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Essay

Codification and the California Mentality

by
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Introduction: The Pomeroy Paradox

On August 8, 1878, John Norton Pomeroy, the principal instructor at the newly established Hastings College of Law in San Francisco, delivered the school's inaugural address. It was the culminating moment of an exhilarating decade for California's legal profession.

Six years earlier, in 1872, California had moved to the forefront of American legal reform by becoming one of the first states in the nation to codify its complete body of laws. The legislature had enacted the California Code, which included new Civil, Criminal, and Political Codes, as well as a revised Code of Civil Procedure. Committees of prominent attorneys had drafted the Code, basing it largely on the work of the illustrious New York jurist, David Dudley Field.¹

The centerpiece of the California Code was the Civil Code, which consolidated all of the state's statutory and common-law rules governing private relations (corporations, property, torts, contracts, and domestic matters) into one meticulously arranged volume.² Only

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1. See Arvo Van Alstyne, *Commentary*, in WEST'S ANNOTATED CALIFORNIA CODES: CIVIL CODE 1, 8-9 (1982).

2. Throughout this Article, I use "Code" to signify the complete four-part California Code, and "Civil Code" to refer to the part concerning substantive private law. The Civil Code was by far the most noteworthy section of the Code. See *infra* note 3. Consequently, when Californians of the time spoke generally of the "Code," they were often thinking primarily or exclusively of the Civil Code. This ambiguity unavoidably slips into my own language when I discuss the attitudes of nineteenth-century Californians toward codification.

three other states or territories before California had codified these fields of law, which comprised the heart of the common law.³

Now, California was opening its first law school, further elevating the prestige of its legal institutions, and an eminent scholar from the faculty had agreed to honor the event with a speech. Pomeroy's listeners undoubtedly felt proud of their state's accomplishments. He said nothing to dampen the celebratory mood.

Pomeroy boasted that California's spirit of improvement made it a particularly advantageous location to study law:

The Hastings Law Department of the University of California will, as a matter of course, be a representative of the jurisprudence of California . . . and will sympathize with the freedom of progress which has abandoned so many ancient dogmas and has moulded to such an extent the legislation of the Pacific commonwealths. . . . California to-day stands absolutely the foremost in the promotion of legal reform among the communities whose jurisprudence has been based upon the English system of common law and equity. While other States, and England itself, have deliberated . . . California has *acted*, and by one mighty stride has reached the point towards which the other commonwealths are tending with greater or less rapidity. She has accepted the principles of law reform, and reduced them to a practical operation.⁴

Pomeroy reminded his audience that the extraordinary achievement in law reform to which he referred was codification:

[California] has embodied the important and controlling doctrines of her jurisprudence in the form of a scientific code The work which California has thus accomplished will certainly be imitated by other states . . . [and] spread with ever increasing rapidity, until its effect shall be shown throughout the entire extent of our common country.⁵

3. Louisiana had adopted Edward Livingston's Civil Code in 1825, Georgia had enacted a civil code in 1860, and the Dakota Territory had embraced David Dudley Field's Civil Code in 1865. LAWRENCE FRIEDMAN, *A HISTORY OF AMERICAN LAW* 405-06 (1985).

Criminal codes and codes of civil procedure were more common. Common-law crimes had been steadily disappearing since the Revolution, as most states and the federal government had replaced them with criminal codes. *Id.* at 289-91. In addition, many states, including California itself in 1851, had replaced the intricate system of common-law pleading with Field's Code of Civil Procedure. *Id.* at 391-98. The Civil Code was, therefore, the most notable feature of the California Code—not only because of its important subject matter, but also because California was one of the earliest and most important states to enact such a code.

4. JOHN NORTON POMEROY, *THE HASTINGS LAW DEPARTMENT OF THE UNIVERSITY OF CALIFORNIA: INAUGURAL ADDRESS* 10 (1878) [hereinafter POMEROY, *INAUGURAL ADDRESS*].

5. *Id.* at 11.

Modern scholars who have examined the history of the California Civil Code would probably be surprised to learn of this speech,⁶ for Pomeroy is generally viewed as the Civil Code's greatest nemesis. Izhak England, for example, has written that Pomeroy "hardly was a great partisan of the idea of codification in general and certainly made no secret of his genuine dislike of the California Civil Code in particular."⁷

Pomeroy's reputation as the man who killed the California Civil Code is based on a highly influential article he wrote in 1884 entitled *The True Method of Interpreting the Civil Code*.⁸ In this article, Pomeroy opposed making the Civil Code the sole source of law, as it is in civil-law jurisdictions.⁹ He argued that judges should instead view the Civil Code, whenever possible, as merely a declaration of existing common-law rules and interpret it using common-law precedents and customs.¹⁰ Pomeroy felt that only judge-made law was ex-

6. The inaugural address at Hastings was not the only instance in which Pomeroy expressed support for the California Civil Code. Pomeroy championed it in an unsigned piece in the *Albany Law Journal* in 1872, stating:

If [the Civil Code] should prove, as we are confident it must, an easily working and satisfactory ordinance, the future Solons of our eastern land, when old teachings and customs have lost their influence, may, perhaps, be induced to seek for legislative wisdom on the shores of the Pacific.

The Civil Code of California, 5 ALBANY L.J. 69, 70 (1872) (Pomeroy is identified as the author in the *Index to Legal Periodicals*, vol. I, to 1886, at 86 (1888)). He also asserted the need for codification of the common law in an unsigned 1873 book review in *The Nation*. Book Review, *THE NATION*, Sept. 11, 1873, at 179, 181 (reviewing JAMES HADLEY, *INTRODUCTION TO ROMAN LAW* (1873)); Pomeroy refers to his authorship of this book review in a November 21, 1873 letter to Theodore Dwight Woolsey; this letter is contained in the Yale University's Manuscript and Archives Collection).

7. Izhak England, *Li v. Yellow Cab Co.—A Belated and Inglorious Centennial of the California Civil Code*, 65 CAL. L. REV. 4, 9-10 (1977) (footnote omitted).

8. JOHN NORTON POMEROY, *THE "CIVIL CODE" OF CALIFORNIA* (1885) (originally published as *The True Method of Interpreting the Civil Code*, 3 W. COAST REP. 585, 657, 691, 717 (1884); 4 W. COAST REP. 1, 49, 109, 145 (1884)) [hereinafter POMEROY, *THE "CIVIL CODE"*].

9. See *id.* Judges in common-law jurisdictions generally decide cases according to precedent. Judges in civil-law jurisdictions such as France, Spain, Louisiana, and Mexico, on the other hand, have traditionally turned exclusively to the provisions of their codes. If there is no express provision to resolve a given case, a civil-law judge attempts logically to deduce a rule from analogous provisions in the code, as well as from the code's structure and legislative history. If necessary, the judge decides the case according to his own sense of natural justice. Although modern civilians have gradually acknowledged the force of judicial precedent, its limited role remains one of the primary distinctions between the civil- and common-law approaches. See Maurice E. Harrison, *The First Half-Century of the California Civil Code*, 10 CAL. L. REV. 185, 188 (1922); Bartholomew Lee, *The Civil Law and Field's Civil Code in Common-Law California*, 5 W. LEGAL HIST. 13, 16-21 (1992); see also JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION* chs. 5, 6, 7, 8, 12 (2d ed. 1985).

