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The Union of Law and Equity: The United States, 1800-1938

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The Union of Law and Equity

The United States, 1800–1938

KELLEN FUNK

INTRODUCTION

Writing to the *Albany Law Review* in 1878, the renowned trial lawyer, codifier and New York law reformer David Dudley Field succinctly if unwittingly highlighted the ambiguities of law and equity in the United States. 'Fusion of law and equity is an expression common in England, though little used in this country', he explained. 'We express the same general idea by the phrase, union of legal and equitable remedies.'[1] Indeed, American commentators since the time of Joseph Story (an Associate Justice of the United States Supreme Court and professor of law at Harvard) had discussed the union of law and equity in ways resonant of the more famous Union formed by America's federated constitutional system. By vesting legal and equitable jurisdiction in the same judges, the federal courts of the United States had proven that an institutional union of law and equity was workable; but like the States in the Union, federal law and equity remained jurisdictionally and operationally distinct. The same federal judge could sit 'at law' or 'in equity', but not at the same time, and a case framed in the wrong posture or set on the wrong calendar would be dismissed with costs.[2] Yet while the Constitution's 'more perfect Union' may have left its component States distinct and intact, fusionists like Field insisted that 'the perfect union of law and equity' required, 'to express differently the same idea[,] ... the complete obliteration of every distinction between them'.[3]

[1] D. D. Field, 'Law and Equity', in A. P. Sprague (ed.), *Speeches, Arguments, and Miscellaneous Papers of David Dudley Field* (New York, NY: Appleton & Co., 1884), vol. 1, 578.

[2] See J. Story, *Commentaries on Equity Jurisprudence, as Administered in England and America* (Boston, MA: Hilliard, Gray & Co., 1838), vol. 1, 35.

[3] Field, 'Law and Equity', 578.

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Field made his proposal sensible to practitioners by subtly shifting his terms: from 'fusion of law and equity' to 'union of legal and equitable *remedies*'. To Field and other American fusionists, there was no difference between the two expressions. Law and equity were perceived to be simply two sets of remedies, with no natural or necessary relationship between remedies and substantive rules or doctrines. The relationship between rights and remedies, the modes of reasoning about rights and the mechanisms for vindicating rights between the two systems were seen to be, if not already the same, at least amenable to assimilation: legal doctrine (one need not say whether it was legal or equitable) offered substantive *rules*, while a trans-substantive *procedure* navigated the practitioner to an open menu of remedies. Convinced of this view, fusionists appeared perplexed by their adversaries' contention that law and equity were traditions in which rights, remedies and the processes that linked them were complexly interwoven and might inhere – to use a ubiquitous phrase from this era – in 'the nature of things'.[4]

This chapter sketches a history of the American debates and tensions over the fusion of law and equity during the critical era from the drafting of Field's Code of Procedure in New York (mandated by the state's 1846 constitution) to the promulgation of the Federal Rules of Civil Procedure in 1938. Depending on the year, the United States comprised some forty distinct jurisdictions, each of which came up with different institutional arrangements of law and equity. Scholarship to date has largely ignored the history of fusion in the states after the colonial era and paid scant more attention to the topic at the federal level. A single chapter can provide only a cursory treatment of these many topics. While gesturing to developments in several jurisdictions, this essay focuses on lawyers' debates of fusion in mid-nineteenth century New York and the operation of New York's fusion in actual practice in the 1870s. I conclude that Field's view of fusion has become the dominant one in America, and his aim to replace the distinction between law and equity with a distinction between 'substance' and 'procedure' has been largely successful – in theory. In practice, the distinct traditions of law and equity continue to meaningfully structure day-to-day legal reasoning about remedies, not just in the special case of the right to jury trial, but in myriad other ways.

[4] On this oppositional view to fusion, see S. Warren, *A Popular and Practical Introduction to Law Studies* (New York, NY: Appleton & Co., 1846), 197–99.

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CHAPTERS OF ERIE: A CASE OF LAW AND EQUITY

The most famous photographic image of Field is Matthew Brady's, made around the time of Field's *Albany Law Journal* essay, which depicts the future president of the American Bar Association as a dignified and elderly statesman of the bar.[5] At exactly the same time, quite a different image of Field was in circulation. The political cartoonist Thomas Nast despised Field. Throughout the 1870s, Nast depicted Field binding Justice in procedural red tape or standing guard as a lion over his clients' wealth. In Nast's final illustration of Field in early 1878, the Devil himself visits the brooding lawyer's office, seeking to retain Field's famous services.[6] Nast saw Field not as a tireless reformer and codifier but rather as the chief lieutenant of a legal corps who exploited technicalities to exonerate and protect the corrupt leaders of an especially corrupt age. Field first earned the disdain of Nast and other Republican municipal reformers in the late 1860s when he and his partner Thomas Shearman became lead counsel to the notorious robber barons Jim Fisk and Jay Gould.[7]

After the Civil War, American railroads became massive financial assets, offering their owners and managers abundant opportunities for profit and plunder. Although Fisk and Gould liked to call their acquisitions 'raids', they excelled in forming teams of attorneys who kept their investments within legal bounds – stopping just short of fraud while clandestinely buying up shares or the power to vote their proxies, and seeing their allies become court-appointed 'receivers' over rail lines mired in bankruptcy or litigation. With Field's help, Fisk and Gould wrested control of the Erie Railroad from Cornelius Vanderbilt in what Charles Francis Adams dubbed the 'Erie War' in 1868.[8]

[5] Available at Library of Congress Prints and Photographs Division, LC-DIG-cwpbh-05048, www.loc.gov/pictures/item/brh2003002394/PP/.

[6] For a presentation and description of Nast's cartoons of Field, see R. L. Lerner, 'Thomas Nast's Crusading Legal Cartoons' (2011) Green Bag Almanac 59.

[7] On Field's corporate clients and career, see D. Van Ee, 'David Dudley Field and the Reconstruction of the Law' (Ph.D. Dissertation, Johns Hopkins University, 1974).

[8] C. F. Adams and H. Adams, *Chapters of Erie and Other Essays* (Boston, MA: Osgood and Co., 1871); G. Martin, *Causes and Conflicts: The Centennial History of the Association of the Bar of New York* (New York, NY: Fordham University Press, 1997), 3–15. On the securitisation and personal profits in nineteenth-century railroad ownership and management, see R. White, *Railroaded: The Transcontinentals and the Making of Modern America* (New York, NY: Norton & Co., 2011). On the Erie War, see J. S. Gordon, *The Scarlet Woman of Wall Street: Jay Gould, Jim Fisk, Cornelius Vanderbilt, the Erie Railroad Wars, and the Birth of Wall Street* (New York, NY: Weidenfeld & Nicolson, 1988).

