

CODES, CULTURES, CHAOS, AND CHAMPIONS: COMMON FEATURES OF LEGAL CODIFICATION EXPERIENCES IN CHINA, EUROPE, AND NORTH AMERICA

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SYNOPSIS

What are the key conditions and factors that contribute to a successful effort within a political unit to create a new legal code? This article builds on the existing "comparative codification" literature by examining that question in the context of three very different legal traditions: dynastic Chinese law, European civil law, and North American common law. Drawing on nine important codification experiences—four from China, two from Europe, and three from North America—the author posits that three conditions must exist in a legal system for codification to occur: (i) that written law is generally regarded favorably as a means of ordering society; (ii) that the top political authority in the society is powerful enough to impose a code; and (iii) that such top political authority is eager to champion the cause of codification. Assuming these three necessary conditions are present, several key contributing factors—for example, cultural change and legal chaos—further augur in favor of codification. The author identifies five such factors and illustrates their importance in each of the nine

codification experiences. The article concludes with some observations about (i) the value of including traditional Chinese law in comparative codification studies and (ii) the interplay between the concentration of political power (lacking, for example, in the international legal system) and the likelihood of legal codification.

I. INTRODUCTION

A. Aims and Overview

Much has been written over the years about legal codification in Europe and, to a lesser extent, in North America. Indeed, an extensive “comparative codification” literature has developed.¹ From this extensive legal scholarship have come various theories about the conditions and factors that contribute to a successful effort within a legal system to create a new legal code.²

In contrast, relatively little attention has been given in the West to the dynastic Chinese experience with legal codification. This lack of attention derives in part from the paucity of reliable information available on the subject in Western languages. Recently, however, substantially more information has come to light in the West about Chinese legal codification, and about dynastic Chinese law generally. For example, in the last half-century numerous archeological finds have yielded remnants of legal codes dating from the Qin and Han eras.³ Moreover, just in the past decade, reliable English translations

1. For examples of contributions to this “comparative codification” literature, see George Lee Haskins, *Codification of Law in Colonial Massachusetts: A Study in Comparative Law*, 30 IND. L.J. 1 (1954) [hereinafter Haskins-1954]; FREDERICK H. LAWSON, A COMMON LAWYER LOOKS AT THE CIVIL LAW 34-64 (1953) [hereinafter LAWSON-1953]; JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION 26-33 (1985); ALAN WATSON, THE MAKING OF THE CIVIL LAW 99-143 (1981). References to comparative codification also appear in some of the other sources cited *infra* notes 2, 17, 148, and 235.

2. For examples of such codification theories, see generally Daphne Barak-Erez, *Codification and Legal Culture*, 13 TUL. EUR. & CIV. L.F. 125 (1998); Michael Berger, *Codification*, in PERSPECTIVES IN JURISPRUDENCE 142 (Elspeth Attwool ed., 1977); Mirjan Damaska, *On Circumstances Favoring Codification*, 52 REV. JUR. U.P.R. 355 (1983); Bruce Donald, *Codification in Common Law Systems*, 47 AUSTR. L.J. 160 (1973); Attila Harmathy, *Codification in a Period of Transition*, 31 U.C. DAVIS L. REV. 783 (1998); Gunther A. Weiss, *The Enchantment of Codification in the Common-Law World*, 25 YALE J. INT'L L. 435 (2000).

3. Much of the credit for bringing these finds to the attention of Western scholars belongs to A.F.P. Hulswé, whose works on Qin and Han law are cited *infra* note 17.

of two key dynastic codes from later eras—the Tang and the Qing—have appeared.⁴

In this article, I attempt to broaden the scope of “comparative codification” to encompass Chinese experience with legal codes.⁵ Without attempting to be at all comprehensive, I offer illustrations of that experience and compare it with selected codification experiences in Europe and North America; and against that backdrop I explain my own perspective on the conditions and factors that can lead to codification.

For these purposes I have chosen nine codification experiences: four from China, two from Europe, and three from North America. For the first two Chinese examples, I look to the third century BCE (B.C.), when the state of Qin unified China and then quickly fell to the Han dynasty. We have a thin but growing body of evidence regarding the codified law issued in this period. I then turn to the seventh century CE (A.D.) and the Tang dynasty, a high point in Chinese cultural development and also, because of its Tang Code, in Chinese legal development. Lastly I look to the fourteenth century CE, when the Ming dynasty succeeded the Mongol (Yuan) dynasty, thus returning China to ethnic Chinese rule, evidenced in part by the enactment of the Ming Code.

For the European examples, I briefly survey the codification efforts of Justinian and Napoleon, which resulted in perhaps the two most celebrated codes in the civil law tradition. My aim in doing so is to suggest some likenesses that these two efforts bear to the Qin, Han, Tang, and Ming codification experiences in China.

For my three North American examples, I consider first the seventeenth-century Massachusetts exercise that yielded the *Laws and Liberties of Massachusetts* and then turn to two codification efforts in nineteenth-century America: the national codification movement that reached a high point around the 1830s, and then a follow-on effort orchestrated mainly by David Dudley Field in New York. In examining

4. The Tang Code has been translated by Wallace Johnson of the University of Kansas, whose work appears in two volumes: WALLACE JOHNSON, *THE T'ANG CODE, VOL. 1—GENERAL PRINCIPLES* (1979) [hereinafter JOHNSON-1979]; WALLACE JOHNSON, *THE T'ANG CODE, VOL. 2—SPECIFIC ARTICLES* (1997) [hereinafter JOHNSON-1997]. The Qing Code has been translated by Bill Jones of Washington University, in WILLIAM C. JONES, *THE GREAT QING CODE* (1994).

5. I expect to publish in 2003 a much longer account of China's experience with legal codes, in the form of a book tentatively titled *LAW CODES IN DYNASTIC CHINA: A SYNOPSIS OF CHINESE LEGAL HISTORY IN THE THIRTY CENTURIES FROM ZHOU TO QING*.

these North American codification efforts, and comparing them with the Chinese and European examples, my aim is to illustrate some similarities and dissimilarities that I consider most important in discerning what conditions and factors—political, legal, and social in character—seem to be most important for codification efforts to succeed.

B. Definitions and Theories of Codification

Before describing specific codification experiences, I offer both a working definition of codification and the general thesis that I intend to develop in this article.

1. “*Codification.*” In defining codification, I opt for simplicity, aware that many different definitions are possible⁶ and that choosing one can bear importantly on the analysis of conditions and factors of codification. For my purposes, “codification” is the process by which the top authority in a political unit puts into effect for the legal system of that political unit a single, newly conceived, legally binding “code.” I define a “code” in turn as a body of rules that, while not necessarily comprehensive or perfectly clear and consistent, is intended to cover all or most aspects of a major area of law within the legal system, such as civil law, criminal law, or procedural law. “Codification” excludes a reissuance or recension of an existing code of laws currently in force, or a revision of such a code unless the revision radically

6. See WATSON, *supra* note 1, at 99–100 (noting that “what may be envisaged as a code can vary enormously, even within the Western tradition” and then turning his attention mainly to “successful modern Western codification,” in the context of which he defines a “code” as “a written work that is intended to set out authoritatively at least the principles and basic rules of a wide field of law, such as the whole of private law, commercial law, or criminal law, or of criminal and civil procedure”). For various definitions, see Haskins–1954, *supra* note 1, at 2 (distinguishing “ancient” codes from “modern” codes, the latter of which are “normally associated with mature systems of law and generally contain what may be termed an ideal element”); Jean Louis Bergel, *Principal Features and Methods of Codification*, 48 LA. L. REV. 1073, 1077 (1988) (defining “true codification” as “devising and shaping a coherent body of new or renovated rules within a whole aimed at instituting or reviewing a legal order” (quotation omitted)); Mark D. Rosen, *What Has Happened to the Common Law?—Recent American Codifications, and Their Impact on Judicial Practice and the Law’s Subsequent Development*, WIS. L. REV. 1119, 1127 (1994) (“Codification refers to the legislative pronouncement of previously fluid judge-made law in an organized and authoritative form.”); André Tunc, *Codification: The French Experience*, appearing in PROBLEMS OF CODIFICATION (S.J. Stoljar, ed., 1977) (including in his analysis of codification both “a codification *stricto sensu* and an enactment or statute that purports to contain all the main principles or rules concerning a matter,” but excluding a statute such as “the English Companies Act 1948 . . . because several basic principles of company law are still only to be found in precedents”).

changes either the structure or content of that code. A “codification” is also to be distinguished from an unofficial “compilation” that constitutes a collection of legal rules (perhaps with added commentary or structure) but that does not itself have the force of law.⁷

2. *Conditions and factors of codification.* Here is my central thesis: Codification, as I have defined it above, depends for its success on a convergence of various conditions and factors. Specifically, for codification to occur, three conditions must exist in the legal system:

- High regard for written law. The first condition is that written law is generally regarded favorably as a means of ordering society. That is, most persons having power and influence within the political unit find it appealing, or at least acceptable, that rules of behavior take the form of official law and that they are written. I refer to this hereinafter as the “regard-for-written-law” condition.⁸
- High concentration of political power. The second condition is that the top political authority is strong enough to impose a code. That is, the lawmaking power within the political unit is not so divided among competing players as to make it impossible to promulgate a comprehensive set of laws applica-

7. It may be noticed that this definition would not encompass some documents that are commonly referred to as codes—for example, the Codex Gregorianus of the late third century CE or the Uniform Commercial Code (UCC) of twentieth century America. The first of these was a “private compilation[] of the enactments of the emperors . . . to serve the needs of legal practitioners” and was a forerunner of later official codifications, including the Justinian codification. A. ARTHUR SCHILLER, *ROMAN LAW: MECHANISMS OF DEVELOPMENT* 55 (1978). The UCC has no force of law at the national level; instead, its status as a legal matter is merely that of proposed legislation unless and until it is enacted (typically with modifications) within a particular state of the United States. My definition of “code” and “codification” might also exclude other important documents or enactments, such as “borrowed” codes—that is, legal codes imposed on a colony or even adopted by a former colony after political independence. These are beyond the scope of this study, and I do not know whether the thesis I offer below about the conditions and factors of codification would hold true in such cases.

8. For references by other writers to something akin to the “regard-for-written-law” condition, see ROSCOE POUND, 3 *JURISPRUDENCE* 679 (1959) [hereinafter POUND, *JURISPRUDENCE*] (observing that “the subject of codification is intimately connected with the idea of a written law”); HENRY SUMNER MAINE, *ANCIENT LAW* 12–13 (1861) (noting that the value of “ancient codes” such as the Twelve Tables of Rome consisted “in their publicity, and in the knowledge which they furnished to everybody, as to what he was to do, and what not to do” and that the point at which a code emerges in a society turns on “at what stage of their social progress, they should have their laws put in writing”). This “regard-for-written-law” condition would probably be similar to a condition that a legal society accept the “rule of law,” but I shall not discuss that similarity here.

ble to the entire political unit. I refer to this hereinafter as the “power concentration” condition.⁹

- A champion for codification. The third condition is that the top political authority has a strong enough desire to impose a code that he (or it) is prepared to champion the cause. Expressed differently, there is a person or a set of persons with controlling authority who considers codification to be vitally important for some reason (typically a political reason, such as to strengthen nationalism or to earn a place in history) and is prepared to push for it. I refer to this hereinafter as the “champion-of-codification” condition.¹⁰

Assuming the three necessary conditions for codification (as described above) are present, the following five factors augur in favor of codification. Not all of these five factors need to be present, but as more of them become present, codification becomes more likely.

- The existing law is chaotic or difficult to ascertain—for example, located in multiple sources, partially or largely unwritten, internally inconsistent, or tangled in its structure. I refer to this hereinafter as the “legal chaos” factor.¹¹

9. For references by other writers to something akin to the “power concentration” condition, see POUND, *JURISPRUDENCE*, *supra* note 8, at 704 (explaining that “[i]n the case of each original code there was a strong organ of legislation which could ensure adequate preliminary study and resist the pressure of those who were not competent to the work.”); WATSON, *supra* note 1, at 100 (noting that codification “require[s] considerable political backing or at least consent”); Damaska, *supra* note 2, at 359–69 (describing “favorable political environment” as a factor necessary for successful codification and noting that high concentration of political power eases codification); Harmathy, *supra* note 2, at 794 (noting that the system of political administration, including apparently the strength of central political authority, influences the style of codification).

10. For references by other writers to something akin to the “champion-of-codification” condition, see WATSON, *supra* note 1, at 102 (arguing that the “power or persuasiveness of one individual” is not a sufficient condition to codification, but implicitly acknowledging the influence that such an individual can have); Harmathy, *supra* note 2, at 792–93 (discussing the factor of “political will” as the central feature of codification). The second and third conditions I have described here—the “power concentration” condition and the “champion-of-codification” condition—might be regarded as a single condition that there be a political authority with both the power and the will to impose a code. I prefer to keep the two elements (power and will) separate in order to highlight which of them was missing in different instances in which codification did not occur.

11. For references by other writers to something akin to the “legal chaos” factor, see LAWSON–1953, *supra* note 1, at 49 (finding codification sometimes occurring “in countries which had in the past suffered from a diversity of legal systems”); POUND, *JURISPRUDENCE*, *supra* note 8, at 701–05 (noting that one of the factors in classical codifications was unwieldiness and uncertainty of law); WATSON, *supra* note 1, at 101 (noting that “one strong impulse toward codification has frequently been the complexity and amount of the existing law”); Berger, *supra*

- The existing law is inconsistent with radical political changes that have just occurred—for example, a change in the form of government, the overthrow of a monarchy, or the dissolution or merger of political units. I refer to this hereinafter as the “radical political change” factor.¹²
- The existing law is behind the times generally—for example, substantially out of step with the social status of one or more segments of the population, or silent on matters now important because of technological or economic advances. I refer to this hereinafter as the “behind-the-times” factor.¹³ Whereas the “radical political change” factor turns on political structures and changes, this “behind-the-times” factor turns on other important changes of a cultural nature.
- A “model” code from an earlier time is available and is culturally relevant to the people of the political unit. I refer to this hereinafter as the “model code” factor.¹⁴

note 2, at 143 (explaining that “[c]odification is also a powerful instrument for the unification of countries which have experienced a diversity of legal systems or local customs”).

12. For references by other writers to something akin to the “radical political change” factor, see LAWSON-1953, *supra* note 1, at 49 (finding codification sometimes occurring “in countries which have just undergone a revolution and wish to recast their law quickly from top to bottom” or which have “come into existence by a union of territories governed by different laws”); POUND, JURISPRUDENCE, *supra* note 8, at 704 (noting that codifications are likely where the traditional development of the law came to an end and thus “a new basis is required for a juristic new start”); WATSON, *supra* note 1, at 102 (acknowledging the importance of radical political change, but suggesting that Lawson’s emphasis on it overlooks some instances of codification); Berger, *supra* note 2, at 143 (stating that “[c]ountries which have undergone a revolution may wish to recast their law almost completely . . . [and] [c]odification then provides a suitable means of starting from scratch by approaching the law as a whole and allowing a minimum of rules to survive”); Bergel, *supra* note 6, at 1077 (explaining that “the greatest codifications responded to important political, social or technological changes, usually occurring after revolutions or following a country’s accession to independence”); Weiss, *supra* note 2, at 467 (observing that codifications “often served to attain legal *and political* unity in a given territory with previously heterogeneous legal sources” and entailed varying degrees of law reform).

13. For references by other writers to something akin to the “behind-the-times” factor, see POUND, JURISPRUDENCE, *supra* note 8, at 701–05 (noting that one of the factors in classical codifications was obsolescence of legal rules and doctrines); J.G. SAUVEPLANNE, CODIFIED AND JUDGE MADE LAW: THE ROLE OF COURTS AND LEGISLATORS IN CIVIL AND COMMON LAW SYSTEMS 7 (1982) (noting that French codification was conceived as a result of revolutionary changes in the society). See also Donald, *supra* note 2, at 173 (observing that “ripeness” is an important factor of codification).

14. For references by other writers to something akin to the “model code” factor, see POUND, JURISPRUDENCE, *supra* note 8, at 694–95 (listing various national codes that derived directly or indirectly from the French Code); SAUVEPLANNE, *supra* note 13, at 8–9 (discussing the influences of classical European codes on various national codes around the world); WATSON, *supra* note 1, at 103 (drawing a connection between “the success of codification in the

- Legal scholars and jurists play a highly important or influential role in the legal system—such that it is natural for practicing attorneys, judges, and legislators to turn to the work of jurists and scholars¹⁵ for guidance in designing, drafting, and applying laws. I refer to this hereinafter as the “scholar/jurist influence” factor.¹⁶

Why might any of this be interesting? Because, like other comparative studies of law, an examination of similarities and dissimilarities in the codification experiences of two or more legal systems can help us better understand each of those legal systems. More particularly, my aim in enumerating various conditions and factors of codification is to provide a framework in which to undertake such an examination. For me, this is not a predictive exercise—to anticipate, for example, where codification might strike next—but instead an explicative one. Ultimately, the value of the exercise rests in a deeper understanding of the legal systems under consideration. One of them, the Chinese legal system, is not only intrinsically fascinating but also largely unfamiliar to most Western students of law. I begin with it.

civil law systems” and those systems’ “acceptance, past or present, of the *Corpus juris* or part of it as authoritative” and the corresponding use by those systems of Justinian’s *Institutes* in particular as a model); Alexander Alvarez, *The Influence of the Napoleonic Codification in Other Countries*, in *THE PROGRESS OF CONTINENTAL LAW IN THE NINETEENTH CENTURY* 251, 251–56 (Joseph H. Drake et al. eds., 1918) (discussing expansion of the French Code abroad and its influence on national codes).

15. I use the term “scholars” to mean lawyers that are oriented primarily toward a scientific, academic, or theoretical study of law, as distinct from “practitioners” that are solely practice-oriented. I use the term “jurists” to mean lawyers that blend the two approaches by having a large component of practice to their career, often by serving in some official capacity within the legal system—judge, advisor—but doing so with a clear view of or curiosity about the system as a whole and an inclination to write about it from a critical or scholarly perspective. The concept of a jurist derives from the Roman *jurisconsult*, who Merryman says “is considered to be the founder of [the] scholarly tradition” in the development of the civil law. MERRYMAN, *supra* note 1, at 57. On Roman jurists generally, see BRUCE W. FRIER, *THE RISE OF THE ROMAN JURISTS* (1985). See also THOMAS GLYN WATKIN, *AN HISTORICAL INTRODUCTION TO MODERN CIVIL LAW* 27–30 (1999) (describing the development of jurists and their activities).

16. For references by other writers to something akin to the “scholar/jurist influence” factor, see Barak-Erez, *supra* note 2, at 137 (asserting that “[e]very legal reform needs theoretical and ideological backing, especially if it goes counter to tradition.”); Damaska, *supra* note 2, at 365 (suggesting that “supportive legal scholarship” is an important factor in sustaining codification); Harmathy, *supra* note 2, at 796–97 (noting that strong theoretical basis is required for codification).

II. CHINESE EXPERIENCES WITH LEGAL CODIFICATION¹⁷

A. Codification in the Qin Period

1. *The historical setting.* A brief synopsis is in order. The third century BCE may be viewed as the defining period of Chinese unification. In 221 BCE, the state of Qin, one of various warring states, prevailed over the others and brought centralized rule to most of what is now east-central China. The Qin dynasty lasted only about fifteen years and was succeeded by the Han dynasty, which lasted roughly four centuries. It is this pair of dynasties—dramatically different from each other in several crucial respects—that set the course of Chinese law for roughly two thousand years.

For purposes of studying legal codification in this period, we should start with the great debate that engaged political and intellectual leaders of China beginning around the time of Confucius (551–479 BCE). The debate centered on the notions of *li*, *xing*, and *fa*. The first of these, *li*, originally referred to rituals and ceremony but gradually expanded in meaning to refer to a general code of proper human conduct in society. Confucius, harking back to what was

17. In writing this portion of the article, I have relied on the following authorities (listed in alphabetical order): Derk Bodde, *The State and Empire of Ch'in*, appearing as Chapter 1 in Volume I of the CAMBRIDGE HISTORY OF CHINA (1986) [hereinafter CHC-I-Bodde]; DERK BODDE & CLARENCE MORRIS, *LAW IN IMPERIAL CHINA* (1967); PAUL HENG-CHAO CH'EN, *CHINESE LEGAL TRADITIONS UNDER THE MONGOLS* (1979); T'UNG-TSU CH'Ü, *LAW AND SOCIETY IN TRADITIONAL CHINA* (1961); JOHN KING FAIRBANK, *CHINA—A NEW HISTORY* (1992); A.F.P. HULSEWÉ, *REMNANTS OF CH'IN LAW* (1985) [hereinafter HULSEWÉ-1985]; A.F.P. HULSEWÉ, *REMNANTS OF HAN LAW* (1955) [hereinafter HULSEWÉ-1955]; A.F.P. Hulsewé, *Ch'in and Han Law*, appearing as Chapter 9 in Volume I of the CAMBRIDGE HISTORY OF CHINA (1986) [hereinafter CHC-I-Hulsewé]; John D. Langlois, Jr., *Ming Law*, appearing as Chapter 3 in Volume VIII of the CAMBRIDGE HISTORY OF CHINA (1998) [hereinafter CHC-VIII-Langlois]; John D. Langlois, Jr., *The Code and ad hoc Legislation in Ming Law*, *ASIA MAJOR*, 3rd ser., vol. 6, part 2 (1993) [hereinafter Langlois-1993]; SIMON LEYS, *THE ANALECTS OF CONFUCIUS* (1997); F.W. MOTE, *IMPERIAL CHINA, 900–1800* (1999); LUCIAN W. PYE, *CHINA—AN INTRODUCTION* (4th ed. 1991); J.A.G. ROBERTS, *A CONCISE HISTORY OF CHINA* (1999); BRADLEY SMITH & WAN-GO WENG, *CHINA—A HISTORY IN ART* (1978); MICHAEL SULLIVAN, *THE ARTS OF CHINA* (3rd ed. 1984); and various essays in *ESSAYS ON CHINA'S LEGAL TRADITION* (Jerome Alan Cohen et al. eds., 1980) [hereinafter ECLT]. I also have drawn from three Chinese-language texts as studied and partially translated by my assistant Ms. Wang Yanping: *CHINESE LEGAL HISTORY* (Zhang Jin Pan ed., 1991); *CHINESE LEGAL PHILOSOPHY OUTLINE* (Zhang Guo Hua & Nao Xin Xian eds., vol. 1 (1984) and vol. 2 (1987)); and *SELECTED MATERIALS ON THE HISTORY OF CHINESE LEGAL PHILOSOPHY* (Justice Ministry Law Textbook Editing Dept. ed., 8th ed. 1983).

regarded as a glorious past of the Western Zhou dynasty (circa 12th century BCE to 771 BCE), endorsed the notion of *li* and urged that good government should use *li* as a guiding light; the state should be governed by individuals of impeccable character whose behavior in strict compliance with the dictates of *li* would serve as such a compelling example to their subjects that punishment (*xing*) would be unnecessary, or nearly so. Under Confucianist thought, the requirements of *li* as they applied to a specific individual depended on the place that such individual occupied in the family and in the polity.¹⁸

Pitted against this Confucianist view was the Legalist view. The Legalist School (*Fa Jia*) regarded stern punishments (*xing*) as absolutely necessary for good government, on grounds that law should be concerned with the majority in society who are selfish, not with the insignificant few in society who are as good as Confucius would (unrealistically) suggest. Hence, Legalist thought discounted the importance of *li* as a practical means of social control and focused instead on *fa*—written law specifying the punishments (*xing*) that any breach of that law would trigger.¹⁹

A central issue in the Confucianist-Legalist debate was therefore whether society should be governed (i) by unwritten rules of proper behavior (*li*) transmitted by one generation to the next and enforced by peer pressure or, instead, (ii) by written, published laws (*fa*) specifying punishments for breach. Confucianists took the former position; Legalists took the latter.

Several developments in the sixth through third centuries BCE suggest that the Legalists won the debate. For example, in 536 BCE the ruler of one of the states competing for power had *xing shu*

18. For an account of Confucianist views, including the importance of the precepts of *li*, see BODDE & MORRIS, *supra* note 17, at 19–23. One authority emphasizes in this way the significance that proper conduct held for Confucius, both as a matter of government and as a matter of family relations:

Confucius believed strongly in the importance of ritual and ceremony and in the value of politeness and good manners. The correct performance of ritual was an essential part of the government of a state. Within a family it was important to observe the niceties of behaviour to others and to apply restraint with regard to eating, drinking and dress. Confucius placed particular stress on the importance of filial piety, which implied obedience to one's parents during their lifetime and care for them as they grew old.

ROBERTS, *supra* note 17, at 15.

19. For an account of Legalist views, including the importance of *fa*, see BODDE & MORRIS, *supra* note 17, at 23–27.

(books of punishment) cast on the sides of bronze tripod vessels,²⁰ apparently attracting sharp criticism from other states' rulers who felt threatened by a move toward written laws and punishments.²¹ Later, in 400 BCE, according to some accounts, the Legalist scholar Li Kui wrote a code in six parts called the *Canon of Laws (Fa Jing)*.²² Still later, in the fourth century BCE, Shang Yang, a minister of the state of Qin, is said to have prepared another code (the *Shang Yang Lü*) as part of a program of radical government reform that embraced Legalist views.²³

2. *Unification of China and promulgation of the Qin Code.* The most tangible triumph of Legalism came, however, in the third century BCE. Continuing a ruthless Legalist program, the state of Qin defeated its rivals and in 221 BCE founded the first universal Chinese empire.²⁴ The key figure in this drama was Ying Zheng, the king of the state of Qin. Upon completing his military campaign, he assumed the title of Qin Shi Huangdi, the First Emperor of Qin, and began im-

20. See *id.* at 16; CH'Ü, *supra* note 17, at 171. Tripod vessels symbolized authority and political power holding "a lofty position among the ruling class" during the Zhou dynasty. Liang Zhiping, *Explicating "Law": A Comparative Perspective of Chinese and Western Legal Culture*, 3 J. CHINESE L. 55, 71-72 (1989). They were a means of preserving royal orders. *Id.* at 32.

21. An often-quoted letter sent by the leader of a nearby state to the prime minister of the state of Cheng (where the *xing shu* had been inscribed on the bronze tripod vessels) describes the dangers inherent in writing down the laws and punishments: "When the people know what the exact laws are, they do not stand in awe of their superiors. They also come to have a contentious spirit, and make their appeal to the express words, hoping peradventure to be successful in their argument. They can no longer be managed." CH'Ü, *supra* note 17, at 171. A nearly identical translation of this letter appears in BODDE & MORRIS, *supra* note 17, at 16-17. At least one Chinese legal scholar contests the authenticity of the letter. See Herrlee Glessner Creel, *Legal Institutions and Procedures During the Chou Dynasty*, in ECLT, *supra* note 17, at 28.

22. References to Li Kui's code appear in numerous Chinese-language legal histories from various periods, but Western scholars have expressed doubts about its existence, at least in 400 BCE. See BODDE & MORRIS, *supra* note 17, at 58; Creel, *supra* note 21, at 37.

23. Shang Yang's reform program involved an "ending [of] the devolution of power to hereditary landowners in favour of direct state administration," dramatic land reform, and the imposition of strict laws and punishment under a comprehensive code. ROBERTS, *supra* note 17, at 20-21. The career and role of Shang Yang, who is perhaps the most famous and influential Legalist, appears in this passage from a Chinese-language treatise:

[Shang Yang] once served as an official under the prime minister of Wei. He was familiar with the philosophy and practice of Li Kuei [Li Kui] [.]. When Qin Xiao Gong (the king of the state of Qin) was taking office, he advertised in order to attract knowledgeable and capable people. [Shang Yang] went to Qin, with the Fa Jing [Li Kui's Canon of Laws] in his hand, and gained Qin Xiao Gong's trust. He was authorized to reform the law in Qin.