10. Pomeroy summarized his method of interpretation as follows:

pansive and flexible enough to meet the needs of a rapidly evolving society, and thus he did not want the Civil Code to alter the court-centered nature of California's legal system.¹¹ As one scholar has noted, Pomeroy's purpose was to establish a method by which the Civil Code would be read "as completely as possible as if it did not change a thing."¹²

The California courts, which had been uncertain about how to treat the Civil Code, explicitly adopted Pomeroy's views in 1888.¹³ And in 1901, the legislature mandated within the Civil Code itself that "provisions of this code, so far as they are substantially the same as existing statutes or the common law, must be construed as continuations thereof, and not as new enactments."¹⁴ As a result, California's legal methodology remained barely discernible from that of traditional common-law states. Except where its provisions clearly differed from common-law rules, the Civil Code was rendered little more than a restatement.¹⁵

Those who label Pomeroy as the chief enemy of the California codification movement, based only on his *True Method*, apparently assume that the movement's primary goal was to reapportion power between the courts and the legislature. It is easy to make such an

Except in the comparatively few instances where the language is so clear and unequivocal as to leave no doubt of an intention to depart from, alter, or abrogate the common-law rule concerning the subject-matter, the courts should avowedly adopt and follow without deviation the uniform principle of interpreting all the definitions, statements of doctrines, and rules contained in the code in complete conformity with the common-law definitions, doctrines, and rules, and as to all the subordinate effects resulting from such interpretation.

POMEROY, THE "CIVIL CODE," *supra* note 8, at 51.

11. *Id.* at 52-55. Pomeroy clearly assumed that California would use his method when, in his Hastings address, he praised the state's form of codification "since it retains all the elasticity, power of adaptation, and inherent capacity for further development, which are the distinguishing elements of the common law itself." POMEROY, INAUGURAL ADDRESS, *supra* note 4, at 1.

12. William B. Fisch, *The Dakota Civil Code: More Notes for an Uncelebrated Centennial*, 45 N.D. L. REV. 9, 29 (1969).

13. *Sharon v. Sharon*, 16 P. 345, 350, 354 (Cal. 1888).

14. CAL. CIV. CODE § 5 (West 1982).

15. See generally Englard, *supra* note 7, at 9-22; Harrison, *supra* note 9, at 188-92; Lee, *supra* note 9, at 13-16, 33-36; Van Alstyne, *supra* note 1, at 29-37. It is important to note that there were more than a few departures from the common law in the California Civil Code, reflecting substantive innovations contained in the Field Code (which served as the Californians' model) and in previous California statutes and case law. Morton Horwitz has suggested that these changes made the Civil Code a "radical" instrument. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960, at 118 (1992). Interestingly, however, little of the contemporary public commentary on the California Code concerned these substantive reforms.

assumption, for during the more celebrated debate over Field's Civil Code in New York during the 1870s and 1880s, one of the principal issues was the role of judges and legislators in the law-making process.¹⁶ Moreover, during the antebellum era, the main objective of radical codifiers throughout the United States had been to reduce the power of judges.¹⁷

In California, however, codification was not primarily, or even significantly, a radical attempt to shift power to the legislature. Californians supported codification for other reasons, hinted at by Pomeroy in his address. It is necessary to recognize these reasons to understand why, regardless of its practical significance as a legal instrument, the Code's adoption was hailed by conservatives and liberals alike as a monumental event in California's history. While codification stripped of its democratic implications may seem inconsequential to modern observers, early Californians, because of their distinctive outlook, saw it as a momentous achievement. By examining codification's peculiar appeal in California in the 1870s, I hope to illuminate the personality of a young state torn between fears of illegitimacy and dreams of greatness.

I. The California Mentality

During its early years, California's self-image was characterized by a complex mixture of confidence and insecurity. Californians were convinced that their state was destined to become the world's foremost empire, but they were simultaneously apprehensive that they did not possess even the basic elements of civilization.

16. In the voluminous literature produced during this debate, both the procodification forces, led by David Dudley Field, and the anticodification troops, led by James Coolidge Carter, spoke extensively of the respective roles of judges and legislators. See, e.g., David Dudley Field, *Codification*, 20 AM. L. REV. 1, 2 (1890) ("There are certain propositions which have become maxims of government, one of which is that the legislative and judicial departments should be kept distinct, or in other words, that the same person should not be both law-giver and judge. . . . [W]e violate it every hour that we allow the judges to participate in the making of the laws."); JAMES COOLIDGE CARTER, *THE PROPOSED CODIFICATION OF OUR COMMON LAW* 87 (1888), cited in FRIEDMAN, *supra* note 3, at 404 (suggesting that the "growth, development and improvement of the law" should "remain under the guidance of men [judges] selected by the people on account of their special qualifications for the work," rather than "be transferred to a numerous legislative body, disqualified by the nature of their duties for the discharge of this supreme function"). New York never adopted Field's Civil Code. The legislature passed it on two occasions, in 1878 and 1887, but each time the governor vetoed it. HORWITZ, *supra* note 15, at 117.

17. See CHARLES M. COOK, *THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM* 69-92 (1981); PERRY MILLER, *THE LIFE OF THE MIND IN AMERICA* 239-65 (1965).

On the one hand, as Kevin Starr observes, a positive "fable" of California developed—a heroic view of the state as democratic, energetic, and cosmopolitan. "[P]astoral past, progressive and colorful present, imperial future—[it was] a proud and optimistic fable, one that conferred a sense of importance and glamour upon a remote, underdeveloped region, unsure of its status in the eyes of the Atlantic Seaboard and torn by pressing internal problems."¹⁸

Californians had particularly grand visions of their future. History demonstrated that civilization progressed as it drifted westward, and the Golden State would be the ultimate beneficiary of this inexorable process. Hubert Howe Bancroft, the great nineteenth-century California historian, boasted:

Here the chronic emigrant must rest; there is for him no farther west. From its Asiatic cradle westward round the antipodes, to the very threshold of its source, civilization has ever been steady and constant on the march, leaving in its track the expended energies of dead nations unconsciously dropped into dream-land. A worn-out world is reanimated, as it slowly wanders toward the setting sun. Constantinople shrivels, and San Francisco springs into being.¹⁹

As Starr notes, however, California's positive fable could not entirely obscure the "violence and frustration and failure" that stained its history.²⁰ The negative aspects of the California experience gave rise to a "counter-fable" that portrayed California as a lawless, brutal, unstable, and crude society.²¹ Californians feared they were cursed with a competitive and materialistic spirit that doomed them to a sort of chaotic vulgarity.