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Of particular interest to Adams was 'an Erie raid' which unfolded after Vanderbilt had withdrawn. Seeking access to Pennsylvania's coal mines, Fisk and Gould commenced their distinctive style of raid against the Albany and Susquehanna Railroad, a 150-mile spur through western New York. Its president, Joseph Ramsey, proved more recalcitrant than Vanderbilt and, with headquarters in Albany, had no lack of skilful legal counsel. Each side continually checked the other over the summer. As Fisk and Gould's Erie party bought up stock, Ramsey's Albany party diluted it with stock offerings to their allies (including the rising banker J. P. Morgan). Field and Shearman then secured decrees from a New York City judge enjoining both the issuance of new stock and the voting of recently transferred stock. Ramsey's lawyers secured a decree from an Albany judge enjoining the enforcement of the New York City injunction. Months of injunctions and counter-injunctions followed until the New York City judge granted Shearman's request to declare the Albany and Susquehanna in receivership: the entire line and all its assets were transferred to two temporary receivers pending the next corporate election (one of the receivers was Fisk himself). But the court in Albany decreed its own receivership in favour of Ramsey and managed to issue process one hour earlier than New York City. The injunctive decrees continued, as did new receiverships – this time as stock was seized from its purchasers and transferred to referees. The largest stock receivership went to one of Field's law clerks.[9]

The manoeuvring came to a head at the annual corporate election in Albany on 7 September 1869. Per the bylaws, shareholder voting could not begin until noon and the poll had to remain open one hour. Field and Shearman waited literally until the eleventh hour to spring their trap. Their reliable New York City judge had ordered the arrest of Ramsey and the other officers as an 'attachment' proceeding to a civil case (filed in the name of the corporation, against its officers, for the misappropriation of corporate records). At 11:45 a.m., Shearman proceeded to the officers' boardroom with the sheriff while Field transferred the Erie party's proxies to a band of fifty Irish 'roughs' brought to town (and plied with drink) for the occasion, and together they proceeded to the meeting room for the vote. The Erie-favoured directors won overwhelmingly.[10]

[9] Adams and Adams, *Chapters of Erie*, 135–91; Lerner, 'Thomas Nast's Crusading Legal Cartoons', 65–68.

[10] Adams and Adams, *Chapters of Erie*, 174–81; G. T. Curtis, *An Inquiry into the Albany & Susquehanna Railroad Litigations of 1869 and Mr David Dudley Field's Connection Therewith* (New York, NY: Appleton & Co., 1871); A. Stickney, 'The Truth of a "Great Lawsuit"' (1872) 14 Galaxy 576.

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The tale was all that a muckraker could want, and Adams relished telling it; but how to explain it? Here in a land of liberty, fresh from a war of emancipation – 'this, be it remembered, was … in New York, and not in Constantinople', Adams drolly reminded his readers – judges of the lowest trial courts were issuing secret decrees of imprisonment, seizing and redistributing property – entire railroads even – and enjoining the enforcement of one another's decrees.[11] And so far as lawyers then and later could determine, none of it ran afoul of the state's Code of Procedure drafted decades earlier by Field. The problem as Adams saw it thus arose from the law – particularly Field's Code – under which 'local judges … are clothed with certain … powers in actions commenced before them, which run throughout the State'.[12] Adams relished the irony that the name of these 'certain powers' that prospered injustice was *equity*.[13] Like Field himself, equitable jurisprudence in the nineteenth century could at times appear stately and dignified, and at other times as the diabolic assistant of the robber barons.

THEN AND NOW: THE PROBLEM OF DEFINING *EQUITY*

Historians of nineteenth-century American law have been hasty in their treatment of equity. Ignoring the cautious arguments of colonial legal historians that 'Americans objected to chancery courts rather than to equity law', some scholars have assumed that the post-Revolution disappearance of chancery courts meant that in America, equity was disfavoured, discarded and 'moribund' until coming to life again at the end of the century.[14] Influential jurisdictions like Massachusetts and Pennsylvania largely did without courts of chancery, it is noted, while New York and Virginia abolished theirs around mid-century, and new states in the West never created them. Not until late in the century did federal judges seem to rediscover the equitable injunction, which they deployed against striking labourers.

[11] Adams and Adams, *Chapter of Erie*, 175. [12] Ibid., 22. [13] Ibid., 23.

[14] S. N. Katz, 'The Politics of Law in Colonial America: Controversies over Chancery Courts and Equity Law in the Eighteenth Century', in D. Fleming and B. Bailyn (eds), *Perspectives in American History* (Boston, MA: Little, Brown and Co., 1971), vol. 5, 257–84, 265; see also D. J. Hulsebosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664–1830* (Chapel Hill, NC: University of North Carolina Press, 2008), 60. For the 'moribund' view of equity, see P. C. Hoffer, *The Law's Conscience: Equitable Constitutionalism in America* (Chapel Hill, NC: University of North Carolina Press, 1990), 147; S. N. Subrin, 'David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision' (1988) 6 L. & Hist. Rev. 311.

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The problem is that many of these accounts tend to reduce the sprawling and sophisticated system of chancery to a small subset of its functions and then eulogise the demise of American 'equity'. Thus Roscoe Pound and his admirers Charles Clark and Edson Sunderland (the main drafters of the 1938 Federal Rules of Civil Procedure), interested as they were in judicial discretion and pre-trial investigation powers, thought they were reviving a long-dormant equity in their reforms.[15] More recently, scholars have made 'inquisitorial' devices like written, juryless process an essential feature of equity, while some have emphasised equity's flexible moral maxims over the 'rigid' decrees of legislatures or common law courts.[16] In this respect, modern commentary differs little from that of the nineteenth century. What counts as equity in the United States has often been in the eye of the beholder. One aim of this chapter is to trace the diverse array of ideas among American lawyers and jurists of what equity was, and how equity might be united with law.

For many ordinary lawyers, the description of equity as a set of procedures, remedies and precedents probably summed up their views on the system. The workaday practitioner understood from experience which remedies could be pleaded at law and which required him to don the title of 'solicitor' and file in chancery.[17] However, an impressive number of lawyers – especially among those who would become America's leading corporate counsel – devoted significant effort to think philosophically and systematically about their dual system of jurisprudence. For the most part, they never published their conclusions in books or pamphlets and rarely did their views on jurisprudential abstractions enter their courtroom arguments. They did, however, speak up at the numerous constitutional conventions held around mid-century and in legislative reports each time the Code was introduced or revised in a jurisdiction.

One of the earliest and most influential of these occasions, New York's 1846 constitutional convention, featured the arguments and themes that

[15] See Subrin, 'How Equity Conquered Common Law'; Hoffer, *The Law's Conscience*, 91.

[16] A. D. Kessler, 'Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial' (2005) 90 Cornell L. Rev. 1181; M. J. Horwitz, *The Transformation of American Law: 1780–1860* (Cambridge, MA: Harvard University Press, 1979), 266.

[17] The leading treatises on equity practice in pre-Code New York include J. W. Moulton, *The Chancery Practice of the State of New York* (New York, NY: Halsted, 1829–32), 2 vols; J. Parkes, *The Statutes and Orders of the Court of Chancery and the State Law of Real Property of the State of New York* (London: Maxwell and Stevens, 1830); D. Graham, *A Treatise on the Organization and Jurisdiction of the Courts of Law and Equity in the State of New York* (New York, NY: Halsted & Voorhies, 1839); O. L. Barbour, *A Treatise on the Practice of the Court of Chancery* (Albany, NY: Gould and Gould, 1844).

