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Dear Readers,

Enclosed are two shorter papers that stem from the same project, a "small book" on *American School of Magnetic Healing v. McAnnulty*, which I'm treating as something of a microhistory of Gilded Age and Progressive Era American legal history. The upshot of the case is simple enough: The U.S. Supreme Court enjoined the Postmaster General to deliver the mail to the American School of Magnetic Healing notwithstanding the postmaster's conviction that the School was a fraudulent enterprise (and despite clear statutory directions to withhold mail from fraudulent enterprises).

The broader context of the case brings together several themes that are of interest to my research as a legal historian, including practical problems of fusing legal and equitable procedure, changing attitudes about legal authority and plural sources of law, and political contests between evangelicals and populists over the definition of "property" and its constitutional protection. The story of the case runs through Comstock raids in New York, the growth of the federal bureaucracy in Washington, and the emergence of new age religions in the West. Ultimately, I want to use the case to ask questions about what constitutes legal modernity in America, and how these features developed at the turn of the century.

The first paper is a synthesis of some things I've written on the fusion of law and equity that then move the story forward into public law equity and equitable theory. For the workshop, I'll particularly focus on the story I want to tell in the Public Law Equity section. The second paper/chapter is a more wide-ranging exploration of the cultural legal history of magnetic healing and its regulation. Readers may wish to focus on the final section, which is much more court-centered.

Obviously, this is a very early stage project, and I'm still considering how these two projects relate to each other, if at all. I very much look forward to all comments and suggestions.

Thanks and see you soon,

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Fusion at the Fin de Siècle

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Ten years before he became dean of the Harvard Law School, Roscoe Pound published his first paper on legal theory, titling it 'The Decadence of Equity'.[1] The essay was awash in the kind of ennui and despair at the triumph of artifice over nature that fin-de-siècle thinkers associated with late-stage empires on the verge of collapse.[2] Equity had imperialistically conquered all. Its dockets were 'overloaded', and people commonly complained they were 'governed by' nothing but 'courts of equity'.[3] But even in its hour of triumph, the system of equity had decayed from within. Its 'refinements and technical doctrines', its 'hair-splitting propensities', and 'the casuistry of modern equity' had rendered a system that was 'artificial and pedantic', the very opposite of where equity had begun its life as a system of 'natural justice'. In short, equity could only be described using the most dreadful epithet Pound could muster: Equity had become 'mechanical'.[4]

Pound's better-known attack on 'mechanical jurisprudence' a few years later has usually been read as an early salvo in the revolt against formalism.[5] This chapter, however, takes Pound's diagnosis seriously as a history of the consequences of American-style fusion of law and equity. Equity, as a couple famous accounts have celebrated, 'conquered' common law in America.[6] And yet equity vanished as a category of jurisprudence, so much so that recent revivals of equity talk in the US Supreme Court has sparked fascination and confusion.[7] This chapter takes up the question of what became of the conqueror after its hour of triumph.

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[1] Roscoe Pound, 'The Decadence of Equity' (1905) 5 Colum L Rev 20. Pound became dean of the Harvard Law School in 1916. A trained botanist, Pound first turned to legal writing with a history of legal philosophy in 'A New School of Jurists' (1904) 4 Univ Studies 249.

[2] On the cultural pessimism of the period, see especially Brooks Adams, *The Law of Civilization and Decay: An Essay on History* (Swan Sonnenschein 1895); Max Nordau, *Degeneration* (D Appleton & Co 1895); TJ Jackson Lears, *No Place of Grace: Antimodernism and the Transformation of American Culture, 1880–1920* (Pantheon 1981).

[3] Pound (n 1) 20.

[4] Ibid 20, 27–28, 34.

[5] Roscoe Pound, 'Mechanical Jurisprudence' (1908) 8 Colum L Rev 605.

[6] Stephen N Subrin, 'How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective' (1987) 135 U Pa L Rev 909; Douglas Laycock, 'The Triumph of Equity' (1993) 56 Law & Contemp Probs 53, 53–54.

