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This State Will Soon Have Plenty of Laws - Lessons from One Hundred Years of Codification in Montana

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“THIS STATE WILL SOON HAVE PLENTY OF LAWS”—LESSONS FROM ONE HUNDRED YEARS OF CODIFICATION IN MONTANA

Andrew P. Morriss

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1. Headline in the ANACONDA STANDARD, Jan. 29, 1895, at 1.
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I. INTRODUCTION

The Fourth Montana Legislature adopted more than 170 pounds of laws, an estimated 784,000 words, during 42 days in 1895. With little attention to the details of its actions, the

2. The enrolled versions of the Codes were reported as weighing: Code of Civil Procedure, 37 pounds, The House, HELENA DAILY HERALD, Feb. 13, 1895, at 1; It Was All Spent, DAILY INDEPENDENT (Helena), Feb. 14, 1895, at 5; Civil Code, 50 pounds, The State Legislature, DAILY INTERMOUNTAIN (Butte), Feb. 19, 1895, at 1; and Political Code, 50 pounds, The State Legislature, DAILY INTERMOUNTAIN (Butte), Feb. 19, 1895, at 1. Based on these estimates and the relative sizes of the printed Codes, I estimated a weight of 33 pounds for the Penal Code, which the newspapers appear to have forgotten to weigh. The description of the Codes in the popular press in pounds indicates both the vastness of their provisions and the novelty of such massive legal measures.

A brief note on sources is necessary: Because surviving nineteenth century Montana legislative records are sparse at best, I have taken most of the details of the various bills, amendments, and discussion in the legislature from newspapers' accounts. I relied most heavily on the two Helena papers, the Democratic Daily Independent and the Republican Helena Daily Herald since these papers covered the legislature and Bar Association activities in the most detail. In general, I used the daily editions of these papers rather than their weekly editions, which appear to consist of reprints from various dailies. Other papers from the period comprehensively reviewed include the Anaconda Standard, the Butte Daily Intermountain, and the Missoulian. For each of the relevant periods (the 1893, 1895, and 1897 sessions of the legislature and several weeks preceding and following each session) I read every story connected to the legislature, the Montana Bar Association, or the Governor in these papers. The style of reporting for the period often led to information regarding the Codes being buried in interior paragraphs of stories whose headlines suggested totally different topics.

Finally, a stylistic note: legislators and others often referred to the Codes in the singular. Except where directly quoting such a reference or referring to an individual Code, I have used the plural to refer to the Codes as a group.


4. This encompasses the time from introduction of the four Codes to the Governor's signature on the last Code.

5. The adoption of the Civil Code certainly has attracted little attention from historians other than Robert Natelson. See infra note 14. Standard works on Montana like K. ROSS TOOLE, MONTANA: AN UNCOMMON LAND (1959), do not mention the Code at all, and none of the major twentieth century Montana history sources mentions the Codes other than to note their passage. See, e.g., MERRILL G. BURLINGAME & K. ROSS TOOLE, A HISTORY OF MONTANA (1957); BANCROFT, infra note 94. The otherwise exhaustive JAMES M. HAMILTON, FROM WILDERNESS TO STATEHOOD: A HISTORY OF MONTANA, 1805-1900 (1957), tells us only that Wade's codification work "has been the model for code commissions." Id. at 329.

Standard legal histories also give little attention to the Western codifiers in
legislature changed Montana's criminal law, civil law, procedural rules, and government structure, and revolutionized the state's infant legal system. While legislators debated patronage jobs and the selection of school textbooks with great fervor, no significant debate occurred on the massive changes in the substance and structure of Montana's laws.6

The story of codification in Montana is more than an amusing tale of frontier corruption and political ineptitude. Montana's codification experience provides important lessons for those engaged in attempts to revolutionize legal systems today. From the former Soviet Union and Soviet bloc countries to Latin America, political change has led to a demand for dramatic legal change. As these countries turn to the West for examples of laws, Montana's experience with the legal reforms created for New York in the 1860s and California in the 1870s suggests that reformers should approach the substance of "foreign" western law with caution. Adoption of laws without creation of the appropriate legal culture and without sensitivity to the laws' suitability to local conditions is a recipe for the distortion of substance. It undermines the rule of law by creating a dissonance between the written law and the law as applied by the courts. Moreover, the legal reforms in the former Soviet and Soviet Bloc countries have again raised the issue of whether reform is best accomplished through centralized, top-down efforts similar to the Montana Codes (the Codes), or through decentralized institutions such as the common law.7 This Article describes the history of the Codes
general, and even less to Montana. See, e.g., LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 351-54 (1973) (mentioning Dakota, California and Montana and attributes the Codes' success in the West to those states being "sparsely settled;" no discussion of Montana codification); KERMIT L. HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 126-27 (1989) (noting only the code of procedure and concluding "[t]he common law . . . was undisturbed"); MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960 117-18 (1992) (not mentioning Montana's adoption although listing Dakota Territory, California, and Georgia).

6. These changes were embodied in four Codes: a Civil Code, a Penal Code, a Political Code, and a Code of Civil Procedure. The Montana codifiers derived the Codes from drafts produced in New York between 1848 and 1865 by David Dudley Field and others. See infra part II.A. They also drew on California's experience with the Codes, where David's brother Stephen helped shepherd them to adoption in 1872, and the experience of the Dakota Territory, which had adopted Codes based on David Dudley Field's drafts in 1866.

in an attempt to show the pitfalls of the top-down approach to law reform.

The Codes' adoption signalled a failure of the young state's governance mechanisms. Rather than considering the substance of these bills, the legislature deferred to the small group of attorneys who vigorously pushed for codification. Legislators waived the safeguards that might have avoided unintended consequences, such as the political code's restructuring of municipal government salaries and offices.\(^8\) At the same time, they slavishly followed procedures, like hand enrollment,\(^9\) which served no purpose and yet were expensive. In doing so, the legislature abdicated its responsibility to govern. Inevitably, after passage, when people began to read the Codes, a multitude of problems surfaced.

Perhaps more surprising than the simple adoption of such massive changes in the legal system was the adoption of these changes based on "foreign"\(^{10}\) law. Dating back to territorial days, Montana had a long history of opposition to outsiders' involvement in the local legal system.\(^{11}\) Despite the significant differences between Montana's economy and society in the 1890s and those of the source states, the Fourth Legislature swallowed a massive dose of "foreign" law. Why?

Montana's advocates of codification succeeded for several reasons. First, many saw codification as an antidote to the chaos of the state's statutes. Thirty years of politics and carelessness produced a jumble of sometimes conflicting provisions, causing great uncertainty regarding the law's content. Although these conditions existed since the 1860s, by the 1890s the chaos reached epic proportions. Second, important elements of the bench and bar united behind the codification effort because it promised to make their lives easier by producing a single, readily available source of law. Unlike the New York Bar, which pro-

\(^{8}\) See infra notes 208-17 and accompanying text.

\(^{9}\) Enrolling bills required copying the final versions by hand. In the case of the Codes, this took weeks of work by a small army of clerks. See infra part II.D.3.

\(^{10}\) The Codes derived directly from David Dudley Field's attempts at codification in New York and Dakota's and California's adoption of modified versions of Field's drafts. See infra part II.A.

\(^{11}\) For an example of Montana's grievances against outsiders and their involvement in territorial government and law, see the speech of Congressional Delegate J. K. Toole to Congress on the subject in *The Territories' Rulers*, DAILY INDEPENDENT (Helena), Jan. 22, 1889, at 3 (a representative quote: "In short, Mr. Speaker, it [Congress] has made the territories the dumping-ground for all the experimental legislation which the whims and caprices of congress can invent.")
duced vigorous opposition to that state's codification, the Montana Bar was not yet a mature profession with strong interests in maintaining the legal status quo against the Codes' changes. Third, a public choice\textsuperscript{12} analysis suggests that the Codes provided an opportune moment for legislators to create demand for their services. By passing such a comprehensive set of laws, the Fourth Legislature created both the need for amendments to "fix" problem areas and the opportunity to provide such services. Additionally, amendments to the Codes were far more difficult for outsiders to decipher than laws written from scratch. Amendments required possession of the Codes to determine what was being amended because the titles to amendments typically provided no information regarding their contents. Finally, Montanans saw the Codes as a chance for Montana to take its rightful place in the nation as a progressive, modern state. Denied statehood for years by national politics, and often chafing under the federal territorial appointees who dominated the executive and judicial branches, the Codes' image as a rational, forward-looking set of principles gave Montana a chance to leap to the forefront of legal reform.

The Codes also physically overwhelmed the Montana Legislature. Their sheer size and hurried passage meant that the usual mechanisms for review of legislation failed completely. An embarrassing legislative patronage scandal over clerical employees contributed to the disregard for the legislators' responsibility to review legislation; the passage of the Codes ended discussion of overstaffing. Indeed, rather than reducing patronage employees, the Codes created the need to expand the ranks of the patronage clerks to enroll the Codes by hand.\textsuperscript{13}

The Codes' adoption had less impact on Montana's legal system than the codifiers hoped. Since adoption, the Montana courts have routinely ignored the Codes' provisions. With respect to employment law, for example, the Code provisions governing interpretation of indefinite employment contracts (discussed in Part IV, infra) proved ineffective in forestalling development of expansive common law remedies for wrongful discharge. Despite these remedies' clear conflict with the Civil Code, Montana's courts paid little attention to the Code's provisions. Because the Montana courts failed to follow the Civil Code, they created a dissonance between the written Codes and the common law,

\textsuperscript{12} Public choice is essentially the economic analysis of politics.

\textsuperscript{13} See infra part II.D.3.
which defeated the codifiers' attempt to create certain and easily known law. By failing to accommodate the common law changes to the clear text of the rule, the Montana courts undermined the Codes. Even worse, as Professor Robert Natelson has shown elsewhere, when Montana courts did follow the Codes, the inappropriateness of the Codes' provisions sometimes distorted the development of law appropriate to Montana's conditions.

More importantly, examination of the development of wrongful discharge law in Montana illustrates a different sort of problem from the general problems associated with codification discussed above. In the Montana jurisprudence of wrongful discharge law, the Civil Code provisions provided an alternative to the Montana Supreme Court's misinterpretation of them. Because of its misinterpretation, the Montana Supreme Court distorted Montana's common law in a manner likely to harm Montana's economy. Had the court carefully followed the Code provisions in this area, it could have both avoided the harshness of the common law at-will rule and the excesses of the court-created remedies.

Part II of this Article briefly sketches the codification movement in the United States and the conditions in Montana in the 1890s. The remainder of Part II tells the story of Montana's adoption of the Civil, Criminal, Political, and Civil Procedure Codes of 1895. Part III examines in detail the subsequent treatment of some of the employment law sections of the Civil Code. Part IV draws lessons from codification and the Codes' application for future legal reform efforts.

II. ADOPTION OF THE MONTANA CODES

Montana's adoption of the Codes was the final success of a major nineteenth century intellectual movement. Codification was debated across the country and took root in four states in the West and one in the South (besides Louisiana). The original source of the Montana Codes was four draft codes prepared for New York in the 1850s and 1860s; although New York never adopted a large portion of them. California and Dakota Territory

16. The Western Code states were California (1872), Montana (1895), North Dakota (1866) and South Dakota (1866) (while both were part of the Dakota Territory). Georgia codified its laws in 1860.
adopted versions of all four New York Codes before they were adopted in Montana.

A. Codification in the United States

Codification movements came and went throughout nineteenth-century America. As Roscoe Pound put it, "The French Civil Code had fascinated many in America as it had almost everyone abroad." Jeremy Bentham began the first systematic attempt to convince Americans of the virtues of codes over the common law, writing to President James Madison in 1811 to volunteer to produce a complete American code. Upon receipt of a letter "importing approbation of this my humble Proposal," Bentham said he would commence drawing up:

[A] complete body of proposed law, in the form of Statute law, say in one word a Pannomion—including a succedaneum to that mass of foreign law, the yoke of which in the wordless, as well as boundless, and shapeless shape of common, alias unwritten law, remains still about your necks—a complete body or such parts of it as the life and health of a man, whose age wants little of four and sixty, may allow of.

Madison's reply, delayed by the War of 1812, refused to give Bentham the encouragement he sought to begin such a project. While waiting for Madison to respond, however, Bentham became convinced that the states were the appropriate forum for his efforts. He wrote to each of the states' governors to offer

17. Codification was an important intellectual movement in Europe as well as in the United States. In England, Jeremy Bentham, for example, was a major proponent of codification. France's adoption of the Code Napoléon in the early part of the nineteenth century launched a codification movement across much of Europe. The Code Napoléon's influence spread with Napoleon's military accomplishments but did not recede with his defeats. Austria, Switzerland, Spain, Portugal, and several of the German and Italian states all adopted at least partial civil codes during the nineteenth century, as did Japan, Ottoman Turkey, and British India.


20. COOK, supra note 15, at 97-98.


his services. Only New Hampshire's governor showed much enthusiasm for the project, an enthusiasm the New Hampshire legislature did not share. Although unsuccessful in his efforts, Bentham succeeded in promoting the idea of codification in the United States as a rationalization and modernization of the common law.

1. The New York Codes — "Is it right? Is it just?"

That a codification of the law is in itself desirable should seem hardly to admit of question. It is desirable alike for the judge, the lawyer, and the citizen, . . . above all to the citizen, because it shows him the laws by which he is to guide his daily conduct. Strange indeed does it seem that any unprejudiced person should imagine that the laws of the land should not, if possible, be written down for the people of the land.

David Dudley Field

In New York, the explosive growth of commercial activity in the first decades of the nineteenth century matched an equally impressive growth in legislative activity. New York's annual session law pamphlets "were rarely less than three hundred pages in length, with some exceeding five hundred pages during the first three decades of the nineteenth century." Despite regular revisions, the growth in statutes combined with the rise in reported decisions made the law increasingly difficult to determine for lawyer and citizen alike. As a result, throughout the first half of the century New York engaged in a prolonged debate over the comparative virtues of codification and revision.

Two commissions drafted the New York Codes and reported them between 1848 (Civil Procedure) and 1865 (Civil Code).
Largely through the efforts of David Dudley Field, codification

the New York Code Commissioners, had also been appointed to draft political, penal, and civil codes. *Id.* at 243. Not until 1857, with the appointment of Field, Noyes, and Bradford, however, did this body begin to accomplish its task. The commission reported the first draft of the Political Code on March 10, 1859 and the final draft on April 10, 1860. *Id.* The first draft of the Penal Code was reported on April 2, 1864 and the final draft on February 13, 1865. *Id.* at 245. The Penal Code was adopted in 1881. Alison Reppy, *The Field Codification Concept*, in *CENTENARY ESAYS*, supra note 18, at 17, 48. The Code Commissioners reported the first draft of the Field Civil Code on April 5, 1862. Coe & Morse, *supra*, at 245. The reported draft was the result of more than the labors of the commissioners and their assistants. Field claimed that “[a]s fast as my part of the Draft was prepared it was to be distributed among the Judges and others for examination, and afterwards to be re-examined, with the suggestions made.” *FIELD*, supra note 26, at 78. Field distributed the 1862 draft to “judges and others” for review and the Code Commissioners “re-examined these two Codes [the Civil and Penal] and considered such suggestions as had been made” and “finally revised and agreed upon them.” NINTH REPORT OF THE COMMISSIONERS OF THE CODE (Feb. 13, 1865), in the 1865 Draft, at iv. In light of these responses, the Code Commission revised the 1862 drafts, after circulating them to judges and members of the bar. The Commission issued an extensively modified final draft of the Civil Code on February 13, 1865, Field’s sixtieth birthday. “The revision of the Civil Code involved as much labor as its original draft.” Coe & Morse, *supra*, at 245; *FIELD*, supra note 26, at 81.

32. Field was a well-connected lawyer, often identified with the interests of the powerful New York street railway corporations. Field’s reputation as a lawyer was blemished by his actions on behalf of Jim Fisk and Jay Gould in the Erie wars over control of the Albany and Susquehanna Railroad and in Gould’s attempts to corner the gold market. DAUN VAN EE, *DAVID DUDLEY FIELD AND THE RECONSTRUCTION OF THE LAW* 238-80 (1986). In addition to the attacks on Field’s professional ethics in connection with his actions in those cases, Field also defended William “Boss” Tweed against corruption charges, further sullying Field’s reputation among both the profession and the general public. *Id.* at 293-310.

Despite these connections and his own wealth (Field earned at least $75,000 a year in 1869 and 1870, for example, putting him at the top of the profession in income, see *id.* at 251-52), Field offered an image of himself as a protector of the middle class, prompting his brother and biographer Henry to label him “the Reformer:”

Justice, in the eye of the Reformer, was the rock, the corner-stone, on which to build the structure of human society. I never knew a man who had a stronger sense of justice. In framing a law it never occurred to him to modify it in the interest of this or that individual or of this or that class. The first question that he asked—and the only question—was, ‘Is it right? Is it just?’ *FIELD*, supra note 26, at 77.

What Field thought was right and just was almost certainly influenced by his political views. Field began his involvement in politics as a Jacksonian Democrat and codification was a Jacksonian program. HORWITZ, *supra* note 5, at 9. He continued as a follower of Van Buren in the radical wing of the New York Democratic party, which sought strict limits on government power. VAN EE, *supra*, at 114-45. As party lines began to reform around slavery, Field, in 1856, reluctantly joined “with the friends of freedom” in the new Republican party. VAN EE, *supra*, at 131 (quoting *FIELD*, supra note 26, at 119 (quoting a letter to the ALBANY ATLAS)). Once a Republican, Field became part of the radical wing of the Republican party in the late 1850s. VAN EE, *supra*, at 132. Disgusted with Republican corruption after the Civil
of the common law in New York finally took on concrete form when Field and two others were appointed in 1857 as a commission to codify the common law. Other than the Civil Procedure Code, the commissioners' work was largely ignored in New York in the 1860s, however, and Field turned his efforts to drafting an international code of laws.

Although all four Codes contained innovations, the Civil Code was the most revolutionary. Field intended the Civil Code to displace the common law entirely. In crafting his substitute for the common law, Field drew on a wide range of sources for the Civil Code's provisions: New York decisions; citations to reporters from both the United States and Britain; New York statutes; British statutes; the works of Coke, Blackstone, Kent, Story, and Lewin; and numerous other reference works. Field aspired not simply to codify the existing law, but to improve upon it. One of Field's major objectives, and an objective of the

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33. The Commissioners were David Dudley Field, who had primary responsibility for the Civil Code, William Curtiss Noyes, and Alexander W. Bradford. The Commissioners did not work alone, of course. Field had assistants, and his brother and biographer, Henry Field, reports:

[H]e preferred young men to old men. They might not be so learned in the law, but that was in one view a qualification, as they were more free from the paralyzing influence of old traditions; more alert in mind as well as in body; more quick to receive new ideas; and last, but not least, had more power of continued labor.

FIELD, supra note 26, at 79. Thomas Shearman and Austin Abbott assisted Field with the Civil Code. FIELD, supra note 26, at 80.

34. COOK, supra note 15, at 196.

35. VAN EE, supra note 32, at 322-29. Field had no more success there where his international code was “for the most part regarded as a curiosity.” VAN EE, supra note 32, at 328 (quoting MERLE CURTI, PEACE OR WAR: THE AMERICAN STRUGGLE, 1636-1936, at 100 (1959)).

36. Natelson, supra note 14, at 37-40; NEW YORK CIVIL CODE § 6 (1865) (“There is no common law in any case where the law is declared by the Five Codes.”).

37. Rodolfo Batista, Sources of the Field Civil Code: The Civil Law Influences on a Common Law Code, 60 TUL. L. REV. 799, 804 (1986). Batista is discussing the final 1865 draft, but inspection suggests that the sources generally remained the same between drafts.

38. In the final report of the Code Commission in 1865, the Commission summed up its work:

In all this immense range of subjects, while it has been the general purpose of the Commissioners to give the law as it now exists, they have kept in mind the injunction of the Constitution to 'specify such alterations and amendments therein as they shall deem proper.' In obedience to this command of the organic law, they have specified various alterations and amendments which they consider proper to be adopted.

Final Report of the Code Commission (Feb. 13, 1865) in 1 SPEECHES, ARGUMENTS,
codification movement generally, was to make the law accessible to the individual layman. 39

Renewed efforts to pass the other Field Codes in New York occurred in the 1880s and included numerous revisions of the proposed Codes. 40 A law revision commission's success in extensively revising Field's earlier Code of Civil Procedure in 1876 spurred the revival of interest in the Civil, Penal, and Political Codes. Field, for whatever reason, opposed the revisions of the Procedure Code, attempted to arrange their repeal, and delayed passage of the final revisions. To persuade Field to drop his opposition, the supporters of the civil procedure revision offered a compromise: They would enact the Civil, Political, and Penal Codes if Field would cease his opposition to the procedure revisions. Field accepted. 41 The New York Legislature adopted the Penal Code in 1881 and portions of the Political Code throughout the 1880s. Despite the Civil Code's passage through one or both houses of the New York Legislature on several occasions, 42 it


This progressive orientation undoubtedly contributed to the preservation of the basic structure of Field's work in Montana's codification in 1895; how else can one explain the acceptance of the basics of a set of laws that originated thirty years and thousands of miles away? See infra note 254.

39. See, e.g., Alexander Martin, Codification, in MISSOURI BAR ASSOCIATION REPORTS, 3D ANNUAL MEETING 152 (1883) ("As it now stands the law is like a sealed book to the citizen."); David Dudley Field, Remarks Before the American Bar Association (Aug. 20, 1886), in SPEECHES, ARGUMENTS AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD 233 (T. Coan ed., 1890) ("The question is, whether the laws made for the people are to be understood by the people.").

40. See Coe & Morse, supra note 31.

41. VAN EE, supra note 32, at 329-31.

42. How carefully legislatures examined the Field Codes is difficult to assess. Even in New York, where the debate was the longest and most heated, evidence suggests that the examination by the legislature was less than thorough. For example, the committee appointed by the Association of the Bar of the City of New York to oppose codification reported that after the Civil Code had passed the state assembly by a vote of 83-3 in 1881, "the result of many inquiries was an inability to find any member of the Assembly who was willing to acknowledge that he had read [the proposed Code], although one member did admit that he himself had voted for it, in order to rid the Assembly of its presence as an element of disturbance." ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, [FIRST ANNUAL] REPORT OF THE SPECIAL COMMITTEE TO "URGE THE REJECTION OF THE PROPOSED CIVIL CODE," APPOINTED MAR. 15TH, 1881 (1881). Even discounting for exaggeration because of its source, it seems likely that few legislators troubled to read the more than two thousand sections which made up the Code. A similar lack of interest was reported among the bar. See ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, FIFTH ANNUAL REPORT OF THE SPECIAL COMMITTEE TO "URGE THE REJECTION OF THE PROPOSED CIVIL CODE," REAPPOINTED OCT. 14, 1884, at 9 (1885). Only 28 of 309 members responded to a New York State Bar Association survey on the Code and Field himself got only 50 responses to a question put to 700 members of the American Bar Association.
never became law. Each time one house passed it, the other house blocked it or the Governor vetoed it.

Among at least part of the public, Field's effort had certainly earned a reputation as a significant modern legal reform. That reputation may have attracted the interest of westerners seeking reform. At the same time, Field's codification efforts (and his tactics in representing clients like Jay Gould and Boss Tweed) had given portions of the New York legal community reason to dislike both Field and his Codes. By the 1890s, New York had seen over thirty years of heated disputes concerning Field's Codes, and even a casual observer could not have failed to notice the criticisms of the Codes. Yet the Montana codification debate contained almost no mention of these controversies.

The debate in New York over Field's proposed Civil Code was lengthy and often acrimonious. Field's chief opponent was James C. Carter. In addition to attacking many of the particulars of Field's drafts, Carter dismissed the claimed benefits of codification. He asserted that: the Codes would not enable people to know the law because many would be unable to read or comprehend the Codes; among those who could both read and understand the Codes, many would neglect to read them; the increased number of law books was not an evil but the result of progress as in "all other sciences;" nonlawyers charged with administering law, such as Justices of the Peace, would find the "precise formulas" of the Codes less comprehensible than "the simple principles of justice" and so would not be helped by the

VAN EE, supra note 32, at 333.

43. The first modern bar association, the Association of the Bar of the City of New York, was created in response to Field's activities in the Erie litigation. See supra note 32. Although Field was invited to participate, which may have been due to a mistake, there was a distinct anti-Field flavor to much of the Association's activities. "[I]t fought his attempts at codification in the 1870s and 1880s with a vengeance that seemed as personal as it was political." Michael Schudson, Private, Public, and Professional Lives: The Correspondence of David Dudley Field and Samuel Bowles, 21 AM. J. LEGAL HIST. 191, 203-04 (1977). Schudson gives a thorough examination of the conflict over ethics surrounding Field's activities in the Erie litigation.

44. For examples of the specific criticisms, see infra note 329.

45. JAMES C. CARTER, THE PROVINCES OF THE WRITTEN AND THE UNWRITTEN LAW 19-20 (1889). Carter wrote widely on codification. I have relied here on an 1889 speech to the Virginia State Bar Association, published as a pamphlet, in which Carter summarized his views. Morton Horwitz takes a different view of Carter's objections, seeing them as unified by social Darwinism. HORWITZ, supra note 5, at 119-21. While there are certainly elements of social Darwinism in Carter's thought, I think Horwitz' view shortchanges the power of Carter's analysis of the adaptability of the common law.

46. Carter, supra note 45, at 21.
Codes;\textsuperscript{47} and students and new lawyers would learn little from even "an age employed in the reading of dull statutes" compared to the knowledge gained from "a single year's intelligent study of the actual cases in which we find the law discussed, reasoned out and applied to the real transactions of men."\textsuperscript{48} Carter argued complete codification was impossible because no one could anticipate the facts of all future transactions. Without knowing the facts, the codifier could not frame the correct rule. "So far, therefore, as future transactions are concerned, codification is not simply morally impracticable, but philosophically impossible."\textsuperscript{49} Even if legislators could write down a complete set of rules, Carter objected that such a code would freeze the development of the law and lose the evolutionary advantage of the common law:

[The common law] takes the transactions of the past, and, by classifying them, makes its rules; but it makes them provisionally only. It declares that they are binding on the courts only so far as respects transactions substantially like those from the examination of which the rules have been framed. In respect to future cases which may wear different aspects, it suspends judgment. It leaves these to be examined and classified as they arise, when and when only, their features can be subjected to examination. But written law affirms that it has made an absolute classification of all possible transactions; and its rules are not subject to change or modification however ill-adapted they may prove to be to the business of the future to which they are to be applied. It refuses to proceed any further with the scientific method of examining and classifying transactions according to their actual features. It insists that however useful that process may have been in the past, it shall now cease.\textsuperscript{50}

Carter's objections applied most strongly to Field's drafts, which sought to replace the common law as much as possible.\textsuperscript{51} These objections also applied, however, to the less radical approaches to codification implemented in Montana and elsewhere in the West. Comprehensive codes, to the extent the courts paid

\textsuperscript{47} Carter, \textit{supra} note 45, at 20-21.
\textsuperscript{48} Carter, \textit{supra} note 45, at 21.
\textsuperscript{49} Carter, \textit{supra} note 45, at 29-30.
\textsuperscript{50} Carter, \textit{supra} note 45, at 29-30.
\textsuperscript{51} \textsc{Civil Code} § 6 (1865); Assembly Bill No. 182 § 6 (1880); Assembly Bill No. 62, § 6 (1881); Assembly Bill No. 215, § 6 (1882). The versions of the Civil Code introduced after 1882 did not include this section. See \textit{infra} note 345 for citations to those versions.
attention to them, inevitably crowded out the common law in some areas and distorted its development in others. Successful codification would thus reduce the flexibility of the common law and hinder its development. Surprisingly, the western states’ debates ignored many of the issues raised by Carter, as discussed in Part II, infra. Indeed, the Codes failed in Montana largely due to many of the problems raised by Carter.

