts of major codifiers like Field, see Daniel J Hulsebosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664-1830* (University of North Carolina Press, Chapel Hill 2008); Sven Beckert, *Monied Metropolis: New York City and the Consolidation of the American Bourgeoisie, 1850-1896* (CUP, Cambridge 2001); Daniel Walker Howe, *What Hath God Wrought: The Transformation of America, 1815–1848* (OUP, Oxford 2009) (see ibid 463–9 on the pervasive language of science).

[38] John Pickering, 'A Lecture on the Alleged Uncertainty of the Law' (1834) 12 American Jurist 293–4; R Floyd Clarke, *The Science of Lawmaking: Being an Introduction to Law, a General View of Its Forms and Substance, and a Discussion of the Question of Codification* 367 (Macmillan & Co, London 1898).

already encountered them in America's tumultuous period of religious disestablishment. A liberalized Protestantism significantly influenced codification movements through the rest of the century, thus prompting opponents of codification to contend with the foundational assumptions of liberal Protestant thought.

1. The varieties of American liberal Protestantism

American disestablishment across the early republic resulted in a dizzying variety of religious groups and sects, even within the relatively narrow stream of Protestant Christianity.[39] Historians have struggled over terms such as *liberal*, *modern*, or *evangelical* to describe trans-denominational American Christians who departed from the Calvinist orthodoxy of the Puritans, a theology that emphasized God's sovereignty over a predetermined and hierarchical social world. New School Presbyterians were more 'liberal' than their Calvinist Old School counterparts in their embrace of an evangelicalism premised on a measure of self-determination, but not nearly as 'liberal' as nonevangelical Unitarians who subjected all doctrine—including the very nature of God—to common-sense rationalism. Despite its imprecision *liberal* has become a conventional label that can usefully apply across denominations to distinguish religious world-views that converged on issues of authority, interpretation, epistemology, and history.[40]

Nevertheless, I use the term 'liberal Protestantism' advisedly and recognize that it is not without serious drawbacks. Any intellectual history at the intersection of law and religion risks oversimplifying either, and generalizing across denominations and across eras is especially perilous. After the Civil War, 'liberal' became a widely used label to describe an emerging Christian theology that minimized literal readings of scripture and used deconstructive interpretive methods to free itself (hence the use of 'liberal') from conventional interpretations and the authority of traditional practices.[41] The degree to which American law and American religion operated with a shared set of hermeneutical practices is a fascinating question, one on which research is only beginning, but it is not the aim of this article.[42] Consequently, I use 'liberal' not as a synonym for the modernist hermeneutics of a later era, but in the sense that political historians of the early republic tend to use—as a constellation of thought, variously sourced, that emphasized the importance and authority of individual

[39] The timeline of 'disestablishment' has been significantly revised in recent years, with scholars recognizing various continuing forms of state control over churches or church appropriation of state jurisdiction. See, eg Sarah Barringer Gordon, 'The First Disestablishment: Limits on Church Power and Property before the Civil War' (2014) 162 University of Pennsylvania Law Review 307; Jeffrey Thomas Perry, *Law in American Meetinghouses: Church Discipline and Civil Authority in Kentucky, 1780–1845* (Johns Hopkins UP, Baltimore 2022). While the argument of this article is not framed in terms of establishment, it could be read to lend further support to the notion that a pervasively Christian 'moral' or 'legal' establishment continued well after the revolutionary era. See Steven K Green, *The Second Disestablishment: Church and State in Nineteenth-Century America* (OUP, Oxford 2010); David Sehat, *The Myth of American Religious Freedom* (rev edn, OUP, Oxford 2015).

[40] See especially Gary J Dorrien, *The Making of American Liberal Theology: Imagining Progressive Religion, 1805–1900* (Westminster, Louisville 2001). See generally E Brooks Holifield, *Theology in America: Christian Thought from the Age of the Puritans to the Civil War* (Yale UP, New Haven 2003); George M Marsden, *The Evangelical Mind and the New School Presbyterian Experience* (Yale UP, New Haven 1970); David Bebbington, Mark A Noll, and George A Rawlyk (eds), *Evangelicalism: Comparative Studies of Popular Protestantism in North America, the British Isles and Beyond, 1700–1990* (OUP, Oxford 1994).

[41] See especially, Dorrien (n 40). Mark Noll argues that liberal theology, in this sense, rapidly developed in popularity and sophistication just before and after the Civil War as Protestants debated whether the Bible, taken literally or taken seriously, sanctioned modern slavery. Mark A Noll, *The Civil War as a Theological Crisis* (University of North Carolina Press, Chapel Hill 2006) (on the distinction between taking the Bible literally or seriously, see Diarmaid MacCulloch, *Christianity: The First Three Thousand Years* (Viking, New York 2010) 11).

[42] On Protestant literalism and print culture, see especially Seth Perry, *Bible Culture and Authority in the Early United States* (Princeton UP, Princeton NJ 2018); Mark Noll, *America's Book* (OUP, Oxford 2022); David Paul Nord, *Faith in Reading: Religious Publishing and the Birth of the Mass Media in America* (OUP, Oxford 2004); Peter J Wosh, *Spreading the Word* (Cornell UP, Ithaca NY 1994). The history of legal hermeneutics, on the other hand, is comparatively undeveloped. See Steven Wilf, 'Law/Text/Past' (2011) 1 UC Irvine Law Review 543. I'm grateful to Jessica Lowe for conversations about her forthcoming research in this domain.

actors and self-determination.[43] Liberal Protestantism, on this account, covers the variety of Christian denominations that could be said to have moved beyond the communal and deterministic Calvinist orthodoxy of the Puritans, whether because they were never Calvinist to begin with (like Wesleyan Methodists), or because they found ways to modify their Calvinism for revivalist appeals to individually stirred hearts (as in Charles Finney's New School Presbyterians), or because they appealed to individual reason in defiance of the revivalism that was sweeping their co-religionists (like the staid and respectable New England Unitarians).[44]

Whether or not liberals tried to remain under a Calvinist banner, they all insisted that individuals had the responsibility—and thus the ability—to obey the gospel call immediately. Spiritual authority thus devolved onto ordinary individuals, even within hierarchical denominations. In a classic work, the historian Nathan O Hatch argues that American Protestantism became significantly decentralized in the early republic as Christian populists rejected traditional claims to authority based on ministerial education, denominational licensing, or any other mechanism that sharply distinguished the spiritual qualifications of clergy from the laity. Salvation was no longer to be mediated through a long course of catechetical instruction by trained elites; in some denominations, recently converted farmers had all necessary qualifications to become preachers of the gospel. Although Presbyterians remained influential publishers, by far the largest gains in adherents went to denominations that granted more authority to ordinary congregants, such as the Methodists, Baptists, and Disciples of Christ.[45]

The authority of ordinary individuals to apprehend and accept the doctrines of salvation gave unprecedented importance to the Reformation idea of biblical perspicuity. Against Catholic teaching that only the magisterium of the church could pronounce on the interpretation of scripture, Protestants had for centuries insisted that scripture was sufficiently clear about important doctrines (those pertaining to salvation especially), that any believer could discern them. Against Catholic tradition, Protestants taught that the Bible alone (*sola scriptura*) 'was the only reliable source of religious authority'. The religious historian Mark Noll shows how Americans pressed these ideas further, as many insisted 'that personally appropriated understanding of Scripture was the only reliable means of interpretation'. Many American churches accordingly professed 'no creed but the Bible', while others speculated that perspicuity extended not only to the spirit-filled but to any ordinary reader.[46]

Noll further contends that popular authority became more defensible after the American embrace of Scottish common-sense rationalism. A response to Enlightenment skepticism (religiously motivated for some), common-sense realism affirmed that the ordinary faculties of human perception and reasoning could indeed arrive at objective truth. Significantly

[43] eg Joyce Appleby, *Liberalism and Republicanism in the Historical Imagination* (Harvard UP, Cambridge MA 1992); Isaac Kramnick, *Republicanism and Bourgeois Radicalism: Political Ideology in Late Eighteenth-Century England and America* (Cornell UP, Ithaca NY 1990); Rafael Major, 'The Cambridge School and Leo Strauss: Texts and Context of American Political Science' (September 2005) 58 Political Research Quarterly 477–85.