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would be debated across the country. Through the month of August 1846, twenty of the state's leading attorneys spoke one after the other, each describing in detail an ideal judicial system and the role of law and equity within that system. Attention then shifted westward, as Iowa, Indiana, Ohio and Kentucky became early adopters of the Field Code – the latter two nevertheless maintaining the law–equity divide.[18]

Legal history was a favourite starting point among the lawyers debating law and equity, and practitioners showed an impressive facility with the history of Greek, Roman and English law. Most agreed on the general outlines of this history, though they disputed the lesson it presented. Many accounts began with Aristotle's distinction between Law, which was necessarily universal in its nature, and Επιεικέια, 'a correction of law, where by reason of its universality, it is deficient'.[19] Roman praetors were said to have introduced laws of Æquitas 'for the sake of helping out, supplementing, and correcting the Civil Law'.[20] As for the English tradition, the story ran that after the writs had become fixed in number and form (around the common law forms of action), the Chancellor began making new writs returnable to his own court, establishing jurisdiction over extraordinary remedies. As the early Chancellors were high church officials holding the title 'keeper of the king's conscience', their jurisprudence emphasised their ability to rule according to discretion to do justice between the parties when the law by its ordinary processes and general rules was deficient. During the reign of Elizabeth I, it was settled that chancery could enjoin the enforcement of a common law judgment, but chancery would not interfere where common law could adequately provide for a case.[21]

As New Yorkers looked around America, they noted that states without courts of chancery – the favoured examples were Massachusetts and Pennsylvania – either incorporated or mimicked equity jurisprudence and

[18] See S. Croswell and R. Sutton (eds), *Debates and Proceedings in the New-York State Convention* (Albany, NY: Argus, 1846); W. G. Bishop and W. H. Attree (eds), *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of New York* (Albany, NY: Evening Atlas, 1846); *Report of the Commissioners Appointed to Prepare a Code of Practice for the Commonwealth of Kentucky* (Frankfurt, KY: Hodges, 1850) [hereinafter 1850 Kentucky Code Report]; *Revision of 1860 Containing All the Statutes of a General Nature of the State of Iowa* (Des Moines, IA: John Teesdale, 1860) [hereinafter 1860 Iowa Code Report]; H. Fowler and A. H. Brown (eds), *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Indiana* (Indianapolis, IN: Brown, 1850).

[19] A. Laussat, *An Essay on Equity in Pennsylvania* (Philadelphia, PA: Desilver, 1826), 17.

[20] W. Whewell, *The Elements of Morality, Including Polity* (London: Parker, 1845), 329.

[21] 1860 Iowa Code Report, 440–43; Whewell, *Elements of Morality*, 330–32; Laussat, *Essay on Equity*, 13–17; Bishop and Attree, *Report of the Debates*, 600–2 (Nicoll). For a twenty-first century account of seventeenth-century equity, see Ibbetson, *'The Earl of Oxford's Case'*.

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devices over time. Pennsylvania may not have had a court of chancery, but from the colonial period onward it maintained an Orphans' Court in which equity powers and procedures pertaining to guardianship were administered. Unwilling to grant judges the power to imprison for civil contempt, state lawmakers approximated chancery's injunctive powers to compel specific performance with conditional judgments: juries returned catastrophically high damages awards but execution was conditioned on the defendant's failure to perform what the court determined – following equity jurisprudence – he or she should do.[22]

THE NATURE OF THINGS: SEPARATIST VISIONS OF LAW AND EQUITY

From this history, the opponents of fusion – call them 'separatists' for ease – worked out a taxonomy of law that to the New York lawyer George Simmons proved that the 'division of remedies into legal and equitable, is founded on a natural distinction, and that it is impracticable to blend them under a common code of procedure, or to administer them by the machinery of courts similarly organized'.[23] In Simmons's taxonomy, capital-e Equity was synonymous with justice itself. It encompassed all of morality, from the 'voluntary' precepts of religion to obligations 'established by the State. *This [latter] part is the law*', Simmons explained. 'It is not *made*, but *discovered*, and it is reared to perfection only by much observation and reflection.'[24] Written law was thus equity calcified, a subset of justice whose principles had been articulated by judges and legislators. But even the best of human wisdom was fallible and incomplete; its expressions of justice aimed at universality but were insufficiently nuanced and failed to account for all the accidents and contingencies of life. A third subset of equity, then (in addition to morality and positive law) was the technical, little-e equity administered in chancery, the discretionary search for as-yet unexpressed or half-expressed principles of justice that could correct the occasional mishaps caused by human pretensions to universalise short-sighted legal principles. By reserving discretion for these extraordinary cases, the rule of law was maintained without granting too much arbitrary

[22] See Laussat, *An Essay on Equity*, 56–57, 105–8. The Orphans' Court took written proofs, relied on bench trial, and could decree injunctions and imprisonment for contempt. On equity in Massachusetts, see P. M. Johnson, *No Adequate Remedy at Law: Equity in Massachusetts 1692-1877*, Yale Law School Student Legal History Papers, Paper 2 (2012), available at http://digitalcommons.law.yale.edu/student_legal_history_papers/2.

[23] Bishop and Attree, *Report of the Debates*, 664.

[24] Ibid., 667 (emphasis original). See also J. T. Humphry, 'Lecture at the Incorporated Law Society' (1856) 51 Leg. Obs. 67.

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power to the courts. As Simmons concluded, human wisdom could 'only divide the great mass of such cases into classes of actions, to be followed by the ordinary courts, and then constitute an extraordinary tribunal to take charge of the residue, and nothing but the residue, that its *action* may be at least so far limited by reason of its jurisdiction being so far confined'.[25]

The fusionists' mistake, according to New York City lawyer Lorenzo Shepard, was their belief that all wrongs could be 'reduced to the same class, and be comprehensible in the same general remedies'.[26] Abstracting a menu of remedies and making them available for all cases ignored how 'wrongs are infinitely diversified in their natures and infinitely diversified in their remedies'.[27] The best that lawmakers wishing to spread the one rule of law over the many exigencies of life could hope to achieve was to classify similar enough injuries under particular remedies (the forms of action), yet leave enough room for discretion when those classifications failed (equity). Abolishing these classifications would empower judges to grant injunctions, one of the most powerful and closely guarded tools of equity in every case: a danger Shepard was particularly keen to avert. Without the traditional confines created by the jurisdictional distinction between law and equity, the only alternatives Shepard saw were for courts to arrogate the injunctive power – an act of tyranny – or for the legislature to enumerate every possible case in which the device would be permitted – a hopelessly tedious task that would inevitably remain incomplete.[28]

These remarks on the infinite diversity of wrongs and the difficult classifications of law show that what was at stake for the separatists was the fundamental legitimacy of the legal order. Equity and the rule of law required that like cases should be treated alike, but even this principle involved a manifest legal fiction, for no two cases in human experience were completely alike. It was the artifice of the lawmaker to discern commonalities between cases and invest them with legal significance, usually by applying a particular remedy to a certain set of common harms.[29] Abolishing the classification and making all remedies available to every case would not 'simplify' procedure, but make it enormously more unwieldy, one lawyer concluded, 'as each case would rest upon its own particular circumstances and [become] its own form'.[30] Every case, that is, would become an equity case, but separatists argued that it was

[25] Bishop and Attree, *Report of the Debates*, 666. See also Humphry, 'Lecture', 68–69; Whewell, *Elements of Morality*, 316–27.

[26] Bishop and Attree, *Report of the Debates*, 622. [27] Ibid., 624. [28] Ibid., 621.

[29] For a succinct contemporary discussion on this point, see B. Tucker, *Principles of Pleading* (Boston, MA: Little, Brown, 1846), 1–4.

[30] Bishop and Attree, *Report of the Debates*, 591 (Marvin).