Above all else, Californians worried their state lacked the capacity for order. During its early years, California often appeared to be on the verge of chaos, as a throng of rapacious Forty-Niners reached the Pacific ahead of American legal and governmental institutions. Even after California became a state in 1850, and the frenetic initial surge of gold-seekers subsided, an atmosphere of commotion seemed to persist. Citizens organized "vigilance committees" to combat rampant crime.²² The status of the huge Mexican land grants was unset-

18. KEVIN STARR, *AMERICANS AND THE CALIFORNIA DREAM* 126 (1973).

19. Hubert Howe Bancroft, *Literary Industries*, in 39 *THE WORKS OF HUBERT HOWE BANCROFT* 1, 11 (1890).

20. STARR, *supra* note 18, at 126.

21. *Id.* at 126-31.

22. See WALTON BEAN, *CALIFORNIA: AN INTERPRETIVE HISTORY* 119-31 (1978); KEVIN J. MULLEN, *LET JUSTICE BE DONE: CRIME AND POLITICS IN EARLY SAN FRANCISCO* 158-78 (1989).

tled, and defiant squatters occupied some of the tracts.²³ The white population displayed widespread, occasionally violent, racial animus against Mexican and Chinese people and waged a "war of extermination" against Native Americans.²⁴

As their state grew to adolescence, Californians began to sense that, as one contemporary put it, their "rudest and ruggedest days must be past, or nearly past."²⁵ In his annual message in 1867, Governor Frederick F. Low claimed, "Peace and good order have been maintained in all our internal affairs." But Low's measure of "good order" reveals how tenuous order remained in California: "No tumultuous or riotous proceedings have taken place, calling for the aid of the military to suppress, except in a single instance."²⁶

Order was not the only rudiment of civilization that Californians feared was lacking in their community. They also worried that their state was intellectually and culturally barren. The idealist philosopher Josiah Royce, who was born in California, frequently bemoaned the intellectual poverty of his native state. "There is no philosophy in California," he complained in a letter to William James. "From Siskiyou to Ft. Yuma, and from the Golden Gate to the summit of the Sierras there could not be found brains enough [to] accomplish the formation of a single respectable idea that was not a manifest plagiarism."²⁷

Californians were proud of their spectacular material accomplishments, but many had a nagging sense that they had neglected to cultivate the loftier aspects of their culture. In his 1860 inaugural address, Governor Milton Latham exhibited such misgivings:

In mineral wealth we are without an equal; and our rapid stride in commerce and agriculture will soon render us the peer of the most prosperous communities. Our alluvial soil, our matchless climate, our auriferous products, should fill our hearts with gratitude to God, that he has cast our lot in a land so blessed.

23. BEAN, *supra* note 22, at 132-38; Paul Wallace Gates, *Pre-Henry George Land Warfare in California*, 44 CAL. HIST. SOC'Y Q. 121 (1967); Lewis Grossman, *John C. Frémont, Mariposa, and the Collision of Mexican and American Law*, 6 W. LEGAL HIST. 17 (1993).

24. See generally BEAN, *supra* note 22, at 119-31 (discussing this period).

25. STARR, *supra* note 18, at 123 (quoting Walter Fisher) (footnote omitted).

26. Annual Message to the Legislature by Governor Frederick F. Low, Dec. 4, 1867, in LEGISLATURE OF THE STATE OF CALIFORNIA, JOURNAL OF THE SENATE, 17th Sess., at 52 (1868).

27. Letter from Josiah Royce to William James (Jan. 14, 1879), in THE LETTERS OF JOSIAH ROYCE 66 (John Clendenning ed., 1970).

Let it be our aim to make our State, morally and intellectually, co-equal with her physical endowments.²⁸

There was a widely held belief that California's materialistic foundations caused its retarded intellectual development. A New York friend of Hubert Howe Bancroft surmised that the historian's "isolation must have been severe" in California, because "the minds of the people [are] so much more intent on gold-getting and society pleasures than on intellectual culture."²⁹ Bancroft himself admitted that "[t]his western spurt of enterprise is a century-step backward in certain kinds of culture."³⁰ Many Californians, as well as Easterners, shared the sense, as Starr describes it, "that life in California had never transcended the search for wealth which had filled it in the first place."³¹

Others embraced geographical determinism to explain California's mental sterility, concluding that California's climate and terrain condemned the state to cultural inferiority. The writer Grace Greenwood remarked:

Leaving out of consideration the fast and furious rate of business enterprise, and the maelstrom-like force of the spirit of speculation, . . . I cannot see how, in a country so enticingly picturesque, where three hundred days out of every year invite you forth into the open air with bright beguilements and soft blandishments, any considerable number of sensible, healthy men and women can ever be brought to buckle down to study of the hardest, most persistent sort; . . . to brooding over theories and incubating inventions. . . . I do not think she will ever be the rival of bleak little Massachusetts or stony old Connecticut in thorough culture, in the production of classical scholars, great jurists, theologians, historians, and reformers. The conditions of life are too easy.³²

Some Californians who agreed with such gloomy prophecies by condescending Easterners abandoned the state. Josiah Royce, for ex-

28. Inaugural Address of Milton S. Latham, in *LEGISLATURE OF THE STATE OF CALIFORNIA, JOURNAL OF THE SENATE*, 11th Sess., at 105 (1860).

29. BANCROFT, *supra* note 19, at 12 (quoting Charles Nordhoff).

30. *Id.* at 30. The assertion that California's exclusive focus on economic development had stunted its intellectual growth was a version of an argument made by many nineteenth-century commentators concerning the United States as a whole. For example, in 1876, F.W. Clarke explained the country's meager scientific accomplishments by observing, "The labor of developing new regions, of building up commerce, manufactures, and agriculture, of constructing railroads, bridges, and telegraphs, has diverted public attention from matters apparently of a more abstract and less immediately practical character. Material necessities have taken precedence of intellectual wants." F.W. Clarke, *American Colleges vs. American Science*, in *SCIENCE IN AMERICA: HISTORICAL SELECTIONS* 229 (John Burnham ed., 1971).

31. STARR, *supra* note 18, at 129.

32. BANCROFT, *supra* note 19, at 15-16 (quoting Grace Greenwood).

ample, despaired of the intellectual future of his birthplace so much that he fled Berkeley for the speculative bliss of Harvard.³³ California also lost such talented literary men as Mark Twain, Bret Harte, Ambrose Bierce, and Henry George.³⁴

Other Californians, however, maintained confidence alongside their fear of failure. They insisted their state would not only achieve intellectual respectability, but would become "a seat of culture . . . to which all roads shall lead."³⁵ The *Daily Examiner* foresaw a Californian empire distinguished even more by its cerebral qualities than by its wealth:

On this western marge of the American continent, we predict, will be ultimately manifested the highest intelligence of the coming centuries. Here will be concreted the concentrated essence of the mental, physical and moral power of all the nations of the earth. In the city of San Francisco . . . will be congregated . . . exemplars and illustrations of . . . all the attributes, faculties and capacities which determine intellectual supremacy.³⁶

Bancroft, who bristled when "arrogant and domineering" Easterners derided California's mental capacities, warned them that "Massachusetts and Connecticut may yet go to school in . . . California."³⁷ Indeed, he predicted that California would lead the world intellectually:

Slowly as were unlocked to man the wealth and mysteries of this Pacific seaboard, so will be the intellectual possibilities of this cradle of the new civilization. As a country once deemed unproductive can now from its surplus feed other countries, so from our intellectual products shall we some day feed the nations.³⁸

The Code was one of the first of these intellectual products with which California hoped to nourish the world.