[7] For the more recent revival of the distinction, see Samuel L Bray, 'The Supreme Court and the New Equity' (2015) 68 Vand L Rev 997.

As many commentators have recognized, American efforts at fusing law and equity typically meant simply picking equity over law. Even as separate courts of chancery were abolished, equitable procedures, remedies, and doctrines triumphed over legal ones, without much attempt at a real amalgamation. Rather than *fuse* with law, in other words, equity became *diffuse*, proliferating to all kinds of cases and being deployed by all kinds of courts, crowding out or overruling ordinary legal process. Notable works have celebrated the completion of this process in the 1938 adoption of the Federal Rules of Civil Procedure and the provision for 'one form of action—the civil action'.[8] Other work, including my own, has sought to demonstrate the advanced progress of fusion by the middle of the nineteenth century in state procedure codes whose provisions strongly influenced the Federal Rules.[9] Still others have shown how much equity had to first absorb legal practices before it could conquer them, including oral, adversarial examination procedures in the early nineteenth century and a more rule-like system of precedents the century before.[10]

This chapter supplements these synoptic accounts by offering a history of fusion over the later decades of the nineteenth century, the period between the adoption of the state codes and the elevation of their system of procedural fusion in the Federal Rules of 1938. In these decades, American courts developed a kind of practical fusion, especially in public law remedies against official misconduct, and theorists from John Norton Pomeroy to Wesley Hohfeld and Walter Wheeler Cook gave fusion a theoretical foundation in American law. All in all, these efforts succeeded in making equitable procedure, doctrine, and remedies more widely available—essentially available in every case—but at the same time emptied equitable reasoning of its distinctive discretion based on the facticity of

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[8] Subrin (n 7); Laycock (n 7) 53–54; Fed R Civ P 2. As adopted in 1938, the rule provided for 'one form of action to be known as "civil action"'; the wording quoted in the text dates from the 2007 restyling.

[9] Kellen Funk, 'Equity Without Chancery: The Fusion of Law and Equity in the Field Code of Civil Procedure, New York 1846–76' (2015) 36 J Legal Hist 152; Kellen R Funk, *Law's Machinery: Reforming the Craft of Lawyering in America's Industrial Age* (OUP 2025).

[10] See Amalia D Kessler, 'Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial' (2005) 90 Cornell L Rev 1181; Amalia D Kessler, *Inventing American Exceptionalism: The Origins of American Adversarial Legal Culture, 1800–1877* (Yale University Press 2017); John H Langbein, Renée Lettow Lerner and Bruce P Smith, *History of the Common Law: The Development of Anglo-American Legal Institutions* (Aspen 2009) 351–58; Dennis R Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (Ashgate 2010) 255–56; Thomas P Schmidt and Kellen R Funk, 'The Equity Docket' (2026) 101 NYU L Rev (forthcoming) pt II.B.

extraordinary cases. In time, the very success of equity in American-style fusion led to its conceptual disappearance.

I. The Triumph of Equity

Pound's complaint that Americans were in danger of being 'governed by courts of equity' was grounded on the observation that over the last half of the nineteenth century, equity's procedures, remedies and modes of reasoning had expanded into nearly every American court and were now applicable across nearly all varieties of cases. All this despite—or because—states had been gradually abolishing their distinct institutions of chancery.

a. Fusion by Diffusion

'Fusion of law and equity is an expression common in England, though little used in this country', David Dudley Field explained to the readers of the *Albany Law Journal* in 1878.[11] Field wrote just after the English had achieved their own fusion in the Judicature Acts of 1873–75, a reform for which English lawyers had studied New York's experience closely.[12] Thirty years had passed since New York enacted his Code of Procedure, and yet nearly every argument in Field's letter, down to its phrasing, could have been lifted from the debates that preceded the Code in 1846. Elsewhere I have described those debates in detail, so a sketch here can suffice.[13] The major point is that the conceptual terms of the American fusion debate were set at mid-century and changed remarkably little over the following decades.