2. The Field Codes In the West: 1866-1872

Despite Field’s failure to persuade New York to adopt his Codes, the Dakota Territory and California enacted modified versions of all four of his Codes. Dakota’s and particularly California’s enacted versions provided the basis for much of the Montana codifiers’ work.

a) Dakota Territory

Field’s efforts at codification first took hold far from New

52. Georgia was the first state to successfully codify its common law. Marion Smith, The First Codification of the Substantive Common Law, 4 Tul. L. Rev. 178 (1930). Georgia did so in a Code adopted in December 1860, effective 1861. The Georgia codifiers’ main goal was to collect and organize Georgia’s existing law, a more limited mission than Field’s or the western codifiers’:

The prominent and leading power of change exercised in construction and revision, has been to cut and unravel Gordian knots, resulting from conflicting decisions of the [c]ourts, to reconcile actual and apparently discordant legislation, harmonizing all conflicts to what seemed to be settled and favored public policy; to remedy existing defects by wise and harmonious provisions, and to supply omissions which the practice and experience of the [c]ourts had discovered and made manifest in existing legislation. In short, the great end and aim has been to reconcile, harmonize, render consistent the body of the Law, so as to give shape and order, system and efficiency, to the sometimes crude, and ill expressed, sovereign will of the State.

R. H. Clark et al., Report of the Committee, Preface to THE CODE OF THE STATE OF GEORGIA at viii (1861). Changes proposed were limited to resolving contradictions in the existing law. Although not aware of the Georgia Code at the time he was drafting his proposals for New York, “owing, it is supposed, to the breaking out of the Civil War,” Field later complimented the Georgia Code as “drawn up with care and precision.” Field, Codification, supra note 27, at 19.

As the first Georgia Code had been adopted shortly after secession, the Code was heavily modified after the war. As David Irwin, of the original codification committee, put it in his revised edition of 1867, “The late war and its results, having produced so many radical changes in the Constitution and Laws of Georgia, a revision of the Code of the State became a matter of necessity.” Preface to the Revised Edition of THE CODE OF THE STATE OF GEORGIA at xi (David Irwin ed., Atlanta, Franklin Steam Printing House 1867). Further changes to the Georgia constitution and statutes required additional revision and a new edition was issued in 1873. THE CODE OF THE STATE OF GEORGIA (David Irwin et al. eds., 2d ed., J. W. Burke & Co.
York in the Dakota Territory. After a copy of the Field Civil Code "came into the possession of the Supreme Court of the Territory," and with a haste that surpassed even

1873) (1867). This edition added annotations and legislative enactments. A fourth edition in 1882 (the first without Irwin's participation) added more extensive annotations as well as updating the intervening legislative enactments. By 1895 a fifth revision was necessary. THE CODE OF THE STATE OF GEORGIA (John L. Hopkins et al. eds., 1896) (1867).

53. Dakota's accomplishment in this respect has long been overshadowed by California's adoption of the Field Codes in 1872, and despite the efforts of Dakota's partisans, even the North Dakota Supreme Court erroneously attributes the at-will provision of that state's code to the California Codes. See Wadeson v. American Family Mut. Ins. Co., 343 N.W.2d 367, 370 (N.D. 1984) ("The Cleary court did not apply the 'independent consideration rule' in construing California Labor Code § 2922 (formerly Cal. Civ. Code § 1999, from which our § 34-03-01, N.D.C.C., was derived."). Section 34-03-01 actually derived directly from § 1029 of the 1865 Field draft code. Kingsbury's 1915 statement that "owing to the prominence of that state, the codes became popularly known as the California codes" but that "[t]his error . . . was later corrected, and Dakota gave the tribute of authorship where it of right belonged," has proven overly optimistic. GEORGE W. KINGSBURY, I HISTORY OF THE DAKOTA TERRITORY 430 (1915).

54. Kingsbury's 1915 history of Dakota gives this account:

[A] printed copy of the report of the commission containing the civil and penal codes, and also the maritime code, came into the possession of the Supreme Court of the Territory of Dakota, then composed of Ara Bartlett, chief justice; Jefferson P. Kidder and William E. Gleason, associate justices; all good lawyers, and all favorably impressed by the codes prepared by Mr. Field. The codes adopted by the Dakota Legislature in March at the first session, in 1862, had not proved satisfactory in every respect, and the bench and bar of the territory united upon recommending that they be repealed and the Field Codes substituted in their stead. This was done at this session, the Legislature of Dakota being the first legislative body to enact and put in operation these excellent laws.

KINGSBURY, supra note 53, at 430. Showing an unusual degree of common sense, the Dakota Territory Legislature refrained from adopting the maritime code. Achieving unanimity of the bench and bar of the territory would not have been difficult as there appear to have been only 17 practicing lawyers and judges in the Dakota Territory in 1866. KINGSBURY, supra note 53, at 447-48. The 1862 Codes mentioned procedure and criminal laws, but did not address civil law as a whole. See George H. Hand, Preface to THE REVISED CODES OF THE TERRITORY OF DAKOTA at iv-v (1877) [hereinafter 1877 Code].

Dakota legal history being understandably sparse in this period, little else is known about either how the Field Codes "came into the possession of the Supreme Court of the Territory" or the particulars of the problems with the previously enacted 1862 Codes. Kingsbury, for example, has little more than the passage quoted on the Codes, while other Dakota histories contain only brief mentions of the enactment of the code or nothing at all. See, e.g., HERBERT S. SCHELL, DAKOTA TERRITORY DURING THE EIGHTEEN SIXTIES (University of South Dakota, Governmental Research Bureau Report No. 30, 1954); DOANE ROBINSON, SOUTH DAKOTA, SUI GENERIS (1930); HERBERT S. SCHELL, HISTORY OF SOUTH DAKOTA 96 (3d ed. rev. 1975). All that is certain is that the early Dakota legislatures showed a keen interest in codification, passing codes of civil procedure in 1862 and 1868, codes of criminal procedure in 1862 and 1869, penal codes in 1862 and 1865, justice codes in 1863 and 1866, and a probate
Montana's, the Dakota Territorial Legislature adopted the Field Civil Code in 1866. Field's 1865 draft was adopted "almost verbatim." A code of civil procedure, presumably Field's, failed to pass during the 1866-67 session. The adoption of the proposed New York Codes without significant changes "naturally left in the laws many repugnant provisions."

Once adopted, the maintenance of a code as an organized code, rather than as a mere collection of laws, required continued effort. In December 1870, Territorial Governor John Burbank called for a code commission in his first message to the legislature, saying "[R]evision and codification has [sic] become a matter of greatest importance, and the difficulty and uncertainty growing out of the present want of systematic arrangement is well known to all who have occasion to refer to [the statutes]." His call went unanswered, and was repeated in 1872. The 1873 legislature appointed an individual to "prepare a complete revision," but did not accept the resulting proposal. Not until 1875 did the territorial legislature create a Code Commission to...
handle the matter systematically. The Commission, consisting of two territorial supreme court justices and a distinguished lawyer,\footnote{Fisch, \textit{More Notes, supra} note 54, at 37.} reported to the legislature a set of Codes, adopted in 1877,\footnote{Adoption was no doubt hastened, and debate shortened, by the fact that the Code Commission's secretary was also the chairman of the Judiciary Committee of the territorial House of Representatives. Hand, \textit{supra} note 54, at vi. The Codes were apparently the reason for his election to the legislature as well. Kingsbury, the Dakota's most thorough historian, reports that "General Beadle [the secretary] had been elected a member of the House from Yankton County mainly because of his familiarity with the new code, which had been quite largely his handiwork as secretary of the code commission." \textit{KINGSBURY, supra} note 53, at 1024. A twentieth-century historian describes Beadle as "pompous, verbose, and inclined to take a self-righteous stand upon all public issues, but Beadle's ability was so great that he came to be a major beneficent and reforming influence in the Republican party of territorial Dakota." \textit{HOWARD R. LAMAR, DAKOTA TERRITORY, 1861-1889,} at 119 (1956).} "which gave to Dakota a code of laws and a system of jurisprudence not surpassed for excellence and completeness by any state or territory of the Union."\footnote{KINGSBURY, \textit{supra} note 53, at 1558.} The 1877 Codes incorporated the two Field Codes not adopted in 1866. The completeness did not last for long, however, and by 1889 the governor had again submitted a new revision of the statutes and Codes to the legislature.\footnote{KINGSBURY, \textit{supra} note 53, at 1024.}

For two reasons, Dakota's experience with the Codes should have provided important lessons for Montana's subsequent codification efforts. First, Dakota's haste in adoption and the subsequent difficulties from provisions "repugnant" to Dakota's conditions should have alerted Montanans to the need for careful revision of the proposed Codes. Second, Dakota's repeated problems in maintaining its Codes as codes provided clear evidence that adoption of Codes did not answer the problem of confused statutes that the Montana codifiers sought to resolve. Despite Dakota's geographical and socio-economic proximity, Montanans did not learn from their neighbors' experience.

\begin{itemize}
\item 63. Fisch, \textit{More Notes, supra} note 54, at 37.
\item 64. Adoption was no doubt hastened, and debate shortened, by the fact that the Code Commission's secretary was also the chairman of the Judiciary Committee of the territorial House of Representatives. Hand, \textit{supra} note 54, at vi. The Codes were apparently the reason for his election to the legislature as well. Kingsbury, the Dakota's most thorough historian, reports that "General Beadle [the secretary] had been elected a member of the House from Yankton County mainly because of his familiarity with the new code, which had been quite largely his handiwork as secretary of the code commission." \textit{KINGSBURY, supra} note 53, at 1024. A twentieth-century historian describes Beadle as "pompous, verbose, and inclined to take a self-righteous stand upon all public issues, but Beadle's ability was so great that he came to be a major beneficent and reforming influence in the Republican party of territorial Dakota." \textit{HOWARD R. LAMAR, DAKOTA TERRITORY, 1861-1889,} at 119 (1956).
\item 65. \textit{KINGSBURY, supra} note 53, at 1024.
\item 66. \textit{KINGSBURY, supra} note 53, at 1558. Even before then, market demand for updated versions had prompted a private publisher in 1884 to add more recent statutes to the Codes and to publish an unofficial edition entitled the Revised Codes of Dakota Territory. Tilton, \textit{supra} note 54, at 91-92. In 1887 another committee was appointed but given no power to make substantive changes; the revision was to take effect after a gubernatorial proclamation, but no proclamation was issued. The 1889 legislature passed an act making the compilation official. Tilton, \textit{supra} note 54, at 92. No further revisions to the Codes were made until this century in either North or South Dakota.
\end{itemize}
b) California

This state has acted the part of a very young state in attaining codification.\(^67\)

Charles Lindley

The first California State Legislature adopted the common law as the basis for its legal system, rejecting a suggestion by Governor Peter Burnett that it adopt a mixture of the common law and Louisiana systems.\(^68\) The second legislative session adopted versions of the Field Procedure Code.\(^69\) The passage of legislation by subsequent legislatures led to confusion and disorder in the statutes, problems that "grew worse with each session of the legislature thereafter."\(^70\) The California Legislature defeated repeated attempts at codification, however, and undertook less ambitious revisions instead.\(^71\) Finally in 1868, a commission was appointed "to revise and compile the laws of the state into a comprehensive and concise system."\(^72\) This commission did not complete its work in the time allotted, however, and a new commission was appointed.\(^73\) Apparently the impetus for codification was that "those required to use the statutes of California were compelled to make their way among the eighteen volumes of session laws or rely upon Hittell's General Laws (through the 1863-64 session), together with the succeeding three volumes of session laws."\(^74\)

Although the 1870 Commission received a broad mandate to correct errors and suggest improvements, "[t]he Commission . . . went a little beyond what was contemplated by the Governor when he made the appointments."\(^75\) Instead of simply correcting the existing laws, the Commission created a new system based on Field's draft New York Codes.

\(^{67}\) CHARLES LINDLEY, CALIFORNIA CODE COMMENTARIES App. at v (1874) (open letter from Charles Lindley to the Hon. H. H. Haight, Ex-Governor of California).


\(^{69}\) Kleps, supra note 68, at 767.

\(^{70}\) Kleps, supra note 68, at 767.

\(^{71}\) Kleps, supra note 68, at 768-70.

\(^{72}\) Statutes of 1867-68, ch. 365 quoted in Kleps, supra note 68, at 770.

\(^{73}\) Kleps, supra note 68, at 770-72.

\(^{74}\) Kleps, supra note 68, at 771.

\(^{75}\) LINDLEY, supra note 67, app. at ii.
In 1871 the Commission published drafts for comments.\(^7\) An intensive critical examination of the proposed Code[s] then began.\(^7\) An Advisory Committee was appointed to examine the proposed Codes and recommended a number of changes.\(^7\) In 1872, the Commission recommended, and California adopted, Civil, Political, Civil Procedure, and Penal Codes based on the New York Field drafts.\(^7\) After passage, the governor appointed a commission, which included David's brother Stephen Field, to review the Codes.\(^8\)

Foreshadowing some of the difficulties Montana would experience in physically incorporating such massive amounts of new law, the California Codes were not published as part of the statutes of 1871-72, and indeed were not published at all until March 31, 1873.\(^8\) Moreover, the volume listing the prior statutes that would continue in force was not completed until November 1873.\(^8\) In addition, the legislature failed to pass the statute designed to repeal those provisions of existing law that conflicted with the Codes.\(^8\) Even after codification, a commission was necessary to keep the Codes up to date and modify

\(^7\) Van Alstyne, supra note 68, at 7-8.
\(^7\) Van Alstyne, supra note 68, at 7.
\(^7\) Van Alstyne, supra note 68, at 7-8.
\(^7\) Rosamond Parma, *The History of the Adoption of the Codes of California*, 22 LAw LIBR. J. 8, 15 (1929). The California press gave scant attention to the Codes' progress through the legislature. The *Sacramento Reporter*, for example, barely mentioned them. See, e.g., *California Legislature*, SACRAMENTO REP., Jan. 7, 1872, at 3 ("A message from the Governor was received transmitting the resolutions passed by the Revision Commission, to the effect that the Penal and Civil Procedure Code [sic] were now completed, and that the work on the Political Code was so far advanced that a committee from the Legislature could proceed to examine it."). The lengthiest report on the Codes in that paper was little more than a summary of the Revision Commission's reports. *The Revised Statutes—Political and Penal Code*, SACRAMENTO REP., Feb. 6, 1872, at 2. The passage of the Codes did not even warrant mention in the *Reporter's* summary of the legislative session. *Vale!*, SACRAMENTO REP., Apr. 2, 1872, at 2.


California's adoption of the New York Codes was partly due to the efforts of David Dudley Field's brother Stephen Field. Natelson, supra note 14, at 40-41; Van Alstyne, supra note 68, at 6. Stephen Field was a member of the California Supreme Court from 1857 to 1863 and a member of the United States Supreme Court from 1863 to 1899. In 1872, Stephen Field was a member of the commission appointed to review the codes prepared by the Code Commission, which commission gave the Civil Code its "unqualified approval and endorsement." Shuck, supra note 80, at 193.

\(^8\) Kleps, supra note 68, at 774, 776.
\(^8\) Kleps, supra note 68, at 776-77 & n.38.
\(^8\) Kleps, supra note 68, at 775-76.
them to conform to the 1879 Constitution. By 1895, when Montana adopted its Codes, California had demonstrated the difficulties of incorporating new statutes into the Codes while maintaining the Codes' integrity.

The California codifiers made several important modifications to Field's original drafts. Most significantly, California rejected Field's "displacement" approach to codification, where the Code supplanted the common law. Instead, the California codifiers specified liberal construction and treatment of Code provisions as continuations of common law rules and statutes similar to the Code provisions. They also heavily modified the Political Code provisions. California provided direct evidence for the Montana codifiers of how well the Codes could solve problems of confused statutory schemes; it also demonstrated the extensive effort needed to adapt such laws to local conditions. As discussed below, Montana's codification advocates failed to examine that evidence.

B. "Montana, in the morning of its jurisprudence . . . "

The statutes of Montana have always been imperfect, confused and incomplete.

Decius Wade

From the beginning, the Montana Territory's laws were in a state of confusion. When the Idaho Territory (present day Idaho, Montana, and part of Wyoming) was organized out of the Washington Territory, no copies of the Washington statutes were found in what is now Montana. Things improved slightly in 1864 when Montana was created out of the Idaho Territory, since a single copy of the Idaho Territorial Statutes was present

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84. Kleps, supra note 68, at 779.
85. Kleps, supra note 68, at 779-81.
86. Without a detailed comparison of Field's drafts and the various California drafts, it is hard to pinpoint the source of innovations. Horwitz notes that the enacted version of the California Civil Code "was perhaps more radical." Horwitz, supra note 5, at 118.
87. Natelson, supra note 14, at 40-41; Cal. CIV. CODE §§ 4-5 (1872).
89. Id. at 661.
in what became Montana. The Montana Territorial Supreme Court and the Territory's lawyers decided these would apply until the new Territory's legislature could produce a local substitute. Little improvement in the condition of Montana's statutes occurred afterwards.

The First Territorial Legislature adjourned without passing a redistricting plan for future legislatures, as required by the Organic Act establishing the Montana Territory. Montana held elections for the Second and Third Legislatures using the original districts. In 1867, the Republican-controlled Congress abrogated the statutes passed by the overwhelmingly Democratic Second and Third Territorial Legislatures, leaving in


92. The First Territorial Legislature did establish a Code Commission, chaired by Wilbur F. Sanders, who became a prominent codification advocate in the 1890s. III MONTANA, ITS STORY AND BIOGRAPHY 957 (Tom Stout ed., 1921); Dave Walter, Wilbur Fisk Sanders, 63 MONTANA MAG. 58, 59 (1984). All records of this commission, except a file of receipts for its expenses, appear to have been lost. The 1865 commission spent over $8,800, including $3,500 for a clerk ($500 per month) and over $700 in rent for a house in which to meet. Record Series 146, File 1-1, Code Commission Territorial, Montana Historical Society.

93. These events were further confused by the absence of Governor Sidney Edgerton, who had gone to Washington to seek funds, since he had been personally paying for many of the territory's expenses. MERRILL G. BURLINGAME, THE MONTANA FRONTIER 158-59 (1942). In his absence, the governor's duties were exercised by Thomas Francis Meagher, who within a few months had switched from supporting the territorial Republicans to working closely with the local Democrats. The switch was caused in part by "his increasing animosity toward the vigorous Republican leaders, headed by Wilbur F. Sanders." Id. at 159-60. As Acting Governor, Meagher initially rejected the Democrats' claim that he had the authority to call a legislative session to solve the districting problem. Along with his changed political convictions came a new view of his authority, and Meagher soon called a new election. Two strongly Republican Territorial Supreme Court judges promptly struck the laws passed at this session as unconstitutional. The legislature responded by redistricting the two to "the eastern part of the Territory, where Indians and buffalo were the chief inhabitants, with the added provision that the judges must reside in their districts." Id. at 162. Sanders was dispatched to Congress to seek legislative relief against Meagher and the Democratic Legislatures. Id. at 163. See also Samuel Word, History of the Democratic Party in Montana, in MILLER, supra note 88, 592 at 597-600; Robert E. Albright, The Relations of Montana With The Federal Government, 1864-1889, 71-81 (1933) (unpublished Ph.D. dissertation, Stanford University).

94. HUBERT H. BANCROFT, HISTORY OF WASHINGTON, IDAHO, AND MONTANA, 1845-1889, at 667 (1890).

95. Decius S. Wade, Speech to the Montana Bar Association (Apr. 5, 1894), in MONT. B. ASS'N PROC., 1885-1902 (Edward C. Russel ed.) [hereinafter Wade, Speech] at 290; Miller, supra note 88, at 317. The districting controversy resulted from a squabble between the First Legislature and the territorial governor over the legislature's attempt to increase its size. Acting Governor Thomas Meagher threw his influence behind the local Democrats while the Governor was out of the territory, and called additional sessions of the legislature. See BANCROFT, supra note 94.
effect a hodgepodge of laws passed by the First and the Fourth Legislatures.96

To repair the confusing state of the statutes, the 1869 legislative assembly appointed the Territorial Supreme Court judges as a commission to codify and arrange the territorial statutes.97 The court gathered all the laws, repealed and in effect, into a single collection, together with notes explaining what remained in effect. The cure proved worse than the disease:

The work of this commission came before the legislative assembly of 1871-2. At that period the sessions were but forty days in length, including Sundays. The judiciary committee of the two houses changed, or attempted to change, the system of Judge Symes, by striking from his codification all of the repealed Acts, or parts of Acts, which it contained. But the shortness of the session and other duties prevented thoroughness in this work, and here is the source and beginning of the confusion and contradictions of our statutes. Acts that had been long since repealed were re-enacted, together with those that had been substituted for them.98

The unavailability of statutory materials worsened the legal uncertainty.99 Despite compilations of statutes made in 1879 and 1887, things did not improve thereafter.100

96. The confusion is best illustrated by the hypothetical of a law passed by the First Territorial Legislature and amended by the Second and Third Legislatures and again in the Fourth Territorial Legislature. The amendments from the Second and Third Territorial Legislatures would have been removed by the congressional action, while the amendments to the amendments passed by the Fourth Territorial Legislature remained. Even without addressing the substance of the law created by such a process, chances were small that it could be read coherently.

97. Roote, supra note 91, at 592.

98. Wade, Speech, supra note 95, at 291. Wade gives a similar account in his contribution to Joaquin Miller's history. Miller, supra note 88, at 380-81.

99. For example, in 1874, the omnipresent Wilbur F. Sanders, who (in addition to his other roles) was a prominent attorney, received a letter plaintively stating, "It is reported here that the mining law passed at the extra session limits the width of a quartz claim to 25 feet. If that is the fact it is terribly distressing to miners who have located since the last session as the law as published repealed all local laws on the subject of the width of claims. Please let me know how the statute stands on this subject." Letter from Jeff Lowry to Wilbur F. Sanders (Feb. 6, 1874) (Sanders File, Montana Historical Society, Box 2, Folder 2-21).

Those materials which were available were not of high physical quality. In 1889 the Montana Bar Association Committee on Jurisprudence and Law Reform reported that the binding of the compiled laws was "worthless" and that "after a book was handled a few times the cover is generally completely torn off or worn out." Legal Luminaries, DAILY INDEPENDENT (Helena), Jan. 10, 1889, at 4.

100. Wade, 1880 to 1894, supra note 88, at 657. Indeed, the compilations introduced new errors. Wade describes how the 1879 revision left out an 1876 statute
By 1889, concern regarding the condition of the statutes prompted the last Territorial Legislature to put aside both its partisan bickering and the final push for statehood to address the issue. Governor Preston H. Leslie, in his address to the Sixteenth Territorial Legislature, called for codification.101 He was joined by the Montana Bar Association, which petitioned the legislature to codify the political, civil, and criminal law and the rules of practice.102 However, the press did not view the creation of a code commission as an important issue103—it limited reports on the progress of the code commission bill to brief notes within discussion of other legislative activity.104 The only arguments advanced for codification were based on the "chaotic condition" of the statutes.105

The governor appointed to the Commission Judge N.W. McConnell, a recently resigned106 Democratic member of the Territorial Supreme Court; former Republican Governor B. Platt Carpenter;107 and F.W. Cole, a Democrat and prominent Butte attorney,108 and the upper house confirmed them.109 Both the giving widows dower rights, authorizing election under the husband's will, and abolishing tenancy by courtesy. The problem was not cured by subsequent legislative sessions or by the 1887 compilation. Wade, 1880 to 1894, supra note 88, at 662.

101. Leslie's primary argument was the confusing state of the law and the difficulty for individuals to know the rules they were to obey. Sixteenth Legislature, HELENA DAILY HERALD, Jan. 16, 1889, at 8; Leslie's Message, DAILY INDEPENDENT (Helena), Jan. 16, 1889, at 1, 2.

102. Sixteenth Legislature, HELENA DAILY HERALD, Jan. 21, 1889, at 1; Bar Association, DAILY INDEPENDENT (Helena), Jan. 16, 1889, at 4.

103. One newspaper went so far as to call for the legislature to "finish up a registration law, drop everything else and adjourn" in view of imminence of statehood later that year, forgetting the code commission. See, e.g., Sixteenth Legislature, HELENA DAILY HERALD, Feb. 27, 1889, at 8; Sixteenth Legislature, HELENA DAILY HERALD, Feb. 28, 1889, at 8; and Forty-Sixth Day, HELENA DAILY HERALD, Mar. 2, 1889, at 2.

104. Untitled Editorial, HELENA DAILY HERALD, Feb. 21, 1889, at 4. The only discussion reported in the papers was about the money appropriated to pay for the commission: sponsors started with $5,000, a cut to $2,500 was proposed, and a compromise on $4,000 reached. Forty-Sixth Day, HELENA DAILY HERALD, Mar. 2, 1889, at 2.

105. The Legislature, DAILY INDEPENDENT (Helena), Mar. 2, 1889, at 4. Interestingly Lee Mantle, one of Colonel Sanders' prime Republican opponents, spoke in favor of the commission. Id. Mantle later became Mayor of Butte and defeated Sanders for a United States Senate seat in 1893. Rickards Will Appoint, DAILY INDEPENDENT (Helena), Mar. 3, 1893, at 8.

106. McConnell reportedly resigned from the Territorial Supreme Court in 1889 partly to protest the admission of women to the bar in Montana. The Montana Solons, WEEKLY MISSOULIAN, Feb. 13, 1889, at 2.


108. Cole both studied and practiced law in New York and practiced in California, as well as served as a trial court judge in Nevada before coming to Montana.
Republican and Democratic press approved of the appointments. The Republican Helena Daily Herald called the commissioners "as fully competent to do their task as any who could be found" and noted that their unfamiliarity with past legislation was "more of a benefit than a disadvantage" because the Codes were "for the future and not for the past." The Democratic Helena Daily Independent editorialized that "[b]etter selections could scarcely have been made." Former Territorial Supreme Court Chief Justice Decius Wade replaced McConnell in 1890.