II. The Appeal of Codification

In view of the ardor with which codification has been opposed at other times and places in American history, young California's consensus on codification is particularly striking. A series of governors, both Republican and Democratic, called for the codification of Cali-

33. STARR, *supra* note 18, at 153.

34. *Id.* at 133.

35. BANCROFT, *supra* note 19, at 217.

36. *The Mighty West*, DAILY EXAMINER (San Francisco), Apr. 11, 1872, at 2.

37. BANCROFT, *supra* note 19, at 345.

38. *Id.* at 9-10.

fornia's laws,³⁹ and both houses of the legislature passed the Code unanimously.⁴⁰ Both the Republican *San Francisco Chronicle* and the Democratic *Daily Examiner* supported codification.⁴¹ In 1874, the California Code Commission recalled:

The Code of California had no [significant] opposition to meet or overcome. . . . Before the Code was adopted, it had received the approval of the great body of the people, and the Legislature . . . but registered their edict. . . . Of course, there were some to object; strange that their numbers were not greater.⁴²

Californians were peculiarly receptive to the idea of codification because it satisfied the needs of both the insecure and confident facets

39. Governors Burnett (Democrat), Leland Stanford (Republican), Henry H. Haight (Democrat), and Newton Booth (Republican) all supported the idea of codification. See LEGISLATURE OF THE STATE OF CALIFORNIA, JOURNAL OF THE SENATE, 1st Sess., at 33-34 (1850) (message from Governor Burnett); LEGISLATURE OF THE STATE OF CALIFORNIA, JOURNAL OF THE ASSEMBLY, 15th Sess., at 52 (1863) (message from Governor Stanford); LEGISLATURE OF THE STATE OF CALIFORNIA, JOURNAL OF THE SENATE, 17th Sess., at 96 (1868) (Inaugural Address of Governor Haight); LEGISLATURE OF THE STATE OF CALIFORNIA, JOURNAL OF THE SENATE, 20th Sess., at 82-83 (1874) (message from Governor Booth).

40. Charles Lindley, a member of the 1870 Code Commission that drafted the codes, reports that the votes were unanimous. Letter from Charles Lindley to Ex-Governor H.H. Haight (Jan. 8, 1874), in CHARLES LINDLEY, CALIFORNIA CODE COMMENTARIES app. at iv (1872). The Journal of the Senate states that when the Civil Code came up for consideration, the rules were suspended and the bill was passed without a voice vote. LEGISLATURE OF THE STATE OF CALIFORNIA, JOURNAL OF THE SENATE, 19th Sess., at 562 (1872).

41. Before the legislature enacted the Code, the *Chronicle* stated that it "heartily approve[d] of . . . some well-considered plan of codification." *The Business of Legislation—The Proposal to Revise Our Laws*, S.F. CHRON., Feb. 6, 1870, at 2. Two weeks after its adoption, the *Daily Examiner* opined, "The adoption of the Codes was the only action of any value performed by the Legislature [this session]." DAILY EXAMINER (San Francisco), Apr. 2, 1872, at 2.

42. Report of the Code Commissioners (Feb. 28, 1874), in 6 THE LEGISLATURE OF THE STATE OF CALIFORNIA, APPENDIX TO THE JOURNAL OF THE LEGISLATURE, 20th Sess., at 8-9 (1874) [hereinafter Report of the Code Commissioners (1874)]. Although lawyers and the press criticized particular aspects of the Code's contents and arrangement after its adoption, the notion of codification remained popular. The *Daily Examiner* observed, "The Code is a beautiful ideal, but, as we in California are just discovering, very hard to break into a practical blessing." *Daily Examiner* (San Francisco), Jan. 28, 1873, at 2.

In response to the criticism, Governor Booth appointed a Committee to Examine the Codes in 1873. The committee was composed of Jackson Temple, a former justice of the California Supreme Court; John W. Dwinelle, a respected member of the San Francisco Bar; and Stephen J. Field, an Associate Justice of the United States Supreme Court (and the brother of David Dudley Field). This Commission submitted a series of amendments that the legislature adopted in 1874. Report of the Commissioners to Examine the Codes, Oct. 11, 1873, in 4 THE LEGISLATURE OF THE STATE OF CALIFORNIA, APPENDIX TO THE JOURNAL OF THE LEGISLATURE, 20th Sess., at 13 (1874) [hereinafter Report of the Commissioners to Examine the Codes].

For a complete history of the process by which the codes were adopted, see Rosamund Parks, *The History of the Adoption of the Codes of California*, 22 L. LIBR. J. 3, 8 (1929).

of their personality. To a people who suspected that their coarse and turbulent society lacked the basic ingredients of civilization, the Code offered reassurance that they could be ordered and intellectual. At the same time, Californians viewed the Code as a step toward perfection and global influence.

Pomeroy's Hastings address illustrates how Californians looked to codification for both confirmation of their civilization's basic legitimacy and evidence of its imperial prospects:

[Law's] improvement is the surest mark of a nation's progress from barbarism to refinement. It is the clearest exponent of a civilization already attained. . . . The nations of ancient or modern times which have graven their character the most deeply into the world's history, which have the most profoundly influenced the movements of society . . . are those which have possessed in the highest degree the organizing faculty, and have thereby brought the municipal law to a condition nearest perfection.⁴³

In the eyes of Pomeroy and his contemporaries, codification was particularly well-suited both to rescue California from "barbarism" and to lead it to "perfection."

A. Codification as Order

A major attraction of the Code was the fact that it imposed order on California's haphazardly scattered laws. The statutes of the young state had accumulated clumsily in a series of bulky, unsystematized volumes. Meanwhile, the rapidly swelling number of California judicial decisions, as well as the decisions of tribunals throughout the United States and Great Britain, lay dispersed among hundreds of tomes.