CHINESE LEGAL PHILOSOPHY OUTLINE, *supra* note 17, at 179.

24. SULLIVAN, *supra* note 17, at 40.

plementing a breathtaking array of reforms and projects. These included dividing the newly-acquired territories into commanderies and prefectures and placing them under the control of central government officials, standardizing weights and other measurements, constructing a network of roads, circulating standard gold and copper coins, developing a standard script to be used in official communications, and building palaces.²⁵ Qin Shi Huangdi also mounted a crusade of terror against Confucianist scholars and scholarship, ordering the death of 460 scholars (by burying them alive, allegedly, although perhaps they were murdered)²⁶ and ordering a burning of classic works such as the *Book of Songs* and the *Book of Documents*, mainstays in Confucianist literature.²⁷

Most important for our purposes, it was also upon Qin Shi Huangdi's assumption of power that "the [Qin] law code . . . was made standard for the entire empire."²⁸ The Qin Code may therefore be regarded as the first Chinese legal code with comprehensive geographic coverage. The evidence we have of its actual content derives mainly from three sources: (i) the Legalist propositions attributed to the fourth-century Shang Yang, as mentioned above (for example, that "[n]othing is more fundamental in removing evil than severe punishment"²⁹), (ii) a collection of bamboo slips found in the mid-

25. See FAIRBANK, *supra* note 17, at 56. See also ROBERTS, *supra* note 17, at 23–24. Consistent with these extraordinarily ambitious undertakings, Qin Shi Huangdi also had his own burial tomb constructed so as to contain over 7,000 life-size terra cotta figures of soldiers. *Id.* at 25.

26. See ROBERTS, *supra* note 17, at 24; FAIRBANK, *supra* note 17, at 56; SULLIVAN, *supra* note 17, at 54; PYE, *supra* note 17, at 38–39.

27. ROBERTS, *supra* note 17, at 24; BODDE & MORRIS, *supra* note 17, at 27 (noting that the books ordered burned were "the classical texts of antiquity, the writings of the non-Legalist schools of thought, and the historical records of former states other than Ch'in"). The burning of the books was far from complete. FAIRBANK, *supra* note 17, at 56. The death penalty was imposed on anyone found reading or discussing some of those classical texts. SULLIVAN, *supra* note 17, at 54.

28. CHC-I-Bodde, *supra* note 17, at 58.

29. CH'U, *supra* note 17, at 265, quoting from the *Shang-chün shu*, a general work on Chinese history. Other statements attributed to Shang Yang are these: "[I]n a well-governed country punishments are many and rewards are few;" "[p]unish light offenses heavily; if light offenses do not appear, heavy offenses will not occur. This is what is called using punishment to abolish punishment." Creel, *supra* note 21, at 45 (citing *The Book of Lord Shang*). These and similar propositions attributed to Shang Yang are rather vague and general, in the nature of maxims rather than rules. In the *Book of Lord Shang*, setting forth Shang Yang's views, "detailed reference . . . to legal institutions and procedures is minimal." "Law is mentioned constantly, but it is only very occasionally that there is allusion to particular statutes or specific pen-

1970s in the grave of a Qin government official,³⁰ and (iii) the *Han shu*, an official history of the Han dynasty.

The bamboo slips found in the mid-1970s include provisions prescribing punishments for men who failed to report when called up for required labor on public projects, for government officials if they did not register young men for military service, and for persons who were caught stealing, fighting, killing their children or slaves without official permission, deviating from the established weights or measures in the transfer or storage of grain, or failing to care properly for horses.³¹ Because the bamboo slips belonged to a subordinate local official, they mainly deal with administrative law.³² A picture of Qin penal law appears, however, from the *Han shu*: “Ch’in [Qin] put together Shang Yang’s laws of mutual responsibility and created . . . the execution of kindred to the third degree[.] In addition to bodily mutilation and capital punishment, there were the punishments of chiseling the crown, extracting ribs, and boiling in a cauldron.”³³ Other punishments in Qin law included beheading, cutting in two at the waist, tearing apart by chariots, and execution preceded by mutilations.³⁴

3. *Conditions and factors of codification.* The specific provisions of the Qin Code are of less interest for our purposes than are the circumstances in which the code arose. It appears that all three of the necessary conditions to codification, as I posited them above in part I.B. of this article, were present in the Qin experience. First, the “regard-for-written-law” condition was satisfied: published law was generally regarded favorably as a means of ordering society. Indeed, that was a key element of the Legalist doctrine that led to Qin success. As noted above, the influential Shang Yang, serving as a minister in the state of Qin in the century before unification, had urged that the laws should be published so as to be known by all, and to this end “[p]illars were erected in the capital (probably in front of the pal-

alties.” “The impression is constantly given that the mere existence of law is all that is necessary.” *Id.*

30. See CHC-I-Bodde, *supra* note 17, at 49; CHC-I-Hulsewé, *supra* note 17, at 521 n.3, 526; ROBERTS, *supra* note 17, at 20–21.

31. CHC-I-Hulsewé, *supra* note 17, at 539–40.

32. *Id.* at 539. See also CHC-I-Bodde, *supra* note 17, at 49.

33. CHC-I-Bodde, *supra* note 17, at 58.

34. *Id.*

ace gate) so that the newly promulgated ordinances could be posted on them."³⁵

Likewise, the "power concentration" condition was met, in that the top political authority—unquestionably this was Qin Shi Huangdi—had adequate political authority to impose a code. Third, the "champion-of-codification" condition was met: Qin Shi Huangdi had the will to promulgate a code, again because such promulgation was a core element of Legalist doctrine that had helped bring him to power, and the use of a code in the state of Qin (that is, before unification) had proved so effective as a means of maintaining social control.

As for other contributing factors, it appears that at least three of the five factors I identified above in part I.B. were present in Qin China. The "radical political change" factor was clearly present, given the fact that the state of Qin had recently conquered its rival states, thus creating a new, singular political entity whose authority superseded all its predecessor states. For similar reasons, the "legal chaos" factor was present: the Legalist doctrine had helped assure Qin success and needed to be extended in practice to the territories of the states recently conquered. It was natural, if not absolutely essential, that a single, centralized legal order be imposed to match and complement the political centralization.³⁶

It seems unlikely that the "behind-the-times" factor was present. As I have expressed it above in part I.B., this factor—clearly present in some codification efforts, such as that of France immediately following its Revolution³⁷—refers to a mismatch between the existing law and the current social, economic, or technical circumstances. In the case of Qin China, there is no indication of any such mismatch. There was, for example, no break in the cultural continuity between

35. *Id.* at 36. As also noted above, Qin Shi Huangdi undertook also to develop a standard script (actually two forms of writing, the so-called small seal for formal use and a more cursive and simple script for everyday business). See *supra* note 25 and accompanying text; FAIRBANK, *supra* note 17, at 56 (describing the two forms of writing). This development could have contributed to the acceptability of written law.

36. An indication of this process—imposing a new legal order on the conquered states—appears from this account in a legal history: "When we come down to the First Emperor of the Ch'in [Qin] annexing and swallowing the Warring States, he finally destroyed the laws of the former kings and extinguished the functions (based on) the rules of ceremonious behaviour and righteousness. He solely relied on mutilating punishments and penalties[.]" Hulsewé-1955, *supra* note 17, at 332, translating from the *Han shu*.

37. See *infra* part III.B.

the state of Qin and the Qin empire; the break in continuity was political, not social, economic, or technological in nature.

Another of the five factors favoring codification—the “model code” factor—also was apparently present in the form of Shang Yang’s code of the fourth century, and perhaps in the form of Li Kui’s *Canon of Laws* dating from 400. As noted above, however, we have only meager and scattered facts about Shang Yang’s code (the *Shang Yang Lü*),³⁸ and considerable doubt surrounds Li Kui’s code.³⁹

Lastly, the “scholar/jurist influence” factor was clearly present, although in a rather disguised mode. As noted above, Qin Shi Huangdi took a dim view of Confucianist scholars,⁴⁰ especially those that criticized him.⁴¹ However, the Legalist reforms that had helped bring him to power were themselves the product of a scholarly tradition. A key player in developing Legalist views was Han Fei (about 280–233 BCE), who had been a student of a famous Confucianist, Xunxi (313–238 BCE), before turning against Confucianism and writing a number of essays (collected in a volume called the *Hanfeizi*) that constitute “the most coherent expression of the ideas of Legalism.”⁴² Moreover, Han Fei’s fellow student (also studying under the Confucianist Xunxi) was Li Si, who put his learning into action by playing a pivotal role in the Qin rise to power and helping administer the vicious system of punishments that characterized Qin Shi Huangdi’s rule.⁴³ Thus, it would appear that there was a heavy scholarly influence, although perhaps indirectly, in Qin law.

38. According to one source, the bamboo slips found in 1976 contain “details of a legal code in existence before Qin united China, which may be the code established by Shang Yang.” ROBERTS, *supra* note 17, at 20–21. Other sources take a different view. See XIN REN, *TRADITION OF THE LAW AND LAW OF THE TRADITION* 116 (1997). In basic content and spirit, however, it seems likely that much of the material in the bamboo slips had its origin in the time of Shang Yang. CHC-I–Bodde, *supra* note 17, at 36.

39. See *supra* note 22.

40. See *supra* notes 26, 27 and accompanying text.

41. The event that triggered Qin Shi Huangdi’s decree that historical classics be burned was a scholar’s citation of some historical record to criticize the emperor for dividing the newly-acquired territories into units that would be controlled by the central government, instead of distributing the territories to a feudal nobility. ROBERTS, *supra* note 17, at 23–24.

42. *Id.* at 21. For information about Xunxi, see *id.* at 18.

43. *Id.* at 22. Perhaps Li Si’s rejection of Confucianism shows in his treachery. He is reported to have engineered the death of his former fellow student, Han Fei, after the state of Han sent Han Fei as an envoy to Qin (when Qin was still a state, before 221 BCE). Later, when the emperor Qin Shi Huangdi died, Li Si and another official “concealed the emperor’s death by keeping his body in the sleeping carriage and disguising the smell by surrounding it with carts loaded with salted fish” so as to “procure[] the succession of a younger son, who became the

B. The Han Dynasty and Codification

1. *From Qin to Han.* It was largely that vicious system of punishments that led to the quick end of the Qin dynasty.⁴⁴ With the death of the emperor Qin Shi Huangdi in 210, the dynasty was unable to hold together. In 208, a high official, Zhao Gao, “was able to force the Second Emperor [Hu Hai] to go into retirement and then to commit suicide.”⁴⁵ Two months later, Zhao Gao himself was killed by the new (third) emperor.⁴⁶

This chaotic setting seemed to invite rebellions. The first was headed by two poor farmers, and other uprisings followed.⁴⁷ The one that succeeded in toppling the Qin dynasty was headed by (among others) Liu Bang, to whom the third and last Qin emperor surrendered in 206 BCE.⁴⁸

A few years later, having defeated rival rebels, Liu Bang took the title of Emperor of the Han, with the reign name Gaozu.⁴⁹ After he consolidated his power, one of his key moves was to reject Legalism and to permit the reintroduction of Confucianist values as the basis for imperial governance.⁵⁰ Indeed, Gaozu’s rejection of Legalism might have occurred as early as 206 BCE, when some Chinese histories say he publicly denounced and abrogated the Qin dynasty’s

Second Emperor.” *Id.* at 25. That effort turned out badly for Li Si, however, as he had apparently offended the emperor’s son. Li Si “was executed by being cut in two at the market-place at Xianyang.” *Id.* at 26.

44. XIN REN, *supra* note 38, at 22 (stating that “[b]ecause of their intensive suppression of undesirable social behavior and heterodox thoughts, the Qin emperor and his Legalist bureaucrats quickly earned a reputation for being the most vicious and cruelest regime in China’s history; that reputation eventually brought about the downfall of the Legalist school in both the political and legal realms”).

45. ROBERTS, *supra* note 17, at 26.

46. *Id.* Some histories refer to Hu Hai as the second and last emperor, presumably on grounds that his successor (his nephew) was installed as the “king” of Qin. SMITH & WENG, *supra* note 17, at 61.

47. ROBERTS, *supra* note 17, at 25.

48. *Id.* at 26–27.

49. *Id.* at 26.

50. *Id.* at 28. Gaozu was himself no fan of scholars. He “declar[ed] that he had won the empire on horseback and had no time for the Confucian classics. However, a Confucian scholar named Lu Jia, who had been an early supporter of the emperor, compiled for him the *New Analects*, a collection of essays which identified the shortcomings of the Qin dynasty and recommended that the new emperor’s government should observe ethical standards. This may have marked the beginning of the adoption of Confucian values as the basis of imperial government.” *Id.*

laws.⁵¹ Other authorities question whether that very early abrogation could “ever have been more than a well meant gesture.”⁵² In any event, the official embrace of Confucianism certainly began by 196 BCE, “when an edict was issued regulating the recruitment of able persons, that is men of merit, to the administration,”⁵³ and was firmly in place in the latter part of the second century BCE, when government service recruitment focused on men who had been educated in the Confucianist texts.⁵⁴

In the end, therefore, both the Confucianists and the Legalists enjoyed victories in the Confucianist–Legalist debate that I described briefly above. Legalism prevailed dramatically in the short-lived Qin dynasty, but was then publicly denounced in the Han, and Confucianism was endorsed as state ideology.⁵⁵

2. *The Han Code.* It might be concluded from this latter fact—the Han dynasty’s public acceptance of Confucianism and denunciation of Legalism—that the Han dynasty would reject the idea of written law and therefore would not enact a legal code. This was not the case. Instead, the Han leaders adopted a legal code almost immediately after overthrowing the Qin.

The job of compiling the Han Code reportedly fell to Xiao He, who, as chancellor under Gaozu (the founding emperor of the Han dynasty), around 200 BCE “gathered together the laws of the [Qin], and choosing those which were suitable for those times, he made the Statutes in Nine Sections.”⁵⁶ Although we have only fragments of the Han Code, its structure, provisions, and application seem to reflect a mixed heritage, drawn from both Legalism and Confucianism.

51. According to the *Han shu* (legal history of the Han dynasty), “[w]hen the Han arose and the Eminent Founder for the first time entered the passes, he restricted the law to three sections [and] . . . rejected and removed the vexations and cruelties, and the host of the people greatly rejoiced.” HULSEWÉ–1955, *supra* note 17, at 333 (translation of the *Han shu*). It was said that “this drastic abrogation of the detailed and vexatious laws in effect in Ch’in [Qin] . . . meant a great lightening of the people’s burdens and secured . . . their goodwill.” *Id.* at 372, quoting from another Western account. The “abrogation took place December 207/January 206” BCE. *Id.*

52. HULSEWÉ–1955, *supra* note 17, at 372.

53. ROBERTS, *supra* note 17, at 28.

54. *Id.* at 31.

55. One source capsulizes this development as follows: “in one of the amazing reversals of history, Confucianism replaced Legalism as the dominant ideology. Already by 100 B.C. Confucianism was beginning to gain recognition as the orthodoxy of the state, whereas Legalism was disappearing for all time as a separate school.” BODDE & MORRIS, *supra* note 17, at 27.

56. HULSEWÉ–1955, *supra* note 17, at 26 (citing a dynastic history of the Han dynasty).

As for its Legalist elements, it seems likely that the “Nine Chapters” in the Han Code as prepared by Xiao He drew from precedents (such as the *Canon of Laws* allegedly prepared by Li Kui) that had six chapters and then added three more chapters.⁵⁷ It also appears that many of the punishments used in Qin law were adopted, at least at first, in the Han Code. For example, one of the commonest forms of execution—beheading in public—was inherited from the Qin dynasty.⁵⁸ Moreover, the punishments prescribed in the Han Code seem quite harsh, consistent with the Legalist approach that had helped bring Qin to power earlier. These punishments included cutting in two at the waist, extermination of relatives, boiling and burning, tattooing of the face, amputation of the nose, amputation of the feet, castration, hard labor, beating, wearing of the iron collar, and exile.⁵⁹

The Han Code also reflected some elements of Confucianist doctrine. This Confucianist influence was modest at first,⁶⁰ but would become increasingly important in actual application of law in the Han dynasty.⁶¹ It was, however, a “Confucianism” that Confucius might not have recognized. Confucius’ teachings had already undergone modification by adherents in the two or three centuries after his death, especially by Mengzi and Xunzi,⁶² and in the Han dynasty even

57. See BODDE & MORRIS, *supra* note 17, at 58.

58. See HULSEWÉ-1955, *supra* note 17, at 109–10.

59. Because of the fragmentary nature of evidence that has survived of the Han Code, and because it was amended over time, it is difficult to know how many of these punishments were expressly included in the code allegedly compiled by Xiao He. The dynastic history of the Han, however, gives dates (usually in the second century BCE) on which several of these were abolished. See HULSEWÉ-1955, *supra* note 17, at 55–56 (noting abolition of, among other punishments, the mutilating punishments such as tattooing) and 109–40 (surveying various Han punishments). From this it can be inferred that the original version of the Han Code included such punishments.

60. For example, the Han Code largely reflected (at least at first) the Legalist view that no distinctions should be made between the noble and the humble in meting out punishments for a particular kind of prohibited act. HULSEWÉ-1955, *supra* note 17, at 286, 296.

61. As Hulsewé points out, “[i]n a number of instances . . . lawsuits were decided by means of an appeal to the classics. Amongst this material the work of the well known Confucian Tung Chung-shu [Dong Zhongshu] . . . occupies a particular place.” HULSEWÉ-1955, *supra* note 17, at 51. For other references to Dong Zhongshu, see *infra* note 63 and text accompanying notes 96–98.

62. For an account of these two men, and how they elaborated on, and departed from, the views of Confucius, see ROBERTS, *supra* note 17, at 17–18.

more radical changes and additions were made to arrive at what has been called "Imperial Confucianism."⁶³

Speaking of Han law generally, one author explains its mix of Confucianist and Legalist influences in this way:

Han law is the outcome of two streams of thought, an archaic one, filled with the magico-mythical concepts of "primitive" society, and a very matter-of-fact one, purely practical and political, with the *raison d'état* as its primary motive. To put it differently: Han law partook on the one hand in the general Chinese heritage with its particular views on the order of the universe, on the interdependence of all the parts of this universe and consequently on the responsibility of the individual to act conformably to its rules as these had been established by society so as not to disturb cosmic harmony, or else to suffer the consequences. On the other hand, Han law took over the administrative and legal rules of the Ch'in empire and their practical application in the government organisation. These rules . . . had the very practical political purpose of maintaining the stability of the government and of increasing its power by means of detailed regulations affecting the behaviour of its subjects.⁶⁴

In summary, the environment in which the Han Code emerged may be viewed as one of compromise between two conflicting approaches espoused by the Legalists and the Confucianists. The very existence of the Code signals a recognition of the remarkable success that written law and harsh punishments had helped bring to Qin Shi Huangdi in unifying China. At the same time, however, the rise of the Han dynasty represented an official repudiation of Legalism and its harshness and set the stage for a return to Confucianism and its establishment as state ideology.

3. *Conditions and factors of codification.* As with the codification experience of the Qin dynasty, that of the Han dynasty also

63. See FAIRBANK, *supra* note 17, at 62. One authority paints a striking, if perhaps oversimplified, picture of how two men, early in the Han dynasty, influenced the development of Imperial Confucianism:

Confucianism gained eminence during the Han period because of the meeting of minds of a monarch in search of a clear mandate from Heaven and a scholar with an ambition to dominate the current ideologies, which included earlier Legalist, Taoist and Confucian theories. Their formula was simple—they interpreted the past to suit the present. The scholar Tung Chung-shu [Dong Zhongshu], hand-picked in an examination by Emperor Wu soon after his ascension to the throne [in 141 BCE], claimed authority from the Confucian ideal of a perfect social order and from the cosmological theory of the Book of Changes and the Yin-yang Five Elements School to support his own concept of the "Oneness of Heaven and Man."

SMITH & WENG, *supra* note 17, at 79.

64. HULSEWÉ-1955, *supra* note 17, at 5.

seems to include all three necessary conditions and several of the favorable factors I enumerated above in part I.B. First, the foregoing explanation points out that the public rejection by the Han of Legalism did not result in a rejection of written law as a desirable means of ordering society. Instead, despite the public "abrogation" of the laws of Qin and the reliance the Qin dynasty had placed in them,⁶⁵ the Han Code emerged very early in the dynasty and was followed by a constant stream of legislation.⁶⁶ Hence the first of the necessary conditions—the "regard-for-written-law" condition—was met.

Likewise, the second and third of the necessary conditions—the "power concentration" condition and the "codification leadership" condition—also existed in Han China. Following the lead of Qin Shi Huangdi, the first Han emperor (Liu Bang, or Gaozu) clearly had the political strength to impose a code if he wanted one, and to prevent its imposition if he did not want one, and the same applies to his successor emperors of the second century BCE, during whose reigns the Han Code took on a more definitive form.⁶⁷ Indeed, the precedent that Qin Shi Huangdi had established for centralization of power, under the concept of a "mandate of heaven" (*tian ming*) was to last for another two millennia.

As for the other factors favoring codification, some are present and some are not. It should be clear from the foregoing that the transition from Qin to Han represented a radical political change—not a centralization of control (Qin Shi Huangdi had already accomplished that) but the overthrow of a dynasty, followed by political chaos, followed by the establishment of a new dynasty.

There was not, however, any significant "legal chaos" that the code was designed to overcome, nor was the "behind-the-times" factor present to any significant extent. As noted above, the Han Code drew much of its content—specifically the punishments, about which

65. See *supra* notes 50–51 and accompanying text.

66. In addition to the original "Statutes in Nine Chapters" reportedly compiled by Xiao He, a set of "Statutes on Trespassing at the Palace" (27 chapters), "Statutes on Meeting at Court with the Emperor" (six chapters), and "Accessory-Chapters Statutes" (18 chapters) were promulgated over the following several decades. See HULSEWÉ—1955, *supra* note 17, at 54, and CHINESE LEGAL HISTORY, *supra* note 17, as studied by my assistant Ms. Wang. Hulsewé describes four main categories of legal norms included in Han law—*lü* ("statutes"), *ling* ("ordinances"), *k'o* ("decisions which had obtained the force of law"), and *pi* ("comparisons" to be used as precedent). HULSEWÉ—1955, *supra* note 17, at 32, 42, 51.

67. According to one source, the Han Code "assumed definitive form [in about] 128 B.C." BODDE & MORRIS, *supra* note 17, at 56.

we know more than the proscriptions—from the Qin Code. The transition from Qin to Han did constitute an ideological change, in that Legalism was officially displaced in favor of Confucianism; but that change did not appear on the face of the code itself.

The “model” code factor was present, in the form of the Qin Code, for reasons already explained. The “scholar/jurist influence” factor was also probably present in the case of the Han Code, although this might depend on whether we focus only narrowly on the first version—the “Statutes in Nine Chapters” reportedly prepared by Xiao He around 200 BCE—or on the more complete set of statutes that had emerged by the late second century BCE. In the latter case, this factor would certainly be present, given the Han’s embrace by that time of Confucianist thought, which had been developed through the writings of a long line of scholars, most notably Mengzi, Xunxi, and Dong Zhongshu.⁶⁸

C. The Tang Dynasty and Codification

1. *Division, Confucianism, reunification.* The Han dynasty succeeded in building an empire that lasted about four centuries. As explained above, this success rested in part on the creation of a hybrid system of government administration that drew on the inherited strength of both the recent past (the Qin, implementing Legalism) and the more distant past (the pre-Qin, rooted in Confucianism). To use a different metaphor, the Han created from two metals an alloy that was more durable than either of them individually—less brittle than the Qin, stronger than the pre-Qin.

No metal, however, is totally impervious to time. By the year 220,⁶⁹ the Han dynasty had suffered too much rust and fatigue to survive severe internal and external challenges, most seriously in the forms of peasant rebellions and barbarian pressures:

As population grew, more peasants became landless and unable to find money for taxes and food. There were renewed barbarian attacks from the outside, too. Warlords who controlled the profes-

68. See *supra* notes 62–63 and accompanying text. See also *supra* note 50 (discussing the influence that Lu Jia, another Confucianist scholar, had on the founding Han emperor). Under the definitions I offered above, Dong Zongshu would surely qualify as a jurist, given his official role as advisor to the emperor. See *supra* note 15 (defining “jurist”) and 63 (referring to the role of Dong Zhongshu).

69. From this point forward, all dates given in the text are CE unless they are specifically shown as BCE.

sional soldiers on which the dynasty relied tended to seize power at home; barbarians, allowed within the frontier in the hope of converting them to Chinese ways, turned on those who had brought them in. It was to the son of the greatest of the warlords that the last Han emperor resigned his throne in AD 221. When he did so, China fell apart again.⁷⁰

The political events of the next 350 years have been capsulized by one author in this way:

Between 220 and 589, apart from a brief interlude between 280 and 316, no one dynasty ruled the whole of China. Between 220 and 280 the empire was divided into three kingdoms. The Western Jin then briefly and ineffectually reunited the country, but from 316 there was a prolonged division between the north and the south. In the south, six dynasties established their capital at Jiankang, that is modern Nanjing. In the north, until 384 there was a period of extreme fragmentation known as the time of the Sixteen Kingdoms. Then the Toba, a branch of the Xianbei, established the Northern Wei dynasty with its capital at Luoyang. In 534 the dynasty split and a further period of political fragmentation ensued until Yang Jian not only conquered the north but also subdued the south and in 589, having established the Sui dynasty, reunified China.⁷¹

Throughout this period of division, Confucianism survived despite the growth of competition from other teachings, especially Daoism⁷² and Buddhism.⁷³ Indeed, in the context of legal developments, Confucianism substantially strengthened its hold. For example, during the Period of Three Kingdoms (220–280, referred to in the quoted material appearing in the preceding paragraph), Confucianists were involved in the actual drafting of legal codes,⁷⁴ and also exercised considerable influence in the interpretation and application of

70. J.M. ROBERTS, *A CONCISE HISTORY OF THE WORLD* 218 (1995) [hereinafter *CONCISE HISTORY*]. See also FAIRBANK, *supra* note 17, at 72 (identifying the “basic mechanism of the Han dynasty’s decline” as “the rise of local or regional power to eclipse that of the central dynasty” as a result of (i) ineffectual Han emperors, (ii) appointment of inadequate personnel, (iii) disregard of merchants’ interests, (iv) a weakening of the military, and finally (v) “a revolt of formerly nomad aristocratic families in North China”).

71. ROBERTS, *supra* note 17, at 40. See also FAIRBANK, *supra* note 17, at 72–73.

72. For accounts of the rise and influence of Daoism in China, see FAIRBANK, *supra* note 17, at 53–54; ROBERTS, *supra* note 17, at 78; PYE, *supra* note 17, at 37, 53–54; MOTE, *supra* note 17, at 497–98.

73. For accounts of the importation of Buddhism into China, and its transformation in the process of that importation, see FAIRBANK, *supra* note 17, at 74–75; ROBERTS, *supra* note 17, at 45; SMITH & WENG, *supra* note 17, at 94–98.