[44] For further background on anti-Calvinist or post-Calvinist developments in these groups, see Peter J Thuesen, 'Agency, Voluntarism, and Predestination in American Religion' in *Oxford Research Encyclopedia of Religion* (OUP, Oxford 2017); Leo Hirrel, *Children of Wrath: New School Calvinism and Antebellum Reform* (Kentucky UP, Lexington KY 2014); Daniel Walker Howe, 'The Decline of Calvinism: An Approach to Its Study' (1972) 14 Comparative Studies in Society and History 306.

[45] Nathan O Hatch, *The Democratization of American Christianity* (Yale UP, New Haven 1991) 5. On the contrast between catechetical conversion and more immediate evangelical forms, see especially the discussion in Albert J Raboteau, *Slave Religion: The 'Invisible Institution' in the Antebellum South* (2nd edn, OUP, Oxford 2004) 97–120.

[46] Mark Noll, *America's God: From Jonathan Edwards to Abraham Lincoln* (OUP, Oxford 2002) 231, 367–84. See also Keith D Stanglin, 'The Rise and Fall of Biblical Perspicuity: Remonstrants and the Transition toward Modern Exegesis' (2014) 83 Church History 38. On the anti-Catholic politics of the nineteenth century that formed a backdrop to Protestant arguments, see Jane Farrelly, *Anti-Catholicism in America, 1620–1860* (CUP, Cambridge 2018); Elizabeth Fenton, *Religious Liberties* (OUP, Oxford 2011); Steven K Green, *The Bible, the School, and the Constitution: The Clash that Shaped Modern Church–State Doctrine* (OUP, Oxford 2012); Philip Hamburger, *Separation of Church and State* (Harvard UP, Cambridge MA 2004).

deviating from the Calvinist insistence on man's fallen and depraved nature, common sense (particularly Francis Hutcheson's variety) won many American adherents by offering 'a scientific, universal, and optimistic ethical theory that did not require the sanction of tradition'. The philosophy, in essence, offered to render all of God's works perspicacious: humans could not only read and understand the scriptures for themselves, they could also scientifically read 'natural revelation', examining their own minds and the natural environment to arrive at universal truth without guidance from mysterious traditions or archaic superstitions.[47]

Still, liberals retained one significant aspect of American Calvinism in its sense of where history was going: a belief that the Reformation would ultimately culminate in the millennium, a time of unprecedented peace, prosperity, and universal Christianity. The Reformation had helped to clear the ground of superstition and the despotism of clerics; renewed enlightenment and spirituality would thrust the world forward towards the climax of history. The dramatic success of the revivals and the growing power of benevolent organizations in America even led some to suspect that America had a special role to play in bringing on this millennial dawn.[48]

Liberal Protestantism encountered opposition on many fronts. Old School Presbyterians at Princeton insisted that modern theology conform itself to Calvinism and not the other way around. Roman Catholic apologists contended that common sense was not as common as Protestants hoped, nor was scripture so easy to interpret. Catholics argued in particular that the rapidly growing number of Protestant schisms was the natural consequence of encouraging individuals to pursue their own reading of scripture.[49]

Alongside these recriminations of Protestant 'sectarianism' and Catholic 'superstition', the legal codification debate came to maturity. Liberal Protestants had shown how to apply common-sense philosophy and a widely accepted logic of history to their thinking about texts and the articulation of popular authority for moral norms. The codifiers extended that reasoning to law.

2. The locus of legal authority

Lawrence Friedman writes that the codifiers hoped to make litigation 'so simple and rational that the average citizen could do it on her own'.[50] Such a claim points towards the view of authority the codifiers held, although it goes well beyond the position many were comfortable taking. As in liberal Protestantism, the codifiers wrestled with an ambiguity as to whether the egalitarian impulses in their movement properly applied to *all* people, all *insiders* (ie, Christians/lawyers), or only *educated* insiders (academic philosophers). While some codifiers, like the Delaware legislator Jesse Higgins, hoped codes would rid America of the

[47] Noll (n 46) 109–10. For a study of the influence of common-sense theology on legal doctrine, see Susanna L Blumenthal, *Law and the Modern Mind: Consciousness and Responsibility in American Legal Culture* (Harvard UP, Cambridge MA 2016).

[48] Though millenarism was a shared expectation across Protestant groups, the specifics of timing and the role of church and society in preparing for the millennium differed widely across sects. See Howe (n 37) 285–319; Ruth H Bloch, *Visionary Republic: Millennial Themes in American Thought, 1756–1800* (Cambridge, CUP 1985); James Moorhead, *World without End: Mainstream American Protestant Visions of the Last Things, 1880–1925* (Indiana UP, Bloomington 1999); Dereck Daschke, 'Millennial Destiny: A History of Millennialism in America' in Eugene V Gallagher and W Michael Ashcraft (eds), *Introduction to New and Alternative Religions in America* (Greenwood Press, Westport CT 2006) 266.

[49] See especially W Bradford Littlejohn, 'Sectarianism and the Search for Visible Catholicity: Lessons from John Nevin and Richard Hooker' (2015) 71 Theology Today 404; Bradley Kime, 'Religious Outsiders and the Catholic Critique of Protestantism in America' (MA thesis, Utah State University 2015); James H Moorhead, 'The "Restless Spirit of Radicalism": Old School Fears and the Schism of 1837' (1997) 78 Journal of Presbyterian History 19. Baptists, Presbyterians, and Methodists suffered massive denominational splits before the Civil War over the question of how to interpret the Bible's teachings about slavery. At the congregational level, churches frequently divided or saw their membership drained away by upstart sects of Disciples, Shakers, Adventists, or Latter-Day Saints, all offering new ways to understand God's revelation. See especially Noll (n 46) 386–438; Hatch (n 45) 49–66.

[50] Friedman (n 1) 297.

legal profession entirely, most agreed that 'such hopes will never be realized this side of utopia', as the *U.S. Monthly Law Magazine* put it.[51]

What the codifiers agreed upon was that the law did not need to be mediated through judicial authority. 'In monarchical or aristocratic governments, it would not be so much to be wondered at that a class should arrogate to itself the knowledge and interpretation of laws; but that this should happen in a republic, where all the citizens both legislate and obey, is … incredible', Field wrote. Since 'all the citizens both legislate and obey', codifiers treated the claim that judges had special authority to declare and apply the law as similar to the claim that priests had special powers to absolve sin—an explicit comparison codifiers often made. American judges, declared Higgins, were like 'the Romish priesthood when that imperious hierarchy was most ambitious and intolerant; … *they* were learned, and *laymen* ignorant'. Likewise, the New Yorker Henry Dwight Sedgwick and the South Carolinian Thomas Smith Grimké mocked the 'superstition' and 'superstitious venerations' of the common law, using language typical of anti-Catholic polemic.[52] The epithet 'priestcraft' was ubiquitous across the debates, succinctly analogizing the hierarchical authority of judges to pre-Reformation prelates.[53]