The Commission reported draft Codes two and a half years later. Although the Code Commission's records unfortunately appear to be lost, it modelled the Montana Codes after the California versions of the Field Codes, and Commissioner Decius Wade reported that the Montana codifiers used their provisions "so far as the same was applicable . . . to our State and constitution." Leading codification proponent Colonel Wilbur F. Sanders later wrote to Field's brother Henry: "I consider the Montana Codes substantially the legislation prepared by [David Dudley Field]." The Commission filed the Codes with the


111. Untitled Editorial, DAILY INDEPENDENT (Helena), Mar. 15, 1889, at 2.
112. Wade's 1894 speech in favor of codification is cited as a major factor in obtaining their passage. Wade, Speech, supra note 95, at 296; see ROBERT G. RAYMER, MONTANA: THE LAND AND THE PEOPLE 383 (1930); Roote, supra note 91, at 602.
113. Roote, supra note 91, at 605.
114. Montana's admission as a state disrupted the Code Commission's work. When created in 1889, the legislature instructed the commission to report to the next session of the legislature, which would have been in 1891 but for statehood. A special session was called after admission, however, and the Codes were not done. The Civil Code had been completed, although it appears from the Code Commission's report to the Governor that they planned additional work upon it. See Joseph Toole, Untitled Typescript, (File LR-1, Folder 1-10, Montana State Archives, First Montana Legislative Assembly, 1889-1890, December 17, 1889, containing quotations from Code Commission report, at 15-16).
115. I was unable to locate any records in the Montana State Historical Society Library under either the Code Commission or under the names of its members.
116. Wade, Speech, supra note 26, at 293.
117. Field, supra note 26, at 92 (Letter to Henry Field (Jan. 24, 1896)). On the other hand, Sanders also had claimed that "the Montana Code Commission not wholly borrowing from any State, and modifying provisions in immaterial matters from them all, selected from Colorado, South Dakota, California, Missouri, Ohio, New York and other states, portions of their laws," so it is difficult to judge the weight to be given to his letter to Henry Field. Col. Wilbur F. Sanders, undated, unpublished manuscript 6 (Sanders File, Folder 4-3, Montana Historical Society Library).
State Auditor on February 4, 1892.

Montana codification proponents advanced arguments similar to some of those made by Field and the New York codification advocates. Both argued that the volume of common law court reports overwhelmed lawyers and courts.\(^{118}\) Both argued that codification would eliminate inconsistencies and contradictions in the law.\(^{119}\) Both argued that codification would put the law within the reach of the common man.\(^{120}\)

Despite these similarities, Wade at least, was ambivalent about the Codes’ eclipse of the common law. In an unpublished, undated manuscript entitled “The Common Law,” Wade tried to reconcile a deep appreciation for the common law with his enthusiasm for codification.\(^{121}\) Beginning with a description of the common law as “one of the marvels of human history,”\(^{122}\) Wade attempted to link it to Roman codification. The imposition of Roman law in Britain, Wade claimed, was the key to the development of English common law.\(^{123}\)

Besides the common law’s Roman heritage, Wade claimed that the common law’s codifiers shared with the Roman codifiers a mission and opponents. The Roman codifiers’ attempts to “rescue the Roman law from the uncertainty and obscurity of traditional decrees, decisions, usages and customs” were opposed by “some of the Roman lawyers and judges, upon pretty much the same grounds as codification of the English common law is opposed.”\(^{124}\)

118. *Current Topics*, ALBANY LAW JOURNAL, Dec. 26, 1885, at 502 (“Shall our laws be written in one volume or in five thousand?”); Wade, 1880-1894, *supra* note 88, at 670 (“If the unlimited publication of the reports and law books manufactured therefrom continues, each year will contribute to the uncertainty and obscuration of the law until the condition becomes hopeless.”).

119. *Current Topics, supra* note 118 (“Shall [our laws] be fixed, consistent and certain, or changing, contradictory and uncertain.”); Wade, 1880-1894, *supra* note 88, at 664 (“The people of Montana are entitled to a complete system of statutes free from contradictions or inconsistencies . . . .”).

120. *Current Topics, supra* note 118 (“Shall [our laws] be within the reasonable reach and capacity of the public, or shall they require the searching and construction of an expert, high-priced and over-influential body of interpreters?”); Wade, 1880-1894, *supra* note 88, at 664 (“[S]tatutes might be made so simple and plain as to be their own interpreters, without the aid of courts and lawyers, and by the same means systems of statutes or codes might be made so clear and certain as to require no revelation or rules of interpretation to understand them.”).

121. Decius S. Wade, The Common Law (undated longhand manuscript, Wade File, Box 2, Folder 2-4, Montana Historical Society).

122. *Id.* at 1.

123. *Id.* at 16-18.

124. *Id.* at 2-3.
Despite this admiration for the Roman codes, Wade argued that precedent was the key to "[p]rogressive jurisprudence."\(^{125}\) Wade concluded by linking the future of the common law and the "English-speaking race":

The English-speaking race is in the infancy of its achievement, but whatever peaceful victories and conquests are before it, and to whatever heights it may attain, the kindly spirit of the common law, with its enlightened reason and justice, will hover near, to share in its triumphs.\(^{126}\)

Even in his 1894 article on Montana's legal history, which reflected Wade's frustration at the 1893 legislature's failure to adopt the Codes, Wade found more beauty and strength in the common law than Field ever did: "These principles would not lose any of their grandeur, strength or beauty or any of their vigor in regulating the affairs of men by being so reduced to the form of statutes."\(^{127}\) Wade resolved the contradiction between his admiration of the common law and his desire for codification by his conclusion that "[i]n this age of the world the discovery of new principles of law is rare, but there is a constant application of old principles to new facts and conditions."\(^{128}\)

C. The Third Legislature: "Without breaking much of the furniture"\(^{129}\)

Republican Governor John E. Rickards submitted the Codes to the legislature in January 1893. The four Codes were introduced as separate bills and were referred to the Judiciary Committees of both houses.\(^{130}\) The Montana Bar Association endorsed action on them.\(^{131}\) No action was taken in the 1893 session other than appropriations to pay the Code Commission clerks.\(^{132}\) The Codes drew some opposition from attorneys outside Helena\(^{133}\) and from mayors,\(^{134}\) but the failure to pass

\(^{125}\) Id. at 3.
\(^{126}\) Id. at 56.
\(^{127}\) Wade, 1880-1894, supra note 88, at 670.
\(^{128}\) Wade, 1880-1894, supra note 88, at 670.
\(^{129}\) After Sixty Long Days, DAILY INDEPENDENT (Helena), Mar. 3, 1893, at 5 (assessing the work of the Third Legislature).
\(^{130}\) The Merry War, WEEKLY MISSOULIAN, Jan. 18, 1893, at 2; Sable-Hued Eye, WEEKLY MISSOULIAN, Jan. 18, 1893, at 8.
\(^{131}\) The Bar Association, DAILY INDEPENDENT (Helena), Jan. 5, 1893, at 8.
\(^{132}\) Two New Counties, WEEKLY MISSOULIAN, Feb. 8, 1893, at 6; Blood, Iago, Blood, WEEKLY MISSOULIAN, Feb. 15, 1893, at 6.
\(^{133}\) Local Mention, WEEKLY MISSOULIAN, Feb. 22, 1893, at 7 (reporting forma-
them does not seem to have been caused by the opposition. Rather, the Codes were apparently simply lost in the mass of "special" legislation demanding attention from the legislature, in the daily, unsuccessful attempts to choose a United States Senator, and in the constant partisan bickering caused by the lack of an effective majority in the Montana House of Representatives (the House). The press made little mention of the Codes, focusing instead on the daily excitement of the senatorial contest. Governor Rickards declined to call a spe-

134. Montana Mayors Meet, DAILY INDEPENDENT (Helena), Feb. 9, 1893, at 1.
135. But Four Days Remain, DAILY INDEPENDENT (Helena), Feb. 26, 1893, at 5.
136. Republicans thought there was more than the usual degree of Democratic incompetence at work in the House in 1893: "The house as a body was a disgrace to the state. Ignorance was at a premium and inexperience ranked as a virtue. The speaker, elected by a combination of democrats and populists as a matter of expediency, was an ass when he took his seat, and had not changed his skin when he stepped down and out. The employees [sic] of the house as a general rule were chumps, fit associates for the hodge podge which made up the collection." Make It A Grave, WEEKLY MISSOULIAN, Mar. 8, 1893, at 2.

Certainly the House was slow to consider legislation. With only nine working days left in the session, for example, it still had a hundred bills to be considered by the Committee of the Whole. But Nine Working Days, DAILY INDEPENDENT (Helena), Feb. 19, 1893, at 5. The House Judiciary Committee, to which the Codes had been referred, finally reported out many of the bills it had been sent without recommendation because so many of its members were on other committees that it had difficulty mustering a quorum. He Caused A Sensation, DAILY INDEPENDENT (Helena), Feb. 21, 1893, at 5. No overwhelming public demand for the Codes appears to have been noted by the press. See, e.g., But Four Days Remain, DAILY INDEPENDENT (Helena) Feb. 26, 1893, at 5 ("The current belief is now that there is very little urgent demand for any general legislation" other than election law reforms; no mention of Codes.).

137. Rickards Will Appoint, DAILY INDEPENDENT (Helena), Mar. 3, 1893, at 8. Although Democrats had a plurality in the joint legislature, they were unable to unite behind a single candidate even though their failure to do so meant that the Republican governor would appoint a Republican. See, e.g., But Four Days Remain, DAILY INDEPENDENT (Helena), Feb. 26, 1893, at 5 (describing determination of Democratic factions to prevent others from succeeding). Rickards' appointment of Lee Mantle was frustrated by the refusal of the federal Senate to seat Mantle. The Daily Missoulian claimed this was due to Mantle's "silver leaning." Just A Few of 'Em, DAILY MISSOULIAN, Jan. 3, 1895, at 1. See also Adelphus B. Keith, History of the Republican Party, in Roote, supra note 91, at 589-91.

138. There were twenty-six Democrats, twenty-six Republicans, and three Populists in the House. Keith, supra note 137, at 588. The Speaker was a Populist, chosen in part because hostility between the Populists and Code proponent Colonel Sanders led the Populists to side with the Democrats in organizing the House. The House Organized, DAILY INDEPENDENT (Helena), Jan. 4, 1893, at 8. The partisan maneuvering started the first day, with the Republicans unsuccessfully attempting to gain control of the House by taking advantage of a dispute over the credentials of one Democratic member and the Democrats and one Populist walking out. Same Old Game, DAILY INDEPENDENT (Helena), Jan. 3, 1893, at 8.

139. See, e.g., Governor's Message, DAILY INDEPENDENT (Helena), Jan. 6, 1893, at
special session of the legislature to pass the Codes due to the expense and because he thought the Codes' length made a full session necessary for their thorough consideration.\textsuperscript{140}

\textbf{D. "Work of the Wise Men"}\textsuperscript{141}

The deal by which the codes were rushed through the legislature is beginning to bear fruit. Members who were led into voting for the measure under the promise that amendments they might suggest would be favorably acted on are having their eyes opened. The bulky codes have been enrolled and will be signed by the governor, and the bushel or two of amendments that have been offered are occupying snug pigeon holes in the several committee rooms. No one member of the house knew what he was voting for when he answered the roll call on the code, but now all are beginning to find out that they have made serious mistakes and will make efforts to rectify them.\textsuperscript{142}

\textit{Great Falls Daily Tribune}

Montana Republicans scored major victories in the 1894 elections, due in part to the unpopularity in Montana of Democratic President Grover Cleveland and his opposition to bimetallism.\textsuperscript{143} Republicans took control of both legislative houses by wide margins.\textsuperscript{144} When the Fourth Legislature convened, the Codes were an important part of its agenda,\textsuperscript{145} although they

\begin{footnotes}
\footnotetext{5, 6 (omitting section on Codes as one of "minor importance").} \textit{The Governor's Message}, \textit{DAILY INDEPENDENT} (Helena), Jan. 6, 1893, at 4 (explaining omissions).
\footnotetext{140.} \textit{Not an Extra Session}, \textit{DAILY INDEPENDENT} (Helena), Mar. 8, 1893, at 5. The Governor's estimate of the time which would be devoted to the Codes was, of course, wildly over-optimistic.
\footnotetext{141.} \textit{Work of the Wise Men}, \textit{ANAConDA STANDARD}, Jan. 29, 1895, at 1 (headline).
\footnotetext{143.} On Cleveland's unpopularity, see \textit{The Mantle Hog}, \textit{HELENA DAILY HERALD}, Jan. 8, 1895, at 1 (quoting an observer that "Grover Cleveland won the last campaign for the Republicans, and a wooden man could have been chairman of the state committee and won the election.") Bimetallism was the plan to introduce silver as a basis for the United States currency along with gold.
\footnotetext{144.} \textit{Senator Makers}, \textit{HELENA DAILY HERALD}, Nov. 21, 1894, at 5. There were thirteen Republicans, six Democrats, and two Populists in the Senate and forty-four Republicans, two Democrats, thirteen Populists, and two "Democrats and Populists" in the House. \textit{Id.}
\footnotetext{145.} The most important issue before the legislature was, of course, the selection of two United States Senators, and codification was not addressed until that matter was resolved. Both Senators having been chosen by the Republican caucus by January 12, \textit{For Senator, Thomas H. Carter}, \textit{HELENA DAILY HERALD}, Jan. 12, 1895, at 1, 5, the legislature was ready to turn to legislation.
\end{footnotes}
had not received widespread public notice. Governor Rickards called for the Codes' adoption as a whole "in order that its [sic] harmony not be destroyed" with later revisions to be made as the legislature saw fit. Representative Rudolph Von Tobel, a Republican from Valley and Fergus Counties and a member of the House Code Committee, introduced the Codes as four bills on January 15th.

1. The House: "To take a pig in a bag"

The House addressed the Codes first. The issue from the start was not whether but rather how to adopt the massive Codes. It avoided the problem of overwhelming the Judiciary Committee by appointing a special committee to handle the Codes. The Committee first set out to determine what the House could physically do with the massive bills. Research determined that the bills could be read by title only on the first as well as the second reading, and the House proceeded to do so.

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146. *It Is Indifference*, DAILY INDEPENDENT (Helena), Jan. 14, 1895, at 5 (reporting the President of Montana Bar Association's lament that "[n]o practical effort has been made to familiarize the public with [the Codes'] . . . contents").

147. *The Message*, HELENA DAILY HERALD, Jan. 8, 1895, at 2. The remainder of the message concerning the Codes was praise for the abilities of the Code Commissioners as "a guarantee that nearly every requirement within its field of labor will be satisfactorily met." *Id.*

The Codes were only the fifth subject raised in the hour-and-twenty-minute speech, so most members probably heard Rickards' advice. *Read His Message*, DAILY INDEPENDENT (Helena), Jan. 6, 1895, at 1.

148. *More New Bills*, HELENA DAILY HERALD, Jan. 16, 1895, at 3; *Roster of Bills*, HELENA DAILY HERALD, Jan. 16, 1895, at 6. Von Tobel was also a member of the three man committee appointed by the Montana Bar Association to recommend a means to physically pass the Codes. *Lawyers In Session*, DAILY INDEPENDENT (Helena), Jan. 9, 1895, at 5.


150. The House Code Committee consisted of Representatives Booth (R-Silver Bow) (Chair), Von Tobel (R-Valley and Fergus), Rodgers (R-Deer Lodge and Missoula); Hershey (R-Missoula), Meyer (R-Park), Bennett (R-Granite), Cooper (D-Gallatin), Corbett (P-Lewis and Clark), and Spriggs (D-P-Meagher). *The Committees*, DAILY INDEPENDENT (Helena), Jan. 12, 1895, at 7; *The Next Assembly*, DAILY INDEPENDENT (Helena), Jan. 3, 1895, at 5 (party and county identifications). Other than Booth and Von Tobel, the members did not figure significantly in the public debate. Interestingly, the committee was drawn entirely from southwestern Montana, as was the Senate Judiciary Committee; see infra note 177.

151. *This Was A Threat*, DAILY INDEPENDENT (Helena), Jan. 18, 1895, at 5, 7. The House refused to make this general policy, requiring other bills to be read in full on the first reading. *They Must Be Read*, DAILY INDEPENDENT (Helena), Jan. 19, 1895, at 5.
The next question was whether to pass the Codes and fix them later or to attempt to correct problems before passage. The Montana Bar Association and leading lawyers argued for adoption first, revision later. In doing so, they often portrayed the Codes as merely a reorganization of existing Montana law. For example, the Helena Daily Herald reported that a panel of lawyers told a joint meeting of the Montana Senate Judiciary Committee and the House Code Committee that the Codes were “made up, with the exception of about one hundred sections, of the present Montana laws. The only difference is that in the new code the laws, instead of being scattered broadcast throughout the volume, have been put in their proper divisions under their proper heads.” It is difficult to imagine anyone familiar with the Codes’ provisions believing such a statement.

Commissioner Wade addressed another potential concern, arguing:

[T]here was a good deal of misunderstanding about the codes, even in the legal profession. It had been assumed that the code commission had formulated something purely original, something out of its own inner consciousness. On the contrary, there was scarcely a section or a line which had not been taken from the statutes of some other state, tried and approved statutes, upon which constructions had been placed by the supreme courts of the respective states concerned.

Wade was technically correct, since the Code Commission had begun with the California version of the Field Codes. Whether wholesale importation of California law would be reasonable for Montana is another question. The lawyers testifying before the joint committee were confused at best: many of the provisions of the four Codes were new to Montana.

Some opposition to the “off-hand manner” proposed for adoption of the Codes was reported, although not identified, by the Anaconda Standard, prompting the Code Committee chairman to send a survey to prominent members of the legal profession regarding the best method to proceed. The responses generally endorsed both adoption and the process of adopting

152. The Bar Association, DAILY INDEPENDENT (Helena), Jan. 15, 1895, at 2.
154. Over in Helena, ANACONDA STANDARD, Jan. 22, 1895, at 2 (emphasis added). The quote is the Anaconda Standard’s. Although the Standard’s story does not claim the language as a direct quote but presents it as a paraphrase of Wade’s, the language reads as a direct quote.
155. Id. at 2.
first and revising later.\textsuperscript{156} The only other opposition in the House concerned the provisions of the Political Code concerning livestock marks and brands.\textsuperscript{157} Even with this minimal opposition, the Helena \textit{Daily Independent} predicted on January 20th that “the consideration of these codes will occupy the time of the house and the committee of the whole for several weeks.”\textsuperscript{158}

Work on passage began in earnest during the Montana Bar Association’s meeting in Helena on January 21st. The Association endorsed the report of a special committee (Colonel Sanders, Judge Wade, and former Code Commissioner N.W. McConnell), which had itself endorsed the Codes. The Bar Association committee, continuing to misrepresent the scope of the changes, stated that “the changes are few and necessary” and argued for adoption based on the confusion that would result from further delay.\textsuperscript{159}

Despite what one paper characterized as “a regular chewing match” on January 22nd by the House Code Committee and the Senate Judiciary Committee, the committees’ only changes were

\textsuperscript{156} Although the actual survey responses appear to have been lost, the Helena \textit{Daily Herald} reported a sampling: Attorney General Haskell: the Codes should be adopted now and amendments should be done by a joint Senate-House committee now before adoption; Judge McHatton of Second Judicial District: adopt and adopt as a whole; Judge Benton of Eighth Judicial District: “I favor the adoption of the codes. The compiled statutes is a contradictory mass of legislation, much of it difficult of interpretation by bench and bar.”; Judge Brantley of Third Judicial District: adopt as stands, then amend this session if practical; County Attorney Freeman of Cascade County: “heartily in favor” of codes, adopt as a whole; attorney Frank P. Sterling: “by no means” adopt as a whole; Judge Woody of Fourth Judicial District: adopt as a whole then amend, “I do not believe that our laws would be in any worse condition if the codes were adopted.”; Durfee and Brown, Philipsburg attorneys: adopt “as quickly as possible” and adopt as a whole; Judge Marshall of Missoula: “I am in favor of the general idea of codification. Very many of the features embraced in the report of the commission are wise and prudent.”; Goddard, President of Montana Bar Association: adopt as a whole; Luce & Luce, Bozeman attorneys: adopt without amendments “except for defects, if any, that may be patent”; Stanton & Stanton, Great Falls attorneys: “by all means” adopt as a whole; W.T. Hartman, Representative Hartman’s brother: “I would say emphatically ‘yes.’”; F.C. Webster: adopt as a whole; James R. Goss, Billings attorney: adopt and then amend later. \textit{Adopt It First, HELENA DAILY HERALD, Jan. 22, 1895, at 1.}

\textsuperscript{157} In particular, the transfer of the office of Recorder of Marks and Brands to the Secretary of State from the Livestock Commission caused the livestock commissioners distress. The livestock commissioners argued that they required the marks and brand books daily and the transfer would prevent them from being able to perform their work. \textit{11th District, HELENA DAILY HERALD, Jan. 19, 1895, at 1; They Must Be Read, DAILY INDEPENDENT (Helena), Jan. 19, 1895, at 5. Other portions of the Code the commission found objectionable could be easily cured by amendment. Id.}

\textsuperscript{158} \textit{They’re After Him, DAILY INDEPENDENT (Helena), Jan. 20, 1895, at 8.}

\textsuperscript{159} \textit{They Want The Codes, DAILY INDEPENDENT (Helena), Jan. 22, 1895, at 6.}
to delete the mercantile corporations section and the ban on gambling. The two committees then agreed to work for passage without further amendment.\textsuperscript{160}

In a rare dissent from the push for adoption, the Democratic \textit{Great Falls Daily Tribune} editorialized that the Codes were an extreme remedy for the problem of confusion in the statutes: "[W]hy should this mon\textsuperscript{s}ter code be adopted without any consideration? Has not our experience taught us that we have too much law and too little justice? Would it not be a practical thing to simplify rather than add to the written law?"\textsuperscript{161} No one else publicly asked or discussed these questions, and the \textit{Tribune} went unanswered.

By January 24, the House Code Committee had issued a favorable report emphasizing the need to clarify the state's laws, which the House adopted\textsuperscript{162} with little debate.\textsuperscript{163} The House

\textsuperscript{160} \textit{They Chewed It All Up}, \textit{Anaconda Standard}, Jan. 23, 1895, at 1. At least one member of the House seems to have shared these views. Republican Representative Dr. O. Leiser introduced a bill on January 23, 1895 to revise and compile the statutes, an unnecessary step if the Codes passed. \textit{Without Any Rules}, \textit{Daily Independent} (Helena), Jan. 23, 1895, at 5, 6. Leiser continued to have qualms about the Codes, unsuccessfully seeking to have the 26 page Code Committee report printed before adoption by the full House. \textit{Ordered Engrossed}, \textit{Daily Independent} (Helena), Jan. 25, 1895, at 5, 7. He did vote for the Codes on final passage, however. \textit{Code Bills Passed}, \textit{Daily Independent} (Helena), Jan. 25, 1895, at 5, 7.


\textsuperscript{162} The Committee Report stated:

\begin{quote}
Your committee are of the opinion that the present condition of the laws of this state are such that the proposed codes should be adopted by the legislative assembly at the earliest day possible. Our present laws are incoherent, in many instances, contradictory, in some cases, unconstitutional so that the interpretation of them on many points is practically impossible either by the judiciary or the bar of the state. This being true, a great majority of the people of the state are unable to arrive at a definite conclusion of what the laws are under which they live. This condition of affairs has arisen from a series of laws enacted by different legislatures, each acting as an independent body, and in many cases paying no attention whatever to the laws existing at the time of the enactment of certain statutes. Your committee are of the opinion that it is unnecessary in this report to add further reasons for the adoption of the proposed codes but would earnestly request that each member of the house give careful consideration to an address by the Hon. Decius S. Wade entitled: 'Necessities for Codification.'
\end{quote}

\textit{Mr. Booth's Plan}, \textit{Anaconda Standard}, Jan. 25, 1895, at 1.

\textsuperscript{163} The discussion consisted of a question whether the Senate Judiciary Committee had been consulted and a motion to print the Code Committee report before adoption, which lost. As Representative Knippenberg put it, the House "took the word of the lawyers for it." \textit{Ordered Engrossed}, \textit{Daily Independent} (Helena), Jan. 25, 1895, at 5, 7. As Knippenberg was one of the more independent Republicans he termed it a limit to the number of times he would say "cuckoo" for the caucus, \textit{King Caucus Rules}, \textit{Daily Independent} (Helena), Feb. 1, 1895, at 5), the lawyers truly had convinced the most skeptical members to take their word for it.
Code Committee recommended only five sets of amendments to the Commission drafts: (1) to preserve existing corporations; (2) to ensure that laws passed at the Third and Fourth Legislatures were maintained, in particular a series of acts establishing county boundaries and creating various state and local offices; (3) to delete the ban on gambling and retain the present law; (4) to remove a section of the Penal Code that prohibited railroads from giving passes to office holders; and (5) to strike a provision giving the State Board of Education, rather than the legislature, the authority to select the state’s school textbooks. The House amendments thus aimed primarily at preserving the legislature’s privileges and ability to satisfy special interests. Selecting school textbooks, for example, was a rich source of legislative “boodle,” and the receipt of a free rail pass was a ma-

164. Interestingly, the same legislature later passed a broad ban on gambling. It Is Gone Forever, DAILY INDEPENDENT (Helena), Mar. 1, 1895, at 8. The Daily Independent noted that the gambling interests “didn’t seem to care a nickel one way or the other” about the gambling ban and were simply avoiding political extortion by the legislature. In The Altogether, DAILY INDEPENDENT (Helena), Mar. 9, 1895, at 5. The Daily Missoulian also noted the lack of opposition to the bill, which meant a loss of $30,000 to $40,000 a year in license revenues. Tis the Old Tale, DAILY MISSOULIAN, Feb. 24, 1895, at 1. Even the bill’s advocates did not argue the bill would stop gambling, but argued that state licensure “had a bad effect on those who are thinking of taking up their residence in the state.” Badly Jumbled Up, DAILY MISSOULIAN, Feb. 17, 1895, at 2. The law was eventually declared unconstitutional. RAYMER, supra note 112, at 382-83.

165. The Proposed Codes, DAILY INDEPENDENT (Helena), Jan. 25, 1895, at 2; The New Codes, HELENA DAILY HERALD, Jan. 24, 1895, at 1. The legislature was unable to come to any final agreement on the school book issue and ended up leaving districts free to choose their own books, repealing all existing school text book laws. A Thing of the Past, DAILY INDEPENDENT (Helena), Mar. 8, 1895, at 1. The Daily Missoulian reported that “[t]he so-called textbook question is attracting more attention than any question since the senatorial fight was made.” Talked Out Loud, DAILY MISSOULIAN, Feb. 15, 1895, at 1.

The issue, of course, surfaced at the next legislature. See Is Left to Districts, DAILY MISSOULIAN, Jan. 22, 1897, at 1. Then the Daily Missoulian advocated legislative book choice on the grounds that it would be more expensive to buy a majority of the legislature than to buy a text book commission and so, presumably, less likely to occur. As To Textbooks, DAILY MISSOULIAN, Feb. 18, 1897, at 2.

166. The Daily Missoulian described the textbook issue this way:

The champions and friends of the American Book Company are working hard to have the old contract renewed and the old line of books retained, while the representatives of the houses outside the trust, some of whom are in the employ of the state, or at least in the offices of state officers, want a fair field and no favor. There are rumors of boodle galore, and the active interest taken in the matter by men who never knew until a week ago what books were used, would seem to indicate that all the enthusiasm aroused is not due entirely to patriotism.

Present Outlook, DAILY MISSOULIAN, Jan. 27, 1895, at 1. School texts continued to inspire visions of “fat batches of good dough” in the Fifth Legislature. Committees
jor benefit of a legislative seat. Special laws concerning corporations were a similar source of favors.