Opponents of fusion, or what I have called 'separatists', insisted that the division of law and equity was 'founded on a natural distinction', existing 'in the unalterable nature of things themselves'.[14] Law sorted the infinite variety of human wrongs into a limited set of remedial forms; equity took charge of 'the residue, and

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[11] David Dudley Field, 'Law and Equity' in AP Sprague (ed), *Speeches, Arguments, and Miscellaneous Papers of David Dudley Field*, vol 1 (D Appleton & Co 1884) 573, 578 (reprinting a letter first published at (1878) 18 Alb LJ 509).

[12] Supreme Court of Judicature Act 1873; Supreme Court of Judicature Act 1875; Michael Lobban, 'Preparing for Fusion: Reforming the Nineteenth-Century Court of Chancery, Part II' (2004) 22 Law & Hist Rev 565, 584; Funk, 'Equity Without Chancery' (n 9) 167.

[13] See Kellen Funk, 'The Union of Law and Equity: The United States, 1800–1938' in John CP Goldberg, Henry E Smith and PG Turner (eds), *Equity and Law: Fusion and Fission* (CUP 2019) 46, 51–60.

[14] William G Bishop and William H Attree (eds), *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of New York* (Evening Atlas 1846) 664 (George Simmons), 621 (Lorenzo Shepard).

nothing but the residue'.[15] The law's rigid classifications were tolerable because equity stood ready to correct them, and equity's discretion was tolerable because so many cases lay beyond its reach. To abolish the distinction would 'convert [a state's] standing army of judges into so many chancellors, with all the arbitrary power of that court'.[16] Nor did the separatists believe fusion could be confined to procedure. '[T]he very forms of proceedings stick so close to the substance', one separatist warned. '[T]he practice of courts is so adhesive to their doctrines', that procedural reform would inevitably unsettle the substantive law.[17]

The fusionists answered with a thoroughgoing nominalism. Law and equity were not 'real existences', Field wrote in the press, but 'ancient formulas, scholastic in their structure and origin, whose vitality has long since departed'. The distinction between them 'has no foundation in the nature of things. Its existence is accidental.'[18] The old jibe about the chancellor's foot, Charles O'Conor scoffed, had been 'exploded long ago'; chancery now followed precedent as faithfully as any court of law.[19] Here the fusionists could quote Blackstone himself, who had described law and equity as 'equally artificial systems, founded on the same principles of justice and positive law; but varied by different usages in the forms and modes of their proceedings'.[20] If the difference lay only 'in the form of pleading and the remedies', as O'Conor put it, then fusion required only the reform of pleading and the pooling of remedies.[21] And because chancery pleading already had 'literally no form about it', fusion meant in practice the extension of equity's procedure to every case as the legal forms of action were abolished.[22]

The Code of Procedure that Field and his fellow commissioners drafted for New York did just that. Its signature provision declared '[t]he distinction between actions at law and suits in equity, and the forms of all such actions and suits

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[15] Ibid 666 (Simmons); see also ibid 622–24 (Shepard).

[16] Ibid 491 (Simmons).

[17] Ibid 664 (emphasis omitted).

[18] [David Dudley Field], 'The Convention' *New York Evening Post* (New York, 13 August 1846).

[19] S Croswell and R Sutton (eds), *Debates and Proceedings in the New-York State Convention* (Albany Argus 1846) 443 (O'Conor); see also Bishop and Attree (n 14) 679 (Michael Hoffman).

[20] William Blackstone, *Commentaries on the Laws of England*, vol 3 (Clarendon Press 1768) 434; see Bishop and Attree (n 14) 679 (Hoffman).

[21] Croswell and Sutton (n 19) 443.