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'dangerous to convert [New York's] standing army of judges into so many chancellors, with all the arbitrary power of that court'.[31] Equitable discretion was tolerable only because there were so many definite categories of legal cases to which it could not apply, Simmons argued:

> Cases cognizable in the law courts are limited and prescribed by law; that is to say, injuries to be redressed there, are by law defined and enumerated, in order to prevent the capricious and arbitrary action of the court, and to make those remedies easy, clear, and free from uncertainty. Injuries to be redressed in equity courts are undefined, unclassed, non-enumerated.[32]

It had taken centuries to enumerate the categories of remedies that worked for the run of cases and excluded equitable discretion. 'To unite law and equity would be to retrograde for three centuries', a colleague of Simmons's warned.[33]

'Retrograde' was usually hurled at the separatists, but lawyers like Simmons and Shepard insisted they were at the leading edge of legal modernisation. Like craftsmen seeking to return to feudal labour practices, it was the fusionists who, Shepard argued, were 'at variance with a principle that has done more for the development of human industry, both physical and mental, than any other. I allude to the division of labor – This has been the great cause of perfection in every art'.[34] The division of labour, the infallible principle of economic modernisation, ensured that 'the tendency of society is to separate the courts of law and equity, and so to secure more expert and competent judges, more prompt and perfect remedies', developments Simmons perceived in all modernising jurisdictions.[35]

Behind these arguments frequently lay the suspicion that the jury posed a problem for the fusionists. Separatists lauded the value of the common law jury – so long as it was confined to actions at common law – but, said Shepard, 'it may be accounted among our misfortunes that [there] are causes to which it cannot be applied'.[36] The fusionists thus faced a dilemma: to truly achieve fusion, they would either have to abandon the jury – an important safeguard of democratic liberty, at least within its sphere – or make all cases triable by jury, reducing New York's sophisticated business law to amateurism. Separatists recognised that in many instances equity's supposedly extraordinary

[31] Ibid., 491 (Simmons). [32] Ibid., 665.
[33] Croswell and Sutton, *Debates and Proceedings*, 446 (Marvin).
[34] Bishop and Attree, *Report of the Debates*, 622.
[35] Ibid., 663. See also ibid., 572 (Jordan). Similar arguments were deployed in England, as discussed by Lobban, Chapter 4.
[36] Ibid., 621. See also Croswell and Sutton, *Debates and Proceedings*, 446–49 (Jordan).

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intervention had become routine and bound to precedent as tightly as any common law form of action, but this did not mean the court could be abolished and its cases transferred to law. It was rather an indication of how successfully the division of labour and the absence of the jury had fitted New York law for modern commerce. 'The exceeding complication of many subjects of equity jurisdiction, though it may be regretted', Shepard reasoned, 'is one of the necessary incidents to high civilization – to extended commerce, and to the vast and involved circle of the transactions of men'.[37]

The danger of chancery's arbitrary discretion convinced the separatists that the distinction of law and equity was a 'difference resting not solely in the will of the Legislature – nor in any great degree dependent on or controlled by it, but existing in the unalterable nature of things themselves', according to Shepard.[38] If they did not convince any fusionists with this ontological claim, they did at least win over a few lawyers with the argument that, at the very least, fusion could not be accomplished merely through the abstraction of procedure from substance, with only the former undergoing reformation. As Simmons argued, 'the very *forms* of proceedings stick so close to the *substance* – the practice of courts is so adhesive to their doctrines – that I am afraid' fusion would prove impracticable if it were attempted.[39] Sympathetic fusionists agreed that fusion could be achieved only gradually and would involve many substantive changes. Merely redrafting the rules of pleading and expanding available remedies would not result in fusion, for 'the present modes are incorporated and interwoven with all our habits of business, and I may say, almost with all our legal notions and ideas', one fusionist conceded.[40] To these lawyers, traditional practices ran deep through the legal order and would not disappear within a generation – and certainly not within a single legislative session.

A PLAY UPON WORDS: FUSIONIST VIEWS ON LAW AND EQUITY

To committed fusionists, the history of legal development in England and America proved only that the distinction between law and equity 'has no foundation in the nature of things', as Field put it.[41] 'Its existence is accidental,

[37] Bishop and Attree, *Report of the Debates*, 621. See also 1850 Kentucky Code Report, vi.

[38] Bishop and Attree, *Report of the Debates*, 621 (Shepard); see also ibid., 590 (Stetson) ('The forms of practice he believed were not the result of arbitrary rules, but existed in reasons behind the causes themselves. An uniformity of practice might be effected, but he did not believe that the distinction in the various actions at law and equity could be abolished').

[39] Ibid., 664 (emphasis original).

[40] Ibid., 575 (Kirkland); see also at 639–41 (Harris).

[41] [D. D. Field], 'The Convention', *New York Evening Post*, 13 August 1846.

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and continues till now only because we have been the slaves of habit.'[42] Unlike his more moderate colleagues, Field was confident these old habits of thought could be transformed if lawyers better understood that names like 'equity' and legal forms of action were not 'real existences' but 'rather ancient formulas, scholastic in their structure and origin, whose vitality has long since departed'.[43]

This strong form of nominalism commonly appeared in fusionist arguments. After the delegates agreed to create 'one supreme court, having general jurisdiction in law and equity', the New York City corporate attorney Charles O'Conor regretted that the phrase 'law and equity' entered the constitution, fearing that 'as long as we spoke of law and equity as distinct things in our constitution … the legislature would not feel at liberty to unite and blend them into one'.[44] Arphaxad Loomis, a future co-drafter of the Field Code, agreed. 'Law and equity' seemed to have talismanic power to his colleagues, but 'the difference was more in words than in reality … There might as well be any other hieroglyphical symbol by which to proceed as to retain those under which the practice was now conducted'.[45]

To support their point, the fusionists spent entire days at the convention arguing that equity had lost its distinct emphases on discretionary justice and had become indistinguishable from law in its precedent-bound jurisprudence. The separatists' fears about arbitrary discretion dated back to the early seventeenth century, when John Selden famously joked that equitable 'conscience' could be as variable as the size of 'a Chancellor's foot'.[46] But, O'Conor argued, after two centuries of building precedents:

> there was not at present any such thing recognized in jurisprudence, as the will or arbitrement of a good and conscientious man finding some measure of justice between neighbors, which the law did not define and declare. It was the law of the land, and not the conscience of the chancellor, by which the right of the citizen must be determined … The maxim that our rights were to be measured by the length of the chancellor's foot was exploded long ago.[47]

[42] Ibid. [43] Ibid.

[44] Croswell and Sutton, *Debates and Proceedings*, 440. See also 1860 Iowa Code Report, 440 ('soon they came to confound *names* with *things*').

[45] Bishop and Attree, *Report of the Debates*, 590.

[46] F. Pollock (ed.), *Table Talk of John Selden* (London: Quaritch, 1927), 43.

[47] Croswell and Sutton, *Debates and Proceedings*, 443. See also Bishop and Attree, *Report of the Debates*, 601 (Nicoll); ibid., 576 (Kirkland), 638 (Loomis). On the regularisation of equity in the late seventeenth century, see D. R. Klinck, 'Lord Nottingham's "Certain Measures"' (2010) 28 L. & Hist. Rev. 711.