Noticeably lacking from these changes were adjustments to adapt the Codes' provisions to Montana's circumstances. The flood of amendments that appeared later suggests that the Codes were far from perfectly suited to Montana. The limited range of amendments made in the House evidences a failure to closely examine the substance of the four Codes.

The Codes were sent to the engrossing committee with the proposed amendments, where their size presented a problem. To engross them in the normal fashion would have required "four times as many clerks as are now employed by the house, and more time than the legislature has left in its session." To resolve this problem, the House decided to make up the engrossed versions from the printed versions, presumably by cutting and pasting in the five changed areas. By suspending the first and third readings, together with the usual practice of reading by title alone on the second reading, the House then could "bolt the codes like a dose of castor oil" and pass the four bills the same day. The House took only ten days from introduction to passage of the Codes, a time during which other matters primarily occupied the House.

Passage through the House was thus accomplished with little examination of the bills. As the skeptical Great Falls Tri-

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167. The desire for rail passes was a feature common to many of Montana's legislatures. Commenting on the rejection of legislation to prohibit passes in 1897, the Daily Missoulian noted that "[t]he house has placed itself squarely on record as being in favor of free transportation on railroads and plenty of it." State Legislature, Daily Missoulian, Jan. 18, 1897, at 1.

168. The changes to municipal government structure, for example, were inappropriate to Montana's existing structures.


170. Id.


172. A smattering of opposition surfaced to the dispensing of the third reading, and the motion to do so with respect to the Civil Procedure Code passed by 45-11. When a similar objection was raised for the other three, the Code Committee Chairman again repeated his characterization of the Codes as "not new laws but simply the old ones compiled and codified with some necessary amendments and laws of late legislative assemblies." Codes by the Cord, Anaconda Standard, Jan. 26, 1895, at 1. At least some of the opposition seems to have come from legislators who objected to the provisions concerning the cattle industry. The First Law, Helena Daily Herald, Jan. 26, 1895, at 5. It certainly was not based on partisan lines; eight of 44 Republicans and three of 13 Populists opposed the motion. See Id. at 5 (listing opponents); Senator Makers, Helena Daily Herald, Nov. 21, 1894, at 5 (listing party affiliations).
bune editorialized, upon passage of the Codes Montana would be able to "boast of a volume of law which for quantity is unsurpassed by any state, no matter what may be said of its quality. No one can vouch for that, for no one in the state has read the code[s] in [their] entirety."173 This was more than editorial hyperbole—given the rapid passage through the lower house, it is doubtful that anyone had tackled the task of reading the entire body of Codes. The Code Commission, the Code Committee and, perhaps, the Montana Bar Association committee had considered them en masse, but it is doubtful whether any one individual from any of those bodies had read and considered all 170 pounds of laws.

2. The Senate: "Warm Friends of the Codes" 174

In the Montana Senate (the Senate) the primary obstacle 176 to prompt passage was a determined effort by the State School Superintendent to incorporate some school law changes into the new Codes.177 The same argument used against the livestock industry amendments in the House blocked these changes: to change any provision would open the floodgates of amendments and doom passage. Although this argument succeeded in blocking the school law changes, it did not stop the livestock interests in the Senate.

When the Codes reached the Senate Judiciary Committee177 on January 28th,178 all but one of the members joined

173. GREAT FALLS DAILY TRIBUNE, Jan. 25, 1895, at 2. Similar claims were made in New York by opponents of the Codes. See, e.g., ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK: FIRST ANNUAL REPORT, supra note 42.
175. Some opposition was also forecast in the Senate because of the House’s action in eliminating the ban on gambling, primarily because some senators objected to the appearance of special treatment of gambling interests. “The only thing that will prevent a fight and probably a successful one being made on this matter is that the senators who hold these views are warm friends of the codes and fear to endanger the action of the house yesterday by making changes.” Id.
176. A Busy Week, HELENA DAILY HERALD, Jan. 28, 1895, at 1. Steere sought a state board of education “selected from the most progressive educators in the state.” He wanted this board to have not only authority over textbook selection but also “authority to make what changes they deem best in the management . . . of schools throughout the state.” Teachers Adjourn, HELENA WEEKLY INDEPENDENT, Jan. 3, 1895, at 8; see also The School Book Law, DAILY INDEPENDENT (Helena), Jan. 11, 1895, at 5.
177. The Judiciary Committee consisted of Senators Leonard (R-Silver Bow) (Chair), Greene (R-Jefferson), Metzel (R-Madison), Eggleston (D-Deer Lodge), and Brosnan (P-Cascade). See The Committees, DAILY INDEPENDENT (Helena), Jan. 12, 1895, at 7 (committee assignments); The Next Assembly, DAILY INDEPENDENT (Hele-
in a majority report urging their adoption in the form passed by the House. Republican Senator Alex Metzel of Madison County offered a minority report on the Penal Code\textsuperscript{179} and the Political Code with some amendments favored by the livestock industry.\textsuperscript{180} In a tribute to the influence of the cattle and sheep industries, the minority report on the Penal Code was adopted with only six dissenting votes.\textsuperscript{181} Senate Judiciary Committee Chairman Charles Leonard then withdrew the majority report on the Political Code and, "probably to show that he was not unalterably opposed to the amendments, passed another [amendment] to Senator Metzel and that gentleman presented it as a portion of his report." Leonard's amendment resolved the school book question, eliminating a Political Code section that gave the State Board of Education authority over school textbook selection. "Not one member out of ten know just what section was being eliminated."\textsuperscript{182} The Senate then unanimously passed the Codes.\textsuperscript{183} The Penal and Political Codes returned to the House, which concurred in the Senate amendments.\textsuperscript{184}

3. \textit{Enrollment Clerks: "General Baggs' Army"}\textsuperscript{185}

Go it, 'General,' work, ye slaves. The House has said it must have the Codes enrolled and in a hurry, so make your pens fly,
trim de ink, and when your labors are at last completed a four-horse truck will come around and cart the results of your labors to the office of His Excellency for approval.  

Helena Daily Herald

The usual procedure for House bills that passed both houses was enrollment by the House Committee on Enrollment. The Committee created a clean copy of each bill including all amendments. Although lack of amendments meant that there were few changes from the original printed bills to incorporate, the size of the Codes meant this was a formidable undertaking. Code Committee Chairman Booth offered a resolution giving the Committee on Enrollment authority over all the House clerks and to engage ten additional clerks as needed. The day before, however, the House had appointed a special committee to investigate charges that the House had been “extravagant” in its hiring of clerks, who were patronage employees. That committee was ready to present its report, and its Chairman, Republican Representative Henry Knippenberg of Beaverhead County, opposed Booth’s resolution. The matter was postponed to allow the Republican caucus to consider the question that night.

Despite the lawyer members’ advice that enrollment by hand was not legally required, the caucus decided to proceed with

186. Id.

187. My account of the enrollment controversy is based on the accounts in a series of Montana newspapers at the time: All Done by Hand, DAILY INDEPENDENT (Helena), Jan. 31, 1895, at 5; Code Clerks, HELENA DAILY HERALD, Jan. 31, 1895, at 1; Much Ado About Little, DAILY INTERMOUNTAIN (Butte), Feb. 1, 1895, at 1; King Caucus Rules, DAILY INDEPENDENT (Helena), Feb. 1, 1895, at 5; Rough on Clerks, GREAT FALLS DAILY TRIBUNE, Feb. 2, 1895, at 1; Smead’s Big Bill, DAILY MISSOULIAN, Feb. 2, 1895, at 1; Ruled by Caucus, DAILY INDEPENDENT (Helena), Feb. 2, 1895, at 5.

188. The method of selecting clerks had caused a “little row” earlier in the session in the House, when an unsuccessful attempt was made to give committee chairs the sole authority to pick clerks. General Assembly, DAILY INDEPENDENT (Helena), Jan. 12, 1895, at 5. Further disputes arose later when one member expressed annoyance at the lack of jobs for Union veterans compared with the large number of female clerks. This Was A Threat, DAILY INDEPENDENT (Helena), Jan. 18, 1895, at 5.

189. Knippenberg, who appears to have been something of a stuffed shirt as well as a regular thorn in the Republican leadership’s side, later resigned from the legislature without explanation and left town to spend the winter in Florida. How It Is Viewed, HELENA DAILY HERALD, Feb. 19, 1895, at 2. His resignation was attributed by some to the criticism he had received in connection with his efforts in the House. Id. Knippenberg’s major legislative efforts had been an attempt to ban display of any flag other than the United States’ and to reduce the number of House clerks. See Flag Field Day, HELENA DAILY HERALD, Feb. 8, 1895, at 1, 5; No Hope From Them, DAILY INDEPENDENT (Helena), Jan. 28, 1895, at 5 (printing text of bill).

190. King Caucus Rules, DAILY INDEPENDENT (Helena), Feb. 1, 1895, at 5.
hand enrollment.\textsuperscript{191} The caucus estimated that doing so would require at least a week's work by thirty-five to forty clerks at five dollars each per day.\textsuperscript{192} As with other estimates concerning the Codes, this proved wildly optimistic; clerks labored for almost four weeks to enroll the Codes. The Knippenberg committee's report, which had recommended the discharge of eleven of the twenty-six existing committee clerks on grounds of incompetence, was tabled.\textsuperscript{193} The Caucus did not acknowledge the Senate's offer to loan the House the Senate's clerks.\textsuperscript{194} The Caucus ignored the governor's assurance that he would accept the Codes without enrollment.\textsuperscript{195} Instead, the House hired more and more clerks, and although a number proved less than competent, few were discharged.\textsuperscript{196}

On February 13th, almost two weeks after enrollment began, the Code of Civil Procedure was finished and sent to the governor for his signature.\textsuperscript{197} Six days later, the Penal Code and Civ-

\textsuperscript{191} The enrollment of the Codes was justified by the Republican \textit{Helena Daily Herald} on the grounds that the legislatures' printed versions of the code commissioners' handwritten work were not properly proofed. These errors were partially corrected by Code Commissioners Wade and Cole, who added various pencil notations to the printed versions. \textit{The Enrollment of the Codes}, \textit{Helena Daily Herald}, Feb. 5, 1895, at 4. Even the \textit{Herald} admitted, however, that the manner of enrollment was "an outrage." \textit{Id.}

\textsuperscript{192} Salaries from \textit{Now It Has Rules}, \textit{Daily Independent} (Helena), Jan. 24, 1895, at 5.

\textsuperscript{193} \textit{Ruled by Caucus}, \textit{Daily Independent} (Helena), Feb. 2, 1895, at 5.

\textsuperscript{194} \textit{The Enrollment of the Codes}, \textit{Helena Daily Herald}, Feb. 5, 1895, at 4. The "code clerks" also caused controversy concerning their employment on Sundays. Some apparently objected to working Sundays for religious reasons, and the House eventually decided to allow those clerks not to attend, but prevented them from claiming compensation for Sundays. \textit{In The House, Helena Daily Herald}, Feb. 9, 1895, at 1; \textit{Thrown Wide Open}, \textit{Daily Missoulian}, Feb. 10, 1895, at 1.

\textsuperscript{195} \textit{The Governor's Position}, \textit{Helena Daily Herald}, Feb. 1, 1895, at 3; \textsl{see also} \textit{Much Ado About Little}, \textit{Daily Intermountain} (Butte), Feb. 1, 1895, at 1.

\textsuperscript{196} \textit{General Assembly}, \textit{Daily Independent} (Helena), Feb. 5, 1895, at 5. Chairman Baggs attributed the number of incompetents to the rapid hiring of so many clerks (although fewer than hired at the start of the session) and claimed he did discharge incompetent clerks once their lack of ability became clear. \textit{Very Little Show}, \textit{Daily Independent} (Helena), Feb. 7, 1895, at 5, 6. A review after the end of the session disclosed that eighty-eight clerks were employed by both houses, at an expense of more than $10,000. \textit{What It Costs To Make Laws}, \textit{Daily Independent} (Helena), Nov. 25, 1896, at 8.

\textsuperscript{197} \textit{It Was All Spent}, \textit{Daily Independent} (Helena), Feb. 14, 1895, at 5; \textit{The Work of Our Law Makers Begins to Produce Results}, \textit{River Press} (Fort Benton), Feb. 20, 1895, at 5. The arrival of the enrolled code was a momentous occasion in the House: "While the speaker was signing the bill, Tallant, Gordon and other prominent Republicans crowded around and viewed the work." \textit{The House, Helena Daily Herald}, Feb. 13, 1895, at 1.
il Code were completed. The governor signed them on February 20th. The Political Code was finally enrolled on February 25th and signed the next day. The first consequence of the Codes' passage was thus the perpetuation of the bloated legislative patronage staff and a waste of considerable public resources.

4. Amendments: “make the people wish the legislature had left the codes alone”

After passage, people began to read the Codes. Changes the Helena Daily Herald characterized as “radical” in placer and quartz mining law were discovered. All cities

199. The House, HELENA DAILY HERALD, Feb. 20, 1895, at 1.
200. It Came To Life, HELENA DAILY HERALD, Feb. 25, 1895, at 1, 5.
202. The Fourth Legislature's expenditures became an object lesson for the Fifth. Newly elected Governor Robert Smith cited the cost of $61,474.96 in his message to the Fifth. Governor Smith Now, DAILY MISSOULIAN, Jan. 4, 1897, at 1. To put that in perspective, total state revenues in 1896 were about $437,000. The Message, DAILY MISSOULIAN, Jan. 4, 1897, at 2.

Before the additional code clerks were hired, the legislature's staff had a payroll of $330 per day, of which $155 per day was for clerks. The Senate, a smaller body, survived with only five committee clerks. Now It Has Rules, DAILY INDEPENDENT (Helena), Jan. 24, 1895, at 5. The total cost of the Codes was estimated to be $2,000 or about three percent of the legislature's budget. A Junketing Party, DAILY INDEPENDENT (Helena), Feb. 10, 1895, at 6.

203. In the Altogether, DAILY INDEPENDENT (Helena), Mar. 9, 1895, at 5.
204. They did not necessarily read them right away. It was not until late 1896 that anyone appears to have noticed a Political Code section requiring county treasurers to furnish “indemnifying bonds” from banks in which they deposited public funds. Those Codes Again, DAILY MISSOULIAN, Dec. 23, 1896, at 1 (recounting how few counties had complied with the law and a recent opinion by the Attorney General that required compliance); see also Failed to Comply, DAILY INDEPENDENT (Helena), Dec. 22, 1896, at 8. Similarly, it took time for school officials to discover that “through a clerical error” there was no explicit provision authorizing school taxes, something remedied at the next legislature and handled in the interim by a court decision of “questionable” legality authorizing county commissioners to make a levy. State Legislature, DAILY MISSOULIAN, Mar. 3, 1897, at 1.

205. On a lighter note, a correspondent pointed out in a letter printed in the Helena Daily Herald that a provision requiring veterinarians to burn or bury deceased diseased animals was unartfully drafted and appeared to require the burning or burying of the animals' owners. The New Codes, HELENA DAILY HERALD, Mar. 5, 1895, at 8 (letter to the editor). A correspondent to the Daily Independent pointed out that the Code Commission draft had also included provisions which stated that a husband's adultery would have no effect on the legitimacy of the children of his wife and which made it illegal for a public official to make change for a taxpayer. Again The Codes, DAILY INDEPENDENT (Helena), Mar. 1, 1895, at 6 (letter).

206. Placer mining is the method of mining that uses water to extract gold from deposits of sand and gravel.
207. New Mining Law, HELENA DAILY HERALD, Mar. 15, 1895, at 2. The changes
except Helena underwent major changes in their governmental organizations, with salaries and fees for city officials cut dramatically.\textsuperscript{208} Residence requirements for voting doubled from three to six months in the city,\textsuperscript{209} the frequency of elections increased,\textsuperscript{210} offices changed from appointed to elected,\textsuperscript{211} unnaturalized residents were exempted from poll taxes (threatening a quarter of revenue from that source),\textsuperscript{212} cities were made liable for damage from mobs and riots,\textsuperscript{213} and police judges' jurisdiction greatly expanded.\textsuperscript{214} Even the powerful live-

made Montana's laws similar to Colorado's, South Dakota's, and Wyoming's. The new law extended the time for recording claims to ninety days from twenty, required shafts of ten feet be dug before recording, and required an additional 10 feet be dug for relocation of claims based on old discovery. \textit{id.}

\textsuperscript{208} \textit{The New Code}, \textit{HELENA DAILY HERALD}, Feb. 16, 1895, at 8. Helena had a special charter and so was unaffected by the changes in the general law. \textit{Id.} As an example of the changes in salaries, Butte's mayor went from $2,000 annually to $600; aldermen's salaries were cut from $300 to $100. Fees were a major source of income for many officials; the new code abolished most of them. These changes were not a complete surprise because a group of mayors objected to them in 1893. \textit{Montana Mayors Meet}, \textit{DAILY INDEPENDENT} (Helena), Feb. 9, 1893, at 1. The legislature restored the salary levels. MONT. REV. CODE § 3240 (1907) (derived from act of March 3, 1895). The mayors specifically objected to the reduction of mayoral salaries, taxation provisions for special assessments, making police magistrates ex officio justices of the peace, and provisions requiring cash on hand before warrants could be issued. \textit{Montana Mayors Meet}, \textit{DAILY INDEPENDENT} (Helena), Feb. 9, 1893, at 1.

\textsuperscript{209} \textit{Id.} Ward residency requirements were also increased from 10 to 30 days. \textit{Id.}

\textsuperscript{210} \textit{Id.} Elections were changed from biennial to annual.

\textsuperscript{211} \textit{Id.} The city marshal was made an elected official. This caused the \textit{Great Falls Daily Tribune} particular annoyance: Of all the city officials the marshal should of all others be appointive and subject to removal in the event of misbehavior. To make him elective, and every year, will be to place the position virtually at the disposal of an element that to say the least should not have any say in the selection of such an official. Reference is of course made to the element that exists in all large communities with which the marshal has the most business. If the office be made elective these people would see to it that a man who was satisfactory to them was nominated and elected, and in the slang of the street would "stand in with them. This is to be avoided, if possible, and the legislature should not adjourn without amending the code in this important particular. Even if the office be made elective the term of one year is too short, for it requires that length of time for a man to get acquainted with the duties of his office. As a matter of fact the city marshal and all the members of the police force should be selected on account of their fitness and the tenure of their office should be during good behavior. This is the great feature of the metropolitan system and is the feature that can be followed with profit in Montana cities. A \textit{Code Mistake}, \textit{GREAT FALLS DAILY TRIBUNE}, Feb. 14, 1895, at 2.

\textsuperscript{212} \textit{Should Be Amended}, \textit{DAILY INDEPENDENT} (Helena), Feb. 25, 1895, at 8.

\textsuperscript{213} \textit{Id.}

\textsuperscript{214} \textit{The New Code}, \textit{HELENA DAILY HERALD}, Feb. 16, 1895, at 8. For additional
stock interests were not immune from surprises: the Codes repealed the 1891 law making railroads liable for damage to livestock. The road laws were changed to contain "serious obstacles to county commissioners" that could "in some instances bankrupt a county." Important changes in the certification system surprised teachers.

Amendments reversed some of these changes before the end of the session. In particular, after complaints by mayors, the legislature retreated from some of the more radical changes in municipal government. Fixing the mistakes required many bills, and the legislature passed more than one hundred amendments to the four Codes. Enough amendments remained unacted upon at the end of the session, however, that some predicted a special session would be necessary.

The Codes' impact was felt indirectly as well. One necessary amendment, concerning construction of the Codes in relation to acts of previous legislatures, enabled the Senate to force the House to retain a contract system for the state prisons, despite its previous refusals to do so. Other matters were de-
laid or stopped altogether due to possible conflicts with the Codes.\textsuperscript{223} A new law governing the militia required extensive revision due to the Codes' provisions on the same subject.\textsuperscript{224} A bill pertaining to altering and defacing brands also required reworking to fit the Codes.\textsuperscript{225} Knippenberg's bill relating to fees and compensation was indefinitely postponed because of the Codes' provisions on the same subject.\textsuperscript{226} Conflict with the Codes also led to at least one veto.\textsuperscript{227} Errors in the Codes also affected state revenues. In 1897, the Secretary of State estimated that a loophole created by the Political Code provisions on filing fees for articles of incorporation cost the state $20,000 a year.\textsuperscript{228}

Perhaps more importantly, the Code Committee was given jurisdiction over "[a]ll bills relating to any subject already covered by the Codes" to avoid damage to the "symmetry of the new laws"\textsuperscript{229}—a far reaching mandate in light of the Codes' sweeping scope. The sheer press of business also had an effect. In one day the House disposed of 181 bills.\textsuperscript{230} On another day, the House dealt with thirty bills, each receiving between three and five minutes.\textsuperscript{231} These factors combined to give the Code Committee an unusual degree of centralized control over the Fourth Legislature's business.

\textsuperscript{223} A Senate bill defining the rights of married women was postponed because the subject was dealt with in the Codes and the committee was unsure of the Code provisions. \textit{The State Solons}, DAILY MISSOULIAN, Feb. 5, 1895, at 1. A bill regulating the medical profession was held up in the Senate because the effects of the Codes on the subject were unknown. \textit{Did All The Work}, DAILY MISSOULIAN, Feb. 3, 1895, at 1. The Codes appear to have influenced the development of the law even before they took effect; the Montana Supreme Court cited the Civil Code's provision that a riparian land owner's property went to the low-water mark, rather than the high-water mark, in choosing the low-water rule in a February 26, 1895 decision. \textit{Gibson v. Kelly}, 15 Mont. 417, 423, 39 P. 517, 519 (1895). I would like to thank Roy Andes for referring me to this case.

\textsuperscript{224} \textit{Doing Business}, HELENA DAILY HERALD, Feb. 22, 1895, at 8.

\textsuperscript{225} \textit{Two More Codes}, HELENA DAILY HERALD, Feb. 19, 1895, at 1, 5.

\textsuperscript{226} \textit{Id.}

\textsuperscript{227} \textit{It Was Veto Day}, DAILY INDEPENDENT (Helena), Mar. 21, 1895, at 5 (describing veto of a bill because it caused a problem when read in conjunction with code sections).

\textsuperscript{228} \textit{To Build A Capitol}, DAILY INDEPENDENT (Helena), Feb. 26, 1897, at 5, 6 (The loophole allowed firms to file articles of incorporation for a small amount of capital, then amend them. This permitted them to take advantage of the flat rate for amendments to avoid payment of a higher fee for the initial filing, which was based on the amount of capital stock.)

\textsuperscript{229} \textit{King Caucus Rules}, DAILY INDEPENDENT (Helena), Feb. 1, 1895, at 5.

\textsuperscript{230} \textit{Broke All Records}, DAILY INDEPENDENT (Helena), Feb. 24, 1895, at 8.

\textsuperscript{231} \textit{Draw Poker Barred}, DAILY INDEPENDENT (Helena), Feb. 26, 1895, at 5.
The Fourth Legislature's final procedural concern was to provide for the incorporation of the many amendments to the Codes as well as the other acts of the Fourth Legislature. If the Codes were to end the confusion in Montana's statutory law, they must be maintained as codes. Decius Wade was appointed commissioner to incorporate the acts of the Fourth and Fifth Legislatures into the Codes, prepare them for printing, and prepare indices.\(^2\) Moreover, because of the haste in adoption, no time remained in the session to consider conflicts between legislation adopted in the current session and the Codes, leading to confusion over what law governed.\(^3\)

As they reported these events, second thoughts crept into newspapers' coverage. The Helena *Daily Independent* called passage of the Codes "[t]he most important work of the legislature" but cautioned that "[w]hether it was the wisest piece of work remains to be seen."\(^4\) After passage the *Daily Independent* discovered that the:

[N]ew codes were prepared some years ago, and in many of their provisions were not applicable to existing laws or to present conditions. Yet it seemed to be absolutely necessary to have

\(^2\) The Butte *Intermountain* won the more than $8,000 contract to print the completed Codes. *Mantle's Paper*, HELENA DAILY HERALD, Feb. 27, 1895, at 1. This might have been due to the influence of Silver Bow county legislators on the various Code committees since the *Intermountain*’s bid was significantly higher than two of the three other bids. *Got A Cinch On It*, DAILY MISSOULIAN, Feb. 28, 1895, at 1. Sanders opposed the *Intermountain*’s edition, which included annotations by Fletcher Maddox consisting largely of California cases and which was published in two volumes, in what appears to be a beginning for a speech: "The Vampire of the Pacific Coast and the stormy petrel of the Rocky Mountains, - one or both of them, thinking they had a monopoly on publishing the laws of Montana" and attacked the circulation of a protest against the Montana Bar Association's one volume, unannotated edition (prepared by Sanders) (Sanders File, (undated), Box 4, Folder 4-3, Montana Historical Society). Sanders represented one of the losing bidders in an unsuccessful attempt to overturn the award to the *Intermountain*. *It Is A Hot Fight*, DAILY INDEPENDENT (Helena), Apr. 26, 1895, at 6; *Winked at Witness*, DAILY INDEPENDENT (Helena), Apr. 27, 1895, at 8; *The Board Upheld*, DAILY INDEPENDENT (Helena), May 7, 1895, at 3.

\(^3\) The members of the next legislature learned this lesson the hard way. The Codes had provided for mileage of $0.20 per mile each way for members to attend sessions; the Fourth Legislature had cut this to $0.10. By the time the members of the Fifth Legislature discovered they were entitled to only half the traditional amount, they had already collected the full sum from the state treasury and faced difficulties in paying it back. As the *Daily Independent* pointed out, "[If] the law makers had been familiar with the laws, it would never have happened—perhaps.” *Too Much Mileage*, DAILY INDEPENDENT (Helena), Feb. 4, 1897, at 1; see also *Was Close Enough*, DAILY INDEPENDENT (Helena), Feb. 5, 1897, at 1. See note 297 infra for additional discussion of this issue.

\(^4\) *In the Altogether*, DAILY INDEPENDENT (Helena), Mar. 9, 1895, at 5.
the codes, so the legislature adopted them with a lot of provisions that were not wanted, and then set to work to amend them so as to get what was wanted. A great part of the legislation, or, rather, a large number of the bills acted on, related to provisions of the codes which were round to be unsatisfactory, and which the legislature sought to amend. In this proceeding there were doubtless some changes crept in which should not have been passed, and they will develop from time to time, and make the people wish the legislature had let the codes alone after passing them.235

The process by which the legislature considered the Code bills overwhelmed the legislature's mechanisms for debate and review, centralized power in the hands of a few members, and disenfranchised all but the most powerful interests.