The fact that judges increasingly published their opinions in publicly printed case reports after 1805 did nothing to blunt the codifiers' charges that judges cloaked their authority in mystery and superstition. On the contrary, the accretion of published precedent only further irritated the codifiers, who complained not only of the growing number of case reports and the difficulty of digesting them, but also about precedential reasoning itself. Precedent appealed to tradition and validated the authority of the judge as the interpreter of tradition. Codifiers like Sedgwick condemned 'the veneration and obedience paid to authority and precedent' in both law and religion, and they especially objected to the 'air of mystery' in the judicial process. Because precedents had become so numerous and could potentially lead in so many directions, judges continued to exercise significant discretion despite the increasing publication of judicial opinions. Codifiers suspected that judges continued to exercise their authority by using non-public, mysterious reasoning. It was often in this context that the codifiers made explicit comparisons to the Catholic priesthood.[54]

Beyond criticizing judges, some codifiers said that all lawyers who defended the common law system presumptuously set themselves above popular authority. 'He seems to care nothing, [for] the opinions of other men', Field said of Carter. 'He knows what is good for them better than they know themselves.' To explain why common law lawyers persisted in their arrogance, Sedgwick compared them to Catholics. Noting that several otherwise brilliant men adhered to Catholicism, a religion 'equally at variance with right reason and divine revelation', he surmised that they did so only because they 'had been *brought up* to be catholics … . Had these men been born in a protestant country', they would have been 'champions of a purer faith'. So too the common law lawyer:

[51] On Higgins's views, see [Jesse Higgins], *Sampson against the Philistines, or the Reformation of Lawsuits* (W Duane, Washington DC 1805); GS Rowe, 'Jesse Higgins and the Failure of Legal Reform in Delaware, 1800–1810' (1983) 3 Journal of the Early Republic 17; 'Nature and Method of Legal Studies' (1851) 3 United States Monthly Law Magazine 380. Field in particular opposed the everyman-his-own-lawyer ideal. 'Justice is attainable only through lawyers', he told law students. '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. Field (n 17) 499. On the parallel Protestant ambiguity, see Hatch (n 45) 179–83.

[52] Field (n 17) 510. Higgins (n 51) 16 (emphasis in original). See also Thomas Smith Grimké, *An Oration on the Practicability and Expediency of Reducing the Whole Body of the Law to the Simplicity and Order of a Code* (AE Miller, Charleston 1827) 6, 21; [Henry Dwight Sedgwick], 'Review of an Anniversary Discourse by William Sampson' (1824) 19 North American Review 421.

[53] See especially Parker (n 53) 121–2.

[54] On the growth of American law reporting, see John H Langbein et al, *History of the Common Law: The Development of Anglo-American Legal Institutions* (Aspen, New York 2009), 824–33. Sedgwick (n 52) 418. See also, for instance, Higgins (n 51) 16 (charging the 'Romish priesthood' with crafting 'every thing which has changed simple justice into a *professional mystery*').

> The *faith* of the lawyer is much akin to that of the [Catholic] theologian. He is brought up to think with the highest reverence of the wisdom of our ancestors, and especially the wisest of them, the ancient sages of the law. These are to him the holy fathers, whose creed he thinks it almost impious to doubt … . To his mind, law and justice are identified with the particular forms, modes, and principles in which he has been accustomed to see them dispensed, and any interference with these he considers as endangering the existence of all law and justice, in the same way in which many pious Christians sincerely believe the particular rites and dogmas of their own sect to be the very body and soul of religion, and that whatever affects the one must endanger the other.

In both cases, Sedgwick saw the same problem: some Americans had simply grown up too accustomed to the authority of tradition and hierarchy.[55]

On the question of authority, common law defenders drew fewer analogies explicitly from religion than did the codifiers, but they nonetheless found themselves echoing Catholic and Old School criticisms of liberal Protestants by arguing that the codifiers had a naive view of authority. Since all authority was naturally and necessarily mediated, common law defenders declared that codifiers were simply substituting one privileged class for another. Codifiers like the New York lawyer Robert Fowler had asserted that 'where the people make the laws, the people alone codify them'. The common law lawyers replied that 'the people' never drafted codes. Even their elected representatives usually assigned the task to two- or three-member commissions. 'The complaint' about judge-made traditions, argued Carter, 'really amounts to this, that *judges* make the law instead of *commissioners*'. Ordinary people would never enjoy unmediated understanding of the law or access to justice—the codifiers' resolve to maintain the privilege of the legal profession admitted as much. Better, then, to favor the judicial community—and for the common law lawyers, *community* was a key term. Like Carter, they did not express a preference for 'the judge' or 'the judiciary' in contrast to legislators; instead they opposed 'the *body of judges*' to an individual commissioner such as Field: an interpretive community dedicated to that enterprise versus the individualized reading of a single lawyer.[56]

Scholars have often emphasized Carter's belief in custom as a source of law, but they have neglected the role Carter assigned communal reason to discern the unwritten 'social standard of justice'. Judges 'know and it and feel it because they are a part of the community. And moreover it is placed before them in a blaze of light by the animated debates of thousands of other professional men belonging to the same community, whose vocation is to study and apply it.' But Carter criticized Field as an individual interpreter of the law, one who demanded that his statements 'in every instance, right or wrong, be *made* the law'. Attacking the American view of codification, common law lawyers implicitly agreed with critics of Protestantism that individual authority and 'private judgment' were inferior to the authority of a hierarchically organized interpretive community.[57]

[55] David Dudley Field, *A Short Response to a Long Discourse* (New York 1884) 8; [Henry Dwight Sedgwick], *The English Practice: A Statement Showing Some of the Evils and Absurdities of the Practice of the English Courts* (J Seymour, New York 1822) 6 (emphasis in original).

[56] Robert Ludlow Fowler, *Codification in the State of New York* (2nd edn, Martin B Brown, New York 1884) 13. Carter (n 30) 42 (emphasis in original). See also William B Hornblower, *Is Codification of the Law Expedient? An Address Delivered before the American Social Science Association* (New York 1888), 18 ('*commissioner-made* law or *politician-made* law'); Carter (n 30) 23 ('He asks that the Legislature *accept* [a code] upon the authority of the two names subscribed to it'). Compare with John T McGreevy, *Catholicism and American Freedom: A History* (Norton, New York 2003) 26, 36, 52; Holifield (n 40) 424–46 ('Catholic theologians stood for communal reason rather than private rationality')

[57] See, for instance, Horwitz (n 2) 117–21. Carter (n 14) 42; Carter (n 30) 22 (emphasis in original). By 1850, the structure of court system to provide for appeal in most cases was seen as a common law advantage; see, for instance, Albert Mathews, *Thoughts on Codification of the Common Law* (4th edn, New York Bar Association, New York 1887) 24 ('All of this class of arguments against what is styled *judge-made-law*, or *case-law*, as distinguished from codification, are apt to leave out of view the corrective power of appeal'); and Carter (n 30) 42 (listing 'revision on appeal' as one of three advantages of the common law over commissioner-made law).

Like Catholic polemicists, common law lawyers pointed to the internal divisions of the codification movement as proof that the codifiers' promotion of popular authority undermined their own movement. Carter wrote that 'the irreconcilable difference of opinion among the advocates of codification concerning the most important questions', made the meaning and virtue of 'codification' differ according to the beholder. The Philadelphia lawyer Joseph Hopkinson warned that a code might contain 'the arbitrary dictates of a single man, or any body of men, who promulgate their own individual sense of right and justice'. Without a designated interpretive authority and salutary checks from an appellate hierarchy, what remained besides private judgment?[58]

The codifiers answered that they could find non-controversial, universal legal principles within the texts used by the legal community, a belief that plunged them deeper into debate over the nature and interpretation of written texts.