Legal reformers around the country decried the law's confused condition. Indeed, this disorganization was one of the primary arguments for codification in the East as well as the West.⁴⁴ Californians, however, appear to have been especially troubled by the extreme disorder of their laws. Governor Leland Stanford remarked in 1863, "All who have occasion to examine into the statutes of California cannot but be deeply impressed with the state of wild confusion into which

43. POMEROY, INAUGURAL ADDRESS, *supra* note 4, at 8.

44. David Dudley Field often referred to the disorganized state of the law as a reason for codification: "[A] Code is the natural, not to say necessary relief, whenever there has come to be an oppressive accumulation of adjudications, enactments and treatises, obstructing and bewildering, as is now the fact in New York." David Dudley Field, *The Civil Code: What It Is; and Why It Should Be Adopted*, 25 ALBANY L.J. 219, 220 (1882).

they have fallen. . . . The Bar and Bench find it alike difficult to extract order out of this wild scene of statutory confusion and chaos."⁴⁵

Californians may have been particularly uneasy about such disorder because it appeared to be another manifestation of their state's general bedlam. In a letter he wrote to the California bar, promoting his Civil Code, David Dudley Field almost seemed to suggest that codification was an aspect of California's struggle to forge a civilization out of tumult. "The chaotic state of the law arises, of course, from the vast mass of unarranged, and sometimes discordant, material. To take this material, separate the discordant parts, analyze, arrange, compress, remould the rest, is to educe order out of chaos."⁴⁶

The logical arrangement of the law clearly offered concrete benefits. David Dudley Field and his supporters frequently argued that "a Code is better than case-law . . . 'chaos,' . . . [because it is] plainer for the people, safer for the judges, easier for the lawyers."⁴⁷ California's codifiers, who heard "[t]he citizen and the lawyer alike complain over the want of a condensed methodical expression of the law," recognized the practical advantages of codification.⁴⁸

Californians, however, even more than their Eastern counterparts, seemed to relish the very ideal of rational classification that codification represented. The Commissioners to Examine the Codes, for example, reported with satisfaction that the codes were "perfect in their analysis, admirable in their order and arrangement, and furnishing a complete code of laws."⁴⁹

B. Codification as Science

The notion of arrangement was important to Californians, not only because of their efforts to establish order in their tumultuous society, but also because they, like nineteenth-century Americans generally, viewed classification as a scientific endeavor. Californians thus

45. Annual Message to the Legislature by Governor Leland Stanford, in *LEGISLATURE OF THE STATE OF CALIFORNIA, JOURNAL OF THE SENATE*, 14th Sess., at 44 (1863).

46. Letter from David Dudley Field to the California Bar (Nov. 28, 1870), in 5 *W. JURIST* 49, 51 (1870). David Dudley Field was in a good position to understand the California mentality, for his brother, Stephen Field, was a Californian. Stephen Field sat on the California Supreme Court and, after he joined the United States Supreme Court, on California's Commission to Examine the Codes.

47. Field, *supra* note 44, at 219.

48. *CIVIL CODE, REVISED LAWS OF THE STATE OF CALIFORNIA* iv (Preface to Preliminary Draft 1871).

49. Report of the Commissioners to Examine the Codes, *supra* note 42, at 3.

saw codification—the arrangement of the law—as a way to prove that they had created an intelligent, sophisticated civilization.

Pomeroy was not alone in calling California's Code "scientific."⁵⁰ Californians frequently pointed out the scientific nature of codification. Governor Newton Booth stated, "The object has . . . been to generalize the statutes and principles of common law into a science"⁵¹ The *Daily Examiner* opined, "The Codes are a good thing, no doubt, in the way of reducing the law to something like a positive science."⁵² Charles Lindley, one of the Code Commissioners, asserted that codified law is "at least theoretically, a science—a system, having grand divisions, parts, titles, chapters, articles and sections, each bearing a relation to the whole."⁵³

It is difficult today to comprehend how one could view the mere arrangement of the law as a scientific task. As Lindley's remark suggests, however, people of his era closely associated science with classification. Indeed, until well into the 1800s, science *was* classification. According to George Daniels, a scholar of the history of science:

In making explicit [an] identification of scientific method with taxonomy, [Samuel Tyler, an American scientist of the 1840s,] was voicing a conviction generally accepted by his contemporaries From this viewpoint, the work of the scientist was merely that of collecting particulars and . . . grouping them into classifications of higher degree The pervasiveness of this identification is suggested by the high praise generally accorded by the American reviews to taxonomists⁵⁴

The primary impetus for scientific classification was the same as that for legal codification; "fact gathering, being largely random and undirected, had resulted in an overwhelming mass of undigested data that ultimately became a source of embarrassment and confusion."⁵⁵ Just as codifiers argued that they had to organize the laws to enable judges, lawyers, and legislators to use them effectively, scientists maintained they had to arrange their facts in an orderly and systematic fashion before they could even begin their research. In other words,

50. POMEROY, INAUGURAL ADDRESS, *supra* note 4, at 11 (referring to California's "scientific code").

51. Inaugural Address of Governor Newton Booth, *in* LEGISLATURE OF THE STATE OF CALIFORNIA, JOURNAL OF THE SENATE, 19th Sess., at 114 (1872).

52. *Degeneracy of the Bar*, DAILY EXAMINER (San Francisco), Mar. 23, 1872, at 2.

53. LINDLEY, *supra* note 40, at 11.

54. GEORGE H. DANIELS, AMERICAN SCIENCE IN THE AGE OF JACKSON 71-72 (1968) (footnote omitted) [hereinafter DANIELS, AMERICAN SCIENCE].

55. *Id.* at 102.

"classification was a necessary step in making information manageable."⁵⁶

Nineteenth-century scientists therefore enthusiastically adopted and mastered a series of classification systems, most of them devised in Europe. Among these systems were Lavoisier's chemical nomenclature, Mohs's systematic method of naming mineral species, and, above all, Linnaeus's scheme for botanical classification, which was gradually replaced by various "natural" classification systems.⁵⁷

Such schemes were so central to the scientific enterprise that, until late in the century, most scientists did not realize there was more to science than classification. Although a few recognized "that to name a thing and place it in a structured system was not the same as to know the thing in the scientific sense,"⁵⁸ they were out of the mainstream of American scientific thought. As Lynn Barber notes:

Linnaeus himself would probably have been the first to admit that classification is only a tool, and not the ultimate purpose, of biological enquiry. But unfortunately this truth was not apparent to his successors and for the next hundred years biologists were to concern themselves with classification almost to the exclusion of everything else. . . . This was the tone that "serious" natural history was to take for the entire first half of the nineteenth century.⁵⁹

Classification thus enjoyed great stature among American scientists. Its prestige was buoyed by its association with the Baconian inductive method.⁶⁰ Furthermore, classification was thought to have philosophical significance, for the arrangement of God's creations into logically related categories seemed to reveal the reason and harmony of His design.⁶¹

56. *Id.* at 108. In a book discussing nineteenth-century biology, Daniels remarks, "While students of the present day are inclined to dismiss the 'mere classifier' as a benighted curiosity from the past, this work had been essential; an orderly and systematic arrangement of life was an absolute necessity before the investigation of evolution, or even its recognition, could take place." GEORGE H. DANIELS, *SCIENCE IN AMERICAN SOCIETY: A SOCIAL HISTORY* 226-27 (1971).