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Fusionists declared that equity's 'extraordinary' jurisdiction and its power to 'supply the deficiencies' of the law were likewise empty phrases. The elderly Jacksonian lawyer Michael Hoffman insisted that 'for more than a hundred years no court of equity has claimed or exercised the power to modify or soften the rigor of the law – or grant relief on mere grounds of moral right, or conscience, that was not given it by fixed rules of law'.[48] On this point, the fusionists boasted the support of so eminent a jurist as William Blackstone, who had written that both systems 'are now equally artificial systems, founded on the same principles of justice and positive law; but varied by different usages in the forms and modes of their proceedings'.[49]

Blackstone's distinction between principles of justice and modes of proceeding inspired the fusionists to argue that 'procedural' fusion could be accomplished without disturbing the 'substantive' law. 'The difference between law and equity, and the only difference', O'Conor claimed, 'was in the form of pleading and the remedies'.[50] Again and again, delegates drew contrasts between 'form', 'mode', 'proceedings' on the one hand and 'substance' on the other. 'The difference between "law" and "equity" is a difference in the *remedies*, and *substantially* in nothing more', one fusionist concluded.[51]

Concerning those remedies, equity judges could decree money damages as at common law but also administer a variety of other injunctive and declarative remedies backed by their power to hold parties in contempt. No case in equity required pleading the forms of action; rather, bills in chancery consisted of (often quite detailed) factual statements, usually verified under oath.[52] Fusionists commonly understood, then, that uniting law and equity basically involved extending equitable procedure – perhaps with some alterations to diminish verbose pleadings – to all cases. O'Conor's 'view was that the forms of pleading used in chancery, reduced and cut down to the extent they might be, were the true forms by which civil justice might be administered in all cases, in one court, and by a uniform mode of practice'.[53] That was because equity had 'literally no form about it. The party stated his case, and asked the relief he desired, and the court, if he proved his case, gave him that relief.'[54]

[48] Bishop and Attree, *Report of the Debates*, 679.
[49] Ibid.; see W. Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon, 1768), vol. 3, 434, discussed by Sherwin, Chapter 15.
[50] Croswell and Sutton, *Debates and Proceedings*, 443; see also ibid., 464 (Nicoll).
[51] Bishop and Attree, *Report of the Debates*, 576 (Kirkland).
[52] See Barbour, *Practice of the Court of Chancery*, vol. 1, 115–19.
[53] Bishop and Attree, *Report of the Debates*, 562. [54] Ibid. See also ibid., 648 (Morris).

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This view of equity's straightforward proceedings provided the fusionists with a rebuttal to the separationist argument that law and equity improved the law through a division of labour. As in any trade, the division of labour spurred progress only when it created *efficiency*, a term that became a favourite among the fusionists. But when two courts performed similar functions, and when the same case often had to seek remedies in both courts, law and equity were not sharpening expertise but creating needless redundancies. 'Why may not the judge have the power to administer to the party, what in his case the law determines to be a proper and necessary remedy?', asked Hoffman.[55] 'Why should he be obliged, if he wants one remedy, to go to one court, and if he wants another to go into another?'[56]

Enough lawyers wished to see jury trial preserved that fusionists adjusted their plans to accommodate a possible expansion of jury trial into formerly equitable proceedings, generally optimistic that the factual complexities of equity were perhaps no worse than certain cases at common law. Even if equity proved too complicated for jury trial, Hoffman argued it might have a salutary effect on equitable jurisprudence if judges and lawyers had to make equitable jurisprudence clear enough that it could be presented to a jury in the course of a few hours.[57]

In all these points, Field was the consummate fusionist. Perhaps no other exceeded Field's legal nominalism and legislative positivism. To Field, the supposed distinctions of equity were 'little more than a play upon words'[58]; 'law and equity ought to mean precisely the same thing'.[59] In the past century, 'it would not at any time have been thought proper or safe for the Courts to disregard an established precedent', and 'in almost every instance where an improvement has been made in the laws, it has come from the Legislature'.[60] The only reason New York had separate court systems, 'if reason it may be called, was purely historical',[61] which was to say, accidental. As positive law kept the courts distinct, so positive law could unite them and eliminate the distinction forever.[62]

[55] Ibid., 676.

[56] Ibid.; see also 1860 Iowa Code Report, 444. On efficiency, see especially Bishop and Attree, *Report of the Debates*, 643–46 (Harris); D. D. Field et al., *First Report of the Commission on Practice and Pleadings* (New York, NY: Van Benthuysen, 1848); *Opinions of Lord Brougham, on Politics, Theology, Law* (Paris: Baudry's European Library, 1841), 227.

[57] Bishop and Attree, *Report of the Debates*, 678; see also at 600–1 (Nicoll), 616 (Brown).

[58] Field, 'Law and Equity', 577.

[59] D. D. Field, 'Legal System of New York', in *Speeches*, vol. 1, 340.

[60] D. D. Field and A. Bradford, *The Civil Code of New York Reported Complete* (Albany, NY: Weed, Parsons & Co., 1865), xxvii.

[61] Field, 'Law and Equity', 580.

[62] Field, 'Legal System of New York'.

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Field insisted that the distinction 'grows out of legal procedure; it does not spring from distinct, inseparable rights; it does not inhere in the nature of things'.[63] The only difference between law and equity were the remedies each court could decree; there was no such thing as a *legal right* distinct from an *equitable right*. Lawyers commonly spoke that way, 'but only because there are legal remedies and equitable remedies. Once abolish the distinction between the latter, and the distinction between the former perishes with it.'[64] By defining rights as 'substantial' and remedies as 'procedural', Field thought he saw a way through the legitimacy problems raised by the separatists. The latter worried that in a fused system every case would become a long recitation of facts. Unmoored from the precedents that defined which facts legally triggered a cabined set of remedies, judges could rule arbitrarily. But Field argued that the rule of law was secured not by stringently defining *remedies* and their availability, but by positively defining *rights*. The written law enumerated the rights of social actors. When those rights were violated, pleading need only show the fact of violation without contorting itself to fit a particular remedy. Instead of cabined remedies, positivism protected against judicial arbitrariness. If no positive right had been violated, a judge had no discretion to grant a remedy; if a right had been violated, then *any* remedy that vindicated the right would be appropriate. Field was not particularly concerned that judges would decree the 'wrong' remedy. Professional experience would guide lawyers and judges towards appropriate remedies, and the appellate process would correct any windfall awards.[65]

After New York abolished its court of chancery, Field and two other commissioners crafted his Code to provide 'a uniform course of proceeding, in all cases, legal and equitable'.[66] Acting on his belief that fusion was a problem only of procedure, Field sought to solve it in the Code of Procedure. 'The distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished', an opening section read.[67] Complaints had to contain 'a statement of the facts constituting the cause of action' and a demand for relief, but no matter what remedy a plaintiff requested, the court could grant 'any relief consistent with the case'.[68] Judges were empowered to order sheriffs to arrest defendants, seize their property, or,

[63] Ibid., 340. [64] Field, 'Law and Equity', 579.

[65] Field et al., *First Report of the Commission on Practice*, 74–75. Lobban, Chapter 4, records Lord Cairns representing one of the three schools of thought on English fusion along these lines.

[66] D. D. Field, *What Shall Be Done with the Practice of the Courts: Shall It Be Wholly Reformed?* (New York, NY: Voorhies, 1847), 7.

[67] 1848 N.Y. Laws c. 379, § 62. [68] Ibid., §§ 120, 231.

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if it appeared the plaintiff might suffer irreparable injury, enjoin a defendant's actions.[69] As New York now had only one court of general jurisdiction, these powers were conferred on the thirty-three district court judges across the state. (Twenty years later those judges would use nearly every remedy Field provided in the Albany and Susquehanna litigation.)