5. Looking Back

After the session ended, the Helena Daily Herald summed up the legislature's work by calling the Codes a "radical movement" to solve the "momentous problem" of having "only fragmentary legislation,"236 a sharp contrast from the paper's reporting before passage that the Codes were mere collections of existing law.237 In many respects, the paper was correct—a radical change had taken place in Montana's legal system, and the problem was no longer "fragmentary" legislation but an overwhelming mass of legislation. No longer would the confusion in Montana's laws arise from political battles left over from Territorial days. Now it would result from the hasty adoption of measures designed for New York and Dakota in the 1860s and California in the 1870s, and their mixture with clerical errors,238

235. Id.
236. The Legislative Assembly, HELENA DAILY HERALD, Mar. 8, 1895, at 4.
238. For example, an enrolling clerk's error in a bill correcting various provisions of the Political Code resulted in the wrong section being repealed. A Wrong Section, DAILY INDEPENDENT (Helena), Mar. 14, 1895, at 5. Another oversight came from the omission of a section of the Code of Civil Procedure through an error by the Code Commission. When the problem was discovered, former Code Commissioner B.P. Carpenter offered this explanation: "Title 3, 'Assignment for the Benefit of Creditors,' of civil code, section 4510, et seq., was largely taken from California, but partly from the New York [sic]. The procedure for accounting, being insufficient in California, was taken from the New York statute, which I now supply you. It was prepared for insertion into the code of civil procedure, but through an oversight was never inserted . . . . The omission of strict and ample provisions for presentation and proof of claims and an accounting by assignees is one of the very worst defects in the code of civil procedure." Work Well In Hand, DAILY INDEPENDENT (Helena), Jan. 30, 1897, at
conflicting amendments, and the quirks of the Fourth Legislature's "bolting" of the Codes.\footnote{Ordered Engrossed, DAILY INDEPENDENT (Helena), Jan. 25, 1895, at 5.}

Perhaps the most puzzling question is how Montana came to adopt the Field Codes in 1895 without any reference to the heated debates over codification that occurred in New York throughout the 1880s.\footnote{In a February 26, 1895 opinion, the Montana Supreme Court suggested that the legislature and Code Commission had paid careful attention to the underpinnings of the various Code sections: "The code commission and the legislature had before them the legal literature and learning to which we have above referred, and as a result they have adopted the rule [in question]." Gibson v. Kelly, 15 Mont. 417, 422, 39 P. 517, 519 (1895).} News from around the world filled Montana's newspapers; there was clearly no lack of interest in developments elsewhere. Despite more than nine revisions of the Field Codes in New York during the 1880s, the formation of the first modern bar association to fight the Codes there, and the extensive coverage of the codification debate in the New York press, no one seems to have mentioned that New York had repeatedly rejected the Civil Code.\footnote{The New York debates were vigorous, if fought primarily among a few hundred lawyers. See GEORGE MARTIN, CAUSES AND CONFLICTS: THE CENTENNIAL HISTORY OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 1870-1970 142-57 (1970) (describing battles of the 1880s). The debate was heated. The Association, for example, referred to changes in the proposed Civil Code as having "vicious character" and congratulated the Association "upon yet another escape from the dreaded results of the proposed innovation . . . and the consequent upheaval of the foundations of the settled jurisprudence of this State." ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, THIRD ANNUAL REPORT at 6-7 (1883). Field's allies, particularly those writing in the Albany Law Journal, used equally strong language. See, e.g., Current Topics, ALBANY L. J., Apr. 25, 1885 at 322 (responding to a critic's mention of the Statute of Frauds as "the stock argument of duller wits"). From 1870 to 1889 the Albany Law Journal published numerous articles advocating codification. Codification was also frequently discussed in the Nation, Evening Post, Tribune, American Law Review, and other periodicals.} The legislature willingly surveyed attorneys around the state, but apparently could not contact even a single attorney in New York.

The skeptical Great Falls Daily Tribune noted:

"In the passage of this code all the safeguards against hasty

8. A more basic error was the Political Code's description of Cascade and Lewis and Clark Counties as overlapping. Food Will Be Pure, DAILY INDEPENDENT (Helena), Feb. 17, 1897, at 5.

239. Ordered Engrossed, DAILY INDEPENDENT (Helena), Jan. 25, 1895, at 5. In a February 26, 1895 opinion, the Montana Supreme Court suggested that the legislature and Code Commission had paid careful attention to the underpinnings of the various Code sections: "The code commission and the legislature had before them the legal literature and learning to which we have above referred, and as a result they have adopted the rule [in question]." Gibson v. Kelly, 15 Mont. 417, 422, 39 P. 517, 519 (1895).

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241. In calling for the code commission in 1889, Governor Leslie did note that three of the codes had not been adopted in New York, but he attributed this, incorrectly, to the New York Legislature being "too much occupied by special legislation to give the necessary time for their consideration[]." Leslie's Message, DAILY INDEPENDENT (Helena), Jan. 16, 1889, at 1, 2. The author was unable to find any other mention of this important fact in the reported discussion of the codes through 1897.
legislation have been ignored, the rules for government of the legislature have been summarily set aside, and the spirit if not the letter of the constitution infringed. It is beyond question that no member of either branch of the assembly has read or given any consideration to these codes. They are to them as a sealed book.”

The legislature might as well go home after final passage, the Tribune continued,

[if they attempt any of the general legislation indicated by the several hundred bills already introduced many of them will conflict with the codes and the gentlemen will follow the example of the Indian chief who, upon opening a council, announced: ‘The law we made yesterday we repeal today.’ That will be about the size of it.”

The Tribune’s skepticism is notable primarily because it was so unusual. As a Democratic paper, the Tribune may simply have been skeptical of a Republican legislature’s accomplishments; its comments never went beyond questioning the haste in adoption to address the merits of codification. Compared with the level of debate in New York, the Tribune’s comments appear almost timid. No evidence can be found in Montana’s public record of New York’s heated debates concerning the merits of codification compared with the common law.

Equally puzzling is why the Montana codification advocates ignored the evidence from California and the Dakotas that codification would not end statutory confusion. California had wrestled with its Codes for over twenty years by 1895 and both Dakotas had almost thirty years experience with their Codes. The frequent need for revisions in those states should have alerted Montanans that considerably more than codification was required to enable Montana to escape the confusion of uncollected session laws.

Montana also ignored the intensive process that California underwent in adapting the Codes. Not only had multiple bodies been appointed to examine and change the Codes there, but the 1870 Code Commission Chairman Charles Lindley, a strong advocate of codification, had resigned over the failure of the commission to adequately examine and complete the Codes. Lindley also wrote the California Code Commentaries, a work

243. Id.
the Montana Commissioners surely examined. He published a letter in it explaining his resignation and decrying the state of the California Codes as proposed to the California Legislature. Indeed, one of Lindley's primary criticisms of his own commission's product was the haste in adoption. Despite this abundance of evidence regarding the level of effort needed to adapt the Codes to local conditions, the Montana codifiers made little effort to modify them.

Although the debate in Montana focused exclusively on local issues, some evidence exists that David Dudley Field himself was involved in the Montana Codes' passage. In November 1895, David Dudley's brother Stephen, then associate justice of the United States Supreme Court and once a leader of California's codification effort, replied to a letter from Wilbur F. Sanders, that:

You say my brother took such an abiding interest in the adoption of the Codes, prepared substantially by him, and in his own conversation, addresses and letters had so much to do with their final passage in Montana, that you feel an irresistible impulse, now that he is dead, to send to me a volume of those laws. You also state that up to within a few weeks of his death his interest in your legislative action was intense, and that he was as active in procuring it as he could have been were he fifty years younger than he was.

In addition in 1885 in New York, Sanders had heard David Dudley Field speak on codification (and probably met him) at least one American Bar Association meeting that discussed codification. Although Field was no longer a Republican by the

244. Lindley, supra note 67, App. at v.
245. Lindley, supra note 67, App. at v.
246. Letter from Stephen Field to Wilbur F. Sanders, Nov. 8, 1895, Sanders File, Montana Historical Society, Box 2, Folder 2-15. Unfortunately the author has been unable to locate Sanders' letter. Sanders and Stephen Field corresponded again in 1897 when Justice Field wrote Sanders asking him for a copy of his account of Sanders' time as a vigilante, mentioning how much he had enjoyed visiting with Sanders when Sanders called upon him. Letter from Stephen Field to Wilbur F. Sanders, Jan. 19, 1897, (Sanders File, Montana Historical Society, Box 2, Folder 2-15). Sanders and Stephen Field had had previous contacts, including in 1892 when Sanders, then a United States Senator, repudiated charges made by his fellow Montana Republican and the other Senator from Montana, T.C. Power, that Justice Field was a lobbyist for the Union Pacific Railroad. Power had cited Sanders as authority for the charges, apparently without Sanders' knowledge. Power, Field and Sanders, WEEkly Missoulian, Feb. 3, 1892, at 2 (A misprint on the masthead incorrectly identifies the issue as that of Jan. 20, 1892, at 2.).
247. 8 REPORT OF THE AMERICAN BAR ASSOCIATION, at 81 (1885) (noting a com-
1890s, he played an active role in Republican politics in the 1860s and 1870s, as did Wade and Sanders.

Although the Codes' proponents claimed Field's authorship as an advantage, no trace of David Dudley Field's "abiding interest" or activity on behalf of the Montana Codes appears in any of the Montana press accounts, in Decius Wade's account, or in either Wade's or Sanders' surviving papers. Sanders' comments to Stephen may have simply been idle compliments for the recently deceased David, but I believe they indicate that Sanders, and by association with him, the other Montana Code advocates, knew of the extensive opposition to the Codes in New York. David was undeniably frustrated by New York's failure to adopt his work; for him to have failed to comment on his frustration to anyone with whom he discussed codification during the 1880s and 1890s would have been unlikely. That the Montana codifiers never mentioned the New York opponents' arguments, even to rebut them, suggests an unwillingness to confront the reasons why codification might have been less beneficial than they portrayed it.

The almost complete lack of opposition, and the legislature's tripartisan support for the Codes, suggest that all of the state's interests, from mining to livestock, and from corporations to labor, either supported the Codes or at least were indifferent to their passage. Such unanimity was rare in Montana

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248. Wade had strong family ties to the Republican party (ties that probably contributed significantly to his rise from probate judge in Ashtabula, Ohio to Territorial Supreme Court Chief Justice in Montana). His uncle Benjamin Franklin Wade was a Whig and then Republican Senator from Ohio between 1851 and 1869. Another relative, Edward Wade, was a Republican Congressman from Ohio from 1853 to 1861. OHIO BIOGRAPHICAL DICTIONARY 329-30 (1986).

249. See, e.g., They Want The Codes, DAILY INDEPENDENT (Helena), Jan. 22, 1895, at 6 and Leslie's Message, DAILY INDEPENDENT (Helena), January 16, 1889 at 1, 2 ("David Dudley Field, whose able and persistent efforts were begun in 1839, is entitled to the credit for [creating the codes] . . . ").

250. In addition to the Wade and Sanders papers in the Montana Historical Society library, I also examined the Wade family papers in the Western Reserve Historical Society Library in Cleveland, Ohio, where some of Wade's family papers are archived. (Wade was originally from Ashtabula, Ohio and returned there in the 1890s).

251. FIELD, supra note 26, at 332 (quoting David Dudley Field: "It is a hard thing to bear, after all I have done.").

252. The occasional complaint of the Great Falls Daily Tribune was made exceptional by the absence of any other voices joined with it.
politics and is all the more startling due to the sweeping nature of the changes. One of the surprising features of the Codes' adoption in Montana was how little it took to accomplish such changes. A small group that found codification attractive pushed it through with almost no public debate.

The reasons Montana adopted the Codes are complex. The vision of a modern legal system that the Codes offered undoubtedly seduced some members as a chance for Montana to sweep to the forefront of legal reform and claim her rightful place as a modern state. Appeals to state pride (combined with assurances that the Codes simply rationalized existing law) probably persuaded the majority of Montanans (and legislators) unaware of the Codes' actual provisions at a time when Montana was literally putting itself on the map. Others, particularly the lawyers, may have been determined to end the confusion caused by the scattered statutes. Montana's Bar had far less interest in maintaining the legal status quo than did the elements of the New York Bar that opposed codification. Not only were

253. See, e.g., Word, supra note 93; Keith, supra note 137.
254. Contemporaries often referred to the Codes in these terms. See, e.g., C.P. Connolly, Three Lawyers of Montana, 14 MAG. OF W. HIST. 59, 61 (1891) (When Codes are done they "will be pronounced equal to that of any State in the Union."); The Bar Association, DAILY INDEPENDENT (Helena), Jan. 5, 1893 at 8 (passage of the Codes would be a "crowning glory" to members of the association who had worked for passage); Leslie's Message, DAILY INDEPENDENT (Helena), Jan. 16, 1889, at 1, 2 (governor calls for codification because statute law "is not up to the standard of progress which characterizes the policy and jurisprudence of the most advanced and enlightened states."); Decius S. Wade, 1880-1894, supra note 88, at 671:

If Montana would rescue the benign common law from the chaos of the reports and the oblivion and obscurity of too many books, and extract therefrom all of the principles which a thousand years has developed and brought to light, reduce them to form and classify and arrange them without repetition, contradiction and confusion, then our noble commonwealth will have accomplished something for American jurisprudence and the rational administration of human justice.

There is some indication that a general feeling that civil law systems were more modern than common law systems was present in Montana as well. An editorial in the Daily Independent, for example, labelled common law water rights systems as "burdened at the very outset by the influence of feudal prejudices and privileges" while calling the civil law water rights system "promulgated by the greatest minds of ancient times." Water Rights, DAILY INDEPENDENT (Helena), Jan. 14, 1895, at 4. Although the codes had lost much of the civil law character Field had attempted to give them, notably their sections displacing the common law, such subtleties probably escaped the average lay person. The president of the Montana Bar Association in his address on codification in January 1895 asserted, quite erroneously, that codification of the common law "is the tendency" in the United States, implying the forces of history would eventually bring about codification. It Is Indifference, DAILY INDEPENDENT (Helena), Jan. 14, 1895, at 5.
Montana's statutes and laws in worse shape than New York's, but Montana lawyers had invested far less time and effort in mastering the existing law than their New York counterparts.

The Republicans also may have wanted to accomplish something to demonstrate that their control of the Montana's government benefitted the state.\textsuperscript{255} Certainly the new Republican members of the legislature had little stake in preserving the law created by the largely Democratic legislatures of the past, and thus less reason to worry whether the Codes' proponents' assurances that the Codes preserved prior law were true.

Another explanation, inspired by public choice analyses of the 1986 Federal tax reform,\textsuperscript{256} might be the opportunity the Codes offered the legislators to provide services to their constituents' interests. Not only did the massive, simultaneous adoption of the laws offer opportunities for slipping in unnoticed changes in the law, as Senator Leonard did,\textsuperscript{257} but the creation of such an enormous body of law also produced an endless need for amendments and future changes. By enacting a comprehensive framework of rules, even if the particular rules were incorrect, the Fourth Legislature created demand for the services of future legislatures.

\textsuperscript{255} The Codes proved an ineffective barrier to the "white" (pro-silver) tidal wave of 1896 which swept many of the Republicans from office, however. See infra notes 259-62 and accompanying text.

\textsuperscript{256} See Milton Friedman, Tax Reform Lets Politicians Look for New Donors, WALL ST. J., July 7, 1986:

[The pre-1986] tax space was overcrowded with loopholes. There was no room to add any more without destroying the tax base altogether. In a last-ditch effort to preserve tax reform, Senator Bob Packwood made his now famous radical proposal—cut tax rates drastically and simultaneously eliminate most tax shelters. The rest is history. Whether he realized it or not, Senator Packwood's approach was an ingenious solution to the potential collapse of tax reform as a source of campaign funds. His bill disappoints almost all the lobbyists in one fell swoop, but it also wipes the slate clean, thereby providing space for the tax reform cycle to start over again.

\textsc{William C. Mitchell \& Randy T. Simmons, Beyond Politics} at 58 (1994):

Congressional politicians have in effect wiped the slate clean so that they may once more "auction" off tax exemptions and other privileges. The marginal value of the thousands of exemptions and loopholes had decreased enormously over the years; with fewer loopholes, their value increases sharply to the advantage of members of Congress, especially those on the tax committees. At the same time, the worth of tax lobbyists has also increased since they are the experts in obtaining a renewal of old loopholes. See also Richard L. Doernburg \& Fred S. McChesney, \textit{On the Accelerating Rate and Decreasing Durability of Tax Reform}, 71 MINN. L. REV. 913 (1987) (describing creation of demand for congressional services in tax legislation).

\textsuperscript{257} See supra note 182 and accompanying text.
Amending the Codes also created more immediate opportunities for providing services. Because the format of bills amending the Codes made for obscure titles ("An act amending section XXX of the Political Code"), public scrutiny of legislative activity became more difficult. Together with the sheer number of bills, this reduced scrutiny from the public and the press.

Regardless of the motivation, the implementation of the reforms left a great deal to be desired. Enacted without public debate or adequate legislative consideration, the Codes made far reaching and often ill-considered changes in Montana's legal system.

E. The Fifth Legislature: "we are governed too much."

But the end came at last and Montana's legislative body passed out of existence unwept and unmourned and the people of the

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258. Consider, for example, a bill introduced in the 1897 legislature, the notice for which stated "To amend part three, title 10, chapter 13, article two of the political code, relating to licenses, by adding a section to be known as and numbered section 4084." Called Down Hard, DAILY INDEPENDENT (Helena), Jan. 26, 1897, at 5. Just what this bill contained would be unknowable to all but those able to procure both the Political Code and the bill itself. Even worse, consider a bill offered by Senator Stanton of Cascade, the notice for which read: "To amend sections 4733, 4740, 4741, 4743, 4748, 4752, 4754, 4756, 4762, 4768, 4780, 4781, 4784, 4786, 4789, 4816, 4911, 4912 and 4913 of the political code, relating to municipal elections; also to amend sections 4805, 4807, 4808, 4809, 4811, 4812, 4813, 4865, 4874 and 4900 of the political code, relating to ordinance and municipal affairs." Had One Test Vote, DAILY INDEPENDENT (Helena), Jan. 28, 1897, at 5, 6.

259. My review of the major newspapers between 1889 and 1897 convinces me that Montana's press was hardly a vigorous watch dog. It did, however, regularly print the text of important bills and there was extensive debate over some issues. A typical report of Code amendments in the Fourth Legislature was this one from the Helena Daily Independent: "A number of other bills amendatory of the codes were also favorably acted upon." Must Come In Now, DAILY INDEPENDENT (Helena), Mar. 7, 1895, at 5.

The effect of such reporting did not go unnoticed in the Legislature. Rep. Monteath complained about the number of bills which simply referred to the Codes, making them unintelligible to the vast majority of Montanans who were without copies of the Codes. Its Seventh Week, DAILY INDEPENDENT (Helena), Feb. 18, 1895, at 5. Review of subsequent reports of bills introduced suggested the practice continued despite Monteath's complaints. The passage of the Codes themselves drew little attention in some papers. The Daily Missoulian, for example, limited its coverage of passage in the house to a single sentence. The State Solons, DAILY MISSOULIAN, Jan. 25, 1895, at 1.

260. The quote is from Governor Smith's annual message. Governor Smith to Montana Law-Makers, HELENA DAILY HERALD, Jan. 5, 1897, at 7.
state breath a sigh of relief that [the legislature] had done no worse than pass necessary appropriation bills with numerous measures amendatory of the codes.  

*Helena Daily Herald*

The Codes’ passage was insufficient to enable the Montana Republicans to retain control of the governor’s office or legislature in the 1896 “white tide” of silver politics.  

A Democratic-Populist “fusion” candidate won the governorship in 1896 with an unprecedented 21,000 vote majority. Republicans lost thirty-six seats in the House and two in the Senate as well as the governorship; they were saved from greater losses in the Senate only by the limited number of upper house seats up for election in 1896. The new House contained only three members with any legislative experience and none from the previous session.

New Governor Robert B. Smith’s first annual message counseled restraint with respect to fixing the Codes:

> I am disposed to advocate that policy which will as far as possible maintain the permanency and stability of our law; I believe the great trouble with the world is a tendency to change and alter the laws too rapidly. Instead of not being governed enough I fear we are governed too much; therefore where the

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261. *In Retrospect*, HELENA DAILY HERALD, Mar. 6, 1897, at 8.
262. *Montana’s Resources Ably Pictured*, HELENA DAILY HERALD, Jan. 13, 1897, at 2. (“Like all the silver states, Montana went ‘white’ with a vengeance last November.”) “White” signified silver as opposed to gold. See also RAYMER, supra note 112, at 386-87.
264. Figures for the Fourth Legislative Assembly from Senator Makers, HELENA DAILY HERALD, Nov. 21, 1894, at 5. The Fifth Legislature had forty-four Democrats, sixteen Populists, and eight Republicans in the House and nine Democrats, three Populists, and eleven Republicans in the Senate. *Montana’s Resources Ably Pictured*, HELENA DAILY HERALD, Jan. 13, 1897, at 2.
266. *Work of the Week*, DAILY INDEPENDENT (Helena), Jan. 11, 1897, at 5; *Above Average Age*, DAILY INDEPENDENT (Helena), Feb. 15, 1897, at 1. (One House member from the Fourth Legislature was elected as a member of the Senate in the Fifth). The new legislature was also a quieter group than the Fourth Legislature. *Is A Quiet Session*, DAILY INDEPENDENT (Helena), Jan. 11, 1897 at 8 (“The members are sedate and economical in their own affairs. The hotel bar rooms do not know them as they did of yore. They retire earlier to their homes, and, all in all, behave more like a man would in the city where he was born and brought up and where his reputation was worth a few dollars to him . . . .The last session would have been a shock to the community if it had met in Butte.”).
laws in the codes are not too conflicting or erroneous, leave them. We would better endure some inconvenience in the law and have it fixed and certain than to be in ignorance of the law by reason of its manifold changes and uncertainties.  

The Governor explicitly called for six changes: reform of the fellow servant rule, amendment of the attachment law, repeal of the probate provisions allowing the living to testify concerning contracts and conversations with the deceased, revision of the municipal incorporation provisions, changes in the school tax collection law, and clarification of rules governing corporations. Other groups sought changes as well, including the Bar Association, city officials, and livestock interests. The Helena Daily Independent greeted the election results with the note that “[m]any amendments to the codes are wanted, to repair omissions and defects, some clerical and some otherwise.”

Despite the predictions at the end of the Fourth Legislature that many provisions would require amendment, the Fifth Legislature accomplished few major changes in the Codes. The only major changes to the Codes were gambling prohibition.

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268. This change was required by a court decision striking the previous law rather than because of a flaw in the Codes. For Railway Employees, DAILY INDEPENDENT (Helena), Feb. 9, 1897, at 6.
269. Id.
270. See Montana Lawyers Meet, DAILY INDEPENDENT (Helena), Jan. 11, 1897, at 6 (an important issue at meeting was proper form for amendments); Lawyers Meet To-day, DAILY INDEPENDENT (Helena), Jan. 12, 1897, at 5 (invitation to members to suggest “amendments and corrections to the codes”); People Make Laws, DAILY INDEPENDENT (Helena), Jan. 12, 1897, at 5 (describing bills introduced which “lawyers have contended for during some time past”); Many Lawyers Came, DAILY INDEPENDENT (Helena), Jan. 13, 1897, at 1 (describing problems identified by the Bar Association meeting); and Poor Lo’s Honesty, DAILY INDEPENDENT (Helena), Feb. 2, 1897, at 5 (describing bills introduced at the request of the Bar Association).
271. From Nine Towns, DAILY INDEPENDENT (Helena), Jan. 12, 1897, at 6 (describing meeting to correct “many defects” found in Codes); Powers of Cities, DAILY INDEPENDENT (Helena), Feb. 18, 1897, at 8 (describing bills introduced to correct problems identified by cities.)
272. See Is A Quiet Session, DAILY INDEPENDENT (Helena), Jan. 11, 1897, at 8 (describing bills sought to benefit stockmen whose animals were killed by trains.)
273. Work for the New Legislature, DAILY INDEPENDENT (Helena), Nov. 24, 1896, at 2. Not everyone thought the legislature would be busy. The Daily Independent reported that a “Helena correspondent of a Butte paper Tuesday wrote that there was very little business to engage the attention of the legislature at its coming session.”
274. See Extra Session, HELENA DAILY HERALD, Mar. 14, 1895, at 8.
275. The discussion of the anti-gambling measure took up a great deal of time
fish and game law revision, increased penalties for livestock and horse theft, correction of some errors regarding cities, and restoration of prior law concerning some aspects of mining.

and energy. See Pass the Bill, HELENA DAILY HERALD, Mar. 4, 1897, at 8. Some claims were made that at least one member had been bribed in connection with the bill. That Gambling Bill, DAILY MISSOULIAN, Feb. 27, 1897, at 2 (editorial). No investigation occurred and the issue received little press attention. In an example of the lack of care with which legislation was drafted, the sponsor of the anti-gambling bill admitted he did not know what one of the games the bill banned was. He had merely copied the bill from a law in Missouri and so when asked “How do you play it?” he replied “Now you've got me[,] I don't know anything about it. But if it is unlawful to play it in Missouri it ought to be made unlawful here.” Has Plenty to Do, DAILY INDEPENDENT (Helena), Jan. 25, 1897, at 8.

276. A complete replacement of the code sections on fish and game was proposed, with the sponsor arguing “[t]he fish and game laws of the codes as they stand now are so mixed that no one but a lawyer can tell which one is in force and effect.” Fish and Game, HELENA DAILY HERALD, Jan. 22, 1897, at 8. Among the changes made were increases in the size of mesh required for fishing nets and restrictions on dynamiting fish. Id. An example of problems with the Code sections on this was the requirement that fish screens be in place between September and March on all irrigation ditches, a time when Montana weather prevented significant irrigation. The new bill changed the requirement to March to August. New Game Law, HELENA DAILY HERALD, Jan. 26, 1897, at 2. The agricultural lobby succeeded in having the requirement stricken entirely. State Legislature, DAILY MISSOULIAN, Feb. 20, 1897, at 1. See also Scrap About Scrip, DAILY INDEPENDENT (Helena), Feb. 20, 1897, at 5 (describing agricultural interests' opposition to screen requirement.)

The confusion in the fish and game laws stemmed from the manner in which the Codes were adapted to the acts of prior Legislatures. A general rule that the laws of the assemblies which had met since the Codes were drafted took precedence over the Code provisions, except where the Code provisions were amended during the Fourth Legislature. This led to the combination of some Code provisions and an 1893 fish and game law, with other Code provisions dropped. See As the Law Stands, DAILY INDEPENDENT (Helena), Mar. 25, 1895, at 6.

A similar argument that the Codes were confused and contradictory was made concerning the Code provisions on the selling of timber from state lands, prompting a bill to amend those sections. Important Bills, HELENA DAILY HERALD, Feb. 3, 1897, at 5.

277. The Codes had made horse and cattle theft petit larceny by restricting grand larceny to cases where property was taken from the person of another or exceed $50 in value. 1895 Penal Code §§ 883-884. Horse and cattle theft had previously been grand larceny and punishable by fines of $100 to $500 and imprisonment for one to fourteen years. REVISED STATUTES OF MONTANA (1879), 4th Division, § 72. The bill introduced made thefts of various listed animals grand larceny, thus returning the punishments to the prior ranges. For Cattle Stealing, HELENA DAILY HERALD, Jan. 9, 1897, at 8. REVISED CODES OF MONTANA (1907), Penal Code § 8645.

278. Reform of § 4800 of the Political Code governing licenses was a major goal of Montana city officials. From Nine Towns, DAILY INDEPENDENT (Helena), Jan. 12, 1897, at 6.