57. See DANIELS, *AMERICAN SCIENCE*, *supra* note 54, ch. 5.

58. *Id.* at 103.

59. LYNN BARBER, *THE HEYDAY OF NATURAL HISTORY, 1820-1870*, at 57 (1980).

60. See DANIELS, *AMERICAN SCIENCE*, *supra* note 54, at 65-66.

61. George H. Daniels, discussing the connection between science and theology in nineteenth-century America, notes that "[e]very instance of order scientists found in nature, if properly interpreted by a learned and pious mind, could be used to reinforce belief in a benevolent God" DANIELS, *AMERICAN SCIENCE*, *supra* note 54, at 53. In 1852, Edward Hitchcock, a scientist and theologian, described the ideal man of science as one who "calmly surveys the phenomena of nature, to learn from thence the great plan of the universe as it lay originally in the divine mind." *Id.* at 52 (quoting Hitchcock).

Classification's stature gradually diminished during the nineteenth century. Fewer specimens remained to be classified, laboratory research grew in importance, and the grand issues of evolution replaced taxonomy as the primary concerns of biology and geology.⁶² Classification did not, however, relinquish its throne easily. Countless amateur and quasi-professional naturalists in nineteenth-century America—inveterate collectors of flora, fauna, and rocks and minerals—continued to exalt the ideal of systematic classification. Furthermore, when confronted with a source of new specimens, scientists were compelled, temporarily at least, to return to the task of classification.

California was such a source. Geographically isolated by formidable natural boundaries, the state was a biological island, harboring a diverse array of unfamiliar species.⁶³ As Michael Smith points out, "For most of the late nineteenth century, California's earth and life scientists were nominally occupied with exploration and inventory: mapping topographic and geological features, locating and identifying plants and animals."⁶⁴ These scientists were aware of the large theoretical issues of the day, issues raised by the arrival of Darwin's ideas in the United States.⁶⁵ Nonetheless, preoccupied with the task of mapping and classifying their new surroundings, "many of the region's professional and amateur scientists considered this backdrop of theoretical inquiry to be secondary or irrelevant."⁶⁶

Therefore, the view that classification was not only a useful project, but was the very essence of science, continued as the prevalent notion in California, even in the nineteenth century's final decades. Californians considered the rational arrangement of a field of knowledge to be a serious intellectual accomplishment. As a people struggling to establish themselves as an advanced civilization, they consequently could point to their classification schemes as evidence of their substantial mental capacities.

62. SCIENCE IN NINETEENTH-CENTURY AMERICA: A DOCUMENTARY HISTORY 29 (Nathan Reingold ed., 1964).

63. MICHAEL SMITH, PACIFIC VISIONS: CALIFORNIA SCIENTISTS AND THE ENVIRONMENT 51-52 (1987).

64. *Id.* at 55.

65. The first American edition of *The Origin of Species* was widely reviewed in 1860. By the early 1870s, issues of evolution dominated the natural sciences in the United States. See RICHARD HOFSTADTER, SOCIAL DARWINISM IN AMERICAN THOUGHT 13-19 (rev. ed. 1955).

66. SMITH, *supra* note 63, at 50.

With an awareness of this perspective, one can understand the source of Pomeroy's conspicuous pride when he declared that Hastings Law School's curriculum would "be truly scientific in its classification and arrangement of subjects."⁶⁷ It also helps to explain why in his autobiography, *Literary Industries*, Hubert Howe Bancroft boasted so extensively about the indexing system he had invented for the Bancroft Library.⁶⁸ One of the historian's primary motives in writing his memoirs was to prove that "an intellectual career was possible in California."⁶⁹ He considered his indexing scheme to be evidence of this fact because it was a scientific accomplishment:

[I had to] reduce the otherwise rebellious mass to form and system. This, after the collection of the material, was the first step in the new chemistry of library reduction. Here, as elsewhere in the application of science, facts must be first collected, then classified, after which laws and general knowledge may be arrived at.⁷⁰

In view of the era's elevated vision of classification, it is not surprising that California's legal reformers, eager to demonstrate their state's intellectual prowess, embraced codification. They facetiously drew parallels between legal codification and scientific taxonomy, particularly Linnaean biological classification. The 1874 Code Commissioners, for example, remarked, "Codes collect the principles established in a series of cases, and reduce them into maxims or canons forming genera, of which each reported case from which the rule was extracted is a species."⁷¹

Charles Lindley, a member of the 1870 Code Commission, similarly noted in his *Code Commentaries* that the "principles upon which [the natural] sciences are developed and advanced, is substantially applicable to the improvement of the science of the law."⁷² He explained that the divisions, parts, titles, chapters, articles, and sections of California's Code should correspond "to the grand groups, families,

67. POMEROY, INAUGURAL ADDRESS, *supra* note 4, at 16.

68. BANCROFT, *supra* note 19, at 230-44. Bancroft started the library with books he had collected concerning the history of the Pacific Coast.

69. *Id.* at 119.

70. *Id.* at 232-33. Bancroft's description of the chaotic state of his materials before indexing sounds strikingly like the codifiers' complaints about the law:

On my shelves were tons of unwinnowed material for histories unwritten and sciences undeveloped. In the present shape it was of little use to me or the world. Facts were too scattered; indeed, mingled and hidden as they were in huge masses of *débris*, the more one had of them the worse one was off.

Id. at 231.

71. Report of the Code Commissioners (1874), *supra* note 42, at 4.

72. LINDLEY, *supra* note 40, at 12.

or orders, *genera*, species and individuals common to the natural sciences.”⁷³

Lindley’s *Commentaries* illustrate how the identification of codification with science was intertwined with the identification of codification with order. In the *Commentaries*, he explained that he admired biological and geological classification schemes because they were integrated, hierarchical systems in which each part related logically to the whole. It was not mere arrangement he admired, but arrangement by learned experts according to general principles, leading to a perfect order. “In this manner there is a harmonious expansion and expression of the natural sciences. They are *integrated* rather than *disintegrated*. Generalization with classification is the process. No ruthless hand, no ignorant head; none but profound scholars in the special departments dare touch this almost sacred work.”⁷⁴

Lindley had similar expectations for legal codification. He hoped to elevate California’s legal profession, which was “little involved in this rapid, hurrying age,” and had “not much time for meditation and for determining the practicability of theories.”⁷⁵ He disapproved of merely arranging the law alphabetically (the method chosen by the unsuccessful 1868 Code Commission), because such an arrangement would not be “logical.” “The difference between *logical*, and *alphabetical* arrangement of law [is the difference] between the *scientific* and the *accidental*—between treating each subject as a part of a system, and treating it as independent of a system—between order and disorder.”⁷⁶

Lindley believed codification, properly performed, should approach a sort of philosophical perfection. “We know it is not practicable to reach the highest degree of perfection which theories may indicate,” he acknowledged, “[but] nevertheless, we can make great advancement in that direction by accomplishing our work under rules that should govern a system.”⁷⁷ Only a person with a refined intellect could perform such a task. Therefore, codification, like classification

73. *Id.* at 11.