74. This occurred in both the state of Wei (one of the three kingdoms that emerged from the Han collapse in 220) and in the Western Jin dynasty (which began in 265). See *CHINESE LEGAL HISTORY*, *supra* note 17, at 253–54, 256.

the codes of that period—explaining, for instance, how the *li* operated within the substantive code provisions.⁷⁵

Similar Confucianist influence was exerted in the period that followed—the so-called “Nan–Bei Dynasties” (literally, South–North Dynasties), beginning around 420.⁷⁶ For example, the seventh emperor of the Northern Wei, Xiao Wendi, is said to have taken several steps that strengthened the Confucianist influence on the law:

Xiao Wendi further supported the development of “incorporating *li* into *lii* [statutory law],” “interpreting *lii* by Confucianist classics [such as the *Chun Chiu* (Spring and Autumn Annals)], and also judging cases according to those Confucianist classics. For example, he stated that “among 3,000 crimes, the severest crime is lack of filial piety,” and therefore he increased the punishment applicable to that crime. In addition, he ordered that “a person who commits a crime punishable by death but whose parents or grandparents are very old and have no other children or grandchildren or other relatives to take care of them shall [not have to suffer the death penalty but shall] instead be permitted to live and take care of his parents or grandparents.”⁷⁷

This survival and strengthening of Confucianism in the period of disunity was to have important repercussions as China moved toward reunification.⁷⁸ By the middle of the sixth century, a small group of non-Chinese aristocratic families dominated North China. One of those families produced Yang Jian, a man born and raised in a Buddhist temple and also married to a Buddhist. Yang Jian rose to prominence as a military commander and eventually deposed the emperor of the Northern Zhou dynasty (which by then was the sole dynasty in the north) and claimed victory in the civil war that ensued. Yang Jian established the Sui dynasty in 581 and immediately took steps toward sinicization and unification of the country. These steps included (i) claiming to be the legitimate heir to the Han dynasty, and going through the appropriate rituals to confirm this; (ii) relying on the moral justification that this claim provided in order to invade the

75. See CHINESE LEGAL HISTORY, *supra* note 17, at 248.

76. See GEOFFREY MACCORMACK, *THE SPIRIT OF TRADITIONAL CHINESE LAW* xi (1996) (giving a chronological table of Chinese dynasties, and showing the “Southern and Northern Dynasties” beginning in 420). For a more detailed dynastic chronology in the complicated period from 220 (when the proclamation of the Wei dynasty marked the demise of the Han) to 581 (when the Sui dynasty was founded), see SMITH & WENG, *supra* note 17, at 89 (noting the solidification in 420 of “the [three] southern dynasties, as against the partially non-Chinese northern dynasties”).

77. MACCORMACK, *supra* note 76, at 447–48.

78. This paragraph and the next draw mainly from ROBERTS, *supra* note 17, at 47–48.

south, which he accomplished in 589; (iii) “placat[ing] the Confucianists by endorsing the virtue of filial piety;”⁷⁹ and (iv) reconstituting a central government like that of the Han dynasty, which he accomplished by employing more Chinese in the service of the state.⁸⁰ It was also during his reign that the essential characteristics of the examination system took shape.⁸¹

For our purposes, the most important initiative Yang Jian undertook was to promulgate the Kaihuang Code (*Kai Huang Lü*). This legal code was promulgated by Yang Jian in 581 (the same year he assumed the throne in the North) and was revised by his order in 583.⁸² Although the Kaihuang Code has been lost, it is considered “[a] major turning point” in the development of legal codes in China, because its “format was adopted virtually unchanged by the earliest surviving code, that of T’ang of 653.”⁸³

The Sui dynasty did not last. It collapsed under Yang Jian’s successor, the emperor Yangdi. Yangdi has been accused of both parricide and megalomania, the evidence of the latter being his penchant for huge public works projects and his fixation on conquering Korea.⁸⁴ Whatever the real validity may be of those specific criticisms, “[t]he collapse of the Sui dynasty has often been attributed to Yangdi’s personal failings and his overweening ambition.”⁸⁵ In 617 a member of a northern aristocratic family, Li Yuan, led a rebellion that succeeded in capturing the Sui capital at Chang’an (Xian). Li Yuan shortly thereafter declared the establishment of the Tang dynasty.⁸⁶

79. *Id.* at 48.

80. However, Yang Jian reserved the most important offices for his own close relatives and colleagues. He also “served as his own chancellor” and personally investigated the work of his officials when he traveled. *Id.*

81. *Id.* at 48–49.

82. See JOHNSON–1979, *supra* note 4, at 39.

83. BODDE & MORRIS, *supra* note 17, at 58.

84. ROBERTS, *supra* note 17, at 50.

85. *Id.* See also SMITH & WENG, *supra* note 17, at 115 (referring to Yangdi as “cunning and ruthless yet constructive” and enumerating some of his “grandiose plans” and the cost they incurred, including the lives of men who died—allegedly half a million—working on the Great Wall).

86. ROBERTS, *supra* note 17, at 52. It took about six years for Li Yuan to complete the conquest of the country, partly because further rebellions arose. *Id.* Li Yuan is often referred to by his posthumous name of Gaozu. I have used his name Li Yuan here in order not to confuse him with Liu Bang, who declared the Han dynasty and took the reign name of Gaozu. See *supra* note 50 and accompanying text.

2. *The Tang Code*. It was in Li Yuan's reign that the work began on a revised code of laws. The most celebrated product of those efforts was promulgated in 653, long after Li Yuan's death, but it was preceded by earlier versions that appeared from the very beginning of his reign. The highlights include these points:

- In 617, upon gaining control of the capital city, Li Yuan "issued a code in twelve articles, which eliminated the death penalty for all crimes except murder, robbery, desertion from the army, and high treason."⁸⁷
- In the first year of his reign (619), Li Yuan "established a commission to revise the Kaihuang Code, an effort that resulted in a code of 53 articles promulgated in the same year."⁸⁸
- In 624, a much-expanded version containing approximately 500 articles was promulgated.⁸⁹
- In 637—by which time Li Shimin, the second emperor, had taken power—a commission undertook another revision of the code; that commission "is credited with lessening the punishment for ninety-two crimes that had carried the death penalty, and another seventy-one that had been punished by life exile."⁹⁰
- Two further revisions of the code occurred in 651 and 653.⁹¹

Another edition of the code was issued in 737, on which "all present editions are based," but "we have no evidence . . . that any substantial changes took place in the content of the *Code* between the 653 and 737 versions of it."⁹² It is the 737 version of the Tang Code, as copied in much later manuscripts (probably all dating from the period of the Yuan dynasty) that we have today and that Professor Wallace Johnson of Kansas University has translated.⁹³

As in my discussions of the Qin and Han codification experiences, the circumstances from which the code emerged matter more

87. JOHNSON-1979, *supra* note 4, at 39. At the same time, the existing Sui code—a replacement issued in 607 to the Kaihuang Code of 581 and 583, as discussed above—was revoked. *Id.*

88. *Id.* at 39.

89. *Id.*

90. *Id.* Li Shimin's reign name was Taizong.

91. *Id.*

92. *Id.* at 40 (emphasis in original).

93. *Id.* at 40, 45.

than its specific content. However, it is worthwhile to pay some attention to the underlying nature of the Tang Code and to consider how it views the origin and purpose of law.⁹⁴ The introductory commentary to the code records the process by which laws were established. Nowhere does the account refer to divine intervention or proclamation of laws, as would be the case in some legal societies. Instead, it makes clear that laws and punishments derive from the earthly rulers to control the behavior of those persons whose misbehavior would threaten to upset the balance of nature and society.⁹⁵

This emphasis on the balance of nature and society reflects the teachings that the scholar and imperial advisor Dong Zhongshu (c. 179-104 BCE) so effectively purveyed in Han times. He succeeded in reconciling a variety of concepts and influences into a unified theory that served as the core of imperial Confucianism in the Han dynasty. His theory encompassed the *yin-yang* distinction⁹⁶ and the significance of the “five elements”—wood, fire, soil, metal, and water⁹⁷—with a view towards providing guidance for the proper governance of the empire by carefully maintaining balance and by promoting what Dong Zhongshu called the “Oneness of Heaven and Man.”⁹⁸

The Tang Code manifests this central concern for harmony in several ways.⁹⁹ For example, the Code itself is to be regarded as representing the *yin*—the dark side of social control—in contrast with the *yang* influence of ritual, morality, and education. More con-

94. For Professor Johnson's discussions of the philosophy and general principles of the Code, see JOHNSON-1979, *supra* note 4, at 9-38.

95. See *id.* at 49-54.

96. See FAIRBANK, *supra* note 17, at 19: “*Yin* was the attribute of all things female, dark, weak, and passive. *Yang* was the attribute of all things male, bright, strong, and active.”

97. One authority offers this summary of Dong Zhongshu's views on both the *yin-yang* distinction and the importance of the five elements:

Heaven, Earth and Man . . . are made up of five elements . . . [and] are controlled by two primal forces: *yin*, the negative, and *yang*, the positive. *Yin* and *yang* complement each other; therefore, when there is high, there must be low; left, right; front, back . . . *Yang* may be equal in quantity to *yin*, but never in quality, because *yang* is inherently nobler than *yin*. In a forward order, each element produces the one following; for example, wood produces fire, and fire produces soil. In reverse order, each element overcomes the next; for example, water overcomes fire, and fire overcomes metal. Man is born with the nature of Heaven; therefore, he also inherits the qualities of *yin*, *yang* and the five elements and is responsive to Heaven. *When human events are in harmony with Heaven, great peace prevails; when they are contrary to Heaven, great upheavals occur.*

SMITH & WENG, *supra* note 17, at 79 (emphasis added).

98. The quoted phrase is from SMITH & WENG, *supra* note 17, at 79. See the earlier reference to “Imperial Confucianism,” *supra* note 63 and accompanying text.

99. This paragraph draws heavily from JOHNSON-1979, *supra* note 4, at 14-15.

cretely, the definition and imposition of punishment by death also reflects the *yin-yang* distinction. Death was under the *yin* or negative power, and so there were two death penalties—strangulation and decapitation—reflecting the fact that two is a *yin* number.¹⁰⁰ Likewise, the Code is full of fives. The first Article lists five types of punishments—beating with the light stick, beating with the heavy stick, penal servitude, life exile, and death—and the accompanying commentary states explicitly that this number is “in imitation” of the five elements.¹⁰¹ While such explicit references do not appear elsewhere, the fact remains that two of the types of punishments have five sub-categories each, and the number five appears in counting the degrees of family relationship and in indicating the division of official privilege, both of which are central to the determination of punishment prescribed in various specific provisions of the Code.¹⁰²

As discussed above in part II.A., the notion of harmony is also central to the concept of *li*, especially in the form as developed by Confucius based on his view of the Western Chou dynasty.¹⁰³ As Derk Bodde has pointed out, the imperial codes can be viewed as exemplifications of, or vehicles for, the principles of *li*.¹⁰⁴ For example, the Tang Code provides that social and political status affects a person’s liability for punishment.¹⁰⁵ Political status is explicitly taken into account in determining the amount of punishment to be imposed. One way it does so appears in the “Eight Deliberations” set forth in Article 7, under which relatives of the emperor and persons in high position—defined as “active duty officials of the third rank and above, titular officials of the second rank and above, and persons with noble titles of the first rank”—are to be given special consideration in the imposition of punishment.¹⁰⁶ Specifically, according to the commentary on Article 7, “[i]f those deserving of one of the eight deliberations commits a capital crime, a memorial [written submission] is

100. As Professor Johnson notes, a discussion of this point, focusing especially on seasonal restrictions governing the carrying out of executions, appears also in BODDE & MORRIS, *supra* note 17, at 46–48. JOHNSON–1979, *supra* note 4, at 14.

101. See JOHNSON–1979, *supra* note 4, at 56.

102. See generally JOHNSON–1979, *supra* note 4.

103. See *supra* note 18 and accompanying text.

104. See BODDE & MORRIS, *supra* note 17, at 29–38. See also CH’U, *supra* note 17, at 278–79.

105. The remainder of this paragraph draws heavily from JOHNSON–1979, *supra* note 4, at 23–26.

106. JOHNSON–1979, *supra* note 4, at 23.

sent up [to higher authorities] requesting authorization to consider and fix a penalty."¹⁰⁷

As for social status, similar differentiation of punishments appears quite clearly in the Code, again reflecting the special emphasis given by the *li* to a person's social standing.¹⁰⁸ An offense by a commoner against a slave, for example, would generally trigger a punishment that was two degrees less than if the offense were committed against another commoner—such as twenty strokes of the light bamboo instead of forty strokes of the light bamboo. An offense by a slave against a commoner would generally be punished two degrees heavier than had the offender been a commoner. If a slave struck a commoner and broke a limb, the punishment was strangulation; but if a master killed a slave who had committed some offense, the penalty was only one hundred blows with the heavy stick.¹⁰⁹

Even more striking—and, again, entirely consistent with the principles of *li*—is the Code's treatment of filial piety. One of the "Ten Abominations" set forth in Article 6 of the Code is "lack of filial piety," and it triggered special punishment.¹¹⁰ As Professor Johnson points out, "[f]ew greater crimes were possible in T'ang China than for a son to strike his father, while a father who beat his son was not committing any crime at all."¹¹¹

3. *Conditions and factors of codification.* By the time of the Tang dynasty, certain patterns had been set in the Chinese legal and political system. For one thing, China was authoritarian. The political supremacy of the emperor was comprehensive and unques-

107. Subcommentary to Article 7. See JOHNSON-1979, *supra* note 4, at 83.

108. The remainder of this paragraph draws heavily from JOHNSON-1979, *supra* note 4, at 28-29.

109. For other examples regarding punishments applicable to offenses committed by someone of one class against someone of another class, see *id.* As Johnson explains, the population of Tang China consisted, for purposes of the Code, of three kinds of persons: those with privilege, the commoners, and the inferior classes, including slaves and bondsmen. *Id.* at 28.

110. The other nine of these heinous crimes were plotting rebellion, plotting great sedition, plotting treason, contumacy, depravity, great irreverence, discord, unrighteousness, and incest. See JOHNSON-1979, *supra* note 4, at 61-83.

111. *Id.* at 31-32. He points out that a family relationship would reduce the degree of punishment for robbery, although it would generally increase it for crimes against the person. *Id.* at 32.

tioned.¹¹² Hence the “power concentration” condition that I referred to above in part I.B. was present.

Similarly, the “regard-for-written-law” condition was present in Tang China. After all, the effectiveness of written, codified laws as a mechanism for governing the country (and thereby maintaining the position of the emperor) had been demonstrated in Qin and Han China. Although an official embrace of Confucianization had occurred beginning with the Han, there had been no retreat from the central Legalist premise that laws should, for political reasons, be written.

The combination of these two conditions virtually assured the third—that the emperor would be a “champion of codification.” This was particularly true with the founding Tang emperor, Li Yuan, who moved to promulgate a code even before having completed his conquest of the Sui.¹¹³

Some of the other factors favoring codification, as I proffered them above, were also present, while others were absent:

- The “radical political change” factor was present, as the Tang Code was issued at the time of, and as part of, the overthrow of one dynasty and the establishment of another.¹¹⁴
- The “legal chaos” factor and the “behind-the-times” factor do not appear to have been present. The commission of legal draftsmen that Li Yuan established in the first year of his reign worked from the Kaihuang Code that emerged from the short-lived Sui dynasty. It is thought that much of the content and format of that Kaihuang Code survived into the Tang Code.¹¹⁵ Such continuity suggests that the draftsmen were not facing a tangled web of inconsistent laws from mul-

112. See PYE, *supra* note 17, at 63. Speaking of the position of the emperor generally (as shaped in large degree by Qin Shi Huangdi), Pye says: “The Western mind, with little for comparison beyond the age of absolutism and the grandeur of Louis XIV, has never known anything like the powers of the Chinese emperor. [The] imperial court . . . [had] tremendous political and economic power. Indeed, it is exceedingly hard for us to grasp the breathtaking scale of the imperial enterprise.” *Id.*

113. As noted above, Li Yuan issued his first code in 617 upon capturing the Sui capital city, but it took about six years for him to complete the conquest of the country, partly because further rebellions arose. See *supra* notes 86–87. See also JOHNSON–1979, *supra* note 4, at 39.

114. See *supra* note 87 and accompanying text.

115. It is said that the Kaihuang Code formalized the five punishments (light bamboo, heavy bamboo, penal servitude, exile, and death) and the Ten Abominations that then appeared in the Tang Code. CHINESE LEGAL HISTORY, *supra* note 17, at 261.

tiple sources; nor were they trying to take account of any dramatic social, cultural, economic, or technological change.

- The “model code” factor was present for a reason just stated—the heavy reliance by the Tang codifiers on the Sui Code and those that preceded it.¹¹⁶
- Lastly, the “scholar/jurist influence” factor was present, as shown by several features of the Tang Code as described above, including its differentiation of punishments, treatment of filial piety, and underlying values drawn either explicitly or implicitly from the teachings of Confucianist scholars.¹¹⁷

D. The Ming Dynasty and Codification

1. *The historical setting.* The last Chinese experience with legal codification that I cite for illustrative purposes is that of the Ming dynasty, which began in 1368 CE.¹¹⁸ Again, it is important to understand the circumstances that preceded the Ming’s rise to power and promulgation of a legal code. For about a century (from the 1260s to the 1350s) the “alien” Mongol dynasty—the Yuan—had controlled China.¹¹⁹ Under its first emperor, Khubilai Khan, the Yuan dynasty had gained effective control over all of China proper (as far south as modern China’s southern border) as well as what are now Korea and Mongolia. However, the Yuan dynasty’s attempt to merge Mongol and Chinese patterns of rule proved difficult.¹²⁰ Even by the time of Khubilai Khan’s death in 1294, “the flaws in his hybrid system of power began to reveal themselves, and through the following half-century his Mongol dynasty’s hold on power weakened.”¹²¹

As Yuan authority weakened, social unrest grew. One rebel band, the “Red Turbans,” attracted the sympathies of a young man,

116. See *supra* note 83 and accompanying text.

117. See *supra* notes 96–111.

118. For a summary of the Ming dynasty, especially political aspects, see FAIRBANK, *supra* note 17, at 128–42. A much more comprehensive treatment appears in MOTE, *supra* note 17, at 517–810 (chs. 21–30). For a reference to the founding of the dynasty in 1368, see *id.* at 563.

119. For accounts of the Yuan dynasty and its replacement by the Ming, see ROBERTS, *supra* note 17, at 107–17; SULLIVAN, *supra* note 17, at 179–80; MOTE, *supra* note 17, at 474–548.

120. See MOTE, *supra* note 17, at 519 (noting the disagreements among Mongol leaders as to how to deal with China); J.A.G. ROBERTS, *supra* note 17, at 116–17 (commenting on the refusal of some Mongol emperors to be absorbed into Chinese culture and the incompatibility of some Mongol political policies with those of the Chinese).

121. MOTE, *supra* note 17, at 517.

Zhu Yuanzhang, who had been born to “the poorest of the poor in a plague- and famine-ravaged rural village.”¹²² Zhu Yuanzhang became a rising star in the Red Turban movement and gradually consolidated power over most of the rebel forces at large in the chaos that the Yuan decline left in its wake.¹²³ In 1368 he captured Beijing¹²⁴ and began a dynasty that retrieved China from foreign domination for nearly three centuries.

2. *The Ming Code.* One of the first acts of Zhu Yuanzhang upon declaring the new dynasty was to issue a legal code. Why? One authority offers the following explanation:

[T]he first Ming emperor was careful to insure that his dynasty would enjoy the benefits of a written body of law known as a *lü* or code. His close attention to the compilation of a code was a product of his perception that the preceding Yuan dynasty, during which the Mongols ruled China, had been defective in its lack of a formal legal code. The founder of the Ming felt that a code was valuable to a ruler because it assisted him in maintaining bureaucratic discipline, public order, and permanent institutions that centered around his line of descent. A code was, furthermore, a symbol of the legitimacy of his rule.¹²⁵

Another authority describes the procedure Zhu Yuanzhang followed in creating the Ming Code:

A preliminary version of his new Ming code was issued in 1368. He then established commissions to reconsider and expand it, through five revisions between 1374 and 1397, the year before his death. Every item in the earlier code was reviewed along with the Tang Code's parallel items, in his presence, by a team of experts, the final determination coming directly from him. Thus the Great Ming Code . . . came into being.¹²⁶

The Tang Code therefore provided a model readily available to the Ming emperor Zhu Yuanzhang as a means of repudiating Yuan influences. The second version of his Ming Code (issued in 1374) relied heavily on the Tang Code in both structure and content.¹²⁷ Later versions used a revised structure—one which had six main chapters

122. *Id.*

123. *Id.* at 549–58.

124. *Id.* at 563.

125. See CHC-VIII-Langlois, *supra* note 17, at 172.

126. MOTE, *supra* note 17, at 570.

127. For example, the 1374 version followed the Tang grouping of laws into twelve categories. See EDWARD L. FARMER, ZHU YUANZHANG AND EARLY MING LEGISLATION 38 (1995). See also BODDE & MORRIS, *supra* note 17, at 59.

(in addition to an introductory chapter) that corresponded to the administrative concerns of the six ministries of the central government: administrative law, civil law, ritual law, military law, penal law, and laws on public works.¹²⁸ In terms of content, however, the later versions of the Ming Code, like the earlier ones, hewed to the Tang Code.¹²⁹ Indeed, “[t]he Ming Code has often been charged with a general lack of creativity” because it borrowed so heavily from earlier codes.¹³⁰

One example of such borrowing appears in a provision of the Ming Code that was drawn directly from a provision in the Tang Code and that illustrates the influence of Confucian learning. The provision stated that “[a]nyone who does something which should not be done shall be sentenced to forty blows of the light stick. In serious cases, the sentence shall be eighty blows of the heavy stick.”¹³¹ This provision presumed general agreement about what should not be done—a presumption probably justified in Ming times by the continued influence of the notion of *li* as developed under Confucianist teachings.

However, although the Ming Code borrowed heavily from earlier codes, there were also some innovations in it. For example, women were shielded in most cases from the dangers inherent in imprisonment and were given additional rights in marriage relationships.¹³²

An account of the Ming Code is incomplete without a reference to its significant erosion and circumvention. Although Zhu Yuanzhang moved swiftly to enact the code, he also, paradoxically, undermined its very integrity. One author explains the phenomenon in this way:

While the emperor was determined to produce a universal code that could be minutely followed, he undermined that intent by con-

128. See BODDE & MORRIS, *supra* note 17, at 59.

129. For a summary of some provisions of the Ming Code relating to redemption—that is, the paying of fines in lieu of suffering one of the five punishments—see Langlois-1993, *supra* note 17, at 105–06. The provisions he cites are, “[f]or the most part, . . . found also in the T’ang code.” *Id.* at 106 (citing pages in JOHNSON-1979, *supra* note 4). The Ming Code has not been translated into English, nor have any extensive comparisons between the substantive provisions of the two codes been published in English. However, a detailed comparison of the Tang and Ming codes was undertaken by at least one late-Qing legal historian. See Langlois-1993, *supra* note 17, at 111.

130. BODDE & MORRIS, *supra* note 17, at 62.

131. Article 140 of the Ming Code, as quoted in CHC-VIII-Langlois, *supra* note 17, at 179.

132. See CHC-VIII-Langlois, *supra* note 17, at 195. See also *id.* at 198–201 (noting Ming Code innovations in some other areas of law).

stantly issuing laws which met immediate needs and which often contradicted his Great Ming Code, thereby producing the anomaly of a Code that all officials were required to follow, and a body of his edicts (typically ordering much harsher, often cruel punishments that his code specifically abolished) which transcended the Code's authority; that would prove to be typical of his imperial style.¹³³

Examples abound of Zhu Yuanzhang's use of harsh punishments. In 1376, in the "Case of the Pre-stamped Documents," hundreds of officials were found to have adopted a short cut for handling the paperwork relating to certain tax revenues. The emperor "flew into a rage and ordered all those officials and many others connected to them . . . to be summarily executed. Thousands were killed."¹³⁴ Later, many more thousands of people (perhaps as many as 15,000) were slaughtered following an aborted ambush that the emperor thought represented a plot being spearheaded by his Chief Counselor.¹³⁵

In short, Zhu Yuanzhang often circumvented and overrode the provisions of his own Ming Code, creating an "inherent legislative contradiction"¹³⁶ and setting a precedent that would last, in changing forms, throughout the Ming dynasty. One of these forms was for a time essentially a "parallel" code: the *Wen-hsing t'iao-li* ("Itemized Sub-statutes for Pronouncing Judgments," or "Ad Hoc Provisions for Trying Penal Cases") was first issued in 1500 with about 297 precedents or sub-statutes that had accumulated up to that time under the Ming Code—partly because of the inconsistencies that naturally arose from emperors issuing legal pronouncements outside the Code itself.¹³⁷

3. *Conditions and factors of codification.* By the time of the Ming dynasty, all three of the conditions I enumerated above in part I.B. of this article as being necessary to the success of a codification effort were firmly established in the Chinese legal and political structure. First, as explained above, the Legalist view that laws should be written and published was by now firmly entrenched in Chinese legal culture, given the success of that approach as an effective tool in pre-

133. MOTE, *supra* note 17, at 570.

134. *Id.* at 573.

135. *Id.* See also ROBERTS, *supra* note 17, at 122 (noting that the number of deaths might have been 30,000). Zhu Yuanzhang took an especially hard line on official corruption. For example, an official found guilty of receiving a bribe over a specified value "was decapitated, his head was spiked on a pole, and his corpse was skinned and stuffed with straw." *Id.* at 128.

136. Langlois-1993, *supra* note 17, at 88.

137. *Id.* at 92-112.

servicing central political control. Hence the “regard-for-written-law” condition was present.

Likewise, the great power of the emperor, especially the first emperor of a dynasty, was assured, thus satisfying the “power concentration” condition. Moreover, as noted above, Zhu Yuanzhang “was determined to produce a universal code”¹³⁸ that would help reclaim China from foreign influence—thus satisfying the “codification leadership” condition.

As for other factors favoring codification, several were present at the advent of Ming China:

- The transition from alien domination under the Mongols to ethnic Chinese control resulted in both “legal chaos” and “radical political change,” even though the latter years of the Yuan dynasty had seen a progressive sinicization of law and institutions.¹³⁹
- To some extent, the law had fallen “behind the times” as well, partly because some Chinese intellectuals shunned government service under the Mongols.¹⁴⁰
- The “model code” factor was obviously present; as noted above, Zhu Yuanzhang and his drafting commissions relied heavily, especially at first, on the Tang Code from seven centuries earlier.
- Lastly, the “scholar/jurist influence” factor also was present in the Ming codification exercise: the Ming Code was part of a larger program to return to traditional Chinese values and practices, one of which was to have members of the government bureaucracy selected by means of a system of civil service examinations based on Confucianist texts.¹⁴¹

138. See *supra* note 133 and accompanying text.

139. See PAUL HENG-CHAO CH'EN, *CHINESE LEGAL TRADITIONS UNDER THE MONGOLS* 18 (1979) (describing increasing Chinese influence during the Yuan dynasty).

140. See FAIRBANK, *supra* note 17, at 122–23.

141. For a reference to Zhu Yuanzhang's revival of the civil service examinations, see ROBERTS, *supra* note 17, at 122. *But see* FARMER, *supra* note 127, at 36 (noting that “[a]fter an unsatisfactory start the examination system was suspended in 1373”). Zhu Yuanzhang also established schools to help return China to its pre-Mongol traditions. *Id.* at 35. Indeed, at the beginning of his reign, Zhu Yuanzhang “ordered a group of Confucian scholars to compile a book of ritual.” *Id.* at 34.

E. Other Sources of Law in Dynastic China

My account so far has focused on legal codification, with particular emphasis on three periods of Chinese history: the Qin-Han period (focusing especially on the third and second centuries BCE), the Tang period (especially its beginnings in the early to mid-seventh century CE), and the Ming period (especially its beginnings in the latter part of the fourteenth century CE). Any account of Chinese law is incomplete, however, without some mention of the areas and means of social control that lay outside the codes. This is a topic thoroughly discussed elsewhere,¹⁴² so I shall touch on it only insofar as it contributes to—or perhaps corrects—the foregoing account of codification in China.