Most other states that adopted the Code likewise abolished their separate chancery courts (or started out with the Code and thus never established such courts). Overall, the commissioners insisted that 'the basis' for code procedure 'was substantially that upon which courts of equity were originally founded'.[70] Like chancery, the code required straightforward, factual pleadings, allowed liberal powers of joinder and amendment and made the jury waivable in all cases. (Constitutional strictures kept the commission from dispensing with the jury entirely.) All equitable remedies, including injunctions, contempt and processes for accounting, partitioning, receiving and disposing of property continued under the expansive provision for 'any relief consistent with the case made by the complaint'.[71] Until the legislature enacted a substantive civil code, judges were to look to legal and equitable precedents (though without regard to the division) to determine whether a complaint made out an appropriate 'cause of action' by stating facts showing the violation of the plaintiff's rights.[72]

As this volume shows, the fusion of law and equity was a common project across the common law world in the nineteenth century. In general, one might say that Americans sought to accomplish *fusion* largely through equity's *diffusion*.[73] Under the Field Code, every judge, in effect, became a chancellor. Even jurisdictions that did not adopt the Field reforms vested equity powers in many more judges than England's lone Chancellor (before 1813) and Vice-Chancellors (after 1841).[74] Most southern states employed two to four

[69] Ibid., tit. 7.

[70] *Second Report of the Commissioners of Practice and Pleadings* (New York, NY: Weed, Parsons and Co., 1849), 7.

[71] 1849 N.Y. Laws c. 438, § 275.

[72] 1848 N.Y. Laws c. 379, § 231; *Final Report of the Commissioners on Practice and Pleadings*, in *Documents of the Assembly of New York*, 73rd Sess., No. 16 (New York, NY: Weed, Parsons & Co., 1850), vol. 2, 314, § 751 [hereinafter Field Code Final Report].

[73] For greater detail, see Funk, 'Equity without Chancery'. That article joins a growing literature showing how much procedural fusion had been accomplished in America and England before the celebrated dates of fusion in the Field Code 1848 and the Judicature Acts 1873–75: see Kessler, *Inventing American Exceptionalism*, ch. 3; McMahon, 'Field, Fusion and the 1850s'.

[74] Until 1813, the Master of the Rolls could sit in place of the English Chancellor, but both could not sit concurrently. England added a Vice-Chancellor to the Chancery bench in 1813, and two more in 1841: Lobban, 'Preparing for Fusion', 393.

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chancellors early on, before granting equity jurisdiction to county or district courts in the 1820s and 1830s. Federal district judges received a uniform equity code from the Supreme Court in 1822. Most code jurisdictions and an increasing number of reform states allowed the joinder of legal and equitable claims and encouraged the use of equitable practices – temporary injunctions and bench trial – in all litigation.[75]

The enduring importance of equity within the American system is thus only surprising because historical scholarship has for so long repeated a narrative about the demise of equity. In the experience of lawyers in virtually every American jurisdiction – as Field's Erie Wars illustrate in part – equity grew more diffuse, sophisticated and powerful across the century. To be sure, not every practice of the old English Court of Chancery persisted in America. In time, for instance, most jurisdictions moved away from chancery's requirement to reduce all proofs to written statements, preferring to take witness examinations orally in court (although even this would become a distinction without a difference with the rise of courtroom stenography). Some experimented with making equity cases triable by jury. But no jurisdiction made jury trial compulsory, and the tendency over the course of the century was in the opposite direction: more cases were tried by the bench as the jury became waivable.[76]

Despite the scandals of the Erie War, most lawyers and reformers over time did not find the extension of equity's powers to more judges, or its novel applications for railroad corporations, problematic. Even Adams's commentary treated Erie as the exception that proved the rule. The equitable powers of

[75] See C. M. Hepburn, *The Historical Development of Code Pleading in America and England* (Cincinnati, OH: Anderson & Co., 1897); K. Collins, '"A Considerable Surgical Operation": Article III, Equity, and Judge-Made Law in the Federal Courts' (2010) 60 Duke L.J. 249; Laussat, *Essay on Equity*, 153–57.

[76] On written proof in New York, see Kessler, 'Our Inquisitorial Tradition', 1224–38; but see 1850 Kentucky Code Report, vi (preserving 'the advantage of having the evidence in writing'). England too moved away from written proceedings, in part prompted by Field's advocacy: McMahon, 'Field, Fusion and the 1850s', 424–62. On the decline of jury trial after waiver, see R. L. Lerner, 'The Failure of Originalism in Preserving Constitutional Rights to Civil Jury Trial' (2014) 22 Wm & Mary Bill of Rights J. 811. Much of the confusion over the persistence of equity has developed from Realist historiography. The code abolished bills of discovery, while the Realists valued discovery for pre-trial investigation: Subrin, 'David Dudley Field and the Field Code', 332–33; Hoffer, *The Law's Conscience*, 91. I have argued elsewhere that the Code's abolition of certain processes for discovery was not a repudiation of equity and that the Realists were not *reviving* the traditions of equity in their own reforms, but rather *innovating*: Funk, 'Equity without Chancery'; see also S. N. Subrin, 'Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules' (1998) 39 Boston Coll. L. Rev. 691.

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trial judges were not as much of a problem as the fact that these judges did not 'co-ordinate' and use 'the delicate powers of equity with a careful regard to private rights and the dignity of the law'.[77] The Code's fusion required 'a high average of learning, dignity, and personal character in the occupants of the bench', which those who ruled in the Erie litigation did not possess.[78] Adams's ultimate complaint, then, was not with the Code's fusion but with New York's elective judiciary. The New York bar largely shared Adams's assessment. The judges who had been most liberal with the injunctive power were eventually impeached on corruption charges, but the bar did not censure any Erie War attorneys or recommend changes to the Code. The problem, ruled the Association of the Bar of the City of New York, had been the judges.[79]

THE DIFFUSION OF EQUITY AND THE LIMITATIONS OF FUSION

Then as now, judges also received blame for halting the progress of fusion. In the early years of the Code, Field and other fusionists dashed off pamphlets and law review articles criticising judicial decisions that distinguished between law and equity or forced 'common law' litigants to follow the old forms of action. One New York judge said he could not understand how 'forms of pleading' could be 'abolished', so he concluded that in the Code, 'the principles of pleading are left untouched'.[80] Among New York's eminent jurists, Alexander Smith Johnson received the praise of fusionists for disregarding the distinction and allowing non-traditional joinders and remedies. Henry Selden on the Court of Appeals received their condemnation. It was 'plain', Selden wrote, that the state constitution's grant of jurisdiction 'in "law and equity", has not only recognized the distinction between them, but placed that distinction beyond the power of the legislature to abolish'.[81] Lawrence Friedman has written of these judges that 'it was as if upper courts tried, not cases, but printed formulae, and tried them according to warped and unreal distinctions'.[82]

[77] Adams and Adams, *Chapters of Erie*, 23. [78] Ibid.

[79] See *Charges of the Bar Association of New York Against Hon. George G. Barnard and Hon. Albert Cardozo and Hon. John H. McCunn* (New York, NY: Polhemus, 1872); Martin, *Causes and Conflicts*, 87–103; Lerner, 'Thomas Nast's Crusading Legal Cartoons', 76–78.

[80] [D. D. Field], *The Administration of the Code* (New York, NY: Voorhies, 1852), 16 (quoting *Dollner* v. *Gibson*, 3 Code Reporter 153 [1850]).

[81] *Reubens* v. *Joel*, 13 N.Y. 488, 497 (1859).

[82] L. M. Friedman, A *History of American Law*, 2nd edn (New York, NY: Simon & Schuster, 1985), 400. See C. E. Clark, 'The Union of Law and Equity' (1925) 25 Colum. L. Rev. 1, 4.