279. Excited Members, HELENA DAILY HERALD, Feb. 17, 1897, at 8 (In offering a bill, the Senate Judiciary Committee reported “the substitute offered is an exact copy of the law previous to the adoption of the codes and had been the law of Montana since January 14, 1872, and seems to have been operated satisfactorily. The Code
The Fifth Legislature was too distracted by the opportunities for Democratic and Populist patronage\(^2^8^0\) (earlier vows to reform the government notwithstanding\(^2^8^1\)), women's suffrage,\(^2^8^2\) a Populist attempt to institute an initiative and referendum law,\(^2^8^3\) the endless series of county division bills,\(^2^8^4\) an

law on this subject has been fruitful of law suits and has certainly been far from satisfactory to a large number of people interested in mines and mining\(\). The provision was eventually fixed in 1899. REVISED CODES OF MONTANA (1907), Code of Civil Procedure, § 6499.

280. See, e.g., Majority Rules, HELENA DAILY HERALD, Jan. 8, 1897, at 8 (discussion of appointment of clerks for committees by committee majority rather than by chair); No More Economy, HELENA DAILY HERALD, Jan. 12, 1897, at 5 ($57,000 appropriation for legislative pay and expenses passed without proper procedures); No More Pages, HELENA DAILY HERALD, Jan. 21, 1897, at 5 (hiring of two additional pages narrowly defeated); Two More Clerks, HELENA DAILY HERALD, Jan. 30, 1897, at 1 (House "kicks over the traces of the retrenchment policy" and hires more staff); and Inconsistency, HELENA DAILY HERALD, Feb. 27, 1897, at 5 (describing attempts to raise salaries of allies of various parties); The Fifth Assembly, DAILY MISSOULIAN, Mar. 5, 1897, at 2 (recounting declining enthusiasm for salary reduction and office elimination as session wore on). The Fifth Legislature was not without problems with clerks, although it seems to have been more prompt at discharging those who did nothing. It Was Ladies' Day, DAILY INDEPENDENT (Helena), Feb. 10, 1897, at 1, 6 (recounting discharge of clerk for doing nothing).

281. The opening days of the session found numerous cries for reduction of salaries for legislative employees and state and county officials. See, e.g., To Cut Salaries, HELENA DAILY HERALD, Jan. 6, 1897, at 5. Enthusiasm for these measures declined during the session. The Fifth Assembly, DAILY MISSOULIAN, Mar. 5, 1897, at 2. The salary bill which had passed both houses was apparently "lost" and so never signed. Where Is That Bill?, DAILY MISSOULIAN, Mar. 8, 1897, at 1.


283. Elliot's I & R Bill, HELENA DAILY HERALD, Jan. 13, 1897, at 3; A Populistic Measure, DAILY MISSOULIAN, Jan. 16, 1897, at 1 (printing text of bill). Debate over the bill took three days of legislative time in the House. Looking Both Ways, DAILY INDEPENDENT (Helena), Feb. 1, 1897, at 5. Although the initiative and referendum amendment failed in this session, With a Vim, HELENA DAILY HERALD, Jan. 28, 1897, at 5, Montana eventually adopted provisions similar to it. 1899 MONT. CONST. art. V, § 1 (amended 1905). Ironically, one of the arguments against the initiative and referendum measure in 1897 was that Montana should wait for other states to experiment with such legislation. Debate Was Warm, DAILY INDEPENDENT (Helena), Jan. 27, 1897, at 5.

284. County division seems to have been a state sport in late nineteenth century Montana. The Fifth Legislature considered bills to enlarge Cascade County (out of Meagher and Chouteau counties), Cascade County, HELENA DAILY HERALD, Jan. 16, 1897, at 8, establish Rosebud County (out of Custer county), New County Bills, HELENA DAILY HERALD, Jan. 9, 1897, at 5, enlarge Lewis and Clark County (out of Meagher and Jefferson counties), Penwell's Bill, HELENA DAILY HERALD, Jan. 19, 1897, at 2, create Broadwater County (out of Deer Lodge county), New County Bills, HELENA DAILY HERALD, Jan. 9, 1897, at 5, create Powell County (out of Deer Lodge county), Powell County, HELENA DAILY HERALD, Jan. 22, 1897 at 8. The Broadwater County bill had been previously introduced in 1885, 1891, 1893, and 1895. Twelve Years Old, DAILY INDEPENDENT (Helena), Feb. 1, 1897, at 8.
eight-hour law for workers on state buildings, attempts to restrict Native Americans to their reservations, and scandals involving bribery in the House and the commission charged with constructing the state capitol building to contemplate extensive revision of the Codes. Although a host of amendments to the Codes were among the 464 bills introduced in the Senate and House, most ended the session in the clerk's pigeonhole for unfinished business. As the Helena Daily Independent

Although often cloaked in language about relative distances between county seats, road quality, and natural patterns of trade, political motives also played a role as well. See, e.g., Lo, Poor Indian, HELENA DAILY HERALD, Jan. 30, 1897, at 1 (Populist member arguing creating new county is means to increase anti-worker representation in the legislature in connection with Broadwater county bill); A Big Political Deal, DAILY MISSOULIAN, Feb. 9, 1897, at 1, 4 (alleging deal between Populists and Democrats to give Populists the Butte mayoralty in exchange for votes on Powell county bill). The Weekly Missoulian had joked about the number of county division bills in the 1893 legislature, claiming that the “144th” county division bill had been introduced to create Missoula County out of all territory not appropriated to other counties.


286. Livestock interests sought the restrictions, enforceable by criminal penalties, arguing that the Native Americans killed livestock, set fires to the range, killed cowboys, and stole when off the reservations. Lo, Poor Indian, HELENA DAILY HERALD, Jan. 30, 1897, at 1. To their credit some members of the Legislature opposed the bill as an infringement of freedom. See, e.g., Id., (Populist member argues measure would lead to similar measures against working people) and The Indian Bill, HELENA DAILY HERALD, Feb. 2, 1897, at 3 (Democratic member arguing Native Americans have as much right on public range as the white man and Populist argues for Constitutional right of all to go where they please). The bill died in the Senate.

287. See Most Sensational, HELENA DAILY HERALD, Mar. 5, 1897, at 3, 6, 7; Expelled Him, HELENA DAILY HERALD, Mar. 5, 1897, at 8. In sworn testimony, Representative Martin Buckley claimed he had found, on numerous occasions, cash in his room, left for him to give “to the boys to spend.” Most Sensational, supra, at 1. Although he later claimed to have been drunk during his testimony and attempting to “josh” the investigating committee, Buckley was expelled. Expelled Him, supra, at 8.

288. See Bad Management and Rank Fraud, HELENA DAILY HERALD, Feb. 23, 1897, at 1, 4, 5; What They Said, HELENA DAILY HERALD, Feb. 24, 1897, at 1, 3; One Man's Report, HELENA DAILY HERALD, Feb. 24, 1897, at 8; The End Not Yet, HELENA DAILY HERALD, Mar. 4, 1897, at 3, 7; Whiteside Again, HELENA DAILY HERALD, Mar. 5, 1897 at 5. The scandal involved charges by Rep. Whiteside that $50,000 of state money was committed to pay an unqualified individual for incomplete plans. Whiteside's charges were made in a minority report of an investigating committee and caused an uproar. When Whiteside had difficulty in proving his claims of bribery and misdeeds, he claimed that he had been offered bribes to suppress his report. Whiteside Again, supra. Ultimately, no action was taken by the Legislature on the matter.

289. In Retrospect, HELENA DAILY HERALD, Mar. 6, 1897, at 8 (334 bills were introduced in the House and 130 were introduced in the Senate). By comparison, in the Third Legislature in 1893, there were 292 bills, 223 in the House and 69 in the Senate. After Sixty Long Days, DAILY INDEPENDENT (Helena), Mar. 3, 1893, at 5.

290. This was undoubtedly a good thing in some cases—one member was report-
noted at the end of the session, the codes were "not altogether straight yet."\textsuperscript{291}

Many of those amendments cast doubt on the thoroughness of the initial code commission's work. For example, a bill to adopt a California law governing sheep grazing was introduced,\textsuperscript{292} somewhat surprisingly in light of the Codes' California roots. A tax on livestock funded bounties for wolves and coyotes,\textsuperscript{293} suggesting inadequate consideration during codification for an area critical to livestock interests. Similarly, bills were introduced to restore pre-code law on penal labor\textsuperscript{294} and mining law,\textsuperscript{295} again suggesting a lack of thoroughness in adapting the Codes to Montana's existing legal system. The same carelessness was apparent in the list of problems the Bar Association sought to remedy: "the lack of necessity for a reply; no limitations on life of judgments; inability to take depositions where the defendant had not appeared; absence of inhibition against a party testifying against the representative of a deceased party; lack of provisions to enforce collection of rents by execution purchases and many others."\textsuperscript{296}

Legislators also introduced a bevy of technical amendments. For example, a clerical error in 1895 was blamed for raising the

\textsuperscript{291} Takes Them All In, DAILY INDEPENDENT (Helena), Apr. 20, 1897, at 5.

\textsuperscript{292} For Ranchers, HELENA DAILY HERALD, Feb. 2, 1897, at 5 (sponsor states "This bill is copied from the statutes of California, where it has been in effect for many years and apparently has been considered good law.")

\textsuperscript{293} Important Bills, HELENA DAILY HERALD, Feb. 3, 1897, at 7.

\textsuperscript{294} Important Bills, HELENA DAILY HERALD, Feb. 3, 1897, at 5 (Sponsor argues "My bill is only a copy of the old law with the added clause that convict labor may be allowed outside prison walls . . . ") Text of measure given in Important Bills, HELENA DAILY HERALD, Feb. 4, 1897, at 2.

\textsuperscript{295} A number of amendments to the code provisions relating to mining were proposed: S.B. 31 amended section 4635 of the Political Code to reduce fees for filing and recording locations of placer and quartz claims, mill sites, and appropriation of water from $2 and $1 to $1 and twenty-five cents respectively. The Senate, HELENA DAILY HERALD, Jan. 21, 1897, at 5. The bill did not pass.

\textsuperscript{296} Col. Botkin President, HELENA DAILY HERALD, Jan. 13, 1897, at 5.
payment to county sheriffs from forty to fifty cents per day for boarding prisoners in jails. In the same vein, a bill was introduced to resolve a conflict between the state constitution and the Political Code concerning when county commissioners took office. The content and brevity of press reports describing the host of bills to amend the Codes suggest that there were many instances of minor problems with code changes to Montana law. Despite the near universal agreement before passage that the Codes required substantial improvement to meet Montana's needs, the Fourth and Fifth Legislatures made few changes, of either a major or minor character. Abundant evidence supports the accuracy of the pre-passage view of the need for amendments. Errors in fish and game laws, mining, and livestock related provisions suggest a failure to adapt the Codes

297. Raised by A Clerk, DAILY INDEPENDENT (Helena), Mar. 16, 1895, at 8; Prisoners' Board, HELENA DAILY HERALD, Jan. 13, 1897, at 5. The Codes had altered a great number of financing arrangements. For example, section 2389 of the Political Code reserved all fees collected by the Secretary of State and ten percent of all fees collected by the clerk of the Supreme Court for the state law library, producing more than $10,000 annually, far more than Governor Smith thought necessary. Communications, HELENA DAILY HERALD, Jan. 14, 1897, at 8 (relating message from governor requesting revision of the section.)

A similar error occurred in setting mileage and per diem pay for members of the legislature. The code set these at the amounts the Montana Constitution provided for the First Legislature while a later bill passed by the Fourth Legislature halved the mileage allowance. Rosebud County, HELENA DAILY HERALD, Feb. 4, 1897, at 8. Apparently the later statute was not properly added to the Codes, and the members of the Fifth Legislature collected the additional moneys before the error was discovered. Id. Eventually it was determined that the holdover members of the Senate were entitled to the higher amount but not the newly elected members. Mileage Question, HELENA DAILY HERALD, Feb. 9, 1897, at 5.

298. County Commissioners, HELENA DAILY HERALD, Jan. 13, 1897, at 3 (bill introduced to amend constitution to resolve issue).

299. See, e.g., No More Economy, HELENA DAILY HERALD, Jan. 12, 1897, at 5. There are numerous such reports. The brevity of the description suggests an editorial judgment of a lack of importance since the Herald, for example, routinely printed the full text of bills. Among the bills reported introduced in the week of January 11-16, 1897 (the first full week of legislative consideration of bills), for example, there were thirty-seven bills introduced in the House, sixteen of which were described in a manner suggesting they were minor amendments to the Codes. Unfortunately the Fifth Legislature's practice of not printing House bills unless they were recommended by a committee for adoption, The First Stir, HELENA DAILY HERALD, Jan. 8, 1897, at 2, and the sketchy nature of nineteenth century legislative records prevents a more complete analysis.

The Codes' size surfaced as an argument against the populist initiative and referendum bill, with Helena Daily Herald asking "How would you referee the laws passed by the legislature of 1895, consisting of 2000 pages, 16,539 sections, and numerous chapters and titles—as a whole, by codes, titles, chapters, pages or sections?" Answer—No Evasion, HELENA DAILY HERALD, Jan. 5, 1897, at 4 (editorial).

300. See HELENA DAILY HERALD, supra note 157 at 1.
even in areas critically important to Montana's economy. Montanans had welcomed the Codes as a clarifying measure, as an end to the confusion of the pre-code statutes, as a means by which the ordinary citizen would understand the law, and as a modernizing mechanism. By the end of the Fifth Legislature, evidence cast doubt on the Codes' success in any of these areas.301

F. Is Montana New York?

New York and its methods are not to be reconciled with the plains of Montana, nor can the one understand the other.302

How reasonable was reliance on the New York Field Codes as filtered through Dakota and California? Montana differed significantly from the source states. The economies differed in scale and composition, the populations differed in size and distribution. Because Montana and the source states were not similar, the problems a set of Codes would need to address would often differ. Even when the problems did not differ, the societal dissimilarities would often dictate different answers.

Table 1303 contains a number of measures of Montana's, California's, and New York's economies in the time periods roughly contemporaneous with the drafting of the Codes in each state. Table 2304 gives greater detail on the composition of California's and Montana's economies at the relevant times. Table 3305 gives demographic data.

301. One example of the lack of clarity induced by the Codes concerned the power of county boards of commissioners with respect to the employment of deputies. "In some counties the question has caused a vast amount of argument between the commissioners and county officials resiting [sic], in a number of instances, in serious ructions between them." Power of Boards, DAILY INDEPENDENT (Helena), Mar. 6, 1897, at 5.

302. Hill Cattle Corp. v. Killhorn, 79 Mont. 327, 337, 256 P. 497, 501 (1927) (statement of defense counsel). The argument concerned whether Montanans had to fulfill their contracts in the same way as New Yorkers rather than the Field Codes, but the sentiment carries over.

303. Reliable data from the nineteenth century of any sort is difficult to come by. These data are from SIMON KUZNETS ET AL., POPULATION Redistribution AND Economic Growth, United States, 1870-1950 93-94, 129-31 (1960) (This data compiled from Tables A 2-8, A 3-5, A 3-6, and A 3-7. They are for the census years closest to the drafting or adoption of the codes (1870 for California and New York and 1890 and 1900 for Montana.)

304. EVERETT S. LEE ET. AL., POPULATION Redistribution AND Economic Growth, United States, 1870-1950 623, 627-28 (1957) This data derived from Table L-5.

305. HOPE T. ELDREDGE & DORTHY S. THOMAS, POPULATION Redistribution AND
Table 1: Economic Statistics

<table>
<thead>
<tr>
<th>Category relative to United States average (U.S. = 100)</th>
<th>California (year)</th>
<th>New York (year)</th>
<th>Montana (year)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Percent labor force in mining</td>
<td>690 (1880)</td>
<td>16 (1880)</td>
<td>727 (1890)</td>
</tr>
<tr>
<td>Percent labor force in manufacturing</td>
<td>83 (1880)</td>
<td>165 (1880)</td>
<td>60 (1900)</td>
</tr>
<tr>
<td>Relative wages per $1,000 value added</td>
<td>96 (1869)</td>
<td>96 (1869)</td>
<td>115 (1889)</td>
</tr>
<tr>
<td>Relative value added per capita</td>
<td>106 (1869)</td>
<td>172 (1869)</td>
<td>66 (1889)</td>
</tr>
<tr>
<td>Relative wages per wage earner</td>
<td>137 (1869)</td>
<td>107 (1869)</td>
<td>158 (1889)</td>
</tr>
</tbody>
</table>

Table 2: Workforce by Industry

<table>
<thead>
<tr>
<th></th>
<th>New York 1880</th>
<th>California 1880</th>
<th>Montana 1900</th>
</tr>
</thead>
<tbody>
<tr>
<td>All industries</td>
<td>1,884,600</td>
<td>376,500</td>
<td>114,800</td>
</tr>
<tr>
<td>Agriculture</td>
<td>433,400 (23%)</td>
<td>94,900 (25%)</td>
<td>31,100 (27%)</td>
</tr>
<tr>
<td>Forestry &amp; Fisheries</td>
<td>3,800 (0.2%)</td>
<td>3,000 (0.1%)</td>
<td>—</td>
</tr>
<tr>
<td>Mining</td>
<td>5,800 (0.3%)</td>
<td>49,300 (13%)</td>
<td>21,700 (20%)</td>
</tr>
<tr>
<td>Construction</td>
<td>149,700 (8%)</td>
<td>28,900 (8%)</td>
<td>6,100 (5%)</td>
</tr>
<tr>
<td>Manufacturing</td>
<td>419,300 (22%)</td>
<td>42,400 (11%)</td>
<td>10,100 (9%)</td>
</tr>
<tr>
<td>Transportation</td>
<td>135,600 (7%)</td>
<td>26,600 (7%)</td>
<td>15,400 (13%)</td>
</tr>
<tr>
<td>Trade, finance</td>
<td>322,400 (17%)</td>
<td>55,800 (15%)</td>
<td>12,700 (11%)</td>
</tr>
<tr>
<td>Services &amp; public administration</td>
<td>411,300 (22%)</td>
<td>75,200 (20%)</td>
<td>17,000 (15%)</td>
</tr>
</tbody>
</table>

As these tables demonstrate, Montana, California, and New York, at the times of the Codes' debate in each, differed strikingly in economic and demographic characteristics. Not only were California's and New York's economies much larger on an absolute scale, but they had much larger trade and manufacturing...
sectors. Montana also had a high wage sector in its economy, reflecting both the relative scarcity of labor and the high rewards possible in the dominant mining sector.

Table 3: Demographic Characteristics

<table>
<thead>
<tr>
<th></th>
<th>California (1870-1880)</th>
<th>New York (1870-1880)</th>
<th>Montana (1890-1900)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Natural increase</td>
<td>119,000</td>
<td>614,000</td>
<td>25,000</td>
</tr>
<tr>
<td>Net migration</td>
<td>149,000</td>
<td>86,000</td>
<td>73,000</td>
</tr>
<tr>
<td>Net migration of foreign born white population</td>
<td>77,000</td>
<td>245,000</td>
<td>27,000</td>
</tr>
<tr>
<td>Rates of net foreign born white migration per 1,000 average population</td>
<td>121</td>
<td>52</td>
<td>155</td>
</tr>
<tr>
<td>Rates of net native white migration per 1,000 average native white population</td>
<td>162</td>
<td>-48</td>
<td>365</td>
</tr>
</tbody>
</table>

The general statistics fail to capture how fully mining and livestock dominated the 1890s Montana economy. In 1896 copper, gold, silver, and coal mining produced roughly fifty-four million dollars of output. Livestock produced about eleven million dollars of revenue in 1896. All other agriculture and manufacturing combined produced less than three million dollars in revenue. The livestock industry shouldered the major burden of funding the state government, constituting forty percent of the total value of assessed property in the state in 1896, compared to five percent for mining interests.

Montana’s demographics in the 1890s also differed sharply from the source states. Montana was much larger geographically than New York (although roughly the same size as California).

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306. See Table 2.
307. See Table 1.
308. Montana’s Resources Ably Pictured, HELENA DAILY HERALD, Jan. 13, 1897, at 2. Copper dominated mining, accounting for over $25 million, silver accounted for $22 million, gold $4.3 million, and coal $4 million. Id.
309. Other agriculture accounted for $1.5 million of revenue. Timber production produced approximately $1 million in revenues, while manufacturing accounted only for $1.2 million. Notable manufacturing included beer, brick, sewer pipes, iron work, cigars, and soap. Montana’s Resources Ably Pictured, HELENA DAILY HERALD, Jan. 13, 1897, at 2.
311. 146,201 square miles compared to 47,645 square miles. BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970 38 (1975).
Its greater size was combined with a much smaller population than either of the two source states. In addition, Montana's population was changing in strikingly different ways from those states. Table 3 shows some indicators of the scope of those changes: Montana was experiencing significantly larger rates of immigration than either of the source states, and its migrant stream was composed of relatively more native whites. Montana, as a state comprised of recent immigrants, also had quite different patterns of land holding than either New York, which had a "quasi-feudal" system of land tenure, or California, which had a long history of settlement and the complication of pre-existing Mexican land titles with which to contend.

Although these are only rough proxies for the differences in the types of legal problems present in the different jurisdictions, these dissimilarities suggest that Montana's legal system faced quite different problems from those that confronted the source states' legal systems. Commerce in California, and particularly in New York, was much more complex than in Montana. Agriculture in both source states was of a completely different character, as were patterns of land holding. Moreover, a small number of mining concerns dominated Montana's economy. Coping with the concentrated political power this economic concentration implied would require quite different laws and governance structures than necessary in a less concentrated economy, such as California's or New York's. The states' legal cultures also differed significantly. Western states had, and still have, far less respect for formalities than New York, a crucial difference when inter-

312. 155,900 square miles. Size is not everything, of course, and Montana's geography is quite different from California's. Id. at 38.
313. Montana's population in 1890 was 143,000; New York's in 1860 was 3,881,000 and in 1880 it was 5,083,000; California's population in 1870 was 560,000. Id. at 25, 30, 32.
314. The data do not include African-Americans as no significant migration of African-Americans into Montana occurred in this period. See LEE, supra note 304, at 168-69 (referring to Table P-1).
315. Natelson, supra note 14, at 90 (noting that much of New York's law on covenants running with the land came from litigation by members of the established families who sought to protect vested interests.)
317. See MICHAEL P. MALONE AND RICHARD B. ROEDER, MONTANA: A HISTORY OF TWO CENTURIES 152-77 (1976), on the dominance of the giant copper companies in this period.
preting statutes.318

Even California, whose economy and demographics during codification were closer to Montana's than New York's ever were, was a quite different society. Montana was virtually empty thirty-five years earlier (except for the Native American presence and whites quickly evicted them from areas whites sought to occupy). California had significant Asian and Hispanic populations and a culture predating annexation to the United States. Montana's population was largely white319 and its culture recently developed. Furthermore, California went directly to statehood (after a brief period of anarchy),320 while Montana languished under federal territorial rule for longer than many new states.321 Additionally, as a largely Democratic territory during a lengthy period of national Republican rule, Montana suffered from an exceptional number of appointees who were out of touch with local views. Laws derived from California and New York would obviously require a great deal of adaptation to meet Montana's needs in the 1890s.

G. Consequences

In some respects, each of the four Codes' stories is similar: In each case a massive restructuring of a portion of the legal system was adopted with little thought. The legislators' willingness to defer to Wade, Sanders, and Booth, who were among the few with some idea of the Codes' substance, is both a tribute to the esteem the legislators held those men and an indication of the legislative system's inability to cope with reform on such a
massive scale. Men who fought bitterly over county boundaries accepted without public protest the complete revamping of the legal system.\(^{322}\)

The consequences of each of four Codes' adoption differ in some respects. Numerous states adopted similar codes of civil procedure,\(^ {323}\) and adoption in Montana, for the most part, modernized Montana practice. The various errors and mistakes in the Civil Practice Code were probably caught relatively quickly through the experience of the trial bar. Because civil procedure codes were the one innovation of Field's adopted by a significant number of states, adopting a procedure code similar to other states' had the advantage of producing ready-made interpretations of the Code's provisions. In addition, since lawyers on the Code Commission and legislative committees revised and reviewed the Code, they were probably in the best position of any group in the state to ensure that the Codes adequately addressed their interests.\(^ {324}\) The involvement of former judges McConnell, Cole, and Wade, as well as the presence of Sanders and other prominent attorneys on the various committees, also made it unlikely that the Civil Procedure Code would significantly diverge for long from the bar's needs.\(^ {325}\) Even if successful at meeting the needs of the bar, however, the Code of Civil Procedure might not have been optimal for the other citizens of Montana. The keen interest of powerful sectors like the livestock industry in the Code's provisions suggests it may not have met other citizens' needs.

The Penal Code, aside from its potential for disrupting the

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\(^{322}\) While it is true that county boundaries could have a direct impact on legislators, through changes in legislative districts, the Codes too had direct impacts on legislators. They were not simply abstract provisions, but immediate changes in laws important to most Montanans.

\(^{323}\) Arizona, California, Colorado, Dakota Territory, Idaho, Indiana, Iowa, Kansas, Minnesota, Missouri, Nebraska, New Mexico, Nevada, North Carolina, Ohio, Oklahoma, South Carolina, Utah, Washington Territory, Wisconsin, and Wyoming all adopted forms of the procedure code. FRIEDMAN, supra note 5, at 343.

\(^{324}\) Montana's lawyers were not, however, unanimously enthusiastic about the Codes. The complaints of the elite lawyers in the Montana Bar Association suggest that many Montana lawyers were apathetic about the Codes. Many Lawyers Came, DAILY INDEPENDENT (Helena), Jan. 13, 1897, at 1 (retiring president of the association complains that "the greater number of our lawyers seem to be indifferent" to "the work of remodelling our laws and the purification of our legal system.")

\(^{325}\) See It Is Indifference, DAILY INDEPENDENT (Helena), Jan. 14, 1895, at 5 (noting that the Code of Civil Procedure had relatively few changes from the existing rules, listing those which would "be welcomed" by the bar in the report of the Montana Bar Association President's speech on the Codes.) There were a significant number of problems in the short run. See supra note 296 and accompanying text.
livestock industry, probably made little difference in the day-to-day life of most Montanans. Again, the bar could correct any egregious errors hampering the judicial system, and the other provisions largely dealt with defining crimes and punishments in a way not radically different from earlier law. With a few exceptions, notably the fish and game laws, this Code probably came closest to the codifiers' ideal of a volume that ordinary citizens could consult to learn the substance of the law. By collecting into a single volume and systematically arranging all the provisions of the criminal law, the Penal Code made the rules easier to find, even if it did little to clarify the rules' substance. As has been true of massive crime bills since, however, it was not enough to solve Montana's crime problems: a Butte crime wave in 1897 brought the report of a new vigilance committee's formation.