Chinese dynastic codes generally, including the ones discussed above, look predominantly criminal in character. They typically take the form of a large set of “if-then” statements, with the “if” part describing a prohibited act and the “then” part prescribing the punishment(s) that the act would trigger. The “then” portions of the statements—the punishments—are almost exclusively corporal in nature; as noted above, from the Tang Code forward (and probably beginning with the Sui Code, preceding the Tang) the five main punishments were beatings with a light stick, beatings with a heavy stick, penal servitude, exile, and death.¹⁴³ More importantly, the “if” portions of the statements address matters that are of concern to the state in advancing its own interests,¹⁴⁴ which included of course the preservation of its own monopoly over political power and the maintenance of social order.¹⁴⁵ That is, only those types of behavior that would run counter to the emperor’s interests in maintaining power and order are

142. See BODDE & MORRIS, *supra* note 17, at 5 (noting that in China, “the ordinary man’s awareness and acceptance of [ethical] norms was shaped far more by the pervasive influence of custom and the usages of propriety than by any formally enacted system of law” and pointing out that the inevitable frictions in society were smoothed out not by legal means but by the operation of “extra-legal bodies” of clan, guild, elders, etc.).

143. These five punishments, and the gradations of each, are enumerated in Articles 1–5 of the Tang Code. See JOHNSON–1979, *supra* note 4, at 55–59.

144. See JONES, *supra* note 4, at 6, 9, 11.

145. See JOHNSON–1979, *supra* note 4, at 10 (explaining the aim of law “to maintain a balance in society and a harmony between the human world and the natural worlds,” reflecting the view that “the human and natural worlds are linked together so that actions in the human world will bring about a corresponding reaction in the natural world”). See also BODDE & MORRIS, *supra* note 17, at 4, 43–44.

proscribed in the codes.¹⁴⁶ Conversely, behaviors that would not have any such effect get no attention from the codes. Hence, the codes are largely silent on private commercial transactions and other purely personal matters such as tort (delict) or employment.

How are those matters regulated in dynastic China? The answer takes us back to the Confucianist-Legalist debate of twenty-five centuries ago. The Confucianist view, as noted above, is that personal behavior is subject to *li*—those precepts of propriety and ritual, differentiated by reference to one's place in the family and in society, that will result in a smooth functioning of society and therefore promote cosmic harmony. These precepts are, and by nature must remain, largely unwritten. One writer offers this explanation:

[T]he *li* were not positive rules; indeed, in a sense they were not rules at all. They lacked the quality of positiveness because they were not understood, formulated, or obeyed as something apart from the concrete relationships that established an individual's identity and social place. No one made the *li*; they were the living, spontaneous order of society, an order that human will, though capable of disturbing, was powerless to create. Therefore, instead of a catalogue of explicit rules, one encounters more or less tacit models of exemplary conduct. These models were transmitted as part of the experience of learning to participate in social relations according to one's rank, and they were formulated, when formulated at all, as moral anecdotes in authoritative literary works¹⁴⁷

It is largely to reflect this point—that much of human behavior in dynastic China was governed not by the legal codes but instead by the precepts of *li*, which were largely unwritten in character—that I have prescribed the first of the three necessary conditions for codification to occur in a society. Unless written law is generally regarded favorably as a means of ordering society, codification will not occur, whatever other circumstances might exist. Put in the context of China, the legal codes—including those of the Qin, Han, Tang, and Ming periods—have a substantially narrower scope than many western legal codes because Chinese culture, as influenced by Legalism, favored

146. Hence “the official law always operated in a vertical direction from the state upon the individual, rather than on a horizontal plane directly between two individuals.” BODDE & MORRIS, *supra* note 17, at 4. However, a collection of articles emerging from a 1991 conference on “Civil Law in Chinese History” suggests that the Qing Code did, by the nineteenth century, give some attention to matters of private property, succession, contracts, and other “civil” relations. CIVIL LAW IN QING AND REPUBLICAN CHINA (Kathryn Bernhardt & Philip C.C. Huang eds., 1994).

147. Roberto Mangabeira Unger, LAW IN MODERN SOCIETY 94 (1976).

written rules only for those types of behavior that bore directly on the emperor's maintenance of power over the bureaucracy on which the stability of the state was considered to rest. All other behavior—by far the bulk of private matters that would interest the typical Chinese individual, whether peasant or gentleman—was governed by traditional principles not amenable to codification.

III. EUROPEAN EXPERIENCES WITH LEGAL CODIFICATION¹⁴⁸

Because European law and history have received so much attention already in the “comparative codification” literature, I shall focus my attention in the following paragraphs on how I believe two of the most celebrated codes (really sets of codes)—those of Justinian and Napoleon—illustrate my thesis about the conditions and factors for codification.

A. Justinian's Codification

1. *The character of the work.* The Emperor Justinian was responsible for what has been called the “most important single event for the subsequent history of Roman law in western Europe.”¹⁴⁹ Justinian, whose rule lasted from 527 to his death in 565,¹⁵⁰ resided in Constantinople, the seat of the Roman Empire in the East after the

148. In writing this portion of the article, I have relied on the following authorities (listed in alphabetical order): RENÉ DAVID & JOHN E.C. BRIERLY, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY* (3d ed. 1985); CHRISTIAN DADOMO & SUSAN FARRAN, *THE FRENCH LEGAL SYSTEM* (1993); Francis Deák & Max Rheinstein, *The Development of French and German Law*, 24 *GEO. L.J.* 551 (1936); MARY ANN GLENDON, MICHAEL WALLACE GORDON, & CHRISTOPHER OSAKWE, *COMPARATIVE LEGAL TRADITIONS IN A NUTSHELL* (1982); Michael H. Hoeflich, *Legal History and the History of the Book: Variations on a Theme*, 46 *KAN. L. REV.* 415 (1997); C.F. KOLBERT, *THE DIGEST OF ROMAN LAW - THEFT, RAPINE, DAMAGE AND INSULT* (1979); LAWSON-1953, *supra* note 1; F.W. LAWSON, *THE ROMAN LAW READER* 16 (1969) [hereinafter *LAWSON-1969*]; ARTHUR TAYLOR VON MEHREN & JAMES RUSSELL GORDLEY, *THE CIVIL LAW SYSTEM* (1977); MERRYMAN, *supra* note 1; RUDOLF B. SCHLESINGER ET AL., *COMPARATIVE LAW* (6th ed. 1998); PETER STEIN, *ROMAN LAW IN EUROPEAN HISTORY* (1999); J.A.C. THOMAS, *TEXTBOOK OF ROMAN LAW* (1976); WATKIN, *supra* note 15; and several essays in *PROBLEMS OF CODIFICATION* (S.J. Stoljar ed., 1977) [hereinafter *PROBLEMS*].

149. VON MEHREN & GORDLEY, *supra* note 148, at 6.

150. For a synopsis of Justinian's life and career, see STEIN, *supra* note 148, at 32-35. See also KOLBERT, *supra* note 148, at i. Justinian first ruled jointly with his elderly uncle, the Emperor Justin, from 518 to 527. *Id.*

fall of the Western Empire in 476.¹⁵¹ In 528, Justinian “ordered the great compilation, systematization, and consolidation of Roman law later known as the *Corpus juris civilis*.”¹⁵² The work was accomplished in a very short time. Between 529 and 534, three works were promulgated: the *Institutes*, the *Digest*, and the *Codex*.¹⁵³ A fourth work, the *Novellae*, was issued later.¹⁵⁴

Some writers would not regard Justinian’s collective work as a code, because at least some of its component parts were poorly-organized or even chaotic.¹⁵⁵ This is particularly true of the *Digest*, generally considered the most important component, especially in terms of its contribution to the development of European civil law. The *Digest*, a set of books about half again the size of the Christian Bible “and . . . almost as inexhaustible,”¹⁵⁶ has been described as “a treatise representing the distillation of what, in the judgment of Justinian’s jurists, was most valuable from the best Roman legal writings from all previous periods.”¹⁵⁷ It is indeed chaotic in its presentation. One authority describes the *Digest* in this way:

It is, in fact, unbelievably confusing. The precise rationale behind the structure of the *Digest* as it has come down to us remains a subject of debate and controversy. What is clear is that it was not arranged for ease of use. It is arranged neither chronologically, which would be of maximum use to the historian, nor topically, which would be of maximum use to a lawyer. If one turns to the *Digest* to discover the Roman legal rule on a particular topic—validity of wills, for example—one cannot find the answer easily. In fact, without help, the only way to find the answer—if one wants to be thorough—is to read the whole thing. I would suggest to you

151. VON MEHREN & GORDLEY, *supra* note 148, at 6. In 476 Odovaker deposed Romulus Augustulus, and this act “broke the western Empire’s last tenuous bond of political unity.” *Id.* at 4. The breakup of the Roman Empire in the West was also “symbolized by the sack of Rome in 410 A.D.” GLENDON, *supra* note 148, at 15.

152. VON MEHREN & GORDLEY, *supra* note 148, at 6. It was not originally known by that name; the title *Corpus Juris Civilis* was coined in the sixteenth century to apply to the *Institutes*, the *Digest*, and the *Codex*. DADOMO AND FARRAN, *supra* note 148, at 2 n.4; WATKIN, *supra* note 15, at 64.

153. VON MEHREN & GORDLEY, *supra* note 148, at 6.

154. *Id.*

155. See Helmut Coing, *An Intellectual History of European Codification in the Eighteenth and Nineteenth Centuries*, in PROBLEMS, *supra* note 148, at 16. According to Coing, “codification must . . . be systematic, expressed in clear and technical terminology,” and the *Corpus Juris Civilis* fails to qualify as a code because it “was really nothing more than an authoritative collection of legal materials.” *Id.*

156. LAWSON-1953, *supra* note 1, at 12.

157. GLENDON, *supra* note 148, at 16.

that this unwieldy, difficult, and terribly long manuscript . . . [was, in modern terms,] . . . simply not accessible.¹⁵⁸

The *Institutes* is as organized as the *Digest* is disorganized. Designed as “a systematic treatise . . . for the use of law students,”¹⁵⁹ the *Institutes* was given a structure that would later be used for many centuries in teaching law and writing national legal codes.¹⁶⁰ Less important for our purposes are the *Codex* and the *Novellae*. The *Codex* was a collection of imperial enactments dating from as early as about 120 CE but drawn mainly from the fourth through sixth centuries.¹⁶¹ The *Novellae* contained Justinian’s own imperial legislation enacted after the *Codex* was issued.¹⁶²

Under the definition I offered above for “codification,”¹⁶³ Justinian’s work product would pass muster, notwithstanding the confusing structure of the *Digest*. After all, it had the force of law following its promulgation,¹⁶⁴ it resulted from a singular effort, it constituted a relatively new work product,¹⁶⁵ and it purported to cover all important areas of law and legal relations.

2. *Conditions and factors of codification.* How do the various conditions and factors of codification that I enumerated above appear in the case of Justinian’s collective work? Almost all are present.

158. Hoeflich, *supra* note 148, at 418–19. Hoeflich goes on then to emphasize the importance of the scholarly work in the twelfth century to develop techniques, including “glosses” and indexes, to make the *Digest* accessible. *Id.* at 419–20. See also THOMAS, *supra* note 148, at 7–8 (describing the work of the glossators).

159. VON MEHREN & GORDLEY, *supra* note 148, at 6. See also Hoeflich, *supra* note 148, at 417 (describing the *Institutes* as “an elementary textbook of Roman legal principles for use in law schools”).

160. See MERRYMAN, *supra* note 1, at 6 (noting that “the first three books of the *Institutes* of Justinian (‘Of Persons,’ ‘Of Things,’ ‘Of Obligations’) and the major nineteenth-century civil codes all deal with substantially the same sets of problems and relationships”).

161. See LAWSON–1953, *supra* note 1, at 11. Similar descriptions appear in GLENDON, *supra* note 148, at 16, and in VON MEHREN & GORDLEY, *supra* note 148, at 6.

162. VON MEHREN & GORDLEY, *supra* note 148, at 6.

163. See *supra* text accompanying note 6.

164. SCHLESINGER, *supra* note 148, at 225 n.b. See also STEIN, *supra* note 148, at 35 (noting that “[t]he *Digest* and *Institutes* became law on 31 December 533 and . . . the *Code* a year later.”). See also WATKIN, *supra* note 15, at 64 (noting that the *Digest* “was given the force of law” and that “[h]enceforth it was to be the only source used for citing juristic opinion, so that in reality all law was now enacted law”).

165. Some parts of the work were more novel than others. The aim of the *Codex* was to bring up to date the Theodosian Code of 438 CE. STEIN, *supra* note 148, at 28–29, 33. The *Institutes* drew heavily from the *Institutes* of Gaius. VON MEHREN & GORDLEY, *supra* note 148, at 6–7. The *Digest*, however, was unprecedented. STEIN, *supra* note 148, at 33.

First, the “view of law” condition was satisfied. Since the time of the Twelve Tables (*Lex Duodecim Tabularum*),¹⁶⁶ Rome had generally regarded law favorably as a means of ordering society. Indeed, the standard account of how the Twelve Tables came into being emphasizes the importance attached then and later to the publication of the laws as a means of protecting the middle class from the arbitrary rule of the patrician class.¹⁶⁷

Second, the “power concentration” condition also was satisfied. The top political authority—Justinian—was powerful enough, at least in the eastern Empire, to impose a binding legal code. Justinian proved himself to be one of the greatest of Roman emperors by consolidating the Empire’s strength in Constantinople and reclaiming temporarily some of the western Empire from the Germanic tribes that occupied it in the sixth century.¹⁶⁸

Third, the “codification leadership” condition was satisfied. Justinian sought through his legal code to “rescue the Roman legal system from several centuries of deterioration and restore it to its former purity and grandeur.”¹⁶⁹ He would accomplish this by sifting through the old law, making corrections, and issuing it anew in an organized form.¹⁷⁰

As for other factors favoring codification, most of the ones that I enumerated above were present in Justinian’s time:

166. The Twelve Tables “mark the beginning of Roman Law, as we know it.” STEIN, *supra* note 148, at 3. They arose around 450 BCE out of friction between the plebians and the patricians in Rome, which at the time was a small community on the left bank of the river Tiber. *Id.* At the insistence of the plebians, a commission of ten citizens was appointed in 451 BC to prepare a written text of the customary law. *Id.* Their work product, the Twelve Tables, was approved by a popular assembly of citizens. *Id.* at 3–4.

167. See STEIN, *supra* note 148, at 3. See also introductory comments to *The Twelve Tables*, as translated and reprinted in ALLAN CHESTER JOHNSON ET AL., ANCIENT ROMAN STATUTES 9 (1961) (noting that “[f]or the Romans the publication of these laws signaled a stage in the class conflict between the patricians and the plebeians, for the latter compelled the codification and the promulgation of what had been largely customary law interpreted and administered by the former primarily in their own interests”). For an account of the political circumstances leading to the issuance of the Twelve Tables, see WATKIN, *supra* note 15, at 19–20.

168. STEIN, *supra* note 148, at 33 (explaining that Justinian, through the efforts of his generals, “recovered North Africa from the Vandals and re-established imperial authority over the Ostrogothic kingdom in Italy”).

169. MERRYMAN, *supra* note 1, at 7. See also STEIN, *supra* note 148, at 33 (noting that “Justinian consciously looked back to the golden age of Roman law and aimed to restore it to the peak it had reached three centuries before”).

170. *Id.*

- the “legal chaos” factor. The existing law was undeniably confused, internally inconsistent, and spread among multiple sources.¹⁷¹ Justinian was concerned in particular “about the great number, length, and variety of commentaries and treatises written by legal scholars.”¹⁷²
- the “radical political change” factor. Justinian came to power less than 50 years after the fall of Rome in 476.¹⁷³ Although the dissolution of the Empire had begun many years before, the actual split of the Empire was a dramatic change in the character of the political unit that Justinian ruled.¹⁷⁴
- The “model code” factor. The *Institutes* was modeled after a similar work of nearly four centuries earlier—Gaius’s *Institutes*.¹⁷⁵ The fact that there was apparently no such model to follow in compiling the *Digest* might partially explain the chaotic nature of that part of Justinian’s collective work.¹⁷⁶
- The “scholar/jurist influence” factor. Justinian entrusted the codification project to a team of legal scholars and jurists,¹⁷⁷ and the works they relied on were largely written by jurists.¹⁷⁸

171. CONCISE HISTORY, *supra* note 70, at 171 (noting that Justinian launched an “attack on the huge confusion and complication of [Byzantine Rome’s] law, some of which went back to the early Republic”); MERRYMAN, *supra* note 1, at 7 (noting that “the mass of authoritative and quasi-authoritative material had become so great . . . that it seemed desirable to Justinian to eliminate that which was wrong, obscure, or repetitive, to resolve conflicts and doubts, and to organize what was worth retaining into some systematic form”).

172. *Id.* at 7. Roman law by the sixth century has been called a “mass of juristic literature which . . . demanded for its understanding not only the exercise of first-class minds but also the maintenance of an active school tradition.” LAWSON-1953, *supra* note 1, at 12. In another book, the same author describes the state of Roman law in Justinian’s time in even more dramatic terms: “[T]he infinite variety of laws and legal opinions had filled many thousand volumes, which no fortune could purchase and no capacity could digest.” LAWSON-1969, *supra* note 148, at 16. See also WATSON, *supra* note 1, at 101 (quoting Justinian’s allegation that Roman statutes were “in a state of such confusion that they reach to an infinite length and surpass the bounds of all human capacity”).

173. See *supra* note 151.

174. For a summary of the split in the Roman Empire, beginning as early as around the year 200 and culminating in the fifth century, see CONCISE HISTORY, *supra* note 70, at 158–71.

175. See STEIN, *supra* note 148, at 35. Gaius’ *Institutes* was published around 161 CE. ALAN WATSON, *THE SPIRIT OF ROMAN LAW* 5 (1995).

176. See *supra* note 158 and accompanying text.

177. For a description of the members of the commission that was assembled to undertake the work, see WATKIN, *supra* note 15, at 63. The bulk of them were legal scholars, mainly from the Constantinople law school and “the other great imperial law school at Beirut.” *Id.* One author calls Tribonian, the minister under whose supervision the commission labored, an “extraordinary man . . . [whose] genius . . . embraced . . . all the business and knowledge of the

In sum, the framework of conditions and factors I have proposed to explain the incidence of codification seems to fit the circumstances of Justinian's codification efforts. Given those circumstances, it is little surprise that the *Corpus Juris Civilis* was created and promulgated.¹⁷⁹

B. The French Experience with Codification under Napoleon

The second European example I use to illustrate variations and commonalities in codification experiences requires a chronological jump forward to France at the turn of the nineteenth century. In 1804, Napoleon gained approval for his *Code Civil*, the enactment of which expressly deprived all prior sources of law—"the Roman laws, the ordinances, the general and local customs, the charters and the regulations"—of any effect insofar as they touched on any matter covered by the *Code*.¹⁸⁰

The *Code Civil* has been referred to as a "modern" code,¹⁸¹ inspired by revolutionary passion for enlightened legal reform.¹⁸² Even as a literary work it has drawn great praise, and it is widely regarded as the premier example of legal codification (perhaps along with the German Civil Code issued in 1896 and effective in 1900).

1. *Background to the Code Civil*. What were the circumstances in which the *Code Civil* emerged? Answering this question requires

age . . . [and who] composed, both in prose and verse, on a strange diversity of curious and abstruse subjects." LAWSON-1969, *supra* note 148, at 16.

178. LAWSON-1953, *supra* note 1, at 10-11 (stating that the *Digest* "consists of extracts from the writings of the classical jurists"); GLENDON, *supra* note 148, at 16 (referring to the *Digest* as a distillation of what "was most valuable from the best Roman legal writings").

179. Ironically, however, Justinian's codification made relatively little impression at the time. See STEIN, *supra* note 148, at 35 (noting that "[t]he extraordinary fact about Justinian's work is that, despite the fanfare with which it was published, it attracted relatively little attention," in part because it was "written in Latin" and hence "unintelligible to many Greek-speaking Byzantine lawyers"). It would in fact be over six hundred years before the product of Justinian's efforts took on great significance; it was then, in the late 11th century, that the *Digest* was rediscovered in Italy and taken up as a centerpiece of legal study at the universities. For accounts of these developments, see SCHLESINGER, *supra* note 148, at 238-39; MERRYMAN, *supra* note 1, at 9; GLENDON, *supra* note 148, at 20-21. For a description of Greek works drawn from the Justinian codification, see STEIN, *supra* note 148, at 35-36.

180. Law of March 21, 1804, as reprinted in SCHLESINGER, *supra* note 148, at 245-46.

181. See Haskins-1954, *supra* note 1, at 2.

182. See MERRYMAN, *supra* note 1, at 30 (referring to the *Code Civil* as having an "essentially revolutionary" character); Coing, *supra* note 155, at 24 (saying that the *Code Civil* served to "stabilise and coordinate the great reforms which the revolutionary era had introduced").

us to go back about three centuries before the Revolution of 1789. Despite France's development as a singular state in those centuries, the law of France was remarkably fragmented. As one source has put it, although "[t]he consolidation of French royal power from the end of the 15th century to the Revolution of 1789 made France the first modern nation, a *politically* unified society under strong central rule,"¹⁸³ France was far from a *legally* unified society in the period before the Revolution—known as the period of the *ancien régime*.¹⁸⁴ Instead, it was "a kaleidoscope of various legal systems existing contemporaneously, yet independently, in the various provinces and districts."¹⁸⁵ Voltaire is often quoted as having said that a traveler in France changed laws as often as he changed horses.¹⁸⁶

Within this pre-Revolutionary "kaleidoscope of various legal systems," a general distinction can be made between the north of France and the south of France.

In the south (the *Midi*), Roman law was paramount and that section is therefore designated by French legal historians as the country of written law (*pays de droit écrit*). In the various provinces of the north, local customs were in force and this area has been termed the country of customary law (*pays de coutume*).¹⁸⁷

183. GLENDON, *supra* note 148, at 29 (emphasis added). See also Deák & Rheinstein, *supra* note 148, at 553 (noting that "mediaeval France . . . [was] a 'nation,' in the modern sense of the word, for several centuries before codification," though it was composed of "a kaleidoscope of various legal systems existing contemporaneously").

184. See GLENDON, *supra* note 148, at 29. See also Deák & Rheinstein, *supra* note 148, at 553 (noting that in France "uniformity of law was not accomplished until the beginning of the nineteenth century").

185. Deák & Rheinstein, *supra* note 148, at 553. The reason for the "kaleidoscop[ic]" nature of French law, according to one source, is "fundamentally institutional": France had no "centralized administration of justice" at the time, in part because of a history of struggles (i) between feudalism and centralized power and (ii) between the Church and the State. See VON MEHREN & GORDLEY, *supra* note 148, at 13–14. See also SCHLESINGER, *supra* note 148, at 268–69 (asserting that, in contrast to England, the reasons why no court on the European continent was able to attain the stature necessary to create a nationally unified law "can be found in the divisive struggles between ecclesiastic and secular power, and between overlord sovereignty and local or regional independence which characterize the medieval period in continental history").

186. GLENDON, *supra* note 148, at 29. See VON MEHREN & GORDLEY, *supra* note 148, at 48.

187. Deák & Rheinstein, *supra* note 148, at 553. See also VON MEHREN & GORDLEY, *supra* note 148, at 10 (explaining that the receptiveness of southern France to the revived Roman law beginning in the thirteenth century stemmed from the fact that "the customary law [applicable in the south at that time] was itself a vulgarized Roman law"); DAVID & BRIERLY, *supra* note 148, at 54 (also distinguishing between the *pays de droit écrit* and the *pays de coutumes*).

Although the customs in the north of France were numerous and varied, they may be classified into two categories—about sixty *coutume générale*, each of which was in force for a whole province or large district (such as the *coutume de Paris* and the *coutume d'Orléans*),¹⁸⁸ and about 300 *coutumes locales*, in force only within a particular city or village.¹⁸⁹ This patchwork of local customary laws might not have had much long-term influence on French law if they had remained scattered and uncollected, but in 1453, Charles VII directed, in his ordinance of Montils-les-Tours, that an official compilation be prepared of all customs.¹⁹⁰ It took more than a century to accomplish this task, but “by the end of the sixteenth century the bulk of French ‘customary’ law was, in fact, reduced to written law”¹⁹¹—albeit rather fragmentary in character.¹⁹²

The written compilation of customs in the sixteenth century naturally contributed to the “kaleidoscope” character of French law. This character was only partially eroded by the creation of uniform national laws on some topics by way of several royal *ordonnances* issued in the sixteenth, seventeenth, and eighteenth centuries. These included the *ordonnances* of Villers-Cotterets (1539) and Moulins (1566), dealing with procedure and evidence,¹⁹³ the *ordonnance* of 1667, “which gave France for the first time a truly uniform civil procedure,”¹⁹⁴ the *ordonnance* of 1673 on commerce,¹⁹⁵ and the *ordon-*

188. See Deák & Rheinstein, *supra* note 148, at 554. The *coutume de Paris* had influence “beyond the geographical limits of its actual authority.” *Id.*

189. *Id.*

190. *Id.* See also DAVID & BRIERLY, *supra* note 148, at 53, 56 (giving the date as 1454); WATSON, *supra* note 1, at 112 (also giving a date of 1454).

191. Deák & Rheinstein, *supra* note 148, at 554.

192. DAVID & BRIERLY, *supra* note 148, at 53 (noting that these compilations of customs had a “fragmentary character” in that they dealt “only . . . with those social relationships already in existence before the thirteenth century: family relations, land law and inheritance”), 56 (observing that these compilations merely set forth “the content of the custom,” thus making “evident all its gaps, archaisms and insufficiencies” and that they therefore “had the appearance of a ‘special law,’ that of a corrective to a system whose main principles were to be found elsewhere”). See also LAWSON-1953, *supra* note 1, at 36–37 (noting that the customs, even after the compilations, “were often very fragmentary” and “often had to be supplemented in order to make them work”). Lawson does point out, however, that the customs in the north of France gradually converged in some respects and that by 1720 they were “taking the shape of a common customary law,” albeit “with regional and local variants.” *Id.*

193. See DAVID & BRIERLY, *supra* note 148, at 62.

194. VON MEHREN & GORDLEY, *supra* note 148, at 14.

195. *Id.* at 51–52. See also DAVID & BRIERLY, *supra* note 148, at 62 (referring to the *ordonnance sur le commerce*). The civil procedure law and the commercial law were enacted by

nances of Chancellor D'Aguesseau governing gifts (1731), wills (1735), and family settlements (1747).¹⁹⁶ While these developments illustrated the increasing domination of the royal, central power from the end of the fifteenth century onward,¹⁹⁷ they did not bring unification to French law.¹⁹⁸ Instead, the law remained fragmented, in part because such centralized legislation was often resisted by the provincial judges and *parlements*¹⁹⁹—that is, governmental bodies combining some aspects of both judicial and legislative functions.²⁰⁰ According to one author, “efforts by the Crown to unify the kingdom and to enforce relatively enlightened and progressive legislative reforms . . . [were often] frustrated. The courts refused to apply the new laws, interpreted them contrary to their intent, or hindered the attempts of officials to administer them.”²⁰¹

2. *Revolution and codification.* The French Revolution “shattered the old institutional structures” and centralized the machinery of government “to a degree never before known in France.”²⁰² It marked the end of the *ancien régime* and the beginning of a short transition period called the time of the *droit intermédiaire*.²⁰³ Although legislation enacted during this time—that is, just following onset of the Revolution—aimed at reform in various areas of public law,²⁰⁴ it did not immediately provide a new national private law to

Louis XIV “under the impulse of his enlightened minister Colbert.” LAWSON–1953, *supra* note 1, at 36.