3. The nature and interpretation of texts

After all Americans had accomplished in revolutionizing politics and religion, remarked William Sampson in his widely reprinted address, they retained 'one pagan idol to which they daily offered up much smoky incense': the common law, sitting 'upon its antique altar, for no use or purpose but to be praised and worshipped by ignorant and superstitious votaries'. Sampson then chronicled the apparently contradictory reasoning of the common law lawyers: 'It was oral tradition as opposed to written law; it was written law, but presuming the writing lost; it was that of whose origin there was no record or memory, but of which the evidence was both in books and records.'[59]

Sampson and his fellow codifiers thought that the time had come to discard oral tradition. They argued instead for the sufficiency and perspicuity of legal texts (at least to qualified readers like themselves). '[I]t may be safely asserted that the whole body of the Common Law has ceased to be *lex non scripta*, and actually is now a part of the *lex scripta*', Grimké wrote. Field premised his Civil Code on the same proposition: '[A]ll that we know of the law, we know from written records. To make a Code of the known law is therefore but to make a complete, analytical, and authoritative compilation from these records.' Whatever oral traditions or courtroom practices persisted in particular locales, the written case reports were sufficient in themselves to communicate the law.[60]

Not only did the codifiers take a *sola scriptura* approach to their texts, they also argued that the particular facts of the various case reports could be stripped away, leaving behind 'general rules' much in the same way that Protestants defended universal propositions with 'proof texts' stripped from their historical or biblical contexts. 'The report of a case sets forth, at length, all the facts which it involves, the arguments of counsel, and the opinion, with all its reasons and illustrations of the Court', noted Francis Hilliard, 'while *the principle* recognized or decided may be concisely but clearly expressed in a few marginal lines'. Modern lawyers commonly extract holdings from a case, but the codifiers were venturing into uncertain territory for their time. A major puzzle they confronted was which holdings, and at what level of specificity, were fit for codification. 'Some one has estimated the whole number of rules laid down in the reports at two million', Field wrote, but '[n]o man would dream of

[58] Carter (n 30) 81; Joseph Hopkinson, *Considerations on the Abolition of the Common Law in the United States* (William Farrand and Co, Philadelphia 1809) 23. Compare with Noll (n 46) 6; Holifield (n 40) 426.

[59] William Sampson, 'An Anniversary Discourse, Delivered before the Historical Society of New York' (1824) in Thompson (n 16) 11–12. On the logic of immemoriality in the defense of the common law, see Parker, *Common Law, History, Democracy*, 30–40, 152–5, 182–7.

[60] Grimké (n 52) 15. David Dudley Field, 'Final Report of the Code Commission' (1865) in *Speeches of Field*, 1:326; see also ibid 322 ('Whatever is known to the judge or to the lawyer can be written, and whatever has been written in the treatises of lawyers or the opinions of judges, can be written in a systematic Code').

collecting and arranging all these in a code'. Instead, '[t]he province of a code is not to give all the rules of law, general and particular, but only such as are general and fundamental'. Where to locate the line between general and particular, fundamental and factual, would bedevil the codifiers, but they agreed the exercise was possible in principle.[61]

Discernment between general and needlessly particular rules was possible, the codifiers thought, because legal texts were *perspicuous*, a term originating in Protestant theology that American lawyers used frequently. While most codifiers did not expect legal texts to be perspicuous to all ordinary readers, they agreed with Grimké that if:

> we can lay before the inquiring reader [ie lawyer], not in the form of oral evidence or tradition, but in pages perfectly intelligible, the whole of the Common Law … where can be the difficulty of determining, with the aid of talent, industry, experience and knowledge, either how much of this written Law is actually of force, or, which is far more important, and by no means so difficult, how much of it ought to be obligatory?[62]

In their views of perspicuity, American codifiers diverged from their English counterparts. Bentham's efforts at codification included a number of proposed institutions such as a Public Opinion Tribunal and a Legislation Minister who was responsible for maintaining the 'clearness' of legislation for the common people. No such institutions seemed necessary to the American codifiers. A diligent lawyer, perhaps even a lay reader, could find the fundamental principles of the written law without these external aids, and all fundamental principles were, indeed, written.[63]

Against the codifiers' faith in the sufficiency and perspicuity of legal texts, common law lawyers pleaded 'the intrinsic ambiguity of language, by which we must express our intentions', as Pickering stated the position, analogizing to Protestant sectarianism. Protestants sought 'to instruct us in … a written law … [y]et, how many different, not to say contradictory constructions, are put upon the various parts of the sacred code, with … confident belief, that each construction is the true one!'. Protestantism vaunted perspicuity, yet '[h]ow various have been the opinions and dogmas of its professors upon what would seem to be the most plain and intelligible portions of its text'. If Protestants divided in their interpretation of divine law, '[h]ow vain, then, is the hope of attaining to perfect exactness in the formation of any laws which are the work of man'.[64]

Common law lawyers thus found similar sectarianism among the codifiers unsurprising, especially when the latter disagreed about the level of generality desirable in a code. Professed advocates of codification such as John Norton Pomeroy and William Hornblower complained about Field's Civil Code, the latter declaring it 'grossly incomplete in some branches, absurdly minute in others'. Favoring codification in principle, these lawyers thought Field had codified the wrong rules and drawn inappropriate distinctions between

[61] Field (n 60) 319, 328. Francis Hilliard, *The Elements of Law: Being a Comprehensive Summary of American Jurisprudence* (John S Voorhies, New York 1848); David Dudley Field, 'Reasons for the Adoption of the Codes by New York, Address Before the Judiciary Committees of the Two Houses of the Legislature' (1873) in *Speeches of Field*, 1:367. Compare with Noll (n 46) 370–1; Hatch (n 45) 81, 179–83; Holifield (n 40) 494 (noting Protestants' 'Baconian habit of assembling proof-texts').

[62] See Miller (n 30) 147; Stanglin (n 46). On the privilege of lawyerly readers, see, for instance, 'Nature and Method of Legal Studies' 512 ('[I]f the best code human wisdom can devise, was hung up in the office of every attorney in the land, no one of them would become great lawyers, without a thorough, scientific study of their profession'). Grimké (n 52) 16. Sedgwick linked perspicuity to popular authority when he argued that common law lawyers and codifiers were separated by their preferences for 'the syllogistic mode of reasoning, [versus] the ordinary style of argument tin which a plain man would press his conclusions' (Sedgwick (n 52) 417).

[63] See David Lieberman, 'Bentham's Jurisprudence and Democratic Theory: An Alternative to Hart's Approach' in Xiaobo Zhai (ed), *Bentham's Theory of Law and Public Opinion* (CUP, Cambridge 2014) 136–9.