The Political Code presented different problems. It significantly changed Montana's state and local government. That alone meant little, as virtually every legislative session resulted in changes, although the extent of the changes made by the Political Code seemed larger. Based on the enormous spoils control of state government offered, and the regular and dramatic changes in partisan control of Montana's state government throughout the 1890s, the Political Code could be seen as just one of many restructurings to benefit friends and punish enemies. To the extent it succeeded in organizing the laws into a coherent framework, it at least served the purpose of making future legislatures' restructurings more convenient. (There is some doubt as to how well it succeeded at even that limited goal.) The Code Commissioners were more ambitious than that, however. They sought to impose their own vision of an appropriate government structure on Montana. The restructuring of municipal salaries and fees, for example, fundamentally altered the nature of local government by reducing the rewards

326. See supra note 276.
327. 3-7-77, Beware!, HELENA DAILY HERALD, Feb. 25, 1897, at 8. Vigilantism played an important role in Montana's early history, and the ubiquitous Wilbur F. Sanders was a leader of the 1866 Vigilance Committee. See THOMAS J. DIMSDALE, THE VIGILANTES OF MONTANA (reprint 1953) (1866) for a first hand account of their activities. "3-7-77" was the 1866 Vigilance Committee's sign, although its significance remains unclear.
328. See, e.g., the comments of M.D. Leehey, a member of the 1897 legislature from Silver Bow County, quoted in Will Be A Busy One, DAILY INDEPENDENT (Helena), Dec. 25, 1896, at 5 (noting the need for amendments to fix "many things" in the Codes, particularly in the Political Code.)
for government service and incentives for particular officials. Except where the Commissioners crossed particularly powerful (and alert) interests like the livestock industry, they largely succeeded. Even if the codifiers’ vision was the correct one for Montana at the time, the adoption of the structure without debate betrayed the principle of self-government. Montana, like many Western states, has a rich heritage of provisions designed to bring government closer to the people. The widespread changes in the Codes deserved public debate.

The Civil Code had the most potential for far-reaching effects. Field’s original intent was to displace the common law. The provisions seeking to create a United States version of the Code Napoléon were revised out of the Code by the Californians before it arrived in Montana. Nevertheless, even without formal displacement of the common law, the Civil Code revolutionized it by offering rules on a wide range of subjects. By occupying space that the common law might have filled differently, the Civil Code in particular changed the development of the law in Montana. The next section examines the Code provisions on the duration of employment contracts as one example of the Codes’ impact. Elsewhere, Professor Robert Natelson has traced the impact of the implementation of the Code provisions on covenants running with the land. Montana’s experience in these two areas suggests that the success of legal revolutions depends on more than having “plenty of laws.” Success also requires institutions that implement those laws.

It is important to examine the Codes’ implementation to gain an understanding of whether the Codes succeeded in directing the growth of Montana law. This specific area also illustrates a different type of problem with the Montana courts’ treatment of the Code; here a combination of misinterpretations and failure to heed the Code provisions lost Montana the opportunity to develop an appropriate law.

III. IMPLEMENTATION: THE LAW OF EMPLOYMENT

A comparison of the Code states’ experience with the common law states’ experience involving similar rules and areas of the law helps to demonstrate the limits of codification. This section examines wrongful discharge, an area where Montana and the other Code states have ignored the Code provisions.  

329. Natelson, supra note 14, at 41.
331. See Andrew P. Morriss, Developing a Framework for Empirical Research on
Examining an area where the Codes' provisions failed to alter the common law's development highlights the importance of institutions that are willing to live within the confines of legal structures. The Montana courts, as well as the courts of the Dakotas and California, have not only followed prevailing common law developments despite Code provisions to the contrary, they have also led those innovations. Without a legal culture that respected the Codes, the Codes' influence quickly declined.

The development of the modern law of wrongful discharge makes this decline clear. Because employment contracts, like other contracts, often fail to contain specific terms regarding particular issues, courts must fill the gaps with default rules. A surprisingly common omission in employment agreements is the term of the contract. Late nineteenth century courts faced increasing numbers of claims from discharged employees. In response, every state eventually adopted the employment-at-will rule for indefinite employment contracts. This rule simply means that where parties have failed to provide either a term for the contract or limits on the conditions under which it may terminate, either party may end the contract at any time. Most importantly, the existence of such a rule precludes wrongful discharge claims. Beginning in 1959, courts began to erode the at-will rule, creating common law exceptions that allowed discharged employees to sue their former employers.

Like the common law states, the Field Code states adopted versions of the at-will rule in their Codes. Examining these rules and subsequent common law developments in the Field Code states is useful because the parallel evolution of the common law on the subject provides a benchmark against which to evaluate the Codes' rules. Together with the history of the Code provisions on covenants running with the land discussed in Professor Natelson's article, the experience with these provisions provides

a means of evaluating the Codes' impact.

A. Field's Drafts

The 1862 draft of the Field Civil Code contained four sections concerning employment termination, only one of which dealt with indefinite contracts.\(^3\) Section 830 stated: "An employment having no specified term may be terminated at the will of either party on notice to the other." As authority, the draft cited three sections of Story's agency treatise.\(^3\) As noted earlier, Field drew on a wide range of sources for the Civil Code's provisions.\(^3\) He certainly had access to, and used, English precedent and so he would have known of the contemporaneous English practice that presumed a definite term.\(^3\) He also would have known of Blackstone's presumption of a yearly hiring based on agricultural work cycles.\(^3\) He also used authority from other states, and thus undoubtedly knew of alternatives to the at-will rule used by mid-century American courts.\(^3\)

\(^3\) Section 831 listed events which terminate employment; § 832 made employment terminable upon the death or incapacity of the employer; and § 833 required employees to continue service after the death or incapacity of the employer so far as was necessary to protect the interests of the employer's successor in interest from "serious injury."

\(^3\) Sections 462, 476, and 477.

\(^3\) See supra note 37 and accompanying text.

\(^3\) See Jacoby, supra note 332, at 95-102, for a discussion of the English practice.

\(^3\) Blackstone's rule was:

> If the hiring be general without any particular time limit, the law construes it to be a hiring for a year; upon a principle of natural equity, that the servant shall serve, and the master maintain him, throughout all the revolutions of the respective seasons, as well as when there is work to be done, as when there is not: but the contract may be made for any larger or smaller term.

WILLIAM BLACKSTONE, COMMENTARIES 413 (1765).

\(^3\) He was also aware of the at-will provisions of the Federal Currency Act, as he was counsel in a case where his client lost because of that section. Taylor v. Hutton, 18 Abb. Prac. 16, 34 Barb. 195 (1864). It does not appear, however, that Field thought he was changing the common law of New York in this regard. Although he had license to innovate, the Final Report noted that the innovations were identified in the text, and none of the employment termination provisions were so identified. \textit{Id.} Thus, Field apparently thought that Blackstone's rule was no longer good law in New York by 1865. National banks and many of their state counterparts operated then (and today) under the strongest version of the at-will rule, one which precluded other types of contracts for certain bank officers. See Harrington v. First Nat'l Bank of Chittenango, 1 Thomp. & C. 361, 366 (N.Y. 1873) ("I think the power as well as the right of the defendant to dismiss the plaintiff exists by the act of Congress, under which all national banking institutions are organized, of which law the plaintiff is presumed to have notice. . . . The plaintiff's appointment could legal-
stead of relying on those sources, he turned to Story's agency treatise, which provided that the principal could end the agency "at his mere pleasure."

The 1865 Civil Code draft included new sections modifying
the at-will provision as well as changes in the language of the 1862 draft's section 830. That section, now section 1029, became:

An employment having no specified term may be terminated by either party, on notice to the other, except where otherwise provided by this title.

Two new provisions were added, sections 1035-36, which read:

1035. A servant is presumed to have been hired for such length of time as the parties adopt for the estimation of wages. A hiring at a yearly rate is presumed to be for one year; a hiring at a daily rate, for one day; a hiring by piece work, for no specified term.

1036. In the absence of any agreement as to wages, a domestic servant is presumed to be hired by the month; a clerk, or other servant not merely mechanical, or agricultural, by the year; and other servants for no specified term.

The new draft supplemented the citations to Story's treatise with case citations. Finally, the 1865 draft added a new section providing that personal service contracts (other than apprentice

341. To § 1029 were added citations to: Hathaway v. Bennett, 10 N.Y. 108 (N.Y. App. Div. 1854); Ward v. Ruckman, 34 Barb. 419 (1861); and Beeston v. Collyer, 4 Bing. 309. The new sections were supported by citations to: Davis v. Marshall, 4 L.T.R. (N.S.) 216; 6 H. & N. [Am. ed.] 916 (§ 1035) and Fawcett v. Cash, 5 B. & Ad. 904, 110 E.R. 1026 (1834) (§ 1036). The case citations Field added to the 1865 draft provide some additional information on the change. To the general at-will provision, Field added citations to Ward and Hathaway, two New York decisions. In Ward, a ship captain sought damages through an action for conversion of an interest in a schooner and for wrongfully depriving the captain of "master's interest" in the ship. In a brief opinion, the General Term of the New York Supreme Court found dismissal of the case justified because, among other reasons, such a contract could not be unlimited and therefore would be terminable upon reasonable notice. (The authority cited for this was Story's partnership treatise. Ward, 34 Barb. at 420.) In Hathaway, a newspaper publisher was sued for terminating a carrier. Field himself argued for the carrier, seeking reversal of the dismissal of the claim. Field argued that the English rule of allowing "one month's notice" should apply, but the court rejected his argument, as no custom had been shown to apply to justify such notice. To support the presumption of a contract for the period for estimation of wages, Field turned to the English case of Davis v. Marshall, 4 L.T.R. (N.S.) 216, 6 H. & N. [Am. ed.] 916. There the court upheld a verdict for an employee, finding that the combination of the employee's position (as a shoe manager) and hiring at thirty pounds per year was sufficient to show a year's contract despite monthly payments. Davis, 4 L.T.R. at 217. For the presumption of a month, Field cited Fawcett v. Cash, another English case, and one he had unsuccessfully relied on in his argument in Hathaway. In Fawcett, an employee sued under a written contract which provided for wages at a fixed rate "for the first year" and thereafter for a fixed annual increase. Fawcett, 5 B. & Ad. at 905. The judges' opinions all found this to be sufficient proof of an annual contract to support a verdict.
contracts) were not enforceable for more than two years. These changes moved the Field Civil Code away from the pure at-will provision and toward a presumed term.

Although many New York interests opposed the idea of codification, the opponents' attack focused mainly on the specifics of Field's draft. Despite the controversy that raged around Field's draft, the employment sections did not seem to significantly interest either the bar or the public. None of the 1880s revisions to the Civil Code altered the employment termination provisions. The Association of the Bar of the City of New York's Special Committee to Urge the Rejection of the Proposed Civil Code produced lengthy critiques of a number of Code sections. Neither these critiques nor the reports themselves criticized the weak version of the at-will rule as excessively favorable to employers; critiques of other sections did make this criticism. One report attacked the time limitation on personal

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342. Section 1013.
343. I found no direct evidence explaining why the Civil Code was changed in this regard. All that is known is that Field distributed the 1862 draft to "judges and others" for review and that the Code Commissioners "re-examined these two Codes [the Civil and Penal] and considered such suggestions as had been made" and "finally revised and agreed upon them." NINTH REPORT OF THE COMMISSIONERS OF THE CODE, at iv (Conn. Print 1865). One possible but unlikely explanation for the changes between the 1862 and 1865 drafts is simply that Field's practice led him to discover the pay period rule, and that he found it preferable to a blanket at-will rule on theoretical or policy grounds. Because Field was devoted to preserving his own reputation, VAN EE, supra note 32, at 253-310 (see a chapter entitled What's Field Whining About? for an account of Field's defense of his conduct in the Erie litigation), the more likely explanation may, therefore, be that he seized the opportunity to "correct" the judges in Hathaway by adding §§ 1035-36.

344. Field himself noted this, stating that "[t]he real objection on the part of lawyers is to any codification of the common law, though by way of warding off discussion respecting the desirability of such a work they take objection to this particular code." Field, Codification, supra note 27, at 23. See also Fisch, More Notes, supra note 54, at 20.

345. See Assembly Bill No. 182, §§ 1029, 1035-36 (1880); Assembly Bill No. 62, §§ 1029, 1035-36 (1881); Assembly Bill No. 215, §§ 1029, 1035-36 (1882); Senate Bill No. 300, §§ 1423, 1441-42 (1883); Senate Bill No. 87, §§ 1423, 1441-42 (1884); Senate Bill No. 135, §§ 1423, 1441-42 (1885); Assembly Bill No. 275, §§ 1423, 1441-42 (1885); Assembly Bill No. 50, §§ 1423, 1441-42 (1886); Assembly Bill No. 329, §§ 1423, 1441-42 (1887); Senate Bill No. 258, §§ 1423, 1441-42 (1888); and Assembly Bill No. 132, §§ 1423, 1441-42 (1888).

346. ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, REPORT OF THE SPECIAL COMMITTEE "TO URGE THE REJECTION OF THE PROPOSED CIVIL CODE, APPOINTED MARCH 15, 1881" (Oct. 21, 1881) with attached Memorandum of Clifford Hand, Mar. 28, 1881; ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, REPORT OF THE SPECIAL COMMITTEE "TO URGE THE REJECTION OF THE PROPOSED CIVIL CODE, REAPPOINTED NOVEMBER 1, 1881" (Oct. 10, 1882) with attached circular "Ought the Bill Entitled 'An Act to Establish a Civil Code' to be Enacted Into a Law?" (May 1882); ex-
service contracts other than apprenticeship, suggesting that the authors did not find the other provisions on employment duration especially objectionable.\textsuperscript{347}

\textbf{B. Montana}

\textit{1. The Code Provisions}

California modified Field's 1865 draft\textsuperscript{348} provisions on em-


347. The only critique sponsored by the Association to specifically discuss the employment sections, Miller, supra note 346, at 56-61, criticized the weak at-will rule only for its effect, in combination with other provisions, on the hiring of contractors to perform specific work. Miller, supra note 346, at 56-61. Interestingly, this paper cites Wood's treatise in its criticism of the provision allowing discharge of ill employees. Miller, supra note 346, at 60. Particularly since other employment provisions were specifically criticized as too favorable to employers (Field represented a number of major railroads and other corporate clients, see VAN EE, supra note 32, at 212-52 (describing Field's practice)), it is significant that the at-will section was not also so criticized.

348. As in Field's 1865 draft, the Dakota Territorial Code stated, under the heading "Termination At Will," that "except where otherwise provided by this title" employees having no specified term "may be terminated at the will of either party." 1877 Code, supra note 54, § 1152. The Dakota Code, however, provided that for "servants" (without specifying the definition of servant) the period used for estimation of wages (a month if no such period was used) was to be the term. Only piece rate workers defaulted to contracts with no specified term. 1877 Code, supra note 54, §§ 1157-59. These provisions survived each subsequent territorial revision.

They continued after statehood in North Dakota until 1961. North Dakota repealed the two presumed term provisions, along with the other provisions in Ch. 34-04, the Master and Servant section of the Code, in 1961. S.L. 1961, ch. 234, 31. It did not repeal the at-will provision. There is no legislative history indicating why this occurred. The sponsors of the repeal also sponsored a bill providing compensa-
ployment duration, and the Montana Civil Code simply adopted and renumbered the California modifications. California adopted three provisions concerning indefinite-term employment contracts in the 1872 Code. California section 1999 stated:

An employment having no specified term may be terminated at the will of either party, on notice to the other, except where otherwise provided by this Title.

California sections 2010-11, gave the “otherwise” mentioned in California section 1999. California section 2010 provided:

A servant is presumed to have been hired for such length of time as the parties adopt for the estimation of wages. A hiring at a yearly rate is presumed to be for one year; a hiring at a daily rate, for one day; a hiring by piece work, for no specified term.

California section 2011 provided:

In the absence of any agreement or custom as to the term of service, the time of payment, or rate or value of wages, a servant is presumed to be hired by the month, at a monthly rate of reasonable wages, to be paid when the service is performed.

The only significant difference from Field’s 1865 draft was the substitution of the text of California section 2011 for Field’s
Read together, these provisions create four groups of employees. First, those employees who have definite-term contracts (including employees with explicit at-will contracts) obviously have a contract for the term agreed. Second, employees who have indefinite contracts that contain a provision concerning wages per unit time have a contract for that period. Third, employees who have a contract that does not mention the time or rate of wages but are not paid under a piece rate have a monthly contract. Finally, employees who are paid piece rates have at-will contracts.\(^{351}\)

The Montana Commissioners included California cases in their annotations, as well as citations to cases from other states and to Field's draft.\(^{352}\) To support Montana section 2703 (re-numbered from California section 1999), the Commissioners cited only one case,\(^{353}\) DeBriar v. Minturn,\(^{354}\) and summarized its

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351. These provisions survived until 1969, although the legislature moved them to the Labor Code when it was created in 1929. Repealed by Stats. 1969, 1537 § 1, pt. 3132.

352. As authority for § 1999, the California annotators (two of the three members of the Code Commission) cited the same sections of Story's agency treatise and cases as Field's 1865 draft. For § 2010 the annotators again copied Field's case citation but added a note that “[i]t seems eminently proper, also, that the presumption, in the absence of express agreement, should here follow the same rule adopted for rent.” Note, § 2010, 1872 Code, at 611. In addition to the note, the annotators referred to the section on rent, a California case supporting the rent rule, and to a California case holding no implied contract existed to pay for the service of a partner's wife as cook. For § 2011, which differed from Field's 1865 draft, they cited the same English case as Field, Fawcett v. Cash, 5 B. & Ad. 904, 110 E.R. 1026 (1834), but added citations on the measure of damages.

They also added a "but see" citation to DeBriar v. Minturn, lending indirect support to Horace Wood's much maligned later reliance on that case. Wood was a nineteenth century treatise writer whose 1877 treatise on employment law, HORACE G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT COVERING THE RELATION, DUTIES AND LIABILITIES OF EMPLOYERS AND EMPLOYEES (1st ed. 1877), is often claimed to be the source of the at-will rule. See, e.g., Feinman, supra note 332; Note, IMPLIED CONTRACT RIGHTS TO JOB SECURITY, 26 STAN. L. REV. 335 (1978). Wood's innovation is generally denounced as unsupported by authority by those who believe he created the rule. These claims rest primarily upon an analysis of "footnote four" of the first edition of his treatise. Wood's defenders have argued that Wood did not invent the rule and that Wood properly cited the cases in footnote four, including DeBriar. For a full discussion of Wood's treatise, including its second edition in 1887, see Morriss, supra note 332, at 756-60.

353. The annotation for this also cites Sullivan v. Grass Valley Quartz Milling & Mining Co., 77 Cal. 418 (1888) for the right of an employee to compensation for past performance in some circumstances, a subject whose relationship to § 2703 may have been clearer to the nineteenth century legal mind than to this writer.

354. 1 Cal. 450 (1851). The California annotators cited this case, as did Horace Wood, in support of his version of the at-will rule.
holding as: "Master may discharge servant at any time after notice where there is no term of service, and may eject the servant by force if necessary."\(^{355}\) As elaborately argued in the literature concerning Wood's treatise, due to the factual circumstances of DeBriar, it provided somewhat tenuous support for any rule concerning employment duration.\(^ {356}\) Since by 1895 numerous cases existed that were more persuasive support for the at-will rule, the choice of DeBriar suggests that either the rule was so obvious that it needed little support, or the section was so inconsequential that it did not merit the minimal attention needed to locate better authority.

For Montana section 2721's pay period rule (renumbered from California section 2010), the annotation cites Beach v. Mullin.\(^ {357}\) The annotation then cites two cases for the proposition that other evidence may overcome the presumption, and one case for the proposition that "permanent" employment constituted employment-at-will.\(^ {358}\) The text of section 2721 does not address either issue, and the citations appear to be aimed at filling gaps left by the drafters.

For Montana section 2722's presumption of a month (renumbered from California section 2011), the annotation is primarily devoted to undercutting the text of the section: It notes that a discharged employee may recover only nominal damages and that custom may vary the presumption; and, giving a "but see" cite to DeBriar, cites an English case that indirectly supports it.\(^ {359}\)

2. Experience in the Montana Courts

Montana has proven a fertile field for such litigation and has developed its own law and precedent accordingly.\(^ {360}\)

\(^{355}\) CODES AND STATUTES OF MONTANA, IN FORCE JULY 1, 1895. Reported by D. S. Wade, F. W. Cole, and B. P. Carpenter, Annotated by Edwin S. Booth § 2703, at 1194 (1895).

\(^{356}\) It dealt with the eviction of a former employee from rooms provided by the employer. 1 Cal. at 451. See, e.g., Note, supra note 352.

\(^{357}\) 5 N.J.L. [Vroom] 343 (1870).


\(^{359}\) Fawcett, 5 B. & Ad. 95, 110 E.R. 1028. Fawcett found a year contract, and one judge noted in passing: "This is not the case of a domestic servant, where the contract might have been put an end to by paying a month's wages or giving a month's warning." 110 E.R. at 1027 (Patteson, J.).

\(^{360}\) Prout v. Sears, Roebuck, and Co., 236 Mont. 132, 156-57, 772 P.2d 288, 290
The Montana courts have paid little attention to these Code provisions. Although there have been occasional flashes of recognition that the Code provisions differ in both character and content from common law rules, when the courts have referred to these provisions they have often done so in a manner that ignores the Code provisions’ plain meaning. The result has undercut the certainty that the Codes sought to create and has distorted Montana law.

The first reported Montana case wrestling with the problem of interpreting employment contracts with vague or nonexistent duration provisions did not appear until 1923. In Weir v. Ryan, the Montana Supreme Court found that a monthly rate of pay and the oral statement “I will give you work the year round” sufficient to establish a year contract rather than a

(1989).

361. The experience of the other Field Code states has been similar. The California courts’ interpretation of the codified at-will rule has not differed significantly from the common law states’ courts interpretation of their rules. The codified at-will rule did not prevent California from adopting the nation’s first public policy exception, without discussion of authority or more than a passing mention of the codified rule. Petermann v. International Brotherhood of Teamsters, 344 P.2d 25 (Cal.App. 1959) (creating the first public policy exception without citing authority or acknowledging it was changing a statutory rule). Nor did it prevent California from adopting, at least temporarily, some of the most far-reaching theories for wrongful discharge litigation. Cleary v. American Airlines, 168 Cal. Rptr. 722 (Cal. Ct. App. 1980) (establishing the implied covenant of good faith and fair dealing theory and allowing tort damages for breach of the covenant) rev’d in part and aff’d in part, Foley v. Interactive Data Corp., 765 P.2d 373 (Cal. 1988) (eliminating tort damages from the implied covenant, significantly reducing its attractiveness to plaintiffs).

South Dakota’s courts have not interpreted the duration Code provision nor have the South Dakota courts relied on it in any significant way. Similarly, North Dakota courts have paid little judicial attention to the Code provisions on employment term. See, e.g., McGregor v. Harm, 125 N.W. 885 (N.D. 1910) (concerning term of contract does not mention the code’s pay period section despite contract’s use of weekly period for calculating compensation and conclusion that contract was for a weekly term); Wood v. Buchanan, 5 N.W.2d 680, 682 (N.D. 1942) (stating, rather than citing the at-will section, “In this country a general or indefinite hiring is presumed to be a hiring at will and may be terminated at the will of either party. 39 C.J., pp. 44, 71; 1 Labatt’s Master & Servants, 2nd Ed., §§ 159, 160, 165.” The failure to cite the code is even more astonishing since the next sentence cites C.L. 1913, §§ 6135-6137!); Wadeson v. American Family Mut. Ins. Co., 343 N.W.2d 367, 370 (N.D. 1984) (noting that at-will rule was stated in Sand v. Queen City Packing Company, 108 N.W.2d 448 (N.D. 1961), without mentioning the code provision).

Neither provision has hampered the adoption of modern common law exceptions. See, e.g., Johnson v. Kreiser’s, Inc., 433 N.W.2d 225, 227 (S.D. 1988) (adopting public policy exception despite noting the general rule of employment at will set forth in the statute) and Krein v. Marian Manor Nursing Home, 415 N.W.2d 793 (N.D. 1987) (adopting public policy exception without mentioning statute).

362. 68 Mont. 336, 218 P. 947 (1923).
month-to-month contract. The opinion did not mention the Code provisions. The defendant's position that the contract was month-to-month clearly reflected the Code's requirement that an employee whose wages were calculated on a monthly basis have a monthly contract. This is evidence of the Codes' indirect influence. Most notable about Weir, however, is the extremely weak evidence needed to remove the employee from the default rules' operation. Some common law rule states had much stronger versions of the at-will rule under which "work the year round" would not have overcome the default presumption. The court addressed the issue in the same fashion in 1935 in Harrington v. Deloraine Refining Co., with similar results.

Until 1980, published cases paid little attention to duration issues in employment contracts after Harrington, perhaps because the Code provisions were clear and easily applied. The Montana Supreme Court's decision in Keneally v. Orgain began a steady flow of opinions that destroyed the system of rules established by the Codes. In Keneally, a discharged employee made a claim for wrongful discharge against his supervisor (Orgain) and employer (National Cash Register). In reciting the facts, the Montana Supreme Court simply labeled plaintiffs contract "at will" without mentioning section 39-2-503 of the Montana Code (the current location of the at-will provision), and then noted that the contract was "governed by an NCR employment contract and company manuals."

Discussing only a five-year-old federal district court opinion from Missouri that had not recognized a claim, the court noted the growing national trend to recognize claims for discharges that violated public policy. Although the court found that

363. Id. at 339, 218 P. at 948.
364. See, e.g., Rape v. Mobile & O.R.R. Co., 100 So. 585 (Miss. 1924); Louisville Tobacco Warehouse Co. v. Zeigler, 244 S.W. 899 (Ky. 1922); Combs v. Hazard Ice & Storage Co., 290 S.W. 1035 (Ky. 1927).
365. 99 Mont. 78, 43 P.2d 660 (1935). The only difference was the defendant's claim that the employee's contract was specifically "at the pleasure" of its board of directors rather than on a month-to-month basis. Duration had been indirectly discussed in Miller v. Yellowstone Irrigation District, 91 Mont. 538, 9 P.2d 795 (1932).
367. Id. at 3, 606 P.2d at 128. Because it would be unlikely that an employee of Keneally's position (account manager) would not be paid in a fashion as to remove him from the default at-will provisions, it may be that Keneally had an explicit provision in his contract providing that he was an at-will employee, although the court does not mention such a provision.
369. 186 Mont. at 5, 606 P.2d at 129.
Keneally had not alleged facts that would establish a claim, it noted that "[w]e do not disagree at this juncture that in a proper case a cause for wrongful discharge could be made out by an employee."³⁷⁰ The court did not explain how to reconcile the creation of a public policy exception to the codified at-will rule.

Five months later in Reiter v. Yellowstone County, the Montana Supreme Court addressed a public employee’s claim that his discharge violated his due process rights.³⁷¹ Invoking the Due Process Clause of the state or federal constitution required identification of a property right in continued employment. Citing the Code’s at-will provision, but ignoring the implied duration provisions,³⁷² the Montana Supreme Court found no property interest could exist since Reiter was an at-will employee.³⁷³

Reiter also argued that the implied covenant of good faith and fair dealing inherent in all contracts existed in his employment contract. The longevity of his service meant that the implied covenant created a property right in his continued employment.³⁷⁴ The court rejected this argument:

Appellant’s argument on implied contracts cannot successfully circumvent the Montana statute which clearly denies his claim of entitlement to continued employment. Even though appellant may have had an implied contract with the county by virtue of his longevity of service, it would be a contradiction in terms to say that he had an “implied specified” period of employment. A specified term is one which the parties expressed, and there was no expression here concerning the length of employment. Section 39-2-503, MCA, operates to fill the gap left by the parties by defining the relationship as an “at-will” employment. While the rule may well be outdated, it is uniquely a province of the legislature to change it.³⁷⁵

³⁷⁰. Id. at 6, 606 P.2d at 130.
³⁷². The implied duration provisions appear in the section entitled “Master and Servant” following the at-will provision, which is in the section headed “Termination of Employment.” One might argue that there is a distinction between employees and servants and that the implied duration provisions do not therefore apply to employees. The definition of servant in § 39-2-601 is sufficiently broad that this would be a difficult argument to sustain in light of the historical use of “master and servant” to refer to employers and employees. More to the point, no Montana opinion makes such a distinction.
³⁷³. 192 Mont. at 199, 627 P.2d at 848.
³⁷⁴. Id. at 199, 627 P.2d at 849.
³⁷⁵. 192 Mont. at 200, 627 P.2d at 849.
The difficulty with this analysis is that it ignores section 39-2-602 of the Montana Code, which implies a term to contracts based upon the period used for estimation of wages. Although the opinion does not disclose the basis for the estimation of Reiter's wages, it seems unlikely that Reiter would not have had his wages estimated on an annual basis, the usual practice for supervisors.