[22] Bishop and Attree (n 14) 562 (O'Conor).

heretofore existing' to be abolished.[23] In their place stood a single civil action, commenced by a plain statement of facts, in which a court could grant 'any relief consistent with the case made by the complaint'.[24] The commissioners made no secret of their model: 'the basis' of their system 'was substantially that upon which courts of equity were originally founded'.[25] Liberal amendment, a waivable jury and the full menu of chancery's remedies, including injunctions, receiverships, accounts and contempts, became available in every court of general jurisdiction.[26]

Fusion in the codes, in short, was accomplished through equity's diffusion. Where England had concentrated equity in a Lord Chancellor and a handful of vice-chancellors, New York made every trial judge a chancellor. By the end of the century some thirty American states and territories had followed the New York model.[27] Even jurisdictions that resisted the Code spread equity's powers more widely. Massachusetts, long the paradigm anti-Chancery commonwealth, finally conferred full equity jurisdiction on its Supreme Judicial Court in 1877. Several states, Illinois, New Jersey and Delaware most conspicuously, held fast to the old division, earning the fusionists' derision as 'the Yellowstone Park of common law pleading'.[28]

But what of the separatists' warning that fusion could not remain a simple matter of procedure? Three answers were given in various quarters by the end of the century.[29] On the first account, fusion was accomplished (or at least possible) in procedure but substantive legal and equitable rights were left distinct, governed by tradition-specific doctrines. On the second account, procedural fusion would necessarily produce substantive fusion: once the remedies were pooled, any

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[23] 1848 NY Laws c 379, s 62.

[24] 1849 NY Laws c 438, s 275; see also 1848 NY Laws c 379, ss 120, 231.

[25] *Second Report of the Commissioners on Practice and Pleadings* (Weed, Parsons & Co 1849) 7.

[26] Funk, 'Equity Without Chancery' (n 9) 186–88; Funk, 'Union of Law and Equity' (n 13) 60–61.

[27] Funk, 'Equity Without Chancery' (n 9) 167 n 99 (listing code jurisdictions by date of adoption); Charles M Hepburn, *The Historical Development of Code Pleading in America and England* (WH Anderson & Co 1897) 93–113.

[28] Phyllis Maloney Johnson, 'No Adequate Remedy at Law: Equity in Massachusetts 1692–1877' (2012) Yale Law School Student Legal History Papers, Paper 2; 'Current Topics' (1885) 32 Alb LJ 161; see also Charles E Clark, 'The New Illinois Civil Practice Act' (1933) 1 U Chi L Rev 209, 215.

[29] This typology is developed in Schmidt and Funk (n 10) pt I.A. For a framework assessing the completeness of fusion along these dimensions, see Samuel L Bray, 'Form and Substance in the Fusion of Law and Equity' in Dennis Klimchuk, Irit Samet and Henry E Smith (eds), *Philosophical Foundations of the Law of Equity* (OUP 2020) 231.

distinction between the rights they protected would wither away. A third view, not fully articulated until the turn of the century, held that substantive fusion was already well under way and code procedure was merely catching up.[30]

Field held the second view, and held it with conviction. Lawyers spoke of legal rights and equitable rights, he acknowledged, 'but only because there are legal remedies and equitable remedies. Once abolish the distinction between the latter, and the distinction between the former perishes with it.'[31] In its place of the old law-equity binary, Field proposed a new one. 'Substantive' rights would be defined by legislation, ideally in a comprehensive civil code; 'procedural' remedies would be selected from an open menu by lawyers and judges guided by professional experience.[32] As I have argued elsewhere, the reconceptualization of law into substance and procedure and the attempt to put this conceptualization into actual American practice was the enduring legacy of the Field Code.[33]