[64] Pickering (n 38) 293–4, 297. See also Hopkinson (n 58) 25–7 ('[S]carcely a word in our language has a single, fixed, determinate meaning.') and n 37 above and text.

the general and the specific. Not surprisingly, such reviews became favorite citations in the New York debates.[65]

Even if codifiers could agree on a desired level of generality, common law lawyers argued that the indeterminacy of language made written codes inferior to the common law tradition, especially in the codifiers' ideal world of popular authority. As Pickering argued, '[T]his ambiguity of language cannot be removed by common consent in any community where each man has an equal right to decide upon the construction of the words of a language'. Judgment would still be required under a code, but Carter believed that judgment in pursuit of justice would be hindered by a code that shifted disputes from principles to language: 'At present … [t]he search is for a rule … . But when the law is conceded to be written down in a statute, and the only question is what the statute means, a contention unspeakably inferior is substituted. The dispute is about words.'[66]

A dispute about words was a tiresome exercise, unworthy of the name of judgment precisely because codifiers tried to proof-text general principles apart from the factual context of cases. An early advocate of codification in the 1820s, the New York lawyer Gulian Verplanck by 1839 had deserted to the common law lawyers, refusing to give up 'the rich inheritance of decided cases, which teach the meaning of words by the example of things'. It was the facts of the cases, not the holdings, which provided the law's 'most perspicuous commentary'. Field proposed that 'that only is truly law which has been provided before [the facts of a particular case]', but Carter insisted that the nature of law ran in the opposite direction: 'The fact must always come before the law … . Apart from known, existing facts, present to the mind of the judge, or the codifier, he cannot even ask, and still less answer, the question, what is the law?' Judges discerned justice not from texts but from the experiential life of a community (through custom), and they passed on their understandings through traditions that kept both fact and holding, experience and meaning, bound together.[67]

By contrast, the codifiers' attempt to live without the authority of tradition sacrificed the very thing, Pickering wrote, 'which gives to doubtful words a determinate signification'. Only after judges had considered a long series of fact-laden cases could one become reasonably sure what a text actually meant. Hopkinson agreed that statutes were 'unsettled and liable to misconception, until a course of judicial decision, which in fact is common law, gives them certainty and character'. From this debate, Orestes Brownson drew his conclusions that codifiers shared with Protestants a naive view of textual authority and interpretation.[68]

Disagreement on whether general law could be extracted from case reports stemmed in part from the codifiers' acceptance of the Christianized common sense that Noll describes as a 'scientific, universal, and optimistic' theory of knowledge. Since many common law lawyers rejected the tenets of common-sense rationalism, they carried the debate into the realm of epistemology.

4. The means of knowledge

The vocabulary of common sense abounded among reformers of the American bar. Codifiers like Grimké confidently affirmed that 'the common sense of the people, becoming

[65] See John Norton Pomeroy, *The 'Civil Code' in California* (New York Bar Association, New York 1885) (republication by Carter's New York associates); Hornblower (n 56) 3.

[66] Pickering (n 38) 298; Carter (n 30) 85–6.

[67] Gulian C Verplanck, *Speech When in the 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* (Hoffman & White, Albany NY 1839) 29; David Dudley Field, *Codification: An Address Delivered before the Law Academy of Philadelphia* (Law Academy of Philadelphia, Philadelphia 1886) 22; Carter (n 14) 28. Compare with Holifield (n 40) 424–5; *Controversy between the Rev. John Hughes of the Roman Catholic Church and the Rev. John Breckinridge of the Presbyterian Church Relative to the Existing Differences in the Roman Catholic and Protestant Religions* (Joseph Whetham, Philadelphia 1833) 20.

[68] Pickering (n 38) 298; Hopkinson (n 58) 28. See Brownson, 'Authority' (n 6).

every day more enlightened' could not 'suffer the indefinite continuance of the Laws, in their present condition'. Others declared that practices variously labeled Catholic, feudal, or European would appear obviously absurd if only they lost the authority of tradition. Although a few lawyers may have learned Scottish philosophy from its source, most adopted the American pairing of common sense with religious ideas of natural or biblical revelation. Hilliard's *Elements of Law*, for instance, reasoned that legal 'rules are founded upon the basis of equity, reason, and right. If this be so, then obscurity no more belongs to the former than to the latter; upon which the instinct of conscience, the conclusions of the understanding, and the teachings of revelation, pour their mingled light.' In sum, the immediate target of American common-sense rationalism was not the skepticism of David Hume, but the crippling depravity propounded by John Calvin.[69]

A major premise of American common sense (what made it 'optimistic' in Noll's account) was that science properly conducted made the world simpler, and the codifiers adopted this ideal zealously. '[T]o the gaze of ignorance', wrote Grimké, 'Creation is naught, but complexity and chaos; yet, to the eye of Science, the works of God are equally admirable for the simplicity of their elements, and the completeness of their system'. The codifiers sought this blend of simplicity and completeness for the law, reducing the sprawling law reports to a terse, systematic set of rules. Field's favorite term to describe common-sense simplicity was *plain*. He hoped his procedure code would produce a 'plain and rational system of procedure' that would require pleadings to give 'a plain statement in ordinary language' simple enough that 'a plain man' could understand them.[70]

If codifiers could overcome the veneration of tradition, they believed judgment too would become a simple task. 'Nothing', wrote Sedgwick, 'is … more simple than the ownership of real property'. It was 'always subject to the apprehension of the senses, and yet subtleties, quibbles, refinements, and false analogies, have been introduced into it to such an extent, that it can excite little admiration except in the eyes of a thorough bred common lawyer'. If, however, procedure were freed from tradition and reformed simply to draw out relevant facts, justice would be easy to render. '[W]hen the whole facts (or truth) are known', Higgins summarized, 'the decision agreeable to law is easy; the law properly being agreeable to the simplest dictates of nature and reason'.[71]

Common sense encouraged the codifiers to believe that searching for general principles in the law books would yield universal legal truths. 'It is impossible … that truth is so difficult to find, as the present system supposes', Higgins wrote. According to Field, 'only such [rules] as are general and fundamental would remain' after codification. An ideal code, Fowler supposed, would be 'concerned only with those larger principles indicated; those which have the force of law universally, or independently of the peculiar groups of facts to which they have, or have not, been applied'. Timeless legal truth waited in the reports to be discovered.[72]

Catholics, of course, had pioneered the study of natural law, so one might expect them to have sympathized with the Protestant quest to codify universal law in systematic detail.

[69] See especially Blumenthal (n 47) ch 1; Noll (n 46) 93–113. Grimké (n 52) 21. See also, for instance, Sedgwick (n 55) 6; Parker (n 53) 68. Hilliard (n 61) vi.

[70] On simplicity in American common-sense philosophy, see *Henry May: The Enlightenment in America* (OUP, Oxford 1976) 346–58. Grimké (n 52) 3. David Dudley Field, 'Study and Practice of the Law', (1884) in *Speeches of Field*, 1:491. David Dudley Field, 'What Shall Be Done with the Practice of the Courts? Shall It Be Wholly Reformed?' (1847) in *Speeches of Field*, 242–4. See also Fowler (n 56) 7 ('one of the greatest problems of the time: Shall the form of the law be more simple?'). On the Protestant sense that the Bible itself was a simple book, see Noll (n 46) 382–5.

[71] Higgins linked common-sense simplicity to the issue of authority: '[S]uch laws as relate to the rights of property are so consistent with simple justice, that every man in society can understand the law, by merely deciding what would be just according to his own opinion of moral rectitude' ((n 51) 26); Sedgwick (n 52) 424.

[72] Higgins (n 51) 26; Field (n 61) 367; Fowler (n 56) 18.

However, most Catholic natural law theorists agreed with the Anglican commentator William Blackstone about the 'indifference' of natural law and revelation on most civil matters. Positive law had a wide realm, and its provisions might differ widely across time and place without ever conflicting with divine law. The Protestants' mistake, Catholics argued, was that, relying only on their own reason, they too frequently elevated a provisional and culturally determined rule to the status of universal truth. The historian of theology E Brooks Holifield notes that American Catholics in particular 'delighted in displaying the ambiguities of Common Sense Realism' and argued 'that the "common sense" to which Protestants so frequently appealed was always culturally determined, taking one form in one part of the world and another in others'. The common law lawyers agreed.[73]

The codifiers' mistake, Carter wrote, was the 'false assumption that courts lay down rules absolutely'. Devoted to a universalizing science, codifiers thought that case reports contained timeless, objective law, but the common law:

> takes the transactions of the past, and, by classifying them, makes its rules, but it makes them *provisionally* only. It declares that they are binding upon the courts only so far as respects transactions substantially like those from the examination of which the rules have been framed. In respect to future cases which may wear different aspects, it suspends judgment.