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These criticisms tend to overlook how extensively Code legislation guided separatist jurisprudence. Throughout the Code, rights to certain remedies and modes of proceeding depended on the form of the complaint. Defendants could not be arrested in contract claims. Actions seeking the recovery of real property or money damages received different procedures in regard to timing, summons and default mode of trial (jury) from 'all other cases';[83] a distinction between legal and equitable traditions in all but name. The final draft of the Code which became popular in other states admitted it was 'following the beaten track already enlightened by the judicial consideration to which the code has been subjected' and included 'special proceedings' for actions regarding mortgages, corporations and legacies, among others, while nevertheless insisting that the general sections of the Code were in their 'nature adapted to almost every case requiring the interposition of judicial authority'.[84]

After judges and treatise writers reasoned that these rules preserved a distinction between law and equity and bound certain remedies to the form of the pleadings, Field retorted with a hypothetical: imagine there used to be separate courts for men and women, with different proceedings. Those who could not see that the Code accomplished fusion were arguing in effect that there was something 'in the nature of things' which prevented a fusion of men and women's proceedings using 'uniform pleadings, a uniform manner of taking testimony, trial by jury in every case in which a man was the suitor, and the reëxamination of a verdict only after the manner practiced in men's courts'.[85] The analogy may have been apt but was not very instructive, as even the language of this hypothetical formula preserved the old conceptual distinctions on which separatists relied.

Rather than distinguish between cases for money damages and 'all other cases', the Code states of Kentucky, Iowa, Oregon, Tennessee and Arkansas explicitly preserved the distinction between law and equity. Because these states – like most others – scheduled different court sessions for jury trial and for bench trial, they referred cases to either the 'law' or 'equity' calendar and forbad the joinder of legal and equitable claims. Even New York continued the latter practice, while judges spoke in their decisions of sitting 'in equity' or 'at law'. 'They tend to keep up a distinction that no longer exists', Field

[83] 1848 N.Y. Laws c. 379, §§ 154, § 203; Field Code Final Report, 227–33, 318–19.

[84] Field Code Final Report, 378, note to tit. 11.

[85] Field, 'Law and Equity', 582. See H. Whittaker, *Practice and Pleading Under the Code, Original and Amended, With Appendix of Forms*, 2nd edn (New York, NY: Jenkins, 1854), vol. 1, 56 ('Although … the preamble [of the Code] seems to contemplate the abolition of all distinction between legal and equitable remedies also, that abolition is, to some extent, and must always continue to be, impracticable').

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lamented of his home state in 1878, 'and go far to confuse and mislead'.[86] Thus, as the Erie Wars drew to a close and the federal struggle to control labour commenced, the 'revival' of equity was of no surprise to American lawyers who had seen the same sophisticated equitable remedies, procedures and precedents survive and prosper during their lifetimes. What did surprise the fusionists was the relentless distinction judges and lawyers continued to draw between these practices and those of 'the law'.

THE TRIUMPH OF A TRADITION IN ERIE'S LAST CHAPTER

Field and Shearman's deployment of equity in what could have been the culminating battle of the Erie War had been nearly flawless. Through their strategic combination of injunctions, receiverships and arrests for attachment, they cobbled together a shareholder majority at their 7 September 1869 meeting during the arrest of their Albany rivals. But whether through lack of nerve or simple miscalculation, the Erie party's sheriff did not remove President Ramsey from the building but merely detained him in the boardroom. It took Ramsey only half an hour to draw up the proper bond paperwork and pay bail – $25,000 a piece for him and his favoured directors. (Ramsey's 'arrest' in the same room in which J. P. Morgan was currently sitting helped his cause.) The liberated directors then held their own meeting within the bylaws' conditions and elected their slate of directors before one o'clock. After all the *ex parte* injunctions and receiverships, an actual trial would finally determine who controlled the Albany and Susquehanna.[87]

At the conclusion of the trial the next January, Judge Darwin Smith of Rochester employed yet another power of equity to cut through the knot of injunctions, receiverships and attachments: the power to declare acts of fraud void. He found that from the beginning, the Erie party had been acting under a fraudulent conspiracy. The initial injunction had been decreed in a 'suit instituted for [a] fraudulent purpose'[88] and all the receiverships of track and stocks had been procured 'in aid of … fraudulent purposes'.[89] Thus, 'in equity' these acts were void, the votes of Erie-received stock were void, and the Ramsey directors were duly elected and rightfully in possession of the

[86] Field, 'Law and Equity', 583. These states mimicked the federal arrangement, which preserved a distinction between law and equity within a tribunal that had jurisdiction over both, a similar situation as described for New South Wales by Leeming, Chapter 6.

[87] See Adams and Adams, *Chapters of Erie*, 181–85.

[88] *People of New York* v. *Albany & Susquehanna Railroad Co.*, 7 Abbr.Pr.N.S. 265, 291 (S.C. N.Y. 1869).

[89] Ibid., 297.

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railroad. 'As the case was on the equity side of the court', Charles Francis Adams commented approvingly, 'there was no intervention of a jury, no chance of an inability to agree on a verdict'.[90] The mess that equitable remedies had created, equitable precepts had cleaned up. The Albany party swept the field.

As Erie's lead counsel, Field appealed Judge Smith's decision, and the absence of a jury became the basis for his remarkable appeal. The foundation of Field's argument was the 1860 case *Hartt* v. *Harvey*.[91] Fusionists usually did not regard *Hartt* as important enough to include on their lists of offensive cases, but its reasoning followed Selden's insistence on the natural distinction between law and equity: 'Although the distinction between actions at law and in equity is abolished', its key section read, 'yet the inherent distinction between legal and equitable jurisdiction and relief exists, and it is not in the power of constitutions or legal enactments, to abolish it'.[92] The decision claimed that even the Code recognised this truth 'in prescribing different modes of trial for the two classes of action'.[93] Accordingly, the *Hartt* court held that in a suit to remove a corporate officer on the basis of fraudulent voting, equitable remedies were inappropriate, and the plaintiff should have sought a common law writ of *quo warranto*. Well before its abolition, the New York Court of Chancery had strongly established the precedent that chancellors would not become involved too deeply with corporate elections. So long as duly installed inspectors collected and counted the votes, equity would not allow the losers to re-run an election through litigation. Common law courts could remove officers who lacked a proper basis for holding office, but the *quo warranto* writ carried the procedural requirements that the 'people of New York' be joined as litigants (effectively a public interest requirement) and the claim of official authority be subjected to jury trial. After a contested election, the plaintiff in *Hartt* sought to remove two directors without joinder of the people or jury trial, so the court dismissed the complaint.

As much as *Hartt* must have offended Field's vision of reform, the precedent was invaluable to his appeal. 'As a court of equity', Field argued, Judge Smith's court 'could not entertain jurisdiction … respecting the title to the office of directors'.[94] It was a settled principle that 'equity cannot interfere in the government of corporations', and if 'the action was one in the nature of *quo warranto*', the 'defendants had the right of trial by jury'.[95] Justice Johnson – the same who was lauded by fusionists for his sympathetic

[90] Ibid., 188. [91] 32 N.Y. 55 (1860). [92] Ibid., 66. [93] Ibid.
[94] *People* v. *Albany & Susquehanna Railroad Co.*, 57 N.Y. 161, 164 (1874). [95] Ibid.

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views – approved Field's arguments. 'Elections to office' were never 'matters of equitable consideration. They depended only on legal inquiries and legal principles',[96] Johnson ruled. That the case was 'eminently proper for jury trial is obvious',[97] and thus the court vacated the more important judgments of Judge Smith and ordered a new trial.