But contra Field, New York's judges largely took the first view, and the Code gave them ample warrant. For all its declared abolition, the Code continued to distinguish between actions for the recovery of money or real property and 'all other cases', attaching different rules of summons, timing and, most consequentially, mode of trial to each.[34] The state constitution, moreover, still guaranteed jury trial 'in all cases in which it has been heretofore used' and still vested the courts with jurisdiction 'in law and equity', which led the Court of Appeals to declare it 'plain' that the distinction lay 'beyond the power of the legislature to abolish'.[35] Another court went further still: 'Although the distinction between actions at law and in equity is abolished', it held, 'the inherent distinction between legal and equitable jurisdiction and relief exists, and it is not in the power of constitutions or legal

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[30] See Charles E Clark, 'The Union of Law and Equity' (1925) 25 Colum L Rev 1, 10; Charles E Clark, 'The Handmaid of Justice' (1938) 23 Wash U LQ 297, 311–12; Part II below.

[31] Field, 'Law and Equity' (n 11) 579.

[32] *First Report of the Commissioners on Practice and Pleadings* (Charles Van Benthuysen 1848) 73–75; David Dudley Field and Alexander W Bradford, *The Civil Code of the State of New York Reported Complete* (Weed, Parsons & Co 1865). On Field's adaptation of Bentham's distinction between substantive and adjective law, see Funk, 'Equity Without Chancery' (n 9) 184–85.

[33] See generally Funk, *Law's Machinery* (n 9), especially 251–54.

[34] 1848 NY Laws c 379, ss 154, 203; *Final Report of the Commissioners on Practice and Pleadings*, in *Documents of the Assembly of the State of New York*, 73rd Sess, vol 2, no 16 (1850) 227–33, 318–19 (Final Report).

[35] NY Const 1846, art I, s 2; art VI, s 3; *Reubens v Joel* 13 NY 488, 497 (1856).

enactments, to abolish it.'[36] Thus thirty years on, the separatist ontology of 1846 had remained the law of New York, and Field was left to complain that the judges 'tend to keep up a distinction that no longer exists, and go far to confuse and mislead'.[37] Even in more sympathetic hands outside of New York, the most that was often claimed for the codes was that they merged legal and equitable procedure but left legal and equitable rights distinct.[38]

The third view belonged to the drafter of the Federal Rules, Charles E Clark. While on the faculty of the Yale Law School, Clark declared in 1925 that '[t]he union of law and equity is justly considered to be the foundation principle' of modern procedural reforms, which 'emphasize substantive rights, [and] not procedural forms'.[39] In Clark's account, the rights themselves were already converging; it was procedure that held them apart. When the Federal Rules took effect in 1938, Clark celebrated the 'triumph of the one form of civil action', which had 'wiped out' the 'annoying' separation of legal and equitable procedure, as if the rules had at last caught up with a law that had long since fused.[40]

Clark relied heavily on the work of John Norton Pomeroy, whose *Remedies and Remedial Rights* (1876) and *Treatise on Equity Jurisprudence* (1881–83) became the leading theoretical works of the code era. 'Equitable jurisdiction', Pomeroy argued, was merely a label for the practices peculiar to the English and early American courts of chancery. Once those institutions were abolished, the 'primary rights' they had protected carried forward as entitlements of a unified legal order, and 'the *raison d'être* of the existing classification of remedies and remedial rights . . . disappears'.[41] Yet Pomeroy conceded that '[t]he *remedies themselves*, the final reliefs which are granted to litigant parties who establish their rights, remain unchanged'.[42] Pomeroy, in other words, abolished the categories while keeping their contents.

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[36] *Hartt v Harvey* 32 NY 55, 66 (1865).

[37] Field, 'Law and Equity' (n 11) 583; see also Arphaxad Loomis, *Historic Sketch of the New York System of Law Reform in Practice and Pleadings* (JR & GG Stebbins 1879) 26 (complaining that trial calendars still bore the labels of law and equity).

[38] See, eg, *Bradley v United States* 214 F 2d 5 (5th Cir 1954); *Byram v Vaughn* 68 F Supp 981 (DDC 1946); *Fitzpatrick v Sun Life Assurance Co of Canada* 1 FRD 713 (DNJ 1941).

[39] Clark, 'Union