74. *Id.*

75. *Id.*

76. *Id.* at 52 nn.70-71.

77. *Id.* at 9. Interestingly, Lindley complained bitterly that the Code Commission, of which he was a member, had not had sufficient time to perfect the Code it presented to the Legislature in 1872. Many aspects of the Code did not yet meet his criteria for scientific classification. *Id.* at 52.

in the natural sciences, could be performed properly only by someone with "a scholarly head and a skillful hand."⁷⁸

Lindley's *Commentaries* manifest the complex interrelationship between classification, order, and science in the minds of nineteenth-century Americans. They thus help to explain how the successful creation and implementation of a Code reassured Californians that they possessed the ingredients of civilization, or even the stuff of empires.

C. Common Law—The Other Science

It should be noted, however, that California did not have to replace the common law with a Civil Code in order to embrace legal science. In fact, since early in the nineteenth century, the common law itself had been routinely characterized by its defenders as a "science."

Ironically, American lawyers' identification of the common law with science developed largely in response to the antebellum codification movement. The radical codifiers of the 1820s and 1830s argued that the common law's lack of formal principles and systematic order allowed judges to make political choices—to make the law instead of "find" it.⁷⁹ Jurists such as James Kent and Joseph Story countered by asserting that common-law methodology was scientific, a subtle balance between induction and deduction, and that the rules it derived were immutable, scientific principles.⁸⁰

Proponents of the common law continued to exalt its scientific character throughout the nineteenth century. In 1870, Christopher Columbus Langdell began teaching at Harvard Law School, using a "case method" based on the notion that the common law was a science.⁸¹ In the celebrated debate over Field's Civil Code in New York in the 1870s and 1880s, the victorious anticodifiers, led by James Coolidge Carter, claimed the mantle of science just as vigorously as did the followers of David Dudley Field. Carter stated that under the common law, "[t]o find out [a] rule and apply it is *a matter of science*,

78. *Id.* at 12.

79. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860*, at 117-18 (1977).

80. For discussions of legal science in antebellum America, see HORWITZ, *supra* note 79, at 253-66; PERRY MILLER, *THE LIFE OF THE MIND IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR* 117-85, 239-65 (1965); G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE 1815-1835*, at 143-56 (abr. ed. 1991).

81. Thomas Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 5 (1984).

and the work can be successfully performed only by following scientific methods."⁸²

Consequently, the aspiration of California lawyers and politicians for a scientific legal system does not fully explain their support of codification; like the vast majority of the country, they could have simply draped the extant common-law system with scientific authority. The science of codification, however, was more attractive to Californians than the science of the common law. The explanation for this preference is rooted in the blend of insecurity and confidence that characterized California in 1872.

D. Codification as a Step Toward Empire

As discussed earlier, the explicit order of classification had particular appeal for a young state struggling to organize and understand itself. The common law may have been a science, but it was a complex and obscure one. The systematic arrangement and apparent clarity of a code better suited a community desiring order and certainty.

Furthermore, Californians' desire to display cultural capabilities required that they perform constructive public acts. While none would have noticed their continued use of the common law, a borrowed institution, their creation and adoption of a Civil Code drew the attention of jurists and lawyers around the country. Californians must have relished the fact that formerly contemptuous Easterners were now seriously debating in legislative committees and law reviews the merits of their young state's legal system. California was finally being noticed for the products of its minds, as well as its mines.

California's codifiers were thus motivated largely by an insecure desire for order and respect. However, if self-doubt alone was a sufficient catalyst for codification, California would surely have adopted a code in the chaotic time following its birth, when it initially decided what type of legal system to adopt. Instead, in 1850, the legislature rejected codification, as well as civil law, and chose "[t]he Common

82. JAMES C. CARTER, ARGUMENT OF JAMES C. CARTER IN OPPOSITION TO THE BILL TO ESTABLISH A CIVIL CODE: BEFORE THE SENATE JUDICIARY COMMITTEE, ALBANY, MARCH 23, 1887, at 1 (1887). There are countless examples of appeals to science in the New York codification debate. As in California, the proponents of codification regularly equated codification with science. Field himself frequently argued that "a code is an authoritative statement, scientifically arranged, of those general rules which flow from all these cases and statutes." Address to the New York Legislature's Judiciary Committee (Feb. 17, 1873), in 7 ALBANY L.J. 193, 196 (1873). Another author asserted, "Wherever a code exists there law has assumed the rank and dignity of a science." *A Short Plea for a Code*, 31 ALBANY L.J. 364, 364 (1885) (anon.).

Law of England, so far as it is not repugnant to, or inconsistent with, the Constitution of the United States or the Constitution or laws of the State of California.”⁸³ The primary concerns of the government of the infant state were to quickly constitute an effective legal structure and to establish the American character of a formerly Mexican territory. Neither embracing the civil law of the region’s previous rulers nor devising an innovative legal system would have furthered both these goals. California thus chose to embrace the country’s common-law traditions.

By the early 1870s, however, California was gaining stability and confidence, and it no longer felt the need meekly to imitate the rest of the country in order to establish its Americanism or Anglo-Saxonism. Indeed, Californians thought it was time to move ahead of the other states, to guide them toward perfection. Codifying the common law was a way to do so. In the final analysis, therefore, California’s codification movement was fueled by rising idealism as much as by uncertainty. Many Californians began to believe that civilization inexorably advanced as it drifted westward. Their purpose was, as Bancroft put it, to “[fight] for deliverance from the tyrannies and superstition of the east.”⁸⁴ Merely to borrow the common law was to deny California’s role as the agent of human progress. But to improve the common law by codifying it—that was to create the world’s finest legal system and thus begin California’s climb to global leadership.

Californians believed that the Code was an unprecedented accomplishment, a work that revealed the originality and genius of her people. The Commissioners to Examine the Codes crowed:

[This is] the first time, we believe, that such a result has been achieved by any portion of the Anglo-Saxon or British races. . . . That California has been the first of this class to enact a complete code of municipal law will add not only to the prosperity of her people, but redound to her honor as a State.⁸⁵

83. 1850 Cal. Stats. ch. 95. After Governor David Douglass and eighteen petitioners from the San Francisco Bar urged the legislature to adopt civil law as the law of the state, the Senate Judiciary Committee, apparently with the support of the remainder of the bar (with over 100 members), successfully exhorted the legislature to embrace the common law. The Committee’s report, an extended and fervent defense of the English common-law system, considered and rejected both codification and civil law. *LEGISLATURE OF THE STATE OF CALIFORNIA, SENATE COMMITTEE ON THE JUDICIARY, REPORT ON CIVIL AND COMMON LAW* (1850), reprinted in 1 Cal. 588 (1850).