One could, of course, treat these cases only as an instance of Field's professional lawyering, his ability to set aside personal philosophies of law in order to use every precedent that advantaged his clients.[98] Field may have been able to satisfy himself that *Hartt*'s flawed substantive reasoning could be separated from the useful procedural rule that it provided, but the *Hartt* line of cases tended to belie the fusionists' claims that there were no 'substantial' distinctions of law and equity that would be affected by a merger of the courts. So much of New York's corporation jurisprudence had arisen out of church disputes that its chancery court had long established precedents that it would not invade corporate ballot boxes and remove officers. (The disputed election in *Hartt* itself was in a church, not a business enterprise.[99]) By sending corporate litigants to seek their remedy at law, the chancellors created a rule that was indistinguishably substantive *and* procedural to preserve the legitimacy of their functions. Equitable discretion was too invasive for corporate elections, but a jury drawn from the community – in a case with a sufficiently high public interest – might arrive at a remedy that was both just and socially approvable. In Field's ideal jurisprudence, either the Erie party or the Albany party had the right to corporate office, and a judge sitting without a jury could vindicate that right (precisely as happened when Judge Smith ruled against Field). His appeal, however, drew on the logic that procedure itself created rights – the right to a jury trial, to corporate office, to vindication of the public's interest – but as they had for centuries, those rights depended upon which remedy a litigant sought.

[96] Ibid., 171–72.

[97] Ibid., 176. The Albany party successfully outmanoeuvred Fisk and Gould once again, by leasing the road while the appeal was pending to the Delaware & Raritan Canal Company, a corporation with sufficient wealth and legal counsel to withstand further litigation by the Erie party. Field's successful appeal vacated punitive damages that Judge Smith had assessed on Fisk in Gould. Contented with that outcome, they turned their attention to other ventures: Adams and Adams, *Chapters of Erie*, 190–91.

[98] See M. Schudson, 'Public, Private, and Professional Lives: The Correspondence of David Dudley Field and Samuel Bowles' (1977) 21 A.J.L.H. 194.

[99] On New York chancery's reluctance to enter into church disputes, see *Robertson* v. *Bullions*, 11 N.Y. 243 (1854).

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CONCLUSION

Although the project to fuse law and equity and sunder rights from remedies remained incomplete, its attempt in the Field Code powerfully influenced the development of American law. When the Massachusetts native Walter Ashburner produced his *Principles of Equity* in 1902, he insisted that 'the two streams of jurisdiction, though they run in the same channel, run side by side and do not mingle their waters'.[100] Ashburner's views were influential around the world, especially in Australia, where jurists insisted Americans were pursuing a 'fusion fallacy'.[101] Ashburner had little influence in his native country, however. In America, trans-substantive procedure became the dominant paradigm; even as academic lawyers wrangled over the legitimacy of the theory, they tended to brush off seemingly law- or equity-specific procedures as anomalies. Such a posture goes back to the early days of the Field Code. The persistence of special proceedings for the vindication of certain rights may have annoyed Field and contradicted his ultimate goals, but it represented a remarkable reversal of Sir Henry Maine's famous aphorism: after the Field Code, action-specific procedures had the look of being gradually secreted in the interstices of a substantive law of rights.[102]

As diffuse as equity became, several jurisdictions remained committedly opposed to fusion. Illinois, Delaware and New Jersey maintained separate courts of chancery and left common law procedures relatively unaltered until the mid-twentieth century. By the late 1870s, fusionists liked to joke that Illinois and New Jersey were 'the Yellowstone Park of common law pleading'.[103] The jest shows how pervasive the fusionists' views became and how closely linked they were to a modernisation thesis: the distinction of law and equity and the preservation of the forms of action were obsolete patches of wilderness in the modern world of corporate capitalism. Without the persistence of these state governments, their practices were doomed to extinction.

Yet these states *were* persistent, and their persistence troubles the fusionist modernisation narrative. Despite their 'retrograde' procedures, Illinois and New Jersey prospered commercially. That the leading edge of corporate and finance capitalism – futures trading in Illinois, general incorporation in New

[100] W. Ashburner, *Principles of Equity* (London: Butterworth, 1902), 18.
[101] *Meagher, Gummow and Lehane*, 1st edn [220]–[222]. See M. Tilbury, 'Fallacy or Furphy?: Fusion in a Judicature World' (2003) 26 U.N.S.W.L.J. 357.
[102] Contrast H. S. Maine, *On Early Law and Custom* (London: Murray, 1890), 389.
[103] See Anon., 'Current Topics' (1885) 32 Alb. L.J. 161; C. E. Clark, 'The New Illinois Civil Practice Act' (1933) 1 U. Chi. L. Rev. 209.

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Jersey – could originate and flourish in these Yellowstone Parks indicated that modern capitalism might find sufficient 'certainty' and 'efficiency' in the forms of action as it could under fact pleading. The elite lawyer Charles O'Conor (Field's chief opponent in the Erie Wars) admitted as much in the 1846 convention. Although O'Conor favoured fusion and codification at the time, he conceded that the forms of action and the law–equity distinction were 'tolerably understood by the profession generally', who could use the devices 'to bring in such a verdict as worked out the ends of justice'.[104] In the 1870s, O'Conor abandoned the drive towards fusion, while his erstwhile allies grew frustrated with half-reformed jurisdictions.

As the first generation of American fusionists passed, Charles E. Clark became the standard bearer for the next. As dean of the Yale Law School, Clark joined in mocking unreformed Illinois lawyers and was pleased to see the state finally adopt several Field reforms in 1933. Using Field's arguments and even his very words, Clark insisted that nothing made the 'old distinctions . . . inherent in the nature of things'.[105] In fact, 'it is unfortunate to continue to speak of law and equity', as, to their dismay, the fusionists found that by debating the distinction between law and equity, their very words were keeping the distinction alive.[106] As a key drafter of the 1938 Federal Rules of Civil Procedure, Clark sought to solve the same problem as Field. The opening provision accordingly declared 'there is one form of action – the civil action' and Clark's note explained that 'reference to actions at law or suits in equity . . . should now be treated as referring to the civil action prescribed in these rules'.[107] On the whole, the project has been counted successful, and leading casebooks assert that the Field Code and the Federal Rules 'merged law and equity'. Nevertheless, American jurisprudence continues to rely on the traditional categories to determine whether certain rights or remedies are available to litigants, such as the Seventh Amendment right to a civil jury trial or the application of laches in the absence of a statute of limitations.[108] Over one hundred and seventy years after Field insisted, with sound historicist reasoning, that the distinction between law and equity 'does not inhere in the nature of things',[109] their union in America remains contested and elusive.

[104] Croswell and Sutton, *Debates and Proceedings*, 441.
[105] Clark, 'The Union of Law and Equity', 7. [106] Ibid., 5.
[107] U.S. Federal Rule of Civil Procedure 1, comment 1b (1938).
[108] D. Crump et al., *Cases and Materials on Civil Procedure* (2012), 258–59; J. Oldham, *Trial by Jury: The Seventh Amendment and Anglo-American Special Juries* (New York University Press, 2006), 5–24; S. L. Bray, 'A Little Bit of Laches Goes a Long Way: Notes on *Petrella* v. *Metro-Goldwyn-Mayer, Inc.*' (2014) 67 Vanderbilt L. Rev. En Banc 1.
[109] Field, 'Legal System of New York', 340.

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