196. See LAWSON–1953, *supra* note 1, at 36. See also DAVID & BRIERLY, *supra* note 148, at 62.

197. See VON MEHREN & GORDLEY, *supra* note 148, at 14.

198. See *id.* at 14 (noting that “[u]nification was . . . not achieved during the *Ancien régime*”), 48 (observing that except for the three eighteenth-century ordinances referred to above, “the private law of France remained as essentially diverse at the end of the 18th century as it had been at the beginning of the 15th”).

199. See *id.* at 48 (stating that “the tradition of local independence remained strong in the provinces and . . . increasingly found expression . . . through provincial institutions, especially the Parliaments”). See also Deák & Rheinstein, *supra* note 148, at 555 (noting that the unifying effect of the royal ordinances “was somewhat impaired by the occasional refusal of some of the provincial *Parlements* to execute them”).

200. See DAVID & BRIERLY, *supra* note 148, at 57–58. For a description of *parlements*, see Deák & Rheinstein, *supra* note 148, at 554 n.5 (explaining that the *Parlement* of Paris and various provincial *parlements* created between 1443 and 1775 “were chiefly courts of justice” but also “exercised legislative as well as administrative powers”).

201. MERRYMAN, *supra* note 1, at 16.

202. VON MEHREN & GORDLEY, *supra* note 148, at 48.

203. See Deák & Rheinstein, *supra* note 148, at 555.

204. See *id.*

replace the “kaleidoscope” that had lasted for several hundred years.²⁰⁵ That was to be the task of comprehensive codification.

It was a huge task. The fragmentary character of law in France that had, for reasons described above, persisted for centuries prompted the famous French lawyer Portalis to give this description of the scene of French law that faced the codifiers:

What a spectacle opened before our eyes! Facing us was only a confused and shapeless mass of foreign and French laws, of general and particular customs, of abrogated and nonabrogated ordinances, of contradictory regulations and conflicting decisions; one encountered nothing but a mysterious labyrinth, and, at every moment, the guiding thread escaped us. We were always on the point of getting lost in an immense chaos.²⁰⁶

The process by which the *Code Civil* was prepared seems just as chaotic as the legal landscape it was designed to replace—at least until Napoleon took charge. In July 1790, the Constituent Assembly voted “that the civil laws would be reviewed and reformed by the legislators and that there would be made a general code of laws simple, clear and appropriate.”²⁰⁷ By August 1793, Jean-Jacques Cambacérès presented an incomplete draft of 715 articles, which was rejected as being too complicated. He presented two more drafts in 1794 and 1796, but neither of these was successful. Likewise, a draft presented in December 1799 by Jacqueminot was also unsuccessful.²⁰⁸

Things changed in 1800. Napoleon, having concentrated great power in his hands²⁰⁹ and “harbor[ing] the ambition to be known by history as a great lawgiver,”²¹⁰ appointed a commission of four to pre-

205. See *supra* text accompanying note 185.

206. VON MEHREN & GORDLEY, *supra* note 148, at 14 (quoting Portalis as reported in a collection of preparatory works relating to the *Code Civil*).

207. *Id.* at 48 (quoting from materials in the same collection of preparatory works relating to the *Code Civil*).

208. The information in this paragraph is drawn from VON MEHREN & GORDLEY, *supra* note 148, at 48–49; and from DADOMO AND FARRAN, *supra* note 148, at 8–9. See also WATSON, *supra* note 1, at 113 (summarizing these developments, and giving the number of articles in Cambacérès’ first draft code as 695, not 715). Jean-Jacques Cambacérès was a lawyer, member of the Revolutionary Convention, and loyal supporter of Napoleon, who rewarded him with several positions, including that of Second Consul, president of the Senate, and duke of Parma. HISTORICAL DICTIONARY OF FRANCE FROM THE 1815 RESTORATION TO THE SECOND EMPIRE 147–48 (Edgar Leon Newman ed., 1987); FELIX MARKHAM, NAPOLEON 80 (1963).

209. Napoleon was appointed to the three-member Consulate, which had the power to propose legislation. In 1802 he became the first Consul for life. DADOMO AND FARRAN, *supra* note 148, at 8.

210. VON MEHREN & GORDLEY, *supra* note 148, at 49. See also GLENDON, *supra* note 148, at 32 (also noting that Napoleon “wanted to be remembered as a great lawgiver”); MERRYMAN,

pare a draft.²¹¹ Within four months the commission prepared a draft code, but it met strong resistance in the Tribunal, a 100-member body that included many opponents of Napoleon and that was responsible for giving recommendations to the 300-member Legislative Body (responsible for actually enacting legislation). In December 1801, the Tribunal gave negative recommendations on two portions of the draft code. Consequently, the Legislative Body voted to reject one and the other "was in jeopardy" by late December.²¹² In January 1802 Napoleon withdrew the draft code to avoid its full rejection,²¹³ and set about securing his power more completely. The Tribunal was reduced in size to fifty members and was divided into three sections, which restricted its capacity to frustrate the government's purpose.²¹⁴

This worked. The draft code was voted on, approved, and promulgated in 36 separate laws between March 1803 and March 1804. Then a law enacted on 21 March 1804 consolidated those separate laws into a single *Code Civil*.²¹⁵

3. *Conditions and factors of codification.* I have given some of the details leading up to the promulgation of the *Code Civil* in order to illustrate how most of the conditions and factors of codification that I introduced earlier are present in this French codification expe-

supra note 1, at 59 (stating that "Napoleon wanted his code . . . to provide the basis for a completely new legal order").

211. The members of the commission were "Tronchet, President of the Court of Cassation, and representing the interests of the *droit coutumier*; Bigot de Préameneu, an advocate and member of the *Parlement de Paris*; Portalis, an administrative official, writer, and public orator, who represented the interests of the *droit écrit*; and Maleville, a judge from the Court of Cassation." DADOMO AND FARRAN, *supra* note 148, at 9 n.29. See also VON MEHREN & GORDLEY, *supra* note 148, at 49 (identifying Bigot de Préameneu as "a *Commissaire du gouvernement* in a Prize Court").

212. VON MEHREN & GORDLEY, *supra* note 148, at 50.

213. See *id.* Napoleon announced that the government was "convinced that the time has not yet arrived when the calmness and unity of purpose required can be employed in these important discussions." *Id.* at 51 (quoting from materials in an 1827 book on the civil, commercial, and criminal legislation of France).

214. *Id.* See also WATSON, *supra* note 1, at 114 (referring to Napoleon's action as "the purging of the Tribunal").

215. See VON MEHREN & GORDLEY, *supra* note 148, at 51. The *Code Civil* is also known as the *Code Napoléon*. On its enactment, its name was the *Code civil des Français*. "Its title changed to the *Code Napoléon* in 1807, back to the *Code Civil* in 1816 following an ordinance of Louis XVIII, reverted to the *Code Napoléon* in 1852 under Napoleon III, and then finally renamed the *Code Civil* in 1870." DADOMO AND FARRAN, *supra* note 148, at 9 n.31. But see Watson, *supra* note 1, at 114 n.27 (giving some different dates).

rience. First, the “regard-for-written-law” condition—that written law be generally regarded favorably as a means of ordering society—is implicit in the evolution of French law during the entire period discussed above, as reflected in the compilation of the *coutumes*, in the issuance of the *ordonnances*, and in the directive of the Constituent Assembly in 1790 that there “be made a general code of laws simple, clear and appropriate.”²¹⁶

Second, both the “power concentration” condition and the “champion-of-codification” condition were met, in the person of Napoleon. His appointment as First Consul²¹⁷ gave him broad control over the forces of radical change that lingered in the aftermath of the Revolution. When the Tribunate blocked legislative approval of the draft code in 1801, Napoleon had sufficient power to slash the Tribunate’s influence.²¹⁸ Moreover, as also indicated above, he had a strong desire to see the *Code Civil* put in place, as reflected in a comment he is said to have made afterwards: “One Waterloo wipes out their memory, but my civil code will live forever.”²¹⁹

As for the other factors contributing to successful codification efforts, most were clearly present. Certainly the “legal chaos” factor was present; as described above, law in France leading up to the Revolution was an almost impossibly fragmented “kaleidoscope.” Likewise, much of the existing law was anachronistic, markedly out of step with the new needs and values that the Revolution had exposed; hence the “behind-the-times” factor was manifest.²²⁰ Of course, the “radical political change” factor was also present. Indeed, it would be

216. See *supra* note 207 and accompanying text.

217. See *supra* note 209.

218. See *supra* note 210 and accompanying text.

219. GLENDON, *supra* note 148, at 32. See also *id.* (noting that Napoleon “wanted to be remembered as a great lawgiver”); MERRYMAN, *supra* note 1, at 59 (stating that “Napoleon wanted his code . . . to provide the basis for a completely new legal order”); WATKIN, *supra* note 15, at 138 (asserting that “Napoleon took his role as a law-giver very seriously”); VON MEHREN & GORDLEY, *supra* note 148, at 49 (explaining that “Bonaparte as First Consul had concentrated great power in his hands and harbored the ambition to be known by history as a great lawgiver”).

220. One source emphasizes that of the “three ideological pillars” that the *Code Civil* established—private property, freedom of contract, and the patriarchal family—at least the first one “made an abrupt break with the feudal past,” and that the *Code Civil* in general “represented a new way of thinking about man, law and government.” GLENDON, *supra* note 148, at 30. Another source explains that “[t]he enactment of a civil code was one of the aims of the French Revolution,” and its proponents “sought to sweep away the legal structure that propped up the *ancien régime*, and replace it with a short, simple code, that would express the aspirations of liberty, equality and fraternity.” STEIN, *supra* note 148, at 114.

hard to imagine a more thorough break with the past, at least in formal terms, than that which the *Code Civil* was supposed to represent. As one author has commented, “[a]ny principles of prior law that were incorporated in the codes received their validity not from their previous existence, but from their incorporation and reenactment in codified form.”²²¹ Another authority makes the following observation about the break with the past that the *Code Civil* was supposed to represent: “So strong was this feeling that the Code must be treated as *res nova* that one of the early commentators, Bugnet, said, ‘I know nothing of civil law; I only teach the *Code Napoléon*.’”²²²

Despite this purported break with the past, the draftsmen of the *Code Civil* did in fact draw heavily from several sources of prior law.²²³ Most important for our purposes is that they followed very closely the framework of the *Institutes* that Justinian’s codification commission had written in the sixth century²²⁴—which itself had drawn heavily from Gaius’ *Institutes* of the second century CE.²²⁵ Hence the “model code” factor was also present in the French experience.

The last of the five key factors I enumerated above is the “scholar/jurist influence” factor. At first blush it is not clear whether, or how much, this factor figured in the French codification experience. Some authorities emphasize the fact that the men who served on the drafting commission—Portalis, Tronchet, Bigot-Préameneu, and Malleville²²⁶—were “practitioners” instead of professors,²²⁷ that

221. MERRYMAN, *supra* note 1, at 27. Merryman says that “the French codifiers sought to destroy prior law” in order “to establish an entirely new legal order.” *Id.*

222. Maurice Amos, *The Code Napoleon and the Modern World*, 10 J. COMP. LEGIS. & INT’L L. (3rd ser.) 222, 224 (1928). See also MERRYMAN, *supra* note 1, at 28, 59 (translating the statement as “I know nothing of the civil law; I know only the Code Napoléon”).

223. See WATKIN, *supra* note 148, at 136 (stating that the content of the *Code Civil* is “drawn in part from the customary rules which had operated in the northern parts of France for centuries and which had been worked into a system by earlier writers, and in part from the accumulated learning of civil law from the time of the Glossators”). For an exploration of this topic, with detailed illustrations of how codifiers in France and elsewhere drew on various sources for guidance in their drafting work, see SCHLESINGER, *supra* note 148, at 246–59.

224. See GLENDON, *supra* note 148, at 31–32 (noting that “the formal tripartite structure of [the *Code Civil*] (Persons, Things and the Different Modes of Acquiring Property) was virtually identical to that of the first three books of Justinian’s *Institutes*,” and that in formulating substantive rules “the draftsmen relied primarily . . . on both customary law and the *jus commune*”).

225. See *supra* note 175.

226. See *supra* note 195.

227. See LAWSON–1953, *supra* note 1, at 53–54 (contrasting the French *Code Civil* with the German Civil Code, which “was drafted mainly by professors after a century of the most intense

“academic lawyers were not even asked to participate in the drafting” process,²²⁸ and that, as a consequence, the drafting of the *Code Civil* was mainly a practical undertaking and not a scholarly one.²²⁹ As one source puts it, “there was nothing philosophical” in the approach of the French compilers, and they “were much more concerned to sum up the teaching of the past in compendious and accessible form” than to create a complete statement of the law based on intense juristic study.²³⁰ In contrast, one author emphasizes that the drafting commission, though consisting of practicing lawyers and judges, was “dominated by the work of scholars (particularly that of Robert Pothier),” and that the commission members had a “grand scholarly design.”²³¹ This might be an exaggeration, but the underlying influence of scholars is undeniable,²³² as is the status of several of the commission’s members as jurists, if not scholars.²³³ Besides, as noted above, the draftsmen built on a structure—that of the *Institutes*—that clearly was the product of juristic work.

On balance, then, it appears that all three conditions and all five factors favoring codification were present to a substantial degree in

juristic study of both Roman and native German law”). Lawson notes that where the draftsmen of the *Code Civil* did consult with the writings of scholars, “they went mainly to the eighteenth century jurist Pothier, an unoriginal compiler who tried from time to time to introduce the sort of order and principle into the law which is necessary for exposition to students”). See also WATSON, *supra* note 1, at 114 (noting that “all the members were practical lawyers and not academics”); DAVID & BRIERLY, *supra* note 148, at 95 n.1 (noting that “[t]he French codes were drawn up by practitioners rather than university professors”).

228. SCHLESINGER, *supra* note 148, at 280 (contrasting the French experience with that in Germany and Switzerland, where “law professors did help to prepare the codes”).

229. See LAWSON-1953, *supra* note 1, at 54.

230. *Id.*

231. MERRYMAN, *supra* note 1, at 58.

232. For references to the influence that Pothier—as well as Domat, another scholar—had on the drafting of the *Code Civil*, see STEIN, *supra* note 148, at 114–15 (indicating that Pothier, a magistrate and later a professor of law at the University of Orleans, “had done much of the detailed preliminary work necessary for the preparation of a civil code” by “reducing both the Roman and the customary laws to a rational and usable order,” and stating that “[t]he compilers of the Code civil relied heavily on Pothier . . . and to a lesser extent on Domat”). See also WATKIN, *supra* note 148, at 134–35 (noting the influence of Pothier and Domat); LAWSON-1953, *supra* note 1, at 35 (writing that Pothier “exerted an overwhelming influence on the compilers”); WATSON, *supra* note 1, at 111–12 (noting the influence of earlier works of legal scholarship by Argou, who published the *Institution au droit français* in 1692, and by Bourjon, who in 1743 published a book with a long title referred to as *Droit commun*), and 120 (asserting that “the main source for the substantive law in the *Code* is Pothier”).

233. See *supra* note 15 for the distinction I draw between jurists and scholars. See also *supra* note 211 (describing the four members of the drafting commission).

the drafting of the French *Code Civil*.²³⁴ It was accepted that law should be written, Napoleon had the power and will to enact a comprehensive code, the existing law was chaotic and behind the times, the radical political changes of the Revolution cried out for legal reform, a "model code" from an earlier time was readily at hand, and scholars and jurists had an influential role in the legal system.

IV. AMERICAN EXPERIENCES WITH LEGAL CODIFICATION²³⁵

The story of legal codification in America is dramatically different from those of China and Europe, at least in the instances I have chosen for illustration. In the following paragraphs I describe three codification efforts in North America—a colonial effort in seventeenth-century Massachusetts, a more or less national effort in early nineteenth-century America, and an effort that concentrated on the state of New York later in the same century. The first effort may be regarded as a success, although it pales in significance when compared to the codification efforts I have written about above. The second effort ended in failure, except to the extent that it laid the groundwork for the third effort, which was a partial success although much narrower in scope than the Chinese and European efforts discussed above. I believe the fate of these three American efforts is at least

234. In the years immediately following the enactment of the *Code Civil*, four other codes were produced—a code of civil procedure (1807), a commercial code (1808), a criminal procedure code (1811), and a penal code (1811). The first of these drew heavily on the *Ordonnance* of 1667, the second on the *Ordonnance* of 1673 on commerce, and the latter two on criminal law and procedure codes that had been enacted during the Revolutionary period. See VON MEHREN & GORDLEY, *supra* note 148, at 51–52.

235. In writing this portion of the article, I have relied on the following authorities (listed in alphabetical order): FRANCIS R. AUMANN, *THE CHANGING AMERICAN LEGAL SYSTEM* (1940); CHARLES M. COOK, *THE AMERICAN CODIFICATION MOVEMENT* (1981); DAVID DUDLEY FIELD, *SPEECHES, ARGUMENTS AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD* (A. P. Sprague ed., 1884); LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (2d ed. 1985); KERMIT HALL ET AL., *AMERICAN LEGAL HISTORY—CASES AND MATERIALS* (2d ed. 1991); HASKINS—1954, *supra* note 1; GEORGE L. HASKINS, *LAW AND AUTHORITY IN EARLY MASSACHUSETTS: A STUDY IN TRADITION AND DESIGN* (1960) [hereinafter HASKINS—1960]; CHARLES M. HEPBURN, *THE HISTORICAL DEVELOPMENT OF CODE PLEADING IN AMERICA AND ENGLAND* (1897); *THE LIFE OF THE LAW* (John Honnold ed., 1964) [hereinafter HONNOLD]; Merryman, *supra* note 1; Mathias Reimann, *The Historical School Against Codification: Savigny, Carter, and the Defeat of the New York Civil Code*, 37 AM. J. COMP. L. 95 (1989); BERNARD SCHWARTZ, *MAIN CURRENTS IN AMERICAN LEGAL THOUGHT* (1993) [hereinafter SCHWARTZ, MAIN CURRENTS]; Thorp L. Wolford, *The Laws and Liberties of 1648*, 28 BOSTON U.L.R. 426 (1948).

partly explicable by reference to the various conditions and factors of codification that I have enumerated at the beginning of this article.

A. *The Laws and Liberties of Massachusetts of 1648*

1. *American colonial legal systems.* Two opposing assumptions—both of them false—might be made about the legal systems in the early days of the English colonies in America. One of these assumptions, probably the more common, is that those legal systems were essentially transplants of English law. As a practical matter, this would have been impossible, largely because the circumstances in the colonies were so radically different from those in England. As Roscoe Pound observed, the common law of England in colonial times was heavily burdened with formalism, and “[i]ts ideals were those of the relationally organized society of the Middle Ages and so quite out of line with the needs and ideas of men who were opening up the wilderness.”²³⁶ Reflecting this reality, the colonial charters customarily provided that laws should be established in the colonies themselves in a way not contrary to the laws of England.²³⁷

The fact that colonial conditions differed radically from those of England might lead to the opposite assumption about legal systems in the early days of the English colonies: that they were, as one author has put it, “home-spun, indigenous legal order[s].”²³⁸ This assumption is also false, although perhaps not so far wide off the mark as the first one is. The basic precepts of English law, including especially its emphasis on individual rights, definitely formed the foundation of law in the English colonies,²³⁹ and once the colonies had progressed beyond the earliest phase of their development—that is, beyond “the nasty,

236. ROSCOE POUND, *THE FORMATIVE ERA OF AMERICAN LAW* (1938), reprinted in HONNOLD, *supra* note 235, at 53.

237. See HASKINS-1960, *supra* note 235, at 5.

238. HONNOLD, *supra* note 235, at 48. Honnold identifies these two competing assumptions in the introduction to Chapter 2 of his book, by asking these rhetorical questions: “Were [English legal] institutions transplanted in the New World? Or did the settlers develop a home-spun, indigenous legal order?” *Id.* For a discussion of these two competing assumptions, under the heading of “conflicting views on colonial law,” see AUMANN, *supra* note 235, at 5–9.

239. Indeed, as one author has pointed out, a key grievance voiced in the Declaration of Independence was that King George had interfered with the colonists’ enjoyment of their rights under English law. See COOK, *supra* note 235, at 4. This, Cook says, distinguishes the American Revolution from many other revolutions, which typically “have brought about drastic transformations in the law.” *Id.* at 3.

precarious life of pioneer settlement"²⁴⁰—the rules and traditions of English law had an important abiding influence.²⁴¹

The most accurate picture of law in the colonies, therefore, has two main features: English legal heritage²⁴² and indigenous legal rules.²⁴³ Both of these features were reflected, in varying proportions, in legal codes that several of the colonies established for themselves in the latter part of the seventeenth century. One of the earliest of these colonial codes, and apparently the most influential, was *The Laws and Liberties of Massachusetts* (hereinafter "*Laws and Liberties*" or "*LLM*").²⁴⁴

2. *The character of the Laws and Liberties.* The *Laws and Liberties* was remarkable in several respects. For one thing, it was purported "to be a complete and comprehensive statement of the laws, privileges, duties, and rights in force" within the colony.²⁴⁵

The [*LLM*] was not only an authoritative compilation of constitutional provisions—regulations for the conduct of administration, courts and their jurisdiction, trade, military affairs, and the relation between church and state—but it included also the substantive law of crime, of property, and of domestic relations. Detailed provisions regulating prices and wages are also found, as well as a num-

240. See FRIEDMAN, *supra* note 235, at 68.

241. *Id.* at 93 (explaining that the colonies remained influenced by the legal tradition of the mother country, partly due to "commercial dependence and English governance," and that several colonial codes reflected English models). For example, South Carolina adopted in 1712 a set of laws in which about 150 English statutes were reprinted and declared to be binding locally. *Id.* See also HASKINS-1960, *supra* note 235, at 6 ("[A]s the eighteenth century progressed, a substantial amount of English common law was absorbed into the local product").

242. This was part of a broader cultural heritage, as Haskins reminds us: "[T]he colonists drew upon their English experience in developing their political institutions, their family and social life, [and] their institutions of government." HASKINS-1960, *supra* note 235, at 7.

243. As Haskins puts it, "[t]he truth is that American law in the colonial period drew upon a complex legal heritage which included not only many of the English statutes and the rules applied by common-law courts but various customs of particular localities—all of which were supplemented by colonial enactments and decisions." *Id.* at 6.

244. FRIEDMAN, *supra* note 235, at 91. Friedman refers to two earlier codes: Dale's laws in Virginia (1611), and the *Body of Liberties* adopted in Massachusetts in 1641. *Id.* at 68-70. See also AUMANN, *supra* note 235, at 12 (enumerating colonial "codification" efforts that predated the *LLM*). Introductory provisions of *The Laws and Liberties of Massachusetts* are reprinted in part in HALL, *supra* note 235, at 15-17. For an analysis of the content of the *LLM*, see Wolford, *supra* note 235, at 431-62 (focusing on administrative and judicial provisions, religious and personal freedoms, public records, property, domestic relations, business regulation, and criminal law). Wolford quotes from an introduction to a 1929 edition of the *LLM* for the proposition that it was "the first attempt at a comprehensive reduction into one form of a body of legislation of an English-speaking country." *Id.* at 426.

245. Haskins-1954, *supra* note 1, at 3.

ber of laws governing individual behavior and affecting the moral welfare of the community. For example, gaming for money is proscribed, and penalties are imposed for drunkenness, profanity, and the telling of lies.²⁴⁶

A second noteworthy feature of the *Laws and Liberties* is its structure. Instead of being arranged in a logical, analytical fashion—as was, for example, Justinian’s *Institutes* or the French *Code Civil* discussed above—the *LLM* was arranged alphabetically by subject. Following its introductory clauses, the *LLM* proceeded from a provision on “Abilitie” (regarding capacity of persons to make wills and to dispose of property) to provisions on “Actions,” “Age,” and “Anabaptists,” and concluded with a provision on “Wrecks of the Sea.”²⁴⁷ In this respect, as I hinted above, the *LLM* pales in comparison to other codification efforts described in this article.²⁴⁸

3. *Conditions and factors of codification.* A third noteworthy feature of the *Laws and Liberties* brings us back to the focal point of this article: conditions and factors of codification. The first of the three conditions that I have identified as necessary for successful codification is evident in the story of what led to the drafting and enactment of the *LLM*. That story centers on the efforts of the colonists to restrict the arbitrary powers of the governor and his assistants by forcing them to have the legal rules by which they governed written down and published. Here is how one authority on the *LLM* tells the story:

It must be borne in mind that the organization of the Colony of Massachusetts Bay was autocratic from the start. At the time of settlement in 1630, the government of several thousand persons was in the hands of the governor and his seven or eight “assistants” or “magistrates”. . . There was nothing in the political theory of this group which could be described as democratic . . . [They] looked upon themselves as instruments in the divine hand for carrying out a great religious mission. Their voice was supreme in judicial as well as in legislative matters, and, during the three years following settlement of the Colony, they inflicted fines and imprisonment, levied taxes, and granted lands entirely within their own discretion. Although the basic aims of these leaders were generally accepted,

246. *Id.* at 3–4 (citations omitted).

247. FRIEDMAN, *supra* note 235, at 91. See also Wolford, *supra* note 235, at 429–30 (commenting on the alphabetical arrangement).

248. See Haskins–1954, *supra* note 1, at 5 (noting that the alphabetical arrangement “cannot . . . be described as analytical, and in this respect it is difficult to compare the [*LLM*] with modern ones [codes] with which we are familiar”).

the absolute authority wielded by this small oligarchic group provided an immediate source of dissatisfaction to the great bulk of the colonists, and a movement was soon under way aimed not only at broadening the basis of government but at obtaining security against the arbitrary power of the magistrates. Although in 1634 the government was placed upon a wider basis through extension of the suffrage, absence of knowledge as to what justice might be expected continued to be a principal basis for complaint. A considerable portion of the population felt that the magistrates . . . could not be trusted to decide fairly unless the rules which were to guide their decisions were public property.²⁴⁹

These circumstances closely resemble those that led to the issuance of the Twelve Tables in Rome in 450 BCE—a large majority successfully pressuring a small minority of power-holders to write down the legal rules, with the aim of preventing the arbitrary exercise of that power. In the case of the Massachusetts experience, however, another element also contributed to this desire for the rules to be written down: the “traditional Puritan belief in the importance of the written word.”²⁵⁰

The colonists’ insistence that a code of laws be drafted eventually resulted in the approval in 1641 of a document known as the “Body of Liberties.”²⁵¹ This document, however, “was less a code of laws than a kind of modern state constitution.”²⁵² It had such inadequate coverage—it did not, for example, incorporate particular laws that had already been enacted²⁵³—that it failed to satisfy the colonists. Indeed, it “in fact increased their insistence upon having a comprehensive code

249. See Haskins-1954, *supra* note 1, at 6-7. See also Wolford, *supra* note 235, at 427 (noting the “demand that the laws be written to limit and define the discretionary power of the magistrates”).

250. Haskins-1954, *supra* note 1, at 7. Indeed, the *LLM* had a strong religious bent throughout. Of its twelve opening sentences, for example, nine carried Christian themes. See the text of the *LLM*, as reprinted in part in HALL, *supra* note 235, at 15-16 (with references to God, his people of Israel, his Ordinances, the Christ Jesus, etc.). See also Wolford, *supra* note 235, at 430 (noting that “[a]ll except one of the capital laws in the *Laws and Liberties* were supported by Biblical authority”).

251. See Haskins-1954, *supra* note 1, at 8. The document was drafted by Nathaniel Ward and approved by the General Court. *Id.* The pressure from the colonists had begun around 1635, but nothing concrete was accomplished toward codification for several years because of resistance on the part of the colony’s leaders. *Id.* at 7-8. See also Wolford, *supra* note 235, at 427-28 (detailing the developments between 1635 and 1641).