Whether a case in the present was 'substantially like' one decided in the past required a skillful interpretation, not of statutory rules, but of the facts of community life.[74]

The ideal of a code containing only timeless, fundamental law was an impossible dream, the common law lawyers argued, because positive law in its essence was geographically and temporally bounded. Altered facts could reshape a rule's applicability and its core meaning. On this reasoning, some common law lawyers such as Carter and his New York ally Albert Mathews defined the doctrine of *stare decisis* quite narrowly. In their jurisprudence, it properly applied only to the judgment between the parties, not to the opinion, not even to the language of the holding. While judges were to maintain tradition, they maintained it within dynamic communities that could require modifications to the old reasoning. Thus with custom as a source of law, the common law could flexibly adapt to evolving local communities.[75]

Over time, common law judges recognized exceptions to general principles and forged new doctrinal paths, but common law lawyers argued that codification would destroy this process and stifle progress. In an extended analogy, Clarke compared the attempt to codify New York's law to the Christian propensity to treat the Bible as a 'divine Code based on Revealed Religion' in matters of science. Too often, particular expressions in the Bible had been treated as timeless truth, but this 'crystallization of ideas' thwarted human progress by preventing scientific challenges to received wisdom. The more general a rule, Carter warned, the more pernicious the effects of codification. 'Suppose a general rule were enacted that promises made upon consideration were binding.' Given the norm of statutory supremacy, judges were bound to render unjust verdicts unless Field codified all of the particular exceptions to the doctrine of consideration. If, on the other hand, judges freely modified the general statutory rule at their discretion, 'this would have utterly destroyed [Field's] code, *qua*

[73] William Blackstone, *Commentaries on the Laws of England* (Clarendon, Oxford 1765–9) 1:41–2; Parker (n 53) 57–8; Holifield (n 40) 421.

[74] Carter (n 30) 25, 30 (emphasis in original); see also Clarke (n 38) 255.

[75] See Carter (n 30) 27; Mathews (n 57) 12. On the link between custom and flexibility in Carter's jurisprudence, see Lewis A Grossman, 'Langdell Upside-Down: James Coolidge Carter and the Anticlassical Jurisprudence of Anticodification' (2007) 19 Yale Journal of Law & the Humanities 149, 176; Parker (n 53) 241.

code, by converting it into a ridiculous digest', Carter scoffed; ridiculous, because it turned material fit for a treatise into a statute that its enforcers could nevertheless disregard.[76]

Common law lawyers thus doubted the optimistic assurances of common-sense rationalists that humans could, with enough persistence, know the intricacies of natural law and write them down in a simple and comprehensive order. The future held 'a thousand cases that no human foresight could have comprehended in general provisions', wrote Verplanck. Only the methods of the common law, with its acceptance of provisionality and modifiability—its humility against claiming timeless truth—would effectively meet these challenges.[77]

When discussing Carter's views, legal historians frequently point to his belief in natural, objective law as a distinguishing feature of common law 'orthodoxy'. Carter thought that judges only declared the law, discerning it from the facts, customs, and traditions that confronted them, and in this sense Carter believed that law had an objective existence outside the mind of the judge.[78] However, the codifiers' affinity for common-sense epistemology with its aims of universality and simple, timeless truth reveals that they too adhered to a type of natural law philosophy. In comparison to the common law lawyers, the codifiers embraced a notion of legal objectivity that was much more detailed than their supposed natural law opponents were willing to accept. They were also much more confident that they knew where history was taking them.

5. The direction of history

When leading codifiers looked back at the historical processes that had prepared the way for their reforms, they frequently focused not on the Enlightenment but rather on the Protestant Reformation. 'The Reformation shut for ever the dark book of despotism, in religion, politics, and science', Grimké wrote, but not yet in law. Codifiers treated the common law method as a relic of Catholic England. Its rules were 'the invention of the same times and same men, who' crafted the indulgence system 'to make sale of the *mercy of God* [and] the *justice of man*', Higgins wrote. It was only an accident of colonial history, Field thought, 'that a most artificial system of procedure, conceived in the midnight of the dark ages, established in those scholastic times when chancellors were ecclesiastics and logic was taught by monks … was imposed upon the banks of the Hudson'.[79]

Codification would thus bring the liberating spirit of the Reformation to the law, and it might, some argued, help to bring about the millennium of Christian peace and prosperity. Field's proposed international code in particular elicited this commentary. An international audience expressed skepticism at the project, but Field 'with American audacity, saw no such impassible barriers', wrote his brother and biographer. 'He had read the prophecy of the last days, that the valleys should be exalted and the hills made low to prepare a highway for the coming of the Prince of Peace, and every strong-armed toiler could help to clear obstructions out of the way.' Field was more temperate in his own remarks before an international audience, but he nevertheless offered his code as a 'law of Christendom', that if accepted

[76] James Coolidge Carter, *Law: Its Origin, Growth, and Function* (Putnam, New York 1907) 274. See also Carter (n 14) 30 ('But written law affirms that it has made an absolute classification of all possible transactions; and its rules are not subject to change or modification however ill-adapted they may prove to be to the business of the future to which they are to be applied'). Clarke (n 38) 366–74.

[77] Verplanck (n 67) 29.

[78] See Horwitz (n 2) 119; Masferrer (n 34) 206.

[79] Grimké (n 52) 5; Higgins (n 51) 33 (emphasis in original); Sedgwick (n 52) 424; David Dudley Field, *Legal Reform: An Address to the Graduating Class at the University of Albany* (C Little & Co, Albany NY 1855), 20; see also George Hoadly, *Codification in the United States: An Address Delivered before the Graduating Classes at the Sixtieth Anniversary of the Yale Law School* (Yale Law Department, New Haven 1884) 14.

'would prove a benefit to the whole human family', echoing a millennialist prophecy Protestants derived from Genesis 12.[80]

Non-lawyers also made use of similar millennial rhetoric. Codification caught the attention of lay Protestant publishers, benevolent associations, and peace societies, who linked international codification to their millennial aspirations decades before Field began to write his code. Such a 'code once completed will be laid up in the hearts of the people, as in a holy ark of the covenant', wrote the *Christian Examiner* in 1841, alluding to a millennial prophecy from Jeremiah.[81]

For codifiers and evangelical Protestants, codes possessed millennial implications because of their power to unite people under the same laws and institutions. Unlike burgeoning volumes of case reports, a code could be copied from one jurisdiction and easily enacted in another—as had happened numerous times in the case of Field's procedure code. As more jurisdictions adopted the same statutes, conflict of laws would disappear, and legal institutions could establish higher levels of federation, culminating in a congress of nations that could secure world peace. Before Field attempted to codify international law, he had hoped his domestic codes would fill the role, providing:

> a CODE AMERICAN, not insular but continental, as simple as so vast a work can be made, free in its spirit, catholic in its principles! and that work will go with our ships, our travelers and our armies; it will march with the language, it will move with every emigration, and make itself a home in the farthest portion of our own continent, in the vast Australian lands, and in the islands of the southern and western seas.