84. BANCROFT, *supra* note 19, at 344.

85. Report of the Commissioners to Examine the Codes, *supra* note 42, at 3.

Lindley observed that the Civil Code would "forever stand as the first legislative adoption of a Common Law Codification."⁸⁶ California's codifiers were certain that their work represented a distinct advance over extant systems. Creed Haymond, the Chairman of the Code Commissioners, declared, "[The codes] are the growth of the world's civilization."⁸⁷ In their most confident moments, the codifiers suggested that they had almost achieved perfection. "[There is] one fact capable of proof and incapable of refutation," the Code Commissioners reported, "namely, that [the Code of California] is the most complete and perfect Code ever given by the law-making power to any people."⁸⁸ A lawyer who had lived in California delivered perhaps the most grandiloquent assessment of California's accomplishment:

With a perfect system of codification of State, National and International law, such as California has obtained, we might reasonably expect for the coming of that golden period yet hidden in the womb of time, when the universal law of "peace on earth; good will to man," shall govern all enlightened States and Nations.⁸⁹

Californians naturally expected that other states would act to share such blessings by imitating California's legal system.⁹⁰ Soon before the legislature enacted the Code, the *Daily Examiner* declared, "It may now be our turn to afford the older States a system of laws . . . well worth of adoption."⁹¹ Two years afterward, the Code Commissioners stated:

The Code was the munificent gift of the Legislature . . . to generations present and future; a gift that no hand can spoil, no power can ever retract. Though but two years have elapsed since its adoption, much of it has passed into the laws of our sister States and Territories [Washington, Oregon, and Nevada], and the rest will speedily follow. . . .⁹²

Pomeroy was therefore not alone in predicting "that within a single generation the California type of jurisprudence will have been adopted by all the States of the American Union."⁹³

86. LINDLEY, *supra* note 40, at 26.

87. HISTORY OF THE BENCH AND BAR OF CALIFORNIA 192 (Oscar T. Shuck ed., 1901) [hereinafter HISTORY OF THE BENCH AND BAR].

88. Report of the Code Commissioners (1874), *supra* note 42, at 13.

89. W.H.H. Russell, *California System of Codes—The Evolution of the Law*, 1 AM. LAWYER 39, 44 (1893).

90. They probably harbored hopes that other countries would follow them, as well. After all, a Japanese delegation visited the Commissioners, took copies of the Code back to Japan, and incorporated portions into the Japanese laws. Japanese authorities sent appreciative letters to Creed Haymond. HISTORY OF BENCH AND BAR, *supra* note 87, at 194.

91. *Further Endorsement*, DAILY EXAMINER (San Francisco), Mar. 7, 1872, at 2.

92. Report of the Code Commissioners (1874), *supra* note 42, at 13.

93. POMEROY, INAUGURAL ADDRESS, *supra* note 4, at 11.

California thus saw itself as a civilization ready to extend its beneficent influence across both time and space. They viewed the Code as a great cultural bequest to the world:

In the changes that time must bring, the names of all connected with the Code of California will pass away, the massive walls of the Capitol in which it was enacted will crumble into dust, the site of the Capitol may be lost to the knowledge of mankind, yet we may fairly indulge the hope that when such changes have taken place, California, in her Code, will have a monument which neither the iron hand of Time has shattered, nor the dust of many ages obscured.⁹⁴

This passage, with its reference to crumbling ruins, analogizes California to the great ancient civilizations. The allusion is a significant one, for Californians viewed codification as a step toward empire. When they reviewed the history of legal codes, they encountered names such as Justinian, Frederick the Great, and Napoleon. Consequently, it was natural for them to associate codification with imperial power.

In prophesying their own ascent to imperial splendor, Californians most often compared their state to Rome.⁹⁵ Their vague sense of connection to the Mediterranean world, arising, as Starr notes, "from similarities of landscape and climate,"⁹⁶ made Rome a natural model. And when California's codifiers surveyed Rome's accomplishments, they considered its greatest legacy to be the Code of Justinian, the basis of the civil-law system still used by much of the globe:

The Code of Justinian, rich with the accumulated wisdom of three hundred years of national prosperity, survived not only the changes made by law makers, but the ravages of time itself. Of Imperial Rome but a vestige remains But the Code is still intact, and enduring testimonial of the wisdom and learning of the people that gave it into being.⁹⁷

The Californians hoped that by creating their own Code, they, like the Romans, would serve as lawgivers to other states and nations, and thus make a similar mark on world history:

94. Report of the Code Commissioners (1874), *supra* note 42, at 13-14.

95. See, e.g., BANCROFT, *supra* note 19, at 217:

Give to the United States one half of the five centuries Rome gave herself in which to become established in that inherent strength which made her mistress of the world, and the great American republic cannot be otherwise if she would than the most powerful nation on earth. And when that time comes, California and the commonwealths around, and up and down this Pacific seaboard, will be the seat of culture and power to which all roads shall lead.

96. STARR, *supra* note 18, at 370. See generally *id.* ch. 12 (entitled "An American Mediterranean").

97. Report of the Code Commissioners (1874), *supra* note 42, at 13.

In the future, other English speaking people may add to it, enrich and adorn its pages with the wisdom of years to come, as the Justinian Code was enriched and adorned by the Latin races. But the Code of California . . . will ever be cited, referred to, and esteemed by the people of our tongue and race, as has been the Code of Justinian by the races which accepted it as the basis of a system of jurisprudence.⁹⁸

In short, the codifiers believed they were helping to build a new Rome on the Pacific Coast. After struggling for more than twenty years to establish its legitimacy as a civilization, California suddenly seemed likely to extend its cultural influence to the other side of the earth. It is hardly surprising that John Norton Pomeroy was caught up in the excitement.

Conclusion

In many ways, California achieved its imperial ambitions. It eventually became, as Donald Worster has asserted, "the leading state in America, and perhaps the single most influential and powerful area in the world for its size."⁹⁹ Codification, however, played virtually no role in California's ascent. The California Code did not change the legal world as its drafters and supporters predicted it would. After the California Supreme Court adopted Pomeroy's method of interpretation,¹⁰⁰ the Civil Code sank to jurisprudential insignificance.¹⁰¹ Moreover, as classification slipped from its position as the central goal of scientific endeavor, the mere act of organization that had so impressed the codifiers' contemporaries no longer attracted notice as an intellectual feat.

Nevertheless, the Code's descent into obscurity in modern times makes California's enthusiasm for it in the 1870s even more striking. The story of the California Code's birth serves as a reminder that the significance of historical events cannot be measured solely by modern standards. It also demonstrates that the attitudes of a people toward its legal system may be based largely on concerns other than the manner in which that system shapes the affairs of society.

98. *Id.* at 13.

99. DONALD WORSTER, *RIVERS OF EMPIRE* 10 (Oxford Univ. Press 1992) (1985).

100. *See Sharon v. Sharon*, 16 P. 345 (Cal. 1888).

101. For an assessment of the California Code's lack of importance in modern California jurisprudence, see England, *supra* note 7.