252. Haskins-1954, *supra* note 1, at 8. “Its one hundred provisions were in no exact order, and they covered such matters as the relations between church and state, principles of town government, and the requirement of just procedure in judicial proceedings . . . [I]t may fairly be said that . . . [it formed] a sort of Bill of Rights . . .” *Id.*

253. *Id.*

of laws."²⁵⁴ Accordingly, committees "were therefore appointed once again with a view to preparing a comprehensive compilation of all applicable laws and regulations. Their work resulted in the detailed and comprehensive Code of 1648 . . . which was printed for distribution in 1649,"²⁵⁵ and this "brought to an end the long struggle over the power of the magistrates."²⁵⁶

The desire to have the laws written down—what I have referred to as the "regard-for-written-law" condition to successful codification—is reflected in the provisions of the *LLM* itself. Its introductory clause posits the general thesis: "These Lawes which were made successively in divers former years, we have reduced under several heads in an alphabeticall method, that so they might the more readilye be found . . . wherin (upon every occasion) you might readily see the rule which you ought to walke by."²⁵⁷ More specifically, other *LLM* provisions required "that both the judgment of any court and the reasons therefor should be recorded"—requirements that grew out of a campaign to force the governing authorities to reduce rules and judgments to writing in order to prevent arbitrary action.²⁵⁸

What of the other two conditions of codification that I have identified—the "power concentration" condition and the "champion-of-codification" condition? Are they evident in the circumstances that resulted in the issuance of the *Laws and Liberties*? They are, but their scope of coverage was fairly narrow. It could be said that these two other conditions occurred once the colonists broke the absolute power of the governor and magistrates and intensified their insistence

254. *Id.*

255. *Id.* But see Wolford, *supra* note 235, at 429 (noting that the *LLM* was dated 1647 and published in 1648, and contesting the accuracy of a claim that the *LLM* was published in 1649).

256. Haskins-1954, *supra* note 1, at 9. See also Wolford, *supra* note 235, at 430 (calling the *LLM* "an important milestone in the effort to curb, by written law, the discretionary power of magistrates").

257. *The Laws and Liberties of Massachusetts, reprinted* (in part) in HALL, *supra* note 235, at 16. Interestingly, Jeremy Bentham used very similar wording several decades later in urging codification: "That which we have need of (need we say it?) is a body of law, from the respective parts of which we may each of us, by reading them or hearing them read, learn, and on each occasion know, what are his rights, and what his duties." Joseph Henry Beale, Jr., *The Development of Jurisprudence During the Nineteenth Century*, appearing in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 565 (1907).

258. Wolford, *supra* note 235, at 452. One authority also points out that seventeenth-century American colonists had a more favorable view of laws written down in the form of statutes: "Unlike the English, who at the same period saw the statute as a dangerous weapon and even a threat to their liberties, the American colonists of the seventeenth century looked favorably on 'written law.'" DAVID & BRIERLY, *supra* note 148, at 389.

on a set of written laws. However, that is all they got. The *LLM* was hardly the kind of sophisticated and structured code that emerged from the codification experiences discussed above—that is, in Qin, Han, Tang, or Ming China, in Justinian’s empire, or in Napoleon’s France—in which codification champions had a much greater concentration of power. This leads me to a further, subsidiary thesis as to the conditions necessary for codification to occur: they can have more or less weight. Once all three of the conditions are present, codification can occur, assuming enough of the other factors also are present; but these conditions (perhaps unlike typical conditions precedent in some contracts) can also vary by weight. The degree to which they are present affects the kind of code they help create—its scope, its exclusivity, and its break with the past. For example, the three conditions—“regard-for-written-law,” “power concentration,” and “champion-of-codification”—were not only present in the case of the French *Code Civil*, but present to an unusually high degree. Napoleon’s power and the importance he placed on codification were both very great. Perhaps as a consequence, the *Code Civil* had a broad scope of coverage and a high degree of exclusivity. It dominated the areas of its coverage, as shown by its displacement of all prior law and by Napoleon’s hope (albeit short-lived) that it would not be made the subject of commentary and interpretation.²⁵⁹ In contrast, although all three conditions were present in the case of the *Laws and Liberties*, two of them—“power concentration” and “champion of codification”—were much less pronounced. Perhaps as a consequence, the *LLM* lacks the kind of exclusivity and domination that characterized the *Code Civil*. There is no indication that the *LLM* was supposed to expand on or displace pre-existing law. Instead, its aim was to restate pre-existing law, as revealed in the introductory clause quoted above: the laws “which were made successively in divers former years, we have reduced . . . so they might the more readilye be found.”²⁶⁰

This subsidiary thesis—that the conditions of codification can have more or less weight, and that their weight (the degree to which they are present, beyond a bare minimum) can affect the scope and exclusivity of the code that they help create—seems to be borne out

259. Napoleon is quoted as having exclaimed, “*mon code est perdu*” (“my code is lost”) when he heard of the publication of the first commentary on it. SCHLESINGER, *supra* note 148, at 246 (citing Amos, *supra* note 222, at 224); MERRYMAN, *supra* note 1, at 51.

260. *The Laws and Liberties of Massachusetts, reprinted (in part) in HALL, supra* note 235, at 16.

in the Chinese experiences with codification as well. As explained above,²⁶¹ codified law in the Qin, Han, Tang, and Ming periods had a limited scope of coverage, reflecting the competition between the Legalist preference for written law (*fa*) and the Confucianist preference for the mainly unwritten norms of *li*, which governed most activities of most Chinese most of the time. Because Chinese society did not regard written law (*fa*) favorably as a means of ordering society as a whole (as distinct from serving merely as a means of maintaining imperial rule sufficient to bring political order), one of the three conditions I have identified—the “regard-for-written-law” condition—did not have as much weight in China as in the two European codification experiences I have discussed above.

Hence, the presence of the conditions of codification is not a black-or-white proposition. There are shades of gray. The conditions of codification can be present in degrees, and the degree to which they are present bears on the character of the codification, and especially on the exclusivity and “reach” of a code.

These same shades of gray appear in the other five factors that I identified above as tending to favor codification. In the case of colonial Massachusetts, some of those factors existed, but in degrees that differed from their presence in some of the other codification experiences discussed above—especially that of France at the beginning of the nineteenth century. More specifically, these factors consist of the following:

- The “legal chaos” factor was present to some degree in colonial Massachusetts. As explained above, one of the main ingredients to colonial American law was English legal heritage. However, it would not be easy to identify clearly what were the laws of England in the seventeenth century, since they would have included a mish-mash of parliamentary statutes, case law, local customs, ecclesiastical law, and other ingredients.²⁶² It is unlikely, however, that the “legal chaos” in seventeenth century Massachusetts was as dramatic as that described by Portalis just before the promulgation of the *Code Civil*—“a mysterious labyrinth” and “an immense chaos.”²⁶³

261. See *supra* part II.

262. HASKINS—1960, *supra* note 235, at 5.

263. See *supra* note 206 and accompanying text.

- The “behind-the-times” factor was also present, and to a substantial degree. The *Laws and Liberties* reflects, according to one author, “a fresh and considered effort to establish new provisions which were suitable to new conditions in a frontier society,”²⁶⁴ and specifically to a society whose announced purpose was “to create a kingdom of God in the wilderness.”²⁶⁵ Again, however, this factor was probably more evident in some other codification exercises described above—for example, Justinian’s codification, which drew from sources that dated from several centuries earlier, before Rome had embraced Christianity and before the Empire had divided and the West had fallen.
- The “radical political change” factor was present to some extent in seventeenth-century Massachusetts, as the frontier colonial circumstances had important political consequences, including the concentration of discretion in a small oligarchy.²⁶⁶ However, there was no revolutionary political re-ordering on the scale of the French Revolution from which the *Code Civil* emerged.
- The Massachusetts codifiers had little in the way of a “model code” on which to draw. Although they might have found some guidance or inspiration in compilations of customary law that existed in some of the local English jurisdictions from which the colonists came,²⁶⁷ and the alphabetical arrangement they followed in preparing the *Laws and Liberties* might have been inspired by various earlier abridgments,²⁶⁸

264. Haskins–1954, *supra* note 1, at 4. Haskins gives examples of how “new conditions in a frontier community required the adoption of laws suited thereto.” *Id.* at 10. These included departures from the rules of primogeniture and from English laws on procedure, debtors and creditors rights, and land registration. *Id.*

265. *Id.* at 9.

266. See *supra* note 249 and accompanying text (explaining that the Massachusetts colony “was autocratic from the start”). Indeed, the question of how much discretionary power should rest with the governing elite was “one of [the] most controversial problems” the Massachusetts colonists faced, and a section on “Magistrates” in the *LLM* placed restraints on such power. Wolford, *supra* note 235, at 432.

267. Haskins–1954, *supra* note 1, at 10–11.

268. See *id.* at 5 n.20. Haskins explains that “various of the English abridgements, such as Brooke’s *Abridgement*, Coke’s *Book of Entries*, or Dalton’s *Country* [sic] *Justice* . . . were certainly known to at least one or two of the colonists who had read law in England.” *Id.* Some copies of such books were available also in Massachusetts. Wolford, *supra* note 235, at 431 (referring to Dalton’s *Country* [sic] *Justice*); AUMANN, *supra* note 235, at 46 (referring to Coke’s

these would almost surely have been of less use than Justinian's *Institutes* were to the drafters of the *Code Civil*, or than the Tang Code was to the commission responsible for creating the Ming Code.

- Lastly, the “scholar/jurist influence” factor would have been largely absent from the colonial Massachusetts codification experience, for a combination of reasons. First, although English law in the 1600s was the subject of some famous scholarly works,²⁶⁹ it was far less influenced by legal scholarship than European civil law, given the centuries of work by Glossators and Commentators poring over Justinian's *Digest* beginning in the twelfth century and sometimes giving opinions that were binding in courts,²⁷⁰ or than Chinese law, with its long march of Confucianist scholars whose work had become so influential in China by the time of the Ming dynasty. Besides, the availability of English legal treatises was slim in Massachusetts as of the mid-seventeenth century.²⁷¹ Moreover, the American colonies at that time did not offer very hospitable circumstances for the kind of homegrown legal scholars that would become influential starting early in the nineteenth century.²⁷²

In sum, the *Laws and Liberties* experience presents a mixed image of codification in early America. On the one hand, the *LLM* did constitute a code of sorts, and it is surely a noteworthy accomplishment given its circumstances and its consequences. In the years following its adoption in 1648, this compilation of laws was widely emulated.²⁷³ Despite differences among the colonies,²⁷⁴ many of them

Book of Entries). See also Wolford, *supra* note 235, at 429 (noting that the alphabetical form would have been “familiar to lawyers of the day”).

269. See A.W.B. Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. CHI. L. REV. 632, 635 et seq. (1981) (mentioning works by Littleton and Coke).

270. See MERRYMAN, *supra* note 1, at 57 (explaining that “the responses of scholars to questions of law were in some places given binding authority in courts, a practice analogous to the use made of juriconsults during the classical period of Roman law”).

271. See AUMANN, *supra* note 235, at 46 (noting that “Massachusetts seems to have possessed a much scantier supply of law books than did Maryland and Virginia” and citing other authors for the proposition that “law books [were] ‘exceedingly rare in New England until the latter part of the seventeenth century when important shipments came to Boston’”).

272. See *infra* notes 328–335 and accompanying text.

273. FRIEDMAN, *supra* note 235, at 92.

copied large portions of *The Laws and Liberties of Massachusetts*.²⁷⁵ Hence, the same basic structural framework—alphabetical arrangement of important laws—appeared in the statutory compilations, or “codes,” adopted in many parts of the colonies, including Connecticut, New Hampshire, New York, Pennsylvania, Delaware, and East New Jersey.²⁷⁶

On the other hand, the *LLM* pales in comparison to the other codes I have described, from Europe and China.²⁷⁷ I have suggested, as a reason for this, that two of the three necessary conditions for codification were only barely present, and several of the other factors favoring codification were less markedly present or influential than in those other codification experiences.

B. The American Codification Movement of 1815–1840

I turn now to the eighth of nine codification efforts discussed in this article—the great flirtation of the United States, shortly after it achieved national independence, with the idea of “substituting a general code for the whole of the common and statute law.”²⁷⁸ That codification effort largely failed as a national movement, for reasons I summarize below.

1. *Post-revolution legal developments.* The account of the American codification effort of the early nineteenth century begins with American independence in the late eighteenth. Unlike many political revolutions, the American Revolution did not involve de-

274. Haskins emphasizes these differences: “Geographical isolation, the date and character of the several settlements, the degree or absence of outside supervision or control—all had their effect in ultimately developing thirteen separate legal systems.” HASKINS—1960, *supra* note 235, at 6.

275. FRIEDMAN, *supra* note 235, at 79–92. For example, of the 78 provisions appearing in the Connecticut Code of 1650, “22 were copied, almost verbatim, from the Massachusetts code, 36 were adopted with certain deletions or amendments, [and] 6 came from other Massachusetts sources; only 14 (chiefly on local matters) were ‘original.’” *Id.* (citing George L. Haskins & Samuel E. Ewing, *The Spread of Massachusetts Law in the Seventeenth Century*, 106 U. PENN. L. REV. 413, 414–15 (1958)).

276. *Id.* at 92–93.

277. One writer, for example, has said that the *LLM* “was by no means a model code” in that it “contained many ambiguities, was detailed about such minor matters as the order of admission to ferries, and slighted or ignored many far more fundamental legal problems.” Wolford, *supra* note 235, at 462.

278. COOK, *supra* note 235, at 70 (quoting William H. Gardiner).

mands for radical changes in laws or legal institutions.²⁷⁹ At least as far as private law was concerned, American patriots felt little need to bring revolutionary legal change.²⁸⁰ Indeed, most of the new states specifically provided by law (usually by constitutional provisions) that the laws in existence before independence would remain in force.²⁸¹

Several reasons have been identified for this preference for legal continuity over legal change. First, "an inequitable legal system had not been a source of revolutionary discontent" in America, as it had been in France.²⁸² Second, the American Revolution had not involved radical ideological change, as was the case for example in the Russian revolution, and therefore "changes in the legal system were not ideologically mandated."²⁸³ Third, practical realities provided "pragmatic reasons for sustaining the inherited legal system."²⁸⁴ These practical realities included the difficulty of creating instantly a new system of law, as well as the instability that any attempts to do so would incite.²⁸⁵

In short, the independence of the American states from England did not trigger any immediate drastic change in the laws and institutions that had developed in the colonies before the separation. It was as if an old house had been transferred to a new owner (by theft, perhaps, in the view of both the English and the American loyalists), and the new owner had seen no immediate need to make major repairs or renovations to the house.

What happened over the next few years was predictable, at least for someone who has purchased and moved into an old house, and it can be seen as involving several stages. First came a period of settling

279. COOK, *supra* note 235, at 3. Cook points out that the Russian and French revolutions both resulted in dramatic legal changes, but that the American Revolution was different in that "the immediate impact of independence on the colonial legal legacy was not innovation but conservation." *Id.*

280. *Id.* at 4.

281. *Id.* at 3-4. Cook quotes from the New York constitution in this regard: "[S]uch parts of the common law of England and the statute law of England, and Great Britain, and the acts of the legislature of the Colony of New York as did form the law of the said colony . . . shall be and continue the law of the State." *Id.* at 3. For a reference to the actions by other states to keep pre-independence laws in force, see E. ALLAN FARNSWORTH, *INTRODUCTION TO THE LEGAL SYSTEM OF THE UNITED STATES* 8 (1983).

282. COOK, *supra* note 235, at 4.

283. *Id.* Cook notes that "[T]he American revolutionaries claimed their purpose was not to create [new rights and liberties] but rather to preserve and guarantee" those already provided in existing laws. *Id.*

284. *Id.*

285. *Id.*

in and adjustment. Second, as circumstances changed, the need for repair and renovation became apparent. Third, a debate developed over how drastic the alterations should be, and indeed whether the entire structure should be destroyed and replaced by a different one. Lastly, the most expansive proposals for change were rejected, and a compromise solution for renovation was reached.

In the case of the "old house" of American law,²⁸⁶ the period of settling in and adjustment lasted for roughly a generation following American independence, and it represented a balance between two urges: (i) to conserve and to continue in force the pre-existing rules and institutions, in the interest of stability, and (ii) to overcome defects that independence created and that changing circumstances exacerbated.

One of the perceived defects in the inherited system was the inaccessibility and uncertainty of the law.²⁸⁷ Complaints along these lines, encouraged by the establishment of a republican form of government,²⁸⁸ were exemplified by the following comment made at the close of the eighteenth century:

Every citizen ought to acquire a knowledge of those laws that govern his daily life and secure the invaluable blessings of life, liberty, and property [Y]et in no country is it more arduous and difficult to obtain a systematic understanding of the law.²⁸⁹

Responding to this problem of uncertainty, most states undertook the "revision" of their statutory laws.²⁹⁰ This exercise did not, however, involve an actual reform of the substance of those laws; in-

286. My research has revealed that I am not the first person to whom an "old house" analogy occurred in this context. See John Forrest Dillon, *Bentham's Influence in the Reforms of the Nineteenth Century*, in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 504 (1907) (remarking that Jeremy Bentham's remedy for English law, which he saw as "a system full of delays, frauds, snares, and uncertainties," was "not to stop leaks in the roof, put in new panes of glass, and otherwise repair the rotten and dilapidated structure, but to demolish it and rebuild anew").

287. COOK, *supra* note 235, at 5.

288. *Id.* As Cook points out, the establishment of a republican government "was quite naturally accompanied by sentiments stressing the need for citizens to be familiar with the laws by which they governed themselves."

289. *Id.* (quoting Zephaniah Swift, a Connecticut jurist at the time). Another critic of common law described it as an "'unbounded trackless ocean' of 'dark, arbitrary, unwritten, incoherent, cruel, inconsistent maxims.'" *Id.* at 13 (quoting the *Aurora* (Philadelphia), Jan. 30, 1805).

290. *Id.* at 24. These efforts did not start for most states until a generation or so following the Revolution. *Id.* at 7. However, by 1815, most of the states had provided for the revision and digesting of their ordinances. *Id.* at 25.

stead, it involved consolidating the statutes still in force in a state and putting them into some kind of order, usually chronological.²⁹¹

Even this seemingly modest exercise was daunting, as the laws enacted by colonial legislatures and later by the state legislatures had not to that point been widely distributed or well organized.²⁹² By preparing their “revisions,” the various states provided reliable and usable compilations of statutes currently in force. In New Jersey, for example, the revised laws as published in 1800 comprised one volume of 455 pages.²⁹³

In this way the immediate challenges of making the legal system (or systems) of the United States functional in the earliest years were met. However, this period of “settling in and adjustment,” to use the old house analogy I introduced above, provided no permanent solutions. Although most American lawyers apparently regarded the state of American law by 1815 with satisfaction,²⁹⁴ the opposite opinion soon prevailed. By 1820, the dominant view was that legal reform was essential to meet the new circumstances in which the United States found itself.²⁹⁵

Numerous specific ills were identified.²⁹⁶ Foremost among these, for our purposes, was that of complexity. One American legal histo-

291. *Id.* at 24–25. According to Cook, “[t]he term ‘revision’ had a well-defined meaning, at least until the mid-1820s. Specifically, it meant a consolidation of statutes reprinted in a uniform style and usually in chronological order, from which were eliminated dead laws (repealed or expired legislation), private acts, and sleeping statutes (obsolete laws). The result was a complete and authoritative statement of the statute law of a jurisdiction in a manageable size.” *Id.* at 24.

292. *Id.* at 6–7.

293. *Id.* at 25. Cook notes that “[c]onsidering the disorderly and confused condition of state ordinances, revision was potentially a tremendous boon to the research needs of the legal profession.” *Id.* at 24.

294. *Id.* at 47. Cook explains that “by 1815, there were well over one hundred volumes of native case law alone, as well as a greatly enlarged corpus of statutory materials. The very number of law books, and their presumably erudite and useful contents, was first taken as evidence that the problems of the postrevolutionary years were being solved, and that the working legal order was moving well along the road to perfection.” *Id.*

295. *See id.*

296. *See id.* According to Cook, the problems identified by lawyers “fell into four broad areas: problems arising out of the magnitude and diversity of the emerging legal product; the institutional role of the judiciary in the common law system; the continued close affinity of American law to English jurisprudence; and the difficulties encountered in dealing with statutory materials.” *Id.* For laypersons, a complaint was that the law was not simple and accessible to the people and was not responsive enough to the people’s will. *Id.* at 165. Another source identifies similar complaints: “the old underlying antagonism of the American public toward the common law, as being of English origin; . . . the ever-active jealousy, entertained by laymen in a

rian says that “it appeared that American law was becoming an incomprehensible tower of Babel.”²⁹⁷ Another asserts that by the early 1800s “a perfectly bewildering array of reported decisions” had been established,²⁹⁸ and provides these details:

It has been estimated that by 1822 there were about “one hundred and forty volumes of American Reports, all published since the organization of the federal government.” The rate of increase was so rapid that by 1824, complaints were being made concerning the “vast and increasing multiplication of reports”²⁹⁹

2. *The call for codification.* What was to be done? According to many—both lawyers and laypersons—codification offered the best answer. Thus began a great national flirtation of the United States with a comprehensive legal codification. It was a movement that generated a surprisingly high degree of attention and enthusiasm:

For nearly three decades, law reform would remain a preoccupation of the legal profession. Few comparable periods exist in American legal history when reform was so prominent in professional life.³⁰⁰

[Although legal reform had been espoused before, the factor that differentiates the period after 1820 from the preceding years was the manifest vitality and comprehensiveness that law reform activity displayed. In the earlier years, overt programmatic improvement of the law was episodic and localized, as was discussion of major legal problems. After 1820, a general American law reform movement could be said to exist. While the states necessarily remained the focus of reform efforts, agitation and debate concerning

democracy toward lawyers, as a privileged class and a monopoly, and the consequent desire to make the law a laymen's law; . . . [and] the increase in the number of law reports deemed, even then, to be ‘vast and unwieldy’.” AUMANN, *supra* note 235, at 121 n.5.

297. COOK, *supra* note 235, at 65.

298. AUMANN, *supra* note 235, at 71–72.

299. *Id.* at 72, citing articles appearing in *The North American Review* in the 1820s. In the same vein, Joseph Story in 1821 warned of the dangers posed by the sheer volume of the American legal product. COOK, *supra* note 235, at 47. Complementing these complaints and warnings about the growing volume of American law was a complaint that it was growing quickly in diversity as well, with inconsistent case decisions from various courts creating uncertainty and confusion. *Id.* at 74 n.21.

300. COOK, *supra* note 235, at 69. According to another text on American legal history, the proposals that emerged from the codification movement “distracted the attention of lawyers for most of the nineteenth century.” HALL, *supra* note 235, at 316. See also GRANT GILMORE, *THE AGES OF AMERICAN LAW* 27 (1977) (noting “the influence which [the codification movement] exerted for the better part of half a century” and asserting that “[f]rom the 1820s until the Civil War, American lawyers lived with the idea that the common law not only could be but probably would be codified”).

the improvement of the legal system transcended local boundaries.³⁰¹

That “agitation and debate” centered on codification,³⁰² and specifically, as one writer put it in the 1820s, on “the expedience and practicability of substituting a general code for the whole of the common and statute law.”³⁰³

Proponents of codification had a precedent for such an effort, of course, in the form of the French codification that had been completed only a few years earlier.³⁰⁴ In particular, the *Code Civil* was an immediate and compelling source of inspiration. It was new, it was easily available in English,³⁰⁵ it had emerged in a country whose circumstances seemed similar to those of the United States,³⁰⁶ and it was widely regarded as a paradigm of grace and simplicity.³⁰⁷ Moreover, it was part of a continental European legal tradition that was gaining popularity in the United States, as reflected in the growing number of references in early nineteenth-century law reports to civil law authorities of various kinds, including Pothier and other scholars, Justinian’s *Institutes* and *Digest*, and the *Code Civil* itself.³⁰⁸

301. COOK, *supra* note 235, at 69.

302. *Id.* at 70.

303. *Id.*, quoting William H. Gardiner.

304. As noted above, the five basic French codes—the *Code Civil*, the Code of Civil Procedure, the Penal Code, the Code of Criminal Procedure, and the Commercial Code—had been promulgated between 1804 and 1811. See *supra* part III.B.

305. COOK, *supra* note 235, at 71. Copies of all the codes were available from England, and some portions were also published in America.

306. *Id.* at 73. American codifiers compared the “ancient” features and divisiveness of the French legal system before codification with the American legal environment, and emphasized the need for law reform after the revolution.

307. *Id.* at 71. Cook quotes one American lawyer as saying that the *Code Civil* had a structure that was marked by “lucid order, precision and method” and another as praising it for its “simple principles of right” written “in simple language.” For some of its proponents, codification reflected not only grace but also mathematical certainties. AUMANN, *supra* note 235, at 150 (suggesting that “Napoleon’s belief in legal logarithm tables undoubtedly led to the Civil Code” and that similar views existed in the United States).

308. AUMANN, *supra* note 235, at 87. For an extensive treatment of the role of Roman and civil law in nineteenth-century America, see generally MICHAEL H. HOEFELICH, *ROMAN AND CIVIL LAW AND THE DEVELOPMENT OF ANGLO-AMERICAN JURISPRUDENCE IN THE NINETEENTH CENTURY* (1997), esp. at 2 (expressing the thesis that Roman and civil law “exercise[d] a significant influence on the thinking of some of the most important jurists and legal theorists of the nineteenth century in both England and the United States”), and at 7 (noting in particular that “by the beginning of the nineteenth century there was already a fair bit of interest . . . in the United States . . . for Roman and civil law among lawyers and jurists,” an interest that “grew and expanded” through the century, which saw, among other things, “the possibility that the new republic would wholly reject the English common law tradition and adopt the civil

The French codification experience, of course, was a hard act to follow. A comprehensive national codification that would reform American law was obviously a radical idea, and like most radical ideas it would need strong, singular leadership and a clear, singular set of specific goals and of measures for achieving them. The codification movement of 1815 to 1840 lacked both. It “manifested a diffused expression of reformist energy rather than a picture of tightly knit organization activity.”³⁰⁹

For one thing, there was “no single person who can be considered the theorist of the movement”³¹⁰ in this period. Although Jeremy Bentham and David Dudley Field are often cited as dominant figures in this regard,³¹¹ many Americans on both sides of the debate in fact spurned Bentham,³¹² and Field was instrumental only in the latter phases of the American codification movement,³¹³ as discussed more fully below in part IV.C. In the early, formative stages, several men, including William Sampson, Joseph Story, Charles Sumner, William Plumer, Thomas Cooper, Robert Rantoul, and others, sang the codification song.³¹⁴ Indeed, “[a]lmost every law writer after 1825 felt

law”). See also Peter Stein, *The Attraction of the Civil Law in Post-Revolutionary America*, 52 VA. L. REV. 403 (1966).

309. COOK, *supra* note 235, at 96.

310. *Id.*

311. See FRIEDMAN, *supra* note 235, at 403 (referring to Field as the “hero” of the codification movement and also the publisher in 1865 of a general Civil Code). See also *id.* at 391 (naming Field as the “heart and soul of the movement” for procedural reform from 1847 on) and 392 (referring to Bentham as one of the “intellectual forefathers” of the Field Code). See also Maurice Harrison, *The First Half-Century of the California Civil Code*, 10 CAL. L. REV. 185, 185–87 (1922) (referring to Field as the “chief author and advocate” of the California Civil Code adopted in the 1870s and the “prophet of American codification”).