One promise of codification thus lay in the hope that universal legal principles could in fact become universal positive law. 'You stand … in the very portals of a new time', Field concluded in his 'Code American' address. In this new era, it was yet to be determined who 'shall be the lawgiver of the [human] race'. Field hoped his American listeners would be inspired to dream it would be their state, their nation that made the law for the world to come.[82]

Codifiers posed cataclysmic events—the Protestant Reformation, the inauguration of the millennium—and plotted law reform efforts between them, but common law lawyers held to a different historical sensibility that lacked a cataclysmic vocabulary and emphasized continuity over time. Kunal Parker's work explores the prominent idea of the 'insensibility' of common law change. Law in the common law system changed over time, but it changed so gradually, and in such step with broader society, as to be nearly imperceptible. As Parker argues, American common law lawyers admired the thought of Edmund Burke, who defended the insensible development of English law against the allure of cataclysmic revolution. Even when a historian could trace the genealogy of a rule to a particular enactment, Burke contended that the process by which the rule passed into broader legal tradition was

[80] Henry Martyn Field, *The Life of David Dudley Field* (Charles Scribner's Sons, New York 1898) 228; David Dudley Field, 'Advantages of an International Code' (1869) in *Speeches of Field* 1:415. Field argued his code was 'the natural fruit of the religion which we profess', but therefore would have limited application to 'Oriental nations, or, to be more precise, non-Christian nations'. David Dudley Field, 'The Community of Nations' (1867) in *Speeches of Field* 1:396–7; David Dudley Field, 'Applicability of International Law to Oriental Nations' (1875) in *Speeches of Field*, 1:456. See also Hoadly (n 79) 30–1 ('Then, but not till then, do I believe the effervescing energies of legislation … will head the mandate, "Peace be still"'). Compare especially with Hatch (n 45) 184–9.

[81] 'Essays on a Congress of Nations' (1841) 29 Christian Examiner 88. See also Charles Loring Brace, *Gesta Christi: A History of Humane Progress Under Christianity* (AC Armstrong & Son, New York 1888) 357. Jeremiah 15:16, 31:31–4.

[82] On the spread of the procedure code, see Charles M Hepburn, *The Historical Development of Code Pleading in America and England* (WH Anderson & Co, Cincinnati 1897). Field (n 79) 32–3; see also Hoadly (n 79) 30 ('What I hope and claim is, that before many years a code of rights as well as remedies, the same in substance, though very likely differing in detail, will be in force in every American State, and within the limits of its powers, be adopted by federal legislation').

ultimately 'mysterious', embracing a concept of authority and tradition American codifiers abhorred.[83]

Common law lawyers did not necessarily disagree that history was moving towards greater legal unity, but they resisted the idea that codification could achieve that end. Instead, only the common law exhibited the advantageous 'tendency' that spurred 'the private law of all English speaking States to a unity', Carter proclaimed. Carter's supporting argument that '[r]ight, reason, and justice are … everywhere the same' seems to belie his belief that common law rules were provisional and determined by local culture. Carter supposed, however, that Americans were becoming more culturally united, and only as this convergence progressed would the 'reciprocal influence of intellectual and legal culture … bring all private law into unison'. Private law remained culturally determined, but as American culture became more uniform, so too—insensibly—would the law. Codes, on the other hand, cemented disunity into writing unless states enacted exactly the same words with exactly the same interpretation—but the codifiers could not achieve that feat without granting significant authority to an interpretive hierarchy.[84]

In their historical sensibilities, the common law lawyers shared an affinity with amillennialist theologians for the continuity of tradition that changed only imperceptibly and mysteriously. In their efforts at legal unity, they believed the common law promised Catholicism in a non-theological sense: it was an all-embracing method that could adapt within an increasingly unified America.

6. The Christianity of the common law

Many of the arguments for and against codification, as noted, rested on analogies to religious culture. Codifiers charged common law lawyers with acting *like* obscurantist priests, and common law lawyers retorted that codifiers were *like* sectarian Protestants in their naive views of perspicuity and textuality. But what of direct claims that the common law itself was Christian?

Both constitutional litigants and historians today debate whether America was 'founded as a Christian nation', but arguments in the nineteenth century focused not on the Christian character of the nation, but of the nation's common law. Influential common law jurists like Chancellor Kent, Lemuel Shaw, Joseph Story, and Daniel Webster all argued before the Civil War that the common law embodied Christianity and would never run contrary to true religion. By the end of the century, Justice David Brewer (Field's nephew) relied on such pronouncements to write for a unanimous Supreme Court that a 'mass of organic utterances' in American common law proved 'that this is a Christian nation'.[85]

The codifiers tended to be dismissive of such claims. One of their supporters, Francis Wharton explained in his influential criminal treatise that 'the ethical rules of Christianity' had influenced the common law insofar as Americans had 'made indictable breaches of domestic duty which were not criminally punishable by the old Roman law' and that witnesses

[83] Parker (n 53) 40–1, 80–4; on Carter and insensibility, see especially ibid 242. On the codifiers' attitude toward mystery, see note 33 above and text. On the Catholic response to American Protestant millennialism, see Howe (n 37) 319–23.

[84] Carter (n 14) 51–2. Even in the same sentence, Carter affirmed both universal objectivity and cultural determinism: 'Right, reason, and justice are however everywhere the same, and in proportion as the popular standards of different States are cultivated they are brought more and more into unison' (ibid). On linguistic ambiguity and cultural determinism, see nn 44, 55–6 above and text.

[85] See Steven K Green, *Inventing Christian America: The Myth of the Religious Founding* (OUP, Oxford 2015); Stuart Banner, 'When Christianity Was Part of the Common Law' (1998) 16 Law & History Review 27; R Kent Newmyer, *Justice Joseph Story: Statesman of the Old Republic* (University of North Carolina Press, Chapel Hill 1985) 182–4; Linda Przybyszewski, 'Judicial Conservatism and Protestant Faith: The Case of Justice David J. Brewer' (September 2004) 91 Journal of American History 471–96. *People v Ruggles*, 8 Johns 545 (Sup Ct NY 1811) (Kent); *Commonwealth v Kneeland*, 37 Mass (20 Pick) 206 (Sup Ct Mass 1838) (Shaw); *Vidal v Girard's Executors*, 43 US 127 (1844) (Webster); *Church of the Holy Trinity v United States*, 143 US 457, 471 (1892) (Brewer).

customarily took their oath upon a Bible. '[B]eyond this', Wharton declared, 'we have not gone', and the idea of a Christian common law was nonsense. One of Wharton's reviewers agreed that Christianity was 'an affair of the individual alone', its own teaching implying a separation between law and dogma.[86] And Field himself regarded the 'separation of church and state' to be one of the signal achievements of early American law.[87]

Thus, although codifiers frequently drew on Protestant modes of argument, they insisted that Protestantism had nothing to do with American law. Scholars have tended to accept Wharton's view uncritically, that where jurisprudence did not unequivocally cite its theology, Christianity had no substantive influence. Classic works in law and religion, however, have long shown how religious patterns of thought and narrative can structure legal jurisprudence on deeper levels than the mere borrowing of a few ethical rules. Such scholarship raises the suspicion that Wharton, a devout Protestant in a society that privileged Protestantism, could simply ignore how deeply American Protestant thought had shaped the jurisprudential system he described.[88]

None of this means that in nineteenth-century America one's religious views necessarily determined one's stance on codification. A liberal Presbyterian might well have concluded that the doctrines of perspicuity and popular authority properly applied only to the Bible within Christian churches (indeed, this appears to have been the view of Hornblower, a Presbyterian critic of the Field Civil Code). Codification in Canada progressed as a Roman Catholic undertaking as codes seemed to be the best security for Catholic political and religious rights, while the German opponent of codification Carl Friedrich von Savigny considered his jurisprudence an extension of his deeply Protestant commitments.[89]

The point is rather than when many American codifiers argued about authority, interpretation, knowledge, and history, they drew upon a familiar Protestant intellectual culture, framework, and vocabulary. One historian of religion in America has recently argued that the Protestant Bible was 'primarily a medium through which public discourse happened' in the nineteenth-century United States, 'rather than primarily a substantive source for that discourse'. That is, 'people said what they had to say in the language of the Bible'.[90] One could conclude much the same about the codification debates—not that a particular theology dictated a stance or method on codification, but that when lawyers argued about the law, they did so using discursive tools supplied by their religious context.