Despite its failure to consider section 39-2-602 of the Montana Code, the Montana Supreme Court clearly recognized the statutory nature of the at-will rule in Reiter. The court's interpretation of the law thus far made only limited inroads on the Code provisions. In January 1982, however, the court decided two cases which signalled that it did not view its development of wrongful discharge law as constrained by the Code provisions.

In Gates v. Life of Montana Insurance Company ("Gates I"), the court addressed the implied covenant of good faith and fair dealing suggested by Reiter, and held that a fact question existed concerning whether the employer's failure to follow its own handbook of personnel policies, which included procedures to be followed in termination cases, would constitute a violation of the covenant. Although the Gates I court attempted to distinguish Reiter due to that case's public employment context, that distinction was irrelevant to the issue of the Code rule's applicability. The court did not directly address Reiter's holding that the statute imposed the at-will rule and could not be circumvented through common law developments.

In Nye v. Department of Livestock, the Montana Supreme Court reviewed a district court's dismissal of a public employee's wrongful discharge claim. Because Nye was classified (again probably incorrectly) as an at-will employee under section 39-2-503 of the Montana Code, the district court rejected her claim. The Montana Supreme Court found that simply classifying an employee as "at will" was insufficient to end the inquiry because "the tort of wrongful discharge may apply to an at-will

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376. The public policy exception that the Keneally opinion hinted at was a relatively minor restriction on the operation of the at-will and presumed term provisions, while the failure to consider the presumed term provisions was an oversight which could have been easily corrected.
378. 196 Mont. at 184, 638 P.2d at 1067.
379. Id. at 183, 638 P.2d at 1066.
381. Again, § 39-2-602 of the Montana Code would likely have given Nye a term contract.
employment situation. Pausing only to note that "the theory of wrongful discharge has developed in response to the harshness of the application of the at will doctrine, under which an employee may be terminated without cause[,]" the Montana court expanded the notion of public policy to include administrative rules requiring certain procedures before dismissal.

The only authority cited was the New Jersey Supreme Court decision in Pierce v. Ortho Pharmaceutical Corp., and the Montana court misapplied that case in three respects. First, Pierce involved the modification of a common law rule rather than a statutory rule. Second, the "harsh" rule that Pierce modified was not the same as the rule provided by the combination of sections 39-2-503 and 39-2-602 of the Montana Code. Under New Jersey's version of the at-will rule, an employer could terminate with or without cause all employees not covered by a specific contractual term governing duration or discharge. In Montana, most employees would have a claim for breach of contract of the presumed term contract created by section 39-2-602 of the Montana Code. Third, Pierce suggested a far less expansive modification than that provided in Nye. In Pierce, the New Jersey Supreme Court found a public policy exception to the at-will rule where an employee refused "to perform an act that is a violation of a clear mandate of public policy" and listed a number of sources of such a mandate. Nye transformed reference to sources into the basis for a claim. The regulation became a means of circumventing the at-will rule when the public employer violated its rules on the procedures for discharge, an action for which a remedy already existed under Montana law.

A second opinion in Gates (Gates II) allowed the court to provide details of the cause of action available under the implied covenant. Despite the recitation that Gates was employed under "an oral contract of indefinite duration," the Gates II opinion did not address the implied term provisions of the Code.

382. Nye, 196 Mont. at 228, 639 P.2d. at 502.
383. Id.
385. Id. at 509.
386. Id. at 512.
389. Id. at 306, 668 P.2d at 214.
390. Although the majority's description of the facts concerned the coercion of a
After *Gates II*, the Montana Supreme Court continued to expand the implied covenant theory while refraining from comment on how the theory could co-exist with the Code provisions. For example, in *Dare v. Montana Petroleum Marketing Co.*,\(^\text{391}\) the Montana Supreme Court held that:

> Whether a covenant of good faith and fair dealing is implied in a particular case depends upon objective manifestations by the employer giving rise to the employee's reasonable belief that he or she has job security and will be treated fairly. The presence of such facts indicates that the term of employment has gone beyond the indefinite period contemplated in the at will employment statute, Section 39-2-503, MCA, and is founded upon some more secure and objective basis.\(^\text{392}\)

Not only did the court fail to follow the at-will provision, but it also ignored the pay period rule, which would have reinforced the at-will presumption.\(^\text{393}\)

If Montana was modifying a common law at-will rule, the analysis might have been appropriate. The idea that evidence might suggest that the parties went "beyond" the indefinite employment relationship provided by a common law rule could be a valid application of a default rule.\(^\text{394}\) Faced with a codified rule, however, it is difficult to understand how the Montana court reached such a conclusion. Even if one accepts the Montana Supreme Court's reading of the at-will rule as generally applicable, its modification of the rule ignores the difference between the formulation of the codified rule and the common law rule. The codified rule provides that "an employment having no specified term may be terminated at the will of either party on notice to the other, except where otherwise provided by this chapter . . . ."\(^\text{395}\) To belabor the obvious, under normal rules of statutory construction, the clause beginning with "except" would operate to preclude the creation of remedies not provided by the letter of resignation from an employee and a supervisor's refusal to return the letter when asked, Justice Gulbrandson's dissent (joined by Justice Harrison) pointed out that the case was not tried solely on a theory that those actions were the tortious conduct, but rather that it was termination without notice which also produced liability. *Id.* at 312, 668 P.2d at 217 (Gulbrandson, J., dissenting).

\(^{391}\) *Dare*, 212 Mont. at 282, 687 P.2d at 1020 (citation omitted).

\(^{392}\) *Dare* had been paid by the hour. *Id.* at 277, 687 P.2d at 1017.

\(^{393}\) In the case of a clear and long-standing rule such as the at-will rule, I would argue that it would be more appropriate not to modify the rule under such circumstances.

statute.

In 1984, Montana's implied covenant doctrine developed a reach beyond that given the doctrine anywhere else when the Montana Supreme Court upheld an award of $125,000 in compensatory damages and $25,000 in punitive damages for a respiratory therapist discharged during a probationary period.396 Besides the huge award for a probationary employee, Crenshaw v. Bozeman Deaconess Hospital is significant as the court's only attempt to explain how the implied covenant theory relates to the codified at-will rule:

We hold that the "at-will" statute, section 39-2-503, MCA, is very much alive. The Gates I decision does not preempt the statute. There is no legitimate precedent for an exception for probationary employees. Therefore, Crenshaw even as a probationary employee was owed a duty of good faith under the mandate of Gates I. This requirement of good faith and fair dealing does not conflict with section 39-2-503, MCA, but merely supplements it. Employers can still terminate untenured employees at-will and do so without notice. They simply may not do so in bad faith or unfairly without becoming liable for damages.397 The ability to terminate "except in bad faith or unfairly" is, of course, not the ability to discharge "at the will of either party."398 "Supplementing" the Code section in this fashion was inconsistent with the plain language of the Code.

The court continued to expand the covenant's reach throughout the 1980s. In Kerr v. Gibson's Products Co. of Bozeman,399 the court found that defendant's having "repeatedly acknowledged respondent's work as satisfactory through promotions and pay increases" was sufficient evidence to make it reasonable for the employee "to believe she had job security and would be treated fairly" and invoke the covenant.400 Under such a test, few employees were left outside the covenant's reach, and the Code sections became irrelevant.

The effect of the Montana Supreme Court's employment decisions in the 1980s was to effectively repeal sections 39-2-503 and 39-2-602 of the Montana Code. The presence of section 39-2-503 is not a real choice, and the Code sections became irrelevant.

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397. Crenshaw, 213 Mont. at 498, 693 P.2d at 492.
399. 226 Mont. 69, 733 P.2d 1292 (1987).
400. Kerr, 226 Mont. at 73, 733 P.2d at 1295.
503 of the Montana Code did nothing to slow the court's adoption of the most pro-plaintiff interpretations of the modern common law exceptions, ultimately provoking a backlash that led to the 1987 statutory replacement.\textsuperscript{401} The Montana Legislature proved no more observant of section 39-2-503 of the Montana Code than the courts were, however, and it neither repealed nor explained the reasons for the survival of section 39-2-503 of the Montana Code when it passed the 1987 Wrongful Discharge From Employment Act.\textsuperscript{402} Similarly, both the Montana Supreme Court and the Montana Legislature have ignored the effects of section 39-2-602 of the Montana Code, which created presumed term exemptions from the at-will rule that would have allowed employees a measure of protection from arbitrary discharge.

Unfortunately, the best one can say for Montana's experience with these sections of the Civil Code is that the provisions did little harm. Because the at-will provisions closely resembled those adopted in the common law states, they did not distort the Montana legal system in the same ways as the Code provisions concerning covenants.\textsuperscript{403} By ignoring these sections, the Montana courts ended up more or less in the same position as most of the common law rule states. If the Montana courts paid attention to the provisions, they might have prevented or delayed the creation of common law wrongful discharge remedies by removing many employees from the at-will category. The state's economy might have thus avoided significant harm.\textsuperscript{404} Since common law wrongful discharge remedies appear to have a negative impact on state economies,\textsuperscript{405} the Code provisions could have been


\textsuperscript{402} MONT. CODE ANN. § 39-2-901 to -914 (1989).

\textsuperscript{403} See Natelson, supra note 14.

\textsuperscript{404} See Meech v. Hillhaven West, Inc., 238 Mont. 21, 48, 776 P.2d 488, 504 (1989) (upholding Wrongful Discharge from Employment Act against constitutional challenges and summarizing testimony that "large judgments in common law wrongful discharge cases could discourage employers from locating their businesses in Montana"). Such a course would have also likely forestalled the passage of the new Act. See Alan B. Krueger, The Evolution of Unjust-Dismissal Legislation in the United States, 44 INDUS. & LAB. REL. REV. 644 (1991) (showing that passage of the Montana act, and introduction of similar acts elsewhere, is heavily dependent on employer support). Although I disagree with some of Krueger's characterizations of court opinions, I found his conclusions generally did not depend upon those characterizations. See Morriss, supra note 331, at _._

\textsuperscript{405} JAMES DERTOUZOS & LYNN KAROLY, LABOR MARKET RESPONSE TO EMPLOYER LIABILITY, Rand Corporation, Institute for Civil Justice Paper R-3989-ICJ (1992) (finding that adoption of common law exceptions to employment-at-will had a significant
a positive force. Because the courts ignored them, however, they had no significant impact on the development of wrongful discharge law in Montana.

Ironically, given the Code provisions' New York origins, the cost of ignoring the Codes was the lost opportunity to create a Montana jurisprudence of employment duration. Such a jurisprudence would have enhanced, rather than wounded, Montana's economy. Had the Montana Supreme Court simply applied the language in the Code provisions, it would have created a remedy for limited damages for most employees and precluded the extreme results (e.g. Crenshaw's huge award for a probationary employee) that threatened economic harm. In addition, through application of the Code provisions, the Montana court might have developed clear rules regarding the evidence required to overcome the default rule provisions. Most importantly, by consistently applying the Code provisions, the Montana courts would have developed the necessary information for the Montana Legislature to modify the Code provisions to fit Montana's needs.

IV. CONCLUSIONS FROM THE CODES: THE RULE OF LAW AND LAW REFORM

It is difficult to measure the importance of this great subject. Gathering together and arranging in logical order the fragmentary elements of a legal system, the reorganization and re-expression of a body of laws for a people, is an event that can have no parallel in magnitude in the history of that people. A Dictator may take the place of a President; a commune may sweep away the Dictator; still the great body of laws remains substantially the same. The system that we now establish, will go down with succeeding generations, until a new race shall come, or until new conditions, wrought under the law of progress, shall make a new system necessary in one, five or twenty centuries.406

Charles Lindley

The final assessment of the Codes depends on the quality of contemporary alternatives. Clearly, problems with the status quo needed to be addressed. Although writing alternative history is

and negative impact on gross state product, suggesting that the social cost of wrongful discharge suits is large). As with Krueger's analysis, a reanalysis of Dertouzos and Karoly's data to account for my characterizations of legal opinions did not change their basic conclusions. See Morriss, supra note 331 at __.

406. LINDLEY, supra note 67, Appendix at v.
always dangerous, a clear alternative to Codes existed. Instead of a Code Commission, the last Territorial Legislature might have authorized a commission to undertake a new revision of the existing statutes. Limited to rearrangement of the existing law and recommendations for clarifying amendments, the commission could have eliminated much of the disorder in the statutory law. The invention of pocket parts alone might have solved many problems. Considering the additional confusion caused by the Codes' and their amendments' conflicting provisions, errors, and clerical mistakes and the more limited scope of a revision (most of the Civil Code would not have been part of any revision), a revision commission probably would have avoided many of the mistakes of past revisers. (Incorporating future laws into revision would have been no harder than incorporating them into the Codes.)

Such a course would have left Montana with fewer rules than it had after adoption of the Codes, particularly in private law areas. The law would have developed through the normal common law process of case-by-case decisions, as in most states. This process would have undoubtedly taken longer to develop rules, but the rules chosen would probably have more appropriately fit Montana's conditions.

Not only would revision have avoided many of the opportunities for the sale of legislative services to "fix" the Codes, but it would have also forestalled the development of the special interests that the new Code provisions created. When the Codes established a rule that previously did not exist (as opposed to simply rearranging existing Montana statutes), some interests benefited from the new rule. Those interests now had a stake in defending the continued existence of the new rule, an interest they would not have had otherwise. By creating a rule, the legislature provided an incentive to organize the affected interests in the rule's defense, assisting in overcoming the collective action problems inherent in lobbying.

Additionally, the lack of a comprehensive code would have


408. Of course, even in the absence of a specific rule, an interest group might have an interest in obtaining that rule, and so organize to influence the legislature. Gaining a new benefit and defending an existing benefit are different, however, and the costs of creation of a new benefit are likely to be higher than the costs of defending an existing one. This suggests that existing benefits will be defended on more occasions than new benefits will be successfully sought.
eliminated the political legitimacy granted to interventionist legislation by the Codes' attempt to gather all of Montana society within their framework. Of course, legislators in states without codes have managed to serve special interests at the expense of the public and to pass statist legislation. Nevertheless, increasing the barriers to such actions would have served Montana well.

Montana's experience with the Codes has some relevant lessons for those considering large scale legal reform. Simply having "plenty of laws" does not ease the confusion accompanying a new legal system. If the laws do not fit the circumstances and needs of the society that they are to regulate, their effects may range from irrelevance to distortion. Since the collapse of the communist regimes of the Eastern Bloc, lawyers from the United States and Western Europe have flocked to offer advice on appropriate laws and legal systems to the new governments in Russia and Eastern Europe. Western lawyers are involved in every aspect of law reform from training judges to drafting laws and constitutions. Those new states are in a position not entirely dissimilar to Montana's in 1889—they have a confusing hodgepodge of laws leftover from the communist era combined with the new statutes, some of which are based on pre-


410. This has been most extensively described in popular press accounts. See, e.g., Greg Rushford, *World Bank: Building Economies, Laws*, LEGAL TIMES, June 13, 1994, at S38 ("[c]hief counsel of World Bank's Europe and Central Asia Division . . . [is] intimately involved in helping craft the legal framework to enable the formerly communist countries . . . to develop market-based economies."). Some law review accounts are beginning to appear, however, focused on specific areas of the law. See, e.g., Spencer W. Waller, *Neo-Realism and the International Harmonization of Law: Lessons from Antitrust*, 42 KAN. L. REV. 557, 570 (1994) ("Much of the effort [of U.S. legal consultants in Eastern Europe] appears to be aimed at selling the Sherman Act as an appropriate model for other countries that are drafting new competition provisions."); Roger W. Mastalir, *Regulation of Competition in the "New" Free Markets of Eastern Europe*, 19 N.C.J. INT'L L. & COM. REG. 61, 84 (1993) (noting that despite attention paid to local conditions and history in drafting laws, "Eastern Europe has extensively transplanted policies and regulations from Western antitrust law . . . ").

Like the new state of Montana, many of these nations were delivered from rulers imposed by outsiders and anxiously seek to assert their independence through changes to their legal systems. Montana's experience with the Codes suggests some of the pitfalls encountered in importation of "foreign" law in similar circumstances.

The most obvious lesson is that wholesale adoption of laws or governmental structures from elsewhere probably does not produce viable, stable legal regimes in the long run. Similarly, the importance of having the institutional structure to support the implementation of law reform is highlighted by Montana's experience with the Field Codes. Without a legal culture that respected the Codes as codes, Code rules such as the employment termination provisions fell into obscurity. Although these conclusions may appear obvious, they escaped legislators in Dakota Territory, California, and Montana in the nineteenth century, and may be missed again.

Montana's experience with the Codes suggests caution when adopting massive legal reforms. Creating conditions of certainty under which the rule of law can flourish requires much more than reams of laws. Indeed, it may require that there not be reams of laws. Laws must answer the questions people ask, not questions from another time and place—as did the requirement of fish guards for irrigation ditches during the winter months in Montana. When the law provides answers, these solutions must be appropriate to the conditions the law seeks to regulate. Professor Natelson's analysis indicates that some of Montana's rules concerning covenants running with the land are clearly not appropriate to Montana's conditions. If the courts ignore the answers, as with the employment-at-will provisions, the point of the Code as a code is destroyed. Reforms must try not to disrupt existing, functioning institutions, as the Codes clearly did with respect to livestock brands and municipal government.

Montana's governance structure's complete failure to review the Codes before passage in 1895 suggests the limits to which

412. See, e.g., Frank Jossi, For Albanians, Uncharted Legal Territory, NAT'L L.J., Dec. 5, 1994, at A12 (describing lack of office space, uncollected state of legal materials requiring knowing the week a statute passed to locate it, and lack of law libraries). Albanians and their Western advisors seem to be falling into the "plenty of laws" trap. The article quotes Roland Bassett, a Texas lawyer representing the American Bar Association in Albania: "I read where the Prime Minister said that the Albanian Parliament passed 89 pieces of legislation last year and that no other country in the Free World had passed that many laws. But that's not many compared to what they need." Id.
legislative institutions can process massive reforms. Presented with a 170 pound stack of Codes, the legislators simply abdicated their responsibilities to understand what they enacted. Anxious to return to subdividing Montana's counties and collecting textbook companies' 'boodle', they focused on the physical process of making the bills laws rather than on the Codes' substance. Aside from the Great Falls Tribune, no one seemed to have asked the obvious question: why are we passing these laws? When presented with four bills, which together overwhelmed the legislature's physical capacities, it seems difficult to explain why legislators rushed ahead rather than undertaking a more modest reform.413

When Montana's codification commission began work in 1889, the Territory's statutory law was a disaster: printed versions of laws were often scarce or unavailable, laws were badly drafted, and contradictory provisions abounded. Despite the problem's origins in the previous territorial legislatures' actions, the Code Commission prescribed more legislation on a grander scale. Montana's legislators succumbed to legislation's appearance as "a quick, rational, and far-reaching remedy against every kind of evil or inconvenience."414 As Bruno Leoni noted, however, "a remedy by legislation may be too quick to be efficacious, too unpredictably far-reaching to be wholly beneficial, and too directly connected with the contingent views of a handful of people (the legislators), whoever they may be, to be, in fact, a remedy for all concerned."415 Leoni's general argument describes the problems with Montana's codification efforts. "Bolting the codes" left Montana with a massive tangle of legislation that required years to adapt to Montana's conditions. Adoption of Codes written for New York and California, with the adjustments of the Code Commissioners and the few members of the legislature who succeeded in affecting the Codes' provisions, gave Montana laws written to serve the interests of a tiny minority of Montanans.

Adoption had costs beyond the salaries of the clerks retained to enroll the bills by hand. Creating massive bodies of laws requiring hundreds of amendments over the following years divert-

413. Admittedly, overwhelming the Fourth Legislature was not exceptionally difficult. It managed to lose a bill passed by both houses raising legislative salaries for the next session, a subject presumably dear to most members' pocketbooks. The Same Old Price, DAILY INDEPENDENT (Helena), Mar. 10, 1895, at 1.
415. Id. at 5.
ed legislative efforts to adjusting the Codes and away from other, potentially beneficial pursuits. Montana's legislatures in the years after 1895 could have spent time on local issues, but too often they were busy fixing the Codes.

More generally, the Codes also had an effect on Montana's common law development. Having rejected Field's original vision of displacement of the common law, the Montana Codes had to coexist with the common law. Sometimes the courts ignored or misinterpreted the Code provisions, as with the development of the modern law of wrongful discharge. Other times, however, the Code provisions distorted the common law's development, as Professor Natelson described with respect to covenants running with the land.\textsuperscript{416} Natelson summarized the problem with the code provisions, stating "newly-borrowed concepts must be kept within common law containers, from which those concepts can be readily returned if they fail to meet local needs. During the early years of a state's juristic development, locking borrowed ideas in statutory strongboxes seems most unwise."\textsuperscript{417} To the extent that the Codes prevented the development of a Montana common law appropriate to Montana's conditions, codification had a heavy price.

The Codes' comprehensiveness imposed an additional cost. The existence of the comprehensive Civil Code promoted the idea that the legislature's role legitimately included subjects such as limiting the freedom of individuals to contract for employment longer than two years\textsuperscript{418} or requiring licenses of the owners of stallions whose owners sold their breeding services.\textsuperscript{419} The codifiers created a system built around legislation rather than law. This left Montana with an interventionist government mindset that continues today.\textsuperscript{420}

Even if we restrict our evaluation to the central problem the codifiers set out to solve, the lack of certainty in Montana's legal system, the Codes cannot be considered a success. Certainty in
the law means more than creation of written rules; it also requires stability of the rules themselves over time.\textsuperscript{421} The legal upheaval of the Codes' adoption and the endless amendments that followed hardly promoted certainty in this second sense, even if the Codes themselves met the test of precision. In attempting to repair the damage of a territorial history of partisan bickering and pandering to special interests, the codifiers rushed through too much, too fast. Moreover, the treatment of the Codes' provisions by the Montana courts has sometimes promoted confusion.\textsuperscript{422} Rather than curing confusion, the Codes transformed and multiplied it.

Moreover, code systems at best provide rules optimal at the time of adoption.\textsuperscript{423} "As soon as a code is passed, however, it begins to become obsolete, and its maladaptation becomes larger until a new code is adopted. The common law, on the other hand, is always somewhat maladapted, but its lack of adaptation is limited because it is continually changing."\textsuperscript{424} When a legislature adopts a set of codes with Montana's haste and lack of consideration, even the initial advantage of optimality is sacrificed.

Is there something to celebrate in this centennial year of the Codes? The codifiers thought they were creating something that history would celebrate. Sanders, for example, enthused that:

\begin{quote}
[A] citizen of Montana, who has but little money to spend on books, needs to have lying on his table but three: an English Dictionary to teach the knowledge of his mother tongue; this Book of the Law [the Codes], to show him his rights as a member of civilized society; and the good old Family Bible to teach him his duties to God and to man.\textsuperscript{425}
\end{quote}

Unfortunately they were wrong.

In 1876, Decius Wade published his only novel, \textit{Clare Lin-}

\begin{footnotesize}\begin{enumerate}
\item LEONI, \textit{supra} note 414, at 95: 
[T]he certainty of the law has been conceived in two different and, in the last analysis, even incompatible ways: first, as the precision of a written text emanating from legislators, and secondly, as the possibility open to individuals of making long run plans on the basis of a series of rules spontaneously adopted by people in common and eventually ascertained by judges through centuries and generations.

\item Natelson, \textit{supra} note 14, at 58, 63-65, 88 (describing effect of decisions to undermine Civil Code; describing circular arguments used to avoid code provisions; and concluding that Montana cases inconsistent with the Code cannot be explained by changed circumstances).

\item Rubin, \textit{supra} note 7, at 11.

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\end{enumerate}\end{footnotesize}
Although Wade was a far better writer of judicial opinions than of novels, the cautionary words of his hero Richard Pembroke to the villain William Stacy would have been wise advice for Wade, Sanders, and their fellow codifiers in the 1890s:

And so, in conquering a profession, or even a book, if we hurry by, or go around principles we do not comprehend or understand, we shall find ourselves cut off from our base of supplies, floundering in an unknown country, beset with difficulties upon every hand, an enemy behind harassing and distressing us and defeat would be the certain result; while if we conquer every principle as we proceed, leaving no troublesome enemy in the rear, victory is ensured before even the campaign is commenced.

Montana's legislators would have served their state better had they followed that advice and refrained from reform on such a dramatic and massive scale. A slow and steady revision of existing law would have avoided the distortions introduced by the inappropriate provisions of the "foreign" codes on Montana's le-

426. DECIIUS S. WADE, CLARE LINCOLN (1876).
427. Wade's, and his associates', opinions are referred to as "everywhere recognized among the soundest and ablest in the whole country" and Wade's decisions "had much to do with perfecting the practice of law in the courts of Montana." C.P. Connolly, supra note 254, at 60.
428. CLARE LINCOLN is deservedly obscure, although it was apparently popular in Montana when published. Id. at 62. Given the difficulty of obtaining a conveniently readable copy (I was able to borrow a microfilm copy through interlibrary loan), I will briefly summarize the plot for the curious. Those who plan to read the book, a course I advise against, should skip the remainder of this footnote. Richard Pembroke, a schoolteacher, Harvard man, and heir to an old New England family now burdened by a debt to a miser, Bowker, falls in love with his 13 year old pupil, Clare Lincoln. Torn from her by the outbreak of the Civil War, Richard meets up with Clare's dying father on the battlefield and receives a message for Clare. Meanwhile, Clare's mother has died and Clare is taken in by kindly Doctor Cornelius Hume, a wealthy man who sees his lost daughter Laura in Clare. Clare is wooed by William Stacy, a cad who affects a humble demeanor to gain her hand in marriage, anticipating that Doctor Hume will leave his vast estate, Evergreen Home, to Clare. Rejected by Clare, Stacy plots with the unethical lawyers Sharp Popper and Popper Sharp to forge a will of a prior owner of Evergreen Home (from whose heirs Hume had bought the property) and secure Evergreen Home for himself. Ultimately, Clare travels to the English Channel Islands where she discovers the true last will of the original owner, returns with it in time for Richard to triumph at the trial and save Evergreen Home for Dr. Hume. Clare is then discovered to be the only heir of the miser Bowker and so owner of Richard's family estate, which Bowker had seized when Richard's parents had defaulted on their mortgage. Clare and Richard marry and all is well. The reader who has made it through this footnote has just spared herself reading the 451 pages of the novel.
429. WADE, supra note 426, at 192.
gal development. Legal reformers elsewhere would do well to heed the lessons of Montana's experience with the Codes.