312. COOK, *supra* note 235, at 74–75. Although Bentham’s writings on codification “probably initiated discussion of the reform in America” and probably helped set the tone for the debate, Bentham was seen by opponents of codification as “a mere theoretician with no practical experience in working with the law,” and even many proponents of codification “made overt attempts to disassociate their own proposals from the most objectionable elements of Bentham’s codification concept.” *Id.* at 75. For a description of Bentham’s efforts to bring codification to American law, see *id.* at 97–101.

313. COOK, *supra* note 235, at 187–88. Cook contends that Field’s role in the movement, while great in New York and elsewhere, “is in need of reassessment.” *Id.* at 187.

314. For references to some of the persons involved in the codification debate, see AUMANN, *supra* note 235, at 124–26 (mentioning Story, Thomas Cobb in Georgia, Governor Gerry of Massachusetts, Charles Sumner, John Pickering, Governor Edward Evertt of Massachusetts, and others); COOK, *supra* note 235, at 101 (mentioning William Plumer, a Governor of New Hampshire who corresponded with Bentham in 1817 and 1818), 125 (mentioning Thomas Cooper, who supported codification in South Carolina in the 1820s), and 160 (mentioning Rob-

compelled to include his views” on the proposed reform of law through codification.³¹⁵

They did not sing the same tune. Except for the most general of grounds for espousing codification—the advisability in principle of bringing more control and clarity to the mounting volume of case law and statutes—there was no common thread in the movement, no single theory sufficiently compelling to translate proposals into effective action. Some proponents called for a radical reform of the law, designed to go back to first principles, perhaps based on natural law, and to create a distinct legal self-identity for the United States.³¹⁶ Among those more radical proponents was William Sampson, who has been described by one source as “a flamboyant codifier who castigated the common law and urged the need for America to declare its independence from English jurisprudence,”³¹⁷ and whose 1823 address to the New York Historical Society encouraged codification by contrasting the defects of English common law with the glorious benefits that could come from a general code of American law.³¹⁸ Other proponents also urged radical reform.³¹⁹

ert Rantoul, “a radical Massachusetts lawyer and a Democrat”). For Rantoul’s July 4, 1836, oration recommending codification, see HALL, *supra* note 235, at 317–19.

315. COOK, *supra* note 235, at 109.

316. *Id.* at 84–85.

317. *Id.* at 80.

318. *Id.* at 106. For the text of Sampson’s oration, see William Sampson, An Anniversary Discourse, Delivered Before the Historical Society of New-York, On Saturday, December 6, 1823: Showing the Origin, Antiquities, Curiosities, and the Nature of the Common Law, reprinted in THE LEGAL MIND IN AMERICA: FROM INDEPENDENCE TO THE CIVIL WAR 119, esp. 130–34 (Perry Miller ed., 1962) [hereinafter Miller].

319. See Robert Rantoul, Jr., Oration at Scituate, reprinted in Miller, *supra* note 318, at 220–27, and in particular at 222 (claiming that the common law “had its origin in folly, barbarism, and feudality”), 223 (announcing that the common law “is the perfection of human reason, just as alcohol is the perfection of sugar”), and 227 (asserting that the common law, coming as it does from judges, is essentially unknowable and anti-democratic and should be reformed and remodeled through legislative action so that “[a]ll American law [will] be statute law”). Some proponents of codification gave less attention to the defects of the common law and emphasized instead the great improvements that codification could bring. See Thomas Smith Grimké, An Oration of the Practicability and Expedience of Reducing the Whole Body of the Law to the Simplicity of the Code, Delivered to the South Carolina Bar Association, March 17, 1827, reprinted in Miller, *supra* note 318, at 147 (claiming that “[a] state of order, as contrasted with a state of chaos, is justly esteemed,” that principles of law will be better respected “when they assume the organized forms of a system,” that “[t]he clearness and simplicity of a code” will make new legislation more orderly and efficient, and that the educated men in the community will, with a codified law, be better able to discharge their responsibilities and “will find it their duty, their interest, and their pleasure, to bestow much time on the study of the code”).

Others preferred a far more moderate or restrictive approach, under which codification would be undertaken for the purpose of rationalizing and systematizing the law by resolving inconsistencies, pruning away obsolete rules, and remedying blemishes—but not to reform it substantively.³²⁰ Among these was Joseph Story, who first opposed codification but then in 1821 gave some encouragement to a general code, or at least to moving in the direction of such a code. He made this comment in 1829:

The mass of the law is, to be sure, accumulating with an almost incredible rapidity It is impossible to look without some discouragement upon the ponderous volumes which the next half century will add to the groaning shelves of our jurists I know indeed of but one adequate remedy, and that is, by a gradual digest, under legislative authority, of those portions of our jurisprudence which under the forming hand of the judiciary, shall from time to time acquire scientific accuracy. By thus reducing to a text the exact principles of the law, we shall, in a great measure, get rid of the necessity of appealing to volumes which contain jarring and discordant opinions; and thus we may pave the way to a general code, which will present in its positive and authoritative text, the most material rules to guide the lawyer, the statesman, and the private citizen [However], to attempt any more than this would be a hopeless labor, if not an absurd project. We ought not to permit ourselves to indulge in the theoretical extravagances of some well meaning philosophical jurists who believe that all human concerns for the future can be provided for in a code speaking a definite language. Sufficient for us will be the achievement to reduce the past to order and certainty.³²¹

In addition to being divided between radicals and moderates (with differing shades of each), the proponents of codification were also divided geographically. However much enthusiasm the codification movement was able to generate at the national level, legal codification in nineteenth-century America would have to be, in the end, largely a state-by-state process.³²² Only a few states could have pro-codification leaders with the stature and endurance of Field, to whose efforts in New York we shall turn in part IV.C. of this article.

320. COOK, *supra* note 235, at 81–82.

321. AUMANN, *supra* note 235, at 74 n.21, quoting from an 1829 address by Story as published in that year in *The American Jurist*.

322. COOK, *supra* note 235, at 121 (noting that the national debate over codification “was only preliminary to the actual efforts in the states aimed at securing legislative sanction to reduce the law to a codified form”). See also *id.* at 96 (explaining that “the states alone had the authority to codify effectively the bulk of American law”).

In short, the codification movement that began around 1815 lacked a clear focus, in that no one person or group gained ascendancy over the others and presented a singular theory and program for codifying American law. One reason for this is especially pertinent to our consideration of the conditions and factors of codification. A singular theory and program of codification would in any event have been difficult for most of the early proponents of codification to muster because of their own intellectual nature and professional bent: "Being, by and large, practical men of the common law, they were not comfortable with legal philosophy or theory Consequently, when it came to the formation of abstract principles on which a proposed system of codified law would operate, they were quite noticeably out of their element."³²³

By 1840, the American codification movement had lost steam, at least as a national effort at comprehensive reform that attracted broad interest and support. One expert on the movement refers to its outcome as "tradition in triumph—almost."³²⁴ Why did tradition triumph (almost)? Two factors seem to predominate: (i) the strength of the common law tradition itself in America and (ii) the emergence by the mid-1800s of a broad range of American legal literature—chiefly treatises and digests—that provided tools for lawyers and judges and largely obviated comprehensive codification of the type originally propounded.

The first factor—strength of the common law tradition itself—can be seen in the intense criticisms voiced by the opponents to codification right from the beginning of the movement. Whether through fear of change or through sincere devotion to the common law, those opponents of codification strenuously defended the status quo. A largely conservative majority of the American bar consistently resisted law reform, and thus codification.³²⁵ More importantly, perhaps, the common law was able to meet the demands of the rapidly

323. *Id.* at 70.

324. *Id.* at 201. See also GILMORE, *supra* note 286, at 27 (noting that "the pre-Civil War codification movement ultimately failed"); DAVID & BRIERLY, *supra* note 148, at 402 (noting that the common law's triumph over the codification efforts in the early to mid-1800s "was, very simply, a victory of tradition").

325. See COOK, *supra* note 235, at 202 (explaining that "[a] conservative faction of the bar, often a majority, had consistently fought demands for legal reform whenever they had appeared"). See also Lawrence M. Friedman, *Law Reform in Historical Perspective*, 13 ST. LOUIS U. L.J. 351, 369-70 (1969) (discussing the opposition of the American bar to substantive reforms of law).

developing American society in the antebellum period.³²⁶ The English legal system was replaced by the 1840s with an indigenous and distinct system of American common law that was “compatible with American circumstances and capable of solving the legal problems created by a rapidly changing society.”³²⁷ The establishment of the uniquely American common law doctrines, the “Americanization”³²⁸ of the common law, diminished the appeal of codification.

The second factor that alleviated the need for codification was the “development of a body of American legal literature, chiefly treatises and digests.”³²⁹ Treatises and digests by American scholars appeared as early as the 1820s and included such influential works as Nathan Dane’s *A General Abridgement and Digest of American Law*³³⁰ and James Kent’s *Commentaries on American Law*.³³¹ The 1830s and 1840s, however, brought what can only be described as a flood of American legal literature, with such works as the *Treatise on the Law of Private Corporations Aggregate* by Joseph K. Angell and Samuel Ames (1832), *Elements of International Law* by Henry Wheaton (1836), *Introduction to American Law* by Timothy Walker (1837), *Evidence* by Simon Greenleaf (1847), and *Treatise on the Measure of Damages* by Theodore Sedgwick (1847) leading the way.³³² Joseph Story, one of the most influential of the American jurists of the first half of the nineteenth century,³³³ published at least eight textbooks on

326. COOK, *supra* note 235, at 202.

327. *Id.* at 203. See generally MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860* (1977) (discussing the adaptation of the American legal system to the demands of growing American society after 1815).

328. COOK, *supra* note 235, at 203.

329. *Id.* at 204. See also DAVID & BRIERLY, *supra* note 148, at 402 (noting that “[t]he outstanding works of certain authors, above all Kent’s *Commentaries* . . . and those of Justice Joseph Story . . . were also largely responsible for America’s adhesion to the Common law family”). The reports of the American state courts’ decisions also played an important role in strengthening the common law tradition, because they “were building blocks for an indigenous system of law” FRIEDMAN, *supra* note 235, at 325–26.

330. See NATHAN DANE, *A GENERAL ABRIDGEMENT AND DIGEST OF AMERICAN LAW*, 9 vols. (1823–29).

331. See JAMES KENT, *COMMENTARIES ON AMERICAN LAW*, 4 vols. (1826–30).

332. FRIEDMAN, *supra* note 235, at 328. See also COOK, *supra* note 235, at 204–07 (noting and discussing the significant increase in American legal literature after the 1830s). In addition to the original American digests and treatises, many of the works by the British legal scholars, such as Joseph Chitty’s *PRACTICAL TREATISE ON THE LAW OF CONTRACTS*, were “adapted” to the American circumstances by adding American precedent and explanatory footnotes. FRIEDMAN, *supra* note 235, at 326. See also COOK, *supra* note 235, at 205 (discussing the “American editions” of English works).

333. See FRIEDMAN, *supra* note 235, at 329.

a wide variety of legal topics between 1832 and 1845.³³⁴ The writings of Story and Kent in particular “discouraged the possibilities of a reception of French law, since they presented in a systematic, orderly, reasoned fashion what was in substance sound common law.”³³⁵ In sum, the treatises by American jurists provided judges and lawyers with practical guidelines and gave the American common law a sufficient theoretical foundation to withstand the sway of civil law.³³⁶

3. *Conditions and factors of codification.* If we examine the American codification movement of 1815–1840 in terms of the various conditions and factors of codification that I identified earlier, we see some of them present but most of them lacking. I assess them as follows:

- The “regard-for-written-law” condition was surely present in early nineteenth-century America, as in all Western law—in contrast, for example, to the Confucianist views discussed above, under which a rule of law (*fa*) was seen as inferior to a rule by men who knew and practiced the precepts of *li*—but this regard for written law was also tempered by a high regard for the approach that English common law had taken for the development of new law. Growing largely through the accretion of judicial decisions announced in particular cases, English common law clearly did not have a primarily statutory character. “Legislation . . . has traditionally occupied only a secondary position in English law and was limited to correcting or complementing the work accomplished by judicial decisions.”³³⁷ The appeal of the common law’s reliance on case-by-case development was perhaps reflected in Joseph Story’s declaration in 1817 that it is “impossible to provide by any code . . . for the infinite variety of distinc-

334. Aumann, *supra* note 235, at 126 n.26. Story’s textbooks included COMMENTARIES ON THE LAW OF BAILMENTS (1832); COMMENTARIES ON THE CONSTITUTION (1833); CONFLICT OF LAWS (1834); EQUITY PLEADING (1838); COMMENTARIES ON THE LAW OF AGENCY (1839); THE LAW OF PARTNERSHIP (1841); BILLS OF EXCHANGE (1843); and PROMISSORY NOTES (1845).

335. AUMANN, *supra* note 235, at 18.

336. See COOK, *supra* note 235, at 204–08 (discussing the important role of American legal literature in the development of American law); FRIEDMAN, *supra* note 235, at 322–33. See also AUMANN, *supra* note 235, at 128 (discussing the role of the American legal literature in the early nineteenth century); GILMORE, *supra* note 286, at 23 (noting the body of American law treatises that accumulated early in the 1800s).

337. DAVID & BRIERLY, *supra* note 148, at 366.

tions” necessary for justice to be done in particular cases,³³⁸ and in his later warning against the “theoretical extravagances of some well meaning philosophical jurists who believe that all human concerns for the future can be provided for in a code speaking a definite language.”³³⁹

- The “power concentration” condition—under which the top political authority is strong enough to impose a code—was certainly absent if the aim of the movement was to create a national codification, as it was for some proponents.³⁴⁰
- The “champion-of-codification” condition—under which there is a person or a set of persons at the top of the political unit’s power structure to whom codification is vitally important for some reason—was also absent in the American codification movement of 1815–1840. As discussed above, no single person led the movement to give it a clear focus and strategy.³⁴¹
- The “legal chaos” factor was certainly present and indeed triggered much of the interest in codification, as discussed above, but the development of treatises took the edge off that interest by bringing an increasing degree of order out of the chaos.
- The “behind-the-times” factor—that is, whether the existing law is substantially out of step with social or economic developments—was probably present to some degree, as reflected in the criticism of the “continued close affinity of American law to English jurisprudence,”³⁴² but, as noted above, the American Revolution did not involve demands for radical changes in laws or legal institutions. Besides, ideological views changed over time (and at the urging of persuasive spokesmen) so that “the common law became synonymous with freedom and codification with restraint.”³⁴³

338. COOK, *supra* note 235, at 105.

339. AUMANN, *supra* note 235, at 74 n.21 and accompanying text.

340. See, e.g., Sampson, *supra* note 318 (arguing for codification of American law); Thomas Smith Grimké, *An Oration of the Practicability and Expedience of Reducing the Whole Body of the Law to the Simplicity of the Code, Delivered to the South Carolina Bar Association (Mar. 17, 1827)*, reprinted in Miller, *supra* note 318, at 152–58 (arguing for adoption of comprehensive code).

341. See *supra* notes 310–320 and accompanying text.

342. See *supra* note 296 and accompanying text.

343. AUMANN, *supra* note 235, at 153.

- The “radical political change” factor was obviously present to a certain degree—that is, the political circumstances of the newly independent United States obviously required new constitutional bases for law. However, for the reasons noted above, this political change did not in itself prompt broad support for radical change to the content of the laws.
- The “model code” factor was present but only to a limited degree. Under my formulation of this factor, the “model code” must be both available and culturally relevant. As explained above, the French *Code Civil* was available and, at first, emulated among some codification proponents.³⁴⁴ However, the enthusiasm for the *Code Civil* had substantially waned by about the 1830s, when it became clear that the *Code Civil* would be subject to continuous interpretation.³⁴⁵ Moreover, any examination of the cultural context of the *Code Civil*, beyond merely its relationship with a revolution that had some similarities to the American Revolution, would reveal that it rested on very different historical, social, and political foundations from those that were found in American law and that might support an American legal code.
- The “scholar/jurist influence” factor was largely absent. As noted above, the proponents were, for the most part, “not comfortable with legal philosophy or theory”³⁴⁶ and hence not cut of the same cloth as Justinian’s team of compilers working under Tribonian, or Napoleon’s drafting commission drawing on Pothier and other legal scholars, or the Chinese codifiers so heavily influenced by Legalist and later Confucianist scholarship. Moreover, to the extent that legal scholarship was pertinent to the American codification debate, it increasingly urged against radical codification based on “theoretical extravagance.”³⁴⁷

344. See *supra* notes 304–308.

345. See COOK, *supra* note 235, at 115. Codification opponents pointed to the numerous reports of the *Cour de Cassation* and various commentaries and digests of the codified French law as evidence that the code had not reduced uncertainty or the workload of legal practitioners.

346. See *id.* at 70.

347. See AUMANN, *supra* note 235, at 74 n.21 and accompanying text (discussing Story’s views).

C. The Field Codes—Successes and Failures³⁴⁸

1. *Field's legacy, aims, and inspiration.* David Dudley Field³⁴⁹ was the key figure in the second phase of the nineteenth-century American codification movement.³⁵⁰ From the appearance of his first published work on law reform in 1839³⁵¹ to the time of his death in 1894, Field was a tireless promoter and theoretician of codification in the United States. The major portion of Field's codification efforts occupied about forty years, beginning in 1847, when he was appointed by the New York legislature with the aim of codifying the laws of New York.³⁵² As I explain in the following paragraphs, this forty-year period was marked by some success but fell far short of the goal Field had set.

What was that goal? Although his efforts were focused on the codification of state law, his ultimate goal (as he expressed it) was to create a universal "CODE AMERICAN, not insular but continental."³⁵³ His reasons for setting this goal were familiar ones. Echoing the law reformers of the early 1800s, Field criticized the common law of the United States for being "filled with tumult and disorder."³⁵⁴ He

348. This section was researched and drafted largely by Mikas Kalinauskas, whose help in preparing this article has been invaluable.

349. David Dudley Field was one of the leaders of the New York Bar in the nineteenth century. Besides his preeminent role in the codification movement, he actively participated in politics, established a thriving corporate practice, argued numerous cases in the Supreme Court, was one of the founders of the New York Bar Association, and took an active part in improvement of international law. On Field, see Helen K. Hoy, *David Dudley Field*, in *GREAT AMERICAN LAWYERS*, Vol. V:125-74 (William D. Lewis ed., 1908).

350. BERNARD SCHWARTZ, *THE LAW IN AMERICA* 73 (1974) (calling Field the "prime mover in the nineteenth-century codification movement" in the United States). See also FRIEDMAN, *supra* note 235, at 341 (describing Field as the "heart and soul" of the American codification movement).

351. Excerpts from a Letter to U.S. Senator G. Verplanck (Dec. 26, 1839), in FIELD, *supra* note 235, at I:219.

352. The New York Constitution of 1846 provided for "three Commissioners whose duty it shall be to reduce into a written and systematic Code, the whole body of law of this state . . ." Art. 1, § 17 (effective Jan. 1, 1847). "Field was the most important member of the different commissions appointed under this provision and the principal draftsman of the codes reported by them." SCHWARTZ, *MAIN CURRENTS*, *supra* note 235, at 218.

353. FIELD, *supra* note 235, at I:515.

354. First Report of the Code Commission (Feb. 27, 1858), *reprinted in* FIELD, *supra* note 235, at I:310. Field complained that common law was "compounded of many incongruous elements, Saxon and Norman customs, feudal and Roman law, provincial usages, and the decisions of various disagreeing tribunals." *Id.*

asserted that the only solution to the problem of chaos and uncertainty in law was comprehensive codification.³⁵⁵

More specifically, Field saw two main purposes for codification of the common law: (i) the “reduction of existing laws into a more accessible form, resolving doubts, removing vexed questions, and abolishing useless distinctions;” and (ii) the “introduction of such modifications as are plainly indicated by our own judgment or the experience of others.”³⁵⁶ He claimed that codification would bring both practical and theoretical advantages: it would result in “dispens[ing] with a great number of the books” that encumber lawyers’ libraries; it would save a “vast amount of labor” that lawyers spent on research; it would “sett[le], by legislative enactment, many disputed questions, which the Courts have never been able to settle;” it would allow the legislature to “effect reforms in different branches of the law;” and finally, it would make knowledge of the law accessible to common people.³⁵⁷

As vehicles for delivering these benefits to New York, Field planned for implementation of five different codes in that state. Together they would constitute a comprehensive code governing all aspects of the law. The codes were to include “a political code, embracing all the laws relating to government and official relations; a code of civil procedure, or remedies in civil cases; a code of criminal procedure, or remedies in criminal cases; a code of private rights and obligations; and a code of crimes and punishments.”³⁵⁸ Field himself wrote and revised significant portions of the proposed codes³⁵⁹ and led efforts to adopt them in the New York legislature.

355. See Letter from David Dudley Field to the California Bar (Nov. 28, 1870), in FIELD, *supra* note 235, at I:350–51 (“Our law is in a state of chaos. Nothing will bring it out of chaos but a code.”).

356. First Report of the Code Commission (Feb. 27, 1858), *reprinted in* FIELD, *supra* note 235, at I:312.

357. See Introduction to the Completed Civil Code, *reprinted in* FIELD, *supra* note 235, at I:337. See also Codification, article in the January–February, 1886 “American Law Review,” *reprinted in id.* at III:239–41, in which Field gave four main reasons for codification: it would lead to the true separation of legislative and judicial powers; it would allow access to the law for a large part of population; it would be convenient for lawyers; and it is supported by the experience of other countries.

358. See Reform in the Legal Profession and the Laws, Address to the graduating class of the Albany Law School (Mar. 23, 1855), *reprinted in* FIELD, *supra* note 235, at I:509.

359. See Irwing Browne, *David Dudley Field*, 3 GREEN BAG 49, 52 (1891) (noting that “Mr. Field has substantially rewritten the Civil Code eight times, some parts of it as many as eighteen times”).

In doing so, Field took cues from Bentham, Story, the drafters of the French codes, and other codification proponents.³⁶⁰ In particular, he incorporated into his codes many principles of the civil law codes and their writers. Field's Civil Code, for example, included sources that were "judicial, statutory, doctrinal, and codal,"³⁶¹ and it contained "over fifty citations to the French and Louisiana Civil Codes, the French Code of Commerce, . . . and references to Justinian's Digest and Code."³⁶² The structure of Field's Civil Code was closely modeled on the Louisiana code and the French code,³⁶³ and it contained "four general divisions; the first relating to persons, the second to property, the third to obligations, and the fourth containing general provisions relating to these different subjects."³⁶⁴

Field not only borrowed freely from the other codes in devising his Civil Code but also had a similar vision of the purpose of the Civil Code as had codifiers in the civil law countries.³⁶⁵ For him a civil code was "to be a statement of the general principles of private law, from which most specific rules can be directly ascertained—either because they are directly expressed or because they can be directly deduced."³⁶⁶ Thus Field asserted that his Civil Code "can not provide for all possible cases which the future may disclose,"³⁶⁷ and that the purpose of the code was to "give the general rules upon the subjects to which it relates."³⁶⁸

360. Reimann, *supra* note 235, at 103. *See id.* at 101 n.32 (explaining that "Field also republished Bentham's fourth letter on codification (1817) and the report on codification in Massachusetts by Story, et al. (1836) in a small volume entitled *Codification of the Common Law* (1882)").

361. Rudolfo Batiza, *Sources of the Field Civil Code: The Civil Law Influences on a Common Law Code*, 60 TUL. L. REV. 799, 803 (1986). *See generally* William B. Fisch, *Civil Code: Notes for an Uncelebrated Centennial*, 43 N.D. L. REV. 485 (1967) [hereinafter Fisch I].

362. Batiza, *supra* note 361, at 804. Aside from the direct citations of the other codes, Field's Civil Code also contained "over sixty unidentified provisions that can be traced to the very same source, in most cases to the Louisiana Civil Code." *Id.* at 808.

363. *See id.* at 805–06. Batiza also notes that "[a]lthough related to the French Code, the arrangement of the Field Code offers more similarities to the Louisiana Code." *Id.* at 807.

364. Final Report of the Code Commission (Feb. 13, 1865), *reprinted in* FIELD, *supra* note 235, at I:319. One significant difference separating Field's from the French codes was that, instead of proposing a separate commercial code, Field included commercial subjects under his Civil Code sections. *See* Batiza, *supra* note 361, at 808.

365. *See* Batiza, *supra* note 361, at 815. Field even "saw his code in the tradition of Justinian and Napoleon." Reimann, *supra* note 235, at 100.

366. Batiza, *supra* note 361, at 815.

367. Introduction to the Completed Civil Code, *reprinted in* FIELD, *supra* note 235, at I:328.

368. *Id.* at I:328. *See also id.* at I:367 (excerpts from Reasons for the Adoption of the Codes, Substance of an address before the Judiciary Committee of the two Houses of the Legislature,

2. *Field's great success—codification of civil procedure.* I have focused most attention on Field's Civil Code because it was the core of Field's effort,³⁶⁹ in that it "constituted Field's attempt to codify the common law."³⁷⁰ In this attempt, Field failed. Let us look first, though, at the area of his success.

The first of the Field codes, the Code of Civil Procedure, was enacted in New York in 1848 and soon became a "landmark in the movement for law reform."³⁷¹ Field intended to prepare a procedural code that would "make legal proceedings more intelligible, more certain, more speedy, and less expensive."³⁷² To a large degree Field achieved these goals.³⁷³ Field's Code of Civil Procedure consisted of only 391 sections,³⁷⁴ and "was couched in brief, gnomic, Napoleonic sections, tightly worded and skeletal."³⁷⁵ Among other things, it "eliminated the common-law forms of action and the distinction between actions at law and actions in equity," thus replacing the dual system of justice with "one unified system administered by one court of general jurisdiction."³⁷⁶ The code's provisions also substantially

at Albany, Feb. 19, 1873) ("The province of a code is not to give all the rules of law, general and particular, but only such as are general and fundamental."). These views bear a noteworthy similarity to those expressed by Portalis, one of the authors of the French Civil Code of 1804, who stated that "[t]o foresee everything [in a civil code] is a goal which is impossible to attain" and that "[t]he function of the law is to state, according to broad perspectives, the general maxims of the law, to establish principles which are fecund in consequences, and not to descend into details of questions that may arise in each subject." Batiza, *supra* note 361, at 814-15 (quoting from materials in a collection of preparatory works to the Code Civil).

369. See FIELD, *supra* note 235, at I:328 (remarking that "[t]his Code [the Civil Code] is, undoubtedly, the most important and difficult of all").

370. SCHWARTZ, MAIN CURRENTS, *supra* note 235, at 220.

371. *Id.* at 219.

372. See Final Report of the Practice Commission (Dec. 31, 1849), reprinted in FIELD, *supra* note 235, at I:291.

373. It is worth noting, however, that Field's original Code of Civil Procedure, as enacted in New York in 1848, was later replaced there by a more cumbersome code adopted between 1876 and 1880. See Roscoe Pound, *Codification in Anglo-American Law, in THE CODE NAPOLEON AND THE COMMON LAW WORLD* 267, 271 (Bernard Schwartz ed., 1975) [hereinafter Pound, *Codification*].

374. See COOK, *supra* note 235, at 191.

375. FRIEDMAN, *supra* note 235, at 391-92.

376. SCHWARTZ, MAIN CURRENTS, *supra* note 235, at 219. Field's Code of Civil Procedure provided that there would be only "one form of action for the enforcement or protection of private rights, and the redress of private wrongs, . . . denominated a civil action." FIELD, *supra* note 235, at I:264.

simplified the pleading procedure and spelled “the death sentence of common-law pleading.”³⁷⁷

Had New York been the only state to adopt Field’s code of civil procedure, the success would have been significant, although not great. However, Field’s Code of Civil Procedure took root all across the country: “The enactment of this New York code opened . . . the floodgates of reformatory legislation, and determined the course of its progress.”³⁷⁸ About half of the American states had adopted codes based on Field’s Code of Civil Procedure by 1900.³⁷⁹ At the forefront of the American states’ adoption of Field’s Code of Civil Procedure were the western states,³⁸⁰ with Missouri approving an analogous code in 1849³⁸¹ and California approving a similar code in 1850.³⁸² While the codes adopted by different states differed in some details from Field’s Code of Civil Procedure of 1848,³⁸³ all codes embraced the essential principles of the civil pleading, permitting only “one form of civil action” and streamlining the procedures of pleading amendment.³⁸⁴

A central reason for the success of Field’s Code of Civil Procedure was the support of the legal profession³⁸⁵ and the commercial

377. FRIEDMAN, *supra* note 235, at 392. For example, the Civil Procedure Code required the parties to state their case “in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended.” COOK, *supra* note 235, at 192 (quoting New York Laws, chap. 397, § 120 (1848)).

378. HEPBURN, *supra* note 235, at 88. Indeed, “by the end of 1873, the New York code of 1848 had been enacted in substance, and often in its very letter, by sixteen other American commonwealths – Oregon, Washington, Nebraska, Wisconsin, Kansas, Nevada, Dakota, Arizona, Montana, Idaho, North Carolina, Wyoming, Arkansas, South Carolina, Florida, and Utah.” *Id.* at 88–89.

379. Nathan M. Crystal, *Codification and the Rise of the Restatement Movement*, 54 WASH. L. REV. 239, 260 (1979).

380. FRIEDMAN, *supra* note 235, at 394–95.

381. HEPBURN, *supra* note 235, at 93.

382. *Id.* at 93–94.

383. *See id.* at 124 (explaining that “[t]here were . . . substantial additions to the provisions of the New York act, made by the legislatures of other code states, and some departures from it in the matters of detail”).

384. *See id.* at 115–24 (reviewing the “[c]ardinal points of agreement among the codes” of different states).

385. *See* COOK, *supra* note 235, at 186–87 (stating that “[t]he legal profession was in near-universal agreement that something had to be done to improve and streamline practice.”); Crystal, *supra* note 379, at 260 (noting that “[t]here was widespread agreement within the profession that the common law system of pleading needed reform”).

elite³⁸⁶ for procedural reform. The procedural law in New York before Field's reforms was indeed antiquated and confusing,³⁸⁷ and while there was some opposition to the reform of procedural law,³⁸⁸ the benefits of codifying the legal procedure outweighed the reservations of the codification's opponents.

3. *Field's great failure—codification of substantive civil law.* Field's success in having his Code of Civil Procedure adopted in New York and elsewhere contrasted with his failure to codify substantive law. In 1857, the New York legislature appointed Field to head a commission charged with drafting codes of substantive law.³⁸⁹ The commission was instructed "to reduce the substantive law of the state to a systematic code consisting of three parts, a 'political,' a 'civil,' and a 'penal code.'"³⁹⁰ Field's Code Commission submitted nine reports to the New York Legislature, with the final report and draft of the Civil Code submitted on February 13, 1865.³⁹¹ To Field's dismay, the Civil Code then "spent the next fourteen years under the legislative rug."³⁹² In 1879, both houses of New York's legislature passed bills adopting

386. See SCHWARTZ, *MAIN CURRENTS*, *supra* note 235, at 221 (explaining that "[b]usinessmen sought settled rules fixed in advance . . . [and] [a]bove all, they needed transactions free from the technicalities of common-law pleading").

387. Field observed that the common law pleadings had not changed much since the times of Edward I, and were "long, overloaded with verbiage, uncouth phrases, and endless repetitions." *What Shall Be Done With The Practice Of The Courts? Question Addressed to Lawyers* (Jan. 1, 1847), *reprinted in* FIELD, *supra* note 235, at 1:234-35.

388. See *Legal System of New York*, Address to the Law Department of the British Social Science Association (Nov. 12, 1866), *reprinted in* FIELD, *supra* note 235, at 1:343; *Reasons for the Adoption of the Codes*, Address Before the Judiciary Committee of the New York State Legislature (Feb. 19, 1873), *reprinted in* FIELD, *supra* note 235, at 1:364-65; COOK, *supra* note 235, at 192-93 (noting the opposition from the "conservative members of the profession").

389. The New York Constitution of 1846 provided for two commissions: the first one was charged with the codification of substantive law, the second one (headed eventually by Field) with the codification of procedural law. See HEPBURN, *supra* note 235, at 140. The initial efforts by the "Code Commission" to codify substantive law were not successful and it "became extinct in 1852." *Legal System of New York*, Address to the Law Department of the British Social Science Association (Nov. 12, 1866), *reprinted in* FIELD, *supra* note 235, at 1:344.

390. HEPBURN, *supra* note 235, at 140.

391. William B. Fisch, *The Dakota Civil Code: More Notes for an Uncelebrated Centennial*, 45 N. D. L. REV. 9, 15 (1968) [hereinafter Fisch II]. The final draft of the Penal Code was submitted together with the Civil Code in 1865; the Political Code in its final form was reported to the legislature earlier, in 1860. See HEPBURN, *supra* note 235, at 140.

392. Fisch II, *supra* note 391, at 15.

the Civil Code, only to be vetoed by the Governor.³⁹³ In 1882, Field's Civil Code was again approved by New York's legislature and again vetoed by the Governor.³⁹⁴ The 1882 effort proved to be "the last time the [Civil] Code got as far as the Governor's desk," although the codification debate continued undiminished for a number of years.³⁹⁵

The main reason for the failure of Field's Civil Code was the strong opposition within the legal profession, especially by the New York Bar, to the reform of substantive law through general codification.³⁹⁶ The New York lawyers, while not fully satisfied with the substantive law, were not ready to embrace full-scale codification.³⁹⁷ The opposition to general codification came from three main lawyer groups: those who considered codification an "economic threat" to their livelihood; those "learned and honest visionaries" who "opposed codification on theoretical grounds;" and those lawyers who "generally favored codification but opposed the Field Codes because they thought that the codes were poorly prepared."³⁹⁸

The leader of the anti-codification forces was prominent New York lawyer James C. Carter.³⁹⁹ Carter argued that "codification was fundamentally at odds with the true nature of law, in particular with the common law and its tradition of flexibility and growth."⁴⁰⁰ Carter also opposed the idea of legislative interference in law making, asserting that "a legislative body consisting principally of laymen, possesses no single qualification which enables it to prosecute the cultiva-

393. *Id.* at 16. The near success of Field's substantive codes mobilized the anti-codification forces in New York, which led to establishment by the Association of the Bar of the City of New York of a Special Committee to urge the rejection of the Proposed Civil Code. *Id.* at 16-17.

394. *Id.* at 19.

395. *Id.*

396. See Crystal, *supra* note 379, at 256 (asserting that "[t]he major reason for the defeat of codification in New York was the opposition of the New York Bar; the Association of the Bar of the City of New York lobbied extensively to defeat codification."). See also Browne, *supra* note 345, at 51 (observing that the defeat of Civil Code "is entirely due to the apathy and hostility of the legal profession, two thirds of whom are probably opposed to it, and particularly to the well organized and able opposition of the Bar Association of the City of New York").

397. See COOK, *supra* note 235, at 195-96. Indeed, Field himself recognized that a majority of the legal profession was opposed to full codification: "[i]t may well be true that not one lawyer in five believes in the practicability or expediency of a civil code . . ." Reform in the Legal Profession and the Laws, Address to the graduating class of the Albany Law School (Mar. 23, 1855), reprinted in FIELD, *supra* note 235, at 1:510.

398. Crystal, *supra* note 379, at 256-57.

399. FRIEDMAN, *supra* note 235, at 403-04 (saying that Carter "fought [against] the idea of codification with as much vigor as Field fought for it").

400. Reimann, *supra* note 235, at 106.

tion and improvement of this science, and its adaptation to human affairs."⁴⁰¹ Field viewed the legislature somewhat differently, considering it a proper vehicle for improvement of laws,⁴⁰² but was careful to address the accusations that there was "something dangerous or revolutionary in the [proposed Civil] Code."⁴⁰³ Field envisioned that the entire codification would be "the work of experts—jurists like Field himself," while the legislature "would simply take the codes and give them its stamp of validity."⁴⁰⁴

In the end, New York lawyers and legislators sided with Carter, and by 1887 Field's substantive codes were defeated.⁴⁰⁵ They had been proposed as legislation various times between 1879 and 1887 in New York but could never muster enough political clout to survive the legislative obstacles or the Governor's opposition.

Field's Civil Code was given a somewhat warmer reception outside New York. Even before the final failure in New York, a few western states and territories—including the Dakotas, Idaho, Montana, and California—had enacted codes modeled on Field's Civil Code.⁴⁰⁶ The acceptance of Field's Civil Code in those states did not translate, however, into the replacement of the common law with the codified law, as seen in the fate of California's Civil Code. That Civil Code, which "consolidated all of the state's statutory and common-law rules governing private relations . . . into one meticulously arranged volume,"⁴⁰⁷ generally met little opposition at its inception in 1872.⁴⁰⁸ In 1884, though, John Norton Pomeroy, a dean of the law school at Berkeley, launched an attack on the California's Civil Code

401. *Id.* at 111 (quoting from an 1884 article by Carter). See also Fisch II, *supra* note 391, at 22–23 (discussing Carter's use of the notion of common law as a modern science).

402. See Introduction to the Completed Civil Code, reprinted in FIELD, *supra* note 235, at I:325 (stating that "[i]n almost every instance where an improvement has been made in the laws, it has come from the Legislature").

403. A Short Reply to a Long Essay (Feb. 18, 1884), reprinted in FIELD, *supra* note 235, at II:498.

404. FRIEDMAN, *supra* note 235, at 405.

405. Reimann, *supra* note 235, at 101 (explaining that in 1887 the New York legislature appointed a new law revision commission that "sounded the death knell for the Civil Code in New York").

406. See FRIEDMAN, *supra* note 235, at 405. For general overview of substantive codifications in those states, see Fisch II, *supra* note 391, at 25 et seq.; Weiss, *supra* note 2, at 511 et seq. For the history of the California Code, see generally Lewis Grossman, *Codification and the California Mentality*, 45 HASTINGS L. J. 617 (1994); Rosamund Parma, *The History of the Adoption of the Codes of California*, 22 L. LIBR. J. 3, 8 (1929).

407. Grossman, *supra* note 406, at 617.

408. *Id.* at 626.

in a series of articles entitled *The True Method of Interpreting the Civil Code*.⁴⁰⁹ Pomeroy criticized the alleged defects of the code, including “its disregard for established terminology, its incompleteness, its strangeness of organization, and above all its inaccuracy.”⁴¹⁰ Pomeroy’s criticism of the Civil Code was based on a belief that “only judge-made law was expansive and flexible enough to meet the needs of a rapidly evolving society.”⁴¹¹ Thus he argued that California courts should consider the Civil Code as declarative of common law and, accordingly, interpret its provisions “using common-law precedents and customs.”⁴¹² The California courts, starting with the state’s 1888 Supreme Court decision in *Sharon v. Sharon*,⁴¹³ adopted Pomeroy’s approach to code interpretation.⁴¹⁴ Thereafter, the Civil Code largely lost its significance in California’s jurisprudence, and the codification effects were negated.⁴¹⁵ The fate of the Civil Codes in other states, with the exception of Louisiana, was similar to that of California’s: “The [civil] code did not become the dominant source of law in any state.”⁴¹⁶

409. Fisch II, *supra* note 391, at 29.

410. *Id.*

411. Grossman, *supra* note 406, at 619–20.

412. *Id.* at 619. See also Crystal, *supra* note 379, at 260 (explaining that Pomeroy “argued that the California courts should mend the code’s defects by interpreting it as declarative of the common law unless a clear intent to the contrary was expressed”); Fisch II, *supra* note 391, at 29 (noting that the purpose of Pomeroy’s criticism “was to establish a uniform method of interpreting the Code, namely by reading it as completely as possible as if it did not change a thing”).

413. See 16 P. 345 (Cal. 1888).

414. See Grossman, *supra* note 406, at 620; Weiss, *supra* note 2, at 515.

415. See Grossman, *supra* note 406, at 639; Weiss, *supra* note 2, at 515; Crystal, *supra* note 379, at 260. See also Izhak England, *Li v. Yellow Cab Co. — A Belated and Inglorious Centennial of the California Civil Code*, 65 CAL. L. REV. 4 (discussing the California Civil Code’s influence on the courts and finding that the courts generally ignored it).

416. Weiss, *supra* note 2, at 516; Fisch II, *supra* note 391, at 54. It is worth noting in passing that Georgia had a codification movement distinct from the one led by Field and in 1861 adopted a comprehensive code that included a political code, a civil code, a code of practice, and a penal code. See generally Marion Smith, *The First Codification of the Substantive Common Law*, 4 TUL. L. REV. 178 (1930). The civil code of Georgia consisted of 1,576 sections, each of which was characterized as a brief, concise statement of a basic principle. *Id.* at 185. That code was in operation until 1933, although its legal success has been disputed. Compare *id.* at 187 (“It is certain that the Georgia code of common law principles has been a success in actual operation”) with POUND, JURISPRUDENCE, *supra* note 8, at 715–16 (“The [Georgia] code has had little effect . . . [in that for] the most part the courts treat it as declaratory and usually go on the common law”). It is clear, however, that the Georgia Code did not exercise much impact on the codification in the rest of the United States. See Smith, *supra*, at 188 (suggesting that the civil war and the post-bellum atmosphere of isolation of the southern states prevented the potential impact of the Georgia Code from reaching other states). See also Fisch I, *supra* note 361, at 10

In the final analysis, then, despite Field's failure to become "the American Justinian" as a result of his unsuccessful attempt to codify the American common law,⁴¹⁷ his fight for codification did have a lasting impact on the development of American law. All of his codes focused the attention of the legal profession and legislators on "some of the drawbacks of common law."⁴¹⁸ His Code of Civil Procedure substantially changed the procedural formalities of common law. Even the defeat of most of his codes on the state level constituted, perhaps ironically, an important contribution to American legal development by giving impetus to a new enthusiasm for national codification, as sponsored and encouraged by the American Bar Association.⁴¹⁹ This process was to result in the Restatement movement of the 1920s, which brought back with renewed force many of Field's arguments.⁴²⁰

4. *Conditions and factors of codification.* How does the Field codification exercise square with the conditions and factors of codification that I have identified in this article? The answer turns in some respects on which aspect of the Field codification exercise we examine—the fairly successful efforts in the area of civil procedure or the largely unsuccessful efforts in substantive areas, especially a substantive civil law codification. In some other respects, of course, the assessments I offered above in part IV.B., discussing the national codification movement of 1815–1840, also apply to the later efforts by Field, focused in New York.

- As noted above, the "regard-for-written-law" condition was obviously present in nineteenth-century America—although tempered by a high regard for the special character of com-

(indicating that "[t]he Georgia code . . . found no resonance in other jurisdictions"). Indeed, "[t]he New York commission which reported Field's civil code in 1865 had not even heard of the Georgia Code." Smith, *supra*, at 188.

417. SCHWARTZ, MAIN CURRENTS, *supra* note 235, at 217.

418. FRIEDMAN, *supra* note 235, at 406.

419. See Crystal, *supra* note 379, at 260 et seq.

420. See generally *id.* (discussing connections and similarities between the Restatement movement and the codification movements of the late nineteenth century). See also FRIEDMAN, *supra* note 235, at 406 (calling the Field codes "the spiritual parents of the Restatements of the Law"). The first Restatements were widely perceived at the time as a foundation for the codification of American law. See Samuel Williston, *Written and Unwritten Law*, 17 A.B.A. J. 39, 41 (1931) (asserting that the Restatements "will serve as a better foundation for a Code"). See also Donald, *supra* note 2, at 170 (explaining that "[t]he [American Law] Institute and the task of Restatement have been conceived as instrumental in the ultimate codification of the law").

mon law as relying on the accretion of case law. Perhaps the distrust that many American lawyers and commercial elites had in legislatures helps explain the experience of codification in California, which continued to endorse case-by-case development of legal principles even though a civil code was enacted.⁴²¹

- The “power concentration” condition was largely absent. Even though the Field efforts took place mainly at the state level (unlike some efforts in the earlier phase of the codification movement), the political power to adopt a code was divided between the legislature and the Governor; complicating the matter further, by exercising its own political clout, was the New York Bar. Although enough support was garnered among these various power-holders to enact the Code of Civil Procedure, the same was not true of the substantive Civil Code: the legislature was won over twice, but the Governor vetoed the adoption of that code.
- The “champion-of-codification” condition was absent under my formulation of that condition.⁴²² Field himself was a ceaseless champion of codification, of course, and he was not without some political influence. However, he was not even an officeholder, much less a political leader with the sort of power that we see in most earlier codification experiences described in this article. Expressed differently, his enthusiasm far outstripped his authority. Nor was the American legislature in the nineteenth century eager or adequately prepared institutionally for the reform of substantive law: “It had neither the interest nor the ability to undertake the rigorous and technical task of codifying the law.”⁴²³
- The “legal chaos” and “behind-the-times” factors were both present in respect of the effort to codify civil procedure. Field repeatedly emphasized the chaotic and anachronistic features of procedure, and the common perception of civil

421. See *supra* notes 407–415 and accompanying text.

422. See *supra* note 10 and accompanying text (setting forth the condition that “the *top political authority* has a strong enough desire to impose a code that he [or it] is prepared to champion the cause” (emphasis added)).

423. SCHWARTZ, MAIN CURRENTS, *supra* note 235, at 223. See also Shael Herman, *The Fate and the Future of Codification in America*, 40 AM. J. LEGAL HIST. 407, 425 (1996) (observing that “[a]s the fate of Field’s code in New York has shown . . . state legislatures were undependable and reluctant innovators of private law”).

procedure as archaic, confusing, and inflexible clearly helped assure the passage of Field's Code of Civil Procedure. However, these two factors were probably absent at the time with respect to substantive aspects of the civil law, at least in the minds of a great many New York lawyers, whose conservatism and faith in the common law James Carter appealed to in order to stymie Field's efforts at substantive codification.⁴²⁴ In addition, as noted earlier, the continuing development of American legal literature⁴²⁵ had taken much of the punch out of the claim that substantive American law was chaotic or antiquated.

- The "radical political change" factor was not present during the Field's codification movement. While the Civil War represented a "profound constitutional crisis,"⁴²⁶ it did not, of itself, prompt any reactive urge toward codification,⁴²⁷ such as that prompted by the French Revolution or the overthrow of a Chinese dynasty.
- The "model code" factor played an influential role in Field's own work—he continuously invoked and drew from the principles and provisions of earlier civil law codes⁴²⁸—but the wider popularity and influence of the French and other codes were scant. As noted above, for example, enthusiasm for the *Code Civil* had waned by around the 1830s.⁴²⁹
- The "scholar/jurist influence" factor was probably absent, as it was a few decades earlier during the first flirtation with codification of American law. Even if American legal scholars were growing in influence with a broad array of publications, practitioners and men of commerce dominated the debate over Field's codes in New York. Furthermore, a good number of those legal scholars who did enter the debate argued against codification, and many advocates of codification

424. See *supra* notes 396–400 and accompanying text.

425. See *supra* notes 329–336 and accompanying text.

426. FRIEDMAN, *supra* note 235, at 342.

427. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 9–10 (1992) (discussing the debate over codification in America and the response of "orthodox legal thinkers and judges" to the tensions of the post-bellum society).

428. See *supra* notes 360–366 and accompanying text.

429. See *supra* note 345 and accompanying text.

generally regarded Field's Civil Code as fundamentally flawed.⁴³⁰

V. CONCLUDING OBSERVATIONS

I have had two goals here. First, I have tried to show that the scope of "comparative codification" can and should be broadened to encompass Chinese experiences with legal codes. Second, against that broader backdrop, I have tried to identify some key conditions and factors that seem important to the success of a codification effort. Although I have not attempted to be comprehensive⁴³¹ or to provide factual information not already familiar to specialists in the legal histories of China, Europe, or North America, I do believe the broadening of scope and the identification of conditions and factors can serve several useful purposes.

For one thing, the juxtaposition of these various codification experiences, particularly those of China, can enrich our understanding of the distinct legal cultures from which they arose. For example, inclusion of Chinese codification into the overall "comparative codification" exercise helps us recognize one key condition to codification that has not so far received much attention in the literature—what I call the "regard-for-written-law" condition. My discussion of the great debate, and subsequent compromise, between the Legalist and Confucianist views of law in the Qin-Han period aims to focus attention on this "regard-for-written-law" condition. Once we do so, we see some parallels in both European and North American experience. Ever since the time of the Twelve Tables, European culture has broadly accepted the proposition that law should be written and published and accessible as a protection against the unfettered discretion of a small governing elite. The same proposition appears in seventeenth century Massachusetts with the *Laws and Liberties* of 1648.

Including Chinese law also draws attention to another of the factors that commonly appear in successful codification efforts—the ex-

430. Hoy, *supra* note 349, at V:166. See also Crystal, *supra* note 379, at 257–58 (noting that "Frederick Pollock, an advocate of codification, called the civil code 'about the worst piece of codification ever produced'").

431. My selection of codification experiences in China, Europe, and North America is intended to be illustrative, not exhaustive. I have not, for example, examined how the conditions and factors of codification that I have identified here might play out in the case of the Theodosian Code of the late fifth century CE, the German Civil Code of the late nineteenth century, other European codes, modern Chinese and Japanese legal codes, or some other well-known codification experiences.

istence of a culturally appropriate “model code.” It appears that codification was relatively easy in China in every dynasty after the Qin because of an increasing body of precedents—especially the Qin Code, the Han Code, and the Tang Code. In contrast, codification was difficult in eighteenth-century America in part for lack of such a precedent; English common law had not been codified, and the European civil law codes were too foreign to serve as a guide acceptable to most Americans interested in legal reform at the time.

Another observation that emerges from this three-cornered comparison relates to the second and third conditions to which I have drawn attention: codification efforts need strong, concentrated political power and will. The Chinese codification experiences highlight this. The tremendous power wielded by the Chinese emperors and by Justinian and Napoleon stand in contrast to the situation in nineteenth century America—and perhaps this difference helps explain the differences in outcomes. Indeed, we might even speculate that legal codification was seen as a means by which the extremely powerful Chinese and European codifiers I have mentioned acted both to exhibit that power and to secure it.

Some new insight might also come from the distinction I have proposed between conditions and factors. Those circumstances that I regard as conditions—a high regard for written law, power concentration, and a champion of codification—are necessary to a successful codification effort. The five other circumstances—the “legal chaos,” “behind-the-times,” “radical political change,” “model code,” and “scholar/jurist influence” factors—are not each individually necessary but can, in aggregate, augur in favor of a successful codification effort. Applying this rubric, we might speculate that a legal system that exhibits all or nearly all of those five factors would still remain uncoded if the system lacks a central concentration of political authority (either in an individual or in a small nucleus of persons) and a strong will to codify. The international legal system comes to mind.

In order to sum up my views on the conditions and factors of codification as applied to the nine specific instances described above, I close with the following tabular presentation. It gives a rough indication (using “X” and “O” notations) of the presence or absence of each of the conditions and factors in each of those nine codification efforts. Some explanations appear in notes following the table. Even with these explanations, the table represents an exercise in oversimplification. For example, it glosses over the differing degrees to which

the various conditions or factors were present in each of those nine codification experiences.⁴³² Despite these shortcomings, I believe the table reflects the main thesis I introduced at the beginning of this article—that codification, broadly defined, depends for its success on a convergence of several specific conditions and factors. In my view, these conditions and factors of codification provide a useful framework in which to examine, and better understand, widely divergent legal systems.

432. In discussing the *Laws and Liberties* of 1648, I introduced “a subsidiary thesis—that the conditions of codification can have more or less weight, and that their weight (the degree to which they are present, beyond the minimum) can affect the scope and exclusivity of the code that they help create.” See *supra* part IV.A.

PRESENCE OR ABSENCE OF KEY CONDITIONS AND FACTORS OF
CODIFICATION IN SELECTED CODIFICATION EFFORTS

	Qin Code ^a	Han Code ^b	Tang Code ^c	Ming Code ^d	Justinian's Codification ^e	<i>Code Civil</i> ^f	<i>Laws and Liberties</i> ^g	USA 1815-1840 ^h	New York (Field) ⁱ
CONDITIONS									
Regard-for-written-law	X	X	X	X	X	X	X	X	X
Power concentration	X	X	X	X	X	X	X?	O	X?/O?
Champion-of-codification	X	X	X	X	X	X	X?	O	X?/O
FACTORS									
Legal chaos	X	O	O	X	X	X	X	X	X/O
Radical political change	X	X	X	X	X	X	X	X	O
Behind-the-times	O?	O	O	X?	O?	X	X	X	X/O
Model code	X?	X	X	X	X/O	X	O?	O	O
Scholar/jurist influence	X	X	X	X	X	X	O	O	O

NOTES TO TABLE

- a. *See supra* part II.A. As explained there, the “behind-the-times” factor was probably absent, given the continuity that existed between the state of Qin and the Qin empire. It is difficult to assess the presence of the “model code” factor because of the paucity of written evidence; but at least Shang Yang’s code would presumably have served as a model for the Qin code.
- b. *See supra* part II.B. As explained there, the radical political change represented by the replacement of the Qin dynasty with the Han probably was not accompanied by any legal chaos or by a view that the laws were behind the times as a social or cultural matter.
- c. *See supra* part II.C. As explained there, the Tang Code showed considerable continuity from the Sui Code, suggesting that the Tang draftsmen were not facing a tangled web of inconsistent laws from multiple sources. Moreover, they were not trying to take account of any dramatic social, cultural, or economic change. Instead, the dramatic change from the Sui to the Tang was primarily a political one.
- d. *See supra* part II.D. As explained there, the law was seen as somewhat behind the times because some Chinese intellectuals had shunned government service under the Yuan dynasty of the Mongols; on the other hand, the latter years of the Yuan dynasty had seen a progressive sinicization of the Mongol influence.
- e. *See supra* part III.A. As explained there, while Justinian’s urge for codification reflected his concern over the chaotic character of sources of Roman law and his desire to regain a centralized political and legal control over the empire, there was no remarkable mismatch between the content of law and contemporary social developments or demands. Hence, the “behind-the-times” factor was probably absent. My inclusion of a “X / O” notation for the “model code” factor reflects the fact that Justinian’s *Institutes* was based on a model (Gaius’ *Institutes*), but the Digest had no such model.
- f. *See supra* part III.B.
- g. *See supra* part IV.A. The “X ?” notations for the “power concentration” condition and the “champion-of-codification” condition reflect my view, expressed there, that these two conditions were barely present in seventeenth-century Massachusetts. The “O ?” notation for the “model code” factor reflects the fact that the only

common-law precedents on which the drafters of the *Laws and Liberties* might have relied are various earlier English abridgments that seem to have been available in Massachusetts at the time.

- h. *See supra* part IV.B. As explained there, two of the three conditions for codification were absent in the efforts to create a national code in early nineteenth-century America.
- i. *See supra* part IV.C. This column reflects both the relatively successful effort to codify civil procedure in New York and the failed effort to codify substantive civil law there. All three conditions were probably present for the first of these efforts (procedural codification), although the merger of concentrated political power with strong political will did not survive long. As for the substantive codification, the “champion of codification” condition was absent despite the leadership showed by Field, as his enthusiasm for codification far outstripped his actual political power to effect it, especially in view of the division of power between the legislature (which Field persuaded) and the Governor (whom he did not). As also explained above in part IV.C., the “legal chaos” and “behind-the-times” factors were present in the case of civil procedure—it was very broadly regarded as chaotic and archaic—but not in the case of substantive civil law, which many opponents of codification thought should grow gradually through the common-law process of accretion of case law. For reasons also explained in part IV.C., the other three factors were also largely absent.