This affinity gave the American codification debates a different character from those in England or Europe. On the other side of the Atlantic, the leading proponents of positivism and codification—Comte, Mill, Bentham, Austin, Cambacérès, Thibaut—all tended to be irreligious or religious radicals, dismissive of traditional Catholic and Protestant Christianity alike. In America, religiously indifferent or heterodox lawyers were more often defenders of a conventional legal method. In their opposition to the Protestant impulses underlying American codification, they emphasized tradition, hierarchy, mystery, and continuity, and they aligned their arguments—ironically at times—with those of American Catholics or Old School Calvinists.

[86] Miller (n 30) 197; AH Wintersteen, 'Christianity and the Common Law' (1890) 38 American Law Register 284–5 (quoting Francis Wharton, *Philosophy of Criminal Law* (Kay & Brother, Philadelphia 1880) 28–9).

[87] David Dudley Field, 'American Progress in Jurisprudence' (1896) 44 American Register and Law Review 545–6.

[88] See especially Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom* (Princeton UP, Princeton NJ 2007); Harold J Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard UP, Cambridge MA 1983); Robert M Cover, 'The Supreme Court 1982 Term—Foreword: *Nomos* and Narrative' (1983) 97 Harvard Law Review 4.

[89] See generally Hornblower (n 56). See Young (n 2) 117–20; James Q Whitman, *The Legacy of the Roman Law in the German Romantic Era: Historical Vision and Legal Change* (Princeton UP, Princeton NJ 1990) 3–40.

[90] Lincoln A Mullen, *America's Public Bible: A Commentary* (Stanford UP, Palo Alto CA 2022) <https://americaspublicbible.supdigital.org/essay/introduction/>.

IV. CONCLUSION

American proponents of codification cast their proposals in the language and logic of the liberal Protestantism that rose to prominence in the nineteenth century. Where their theological commitments seemed to support their jurisprudence, Protestant codifiers readily drew the connections and offered them as compelling arguments. Authority, perspicuity, epistemology, and millennialism could be joined in a coherent world-view for both law and religion. Because their theological convictions were so widely held, codifiers had the luxury of denying religious schema as the source of their thought and claiming a natural common sense as the basis of their reforms.

In attacking these positions, common law defenders struck at the assumptions of American Protestantism, often mirroring the arguments propounded by American Catholics or Old School Protestants. But unlike their opponents, common law lawyers rarely acted from religious motivation (committed Catholic apologists like Orestes Brownson excepted). If lawyers like James C Carter and his associates ever realized that their attack on American codification and its Protestant underpinnings echoed Catholic theology, they had nothing to gain in saying so.[91] Rather, like the Gilded Age elites studied in Jackson Lears's classic account, common law lawyers embraced Catholic forms—either for functional or aesthetic reasons—while rejecting Catholic dogma.[92]

Paying attention to the theological structure of the debates can help us understand why this chapter in American legal history seems to have closed with the nineteenth century. The intensity of the codification controversy came to an abrupt end as the structure of thought known as 'modernism' came simultaneously to American theology and American law: the liberal biblical scholar ('liberal' in the modernist sense) Charles Augustus Briggs was acquitted of heresy just before Oliver Wendell Holmes Jr penned 'The Path of the Law'.[93] Creating and elevating the role of the expert social scientist, modernism offered a paradigm that rejected both popular authority *and* tradition, common sense *and* romantic mystery. Part of the codification project endured, but undergirt with a new philosophy.[94] Furthermore, the dismantling of the Protestant establishment in the twentieth century allowed space for opposition to legal realism to arise from Roman Catholic jurists in fully confessional terms.[95]

The continuation of statutory consolidation in the era of legal modernism has obscured the significant discontinuity of thought between the nineteenth century codifiers and the modern theorists of legislation. The basis for the codifiers' positivism, their optimistic views on perspicuity, and their millennial zeal pose significant challenges for those who wish to see the codifiers as rational champions of statutory law, living ahead of their time. More than that, this history undermines the pretentions of our present textualism to ground itself in either universal methods or methods established by 'history and tradition' in American law. Building on Jonathan Gienapp's argument that the founding generation itself did not hold to the

[91] For the most part, the Protestant structure of American codification theory was worked out before the rise of Catholic immigration to the US and the often extreme, often violent anti-Catholic backlash. While anti-Catholic imagery was ubiquitous among the early codifiers, especially the writings of William Sampson and David Dudley Field, it tended to be oriented around critique of the *ancien régime* of the Continent, rather than any near neighbors. Still, there would have been very little incentive for the common law lawyers to make common cause with Catholic thought until the twentieth century. See especially, Farrelly (n 46).

[92] TJ Jackson Lears, *No Place of Grace: Antimodernism and the Transformation of American Culture* (University of Chicago Press, Chicago 1981) 183–98.

[93] Mark S Massa, 'Mediating Modernism: Charles Briggs, Catholic Modernism, and an Ecumenical "Plot"' (1988) 81 Harvard Theological Review 413; Oliver Wendell Holmes, 'The Path of the Law' (1897) 10 Harvard Law Review 457; David J Seipp, 'Holmes's Path' (1997) 77 Boston University Law Review 515.

[94] See Parker (n 53) 4–11; Edward Purcell, *The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value* (University Press of Kentucky, Lexington KY 1973) 159–80.

[95] See John M Breen and Lee J Strang, 'The Forgotten Jurisprudential Debate: Catholic Legal Thought's Response to Legal Realism' (2014) 98 Marquette Law Review 1203; Neil Duxbury, 'The Reinvention of American Legal Realism' (1992) 12 Legal Studies 137

positivisms of our present moment or even perceive the Constitution as an 'exclusively written text', the codification debates supply the second act of the story, one in which confidence in texts, their clarity, and their authority had to be constructed out of cultural tools that were not yet available at the founding nor remain in much use among elite legal circles today.[96]

Engaging in this excavation of an earlier textualism reveals that on occasion it was the common law lawyers, so often depicted in the literature as curious premodern specimens, who could actually appear ahead of their time. After all, the problem of language and the uncommonness of common sense were not phenomena suddenly discovered in the 1970s. Common law lawyers made these concepts the heart of their critique, in some ways anticipating and seeking to avoid the problems of statutory interpretation that have arisen in recondite battles over, for instance, the distinction between 'construction' and 'interpretation' or 'the meaning of original meaning'.[97] On this account, the common law lawyers are not so strange as they have seemed, nor the codifiers so familiar. Perhaps it for such accounts that we turn to history—and to theology.[98]

[96] Gienapp (n 8) 322. On the Supreme Court's recent and historic veneration of 'history and tradition', see Aaron Tang, 'After *Dobbs*: History, Tradition, and the Uncertain Future of a Nationwide Abortion' (2023) 75 Stanford Law Review 1091; Richard L Heppner, 'Rooted: Metaphors and Judicial Philosophy in *Artis v. District of Columbia*' (2023) 56 Indiana Law Review 329.

[97] See, for instance, Lawrence B Solum, 'The Interpretation–Construction Distinction' (2010) Constitutional Commentary 95–118; Christopher R Green, 'Originalism and the Sense–Reference Distinction' (2006) 50 St Louis University Law Journal 555–627; Mark D Greenberg and Harry Litman, 'The Meaning of Original Meaning' (1998) 86 Georgetown Law Journal 571.

[98] Walter Benjamin, *The Arcades Project* (tr Howard Eiland and Kevin McLaughlin, Harvard UP, Cambridge MA 1999) 471 N7a, 7, N8, 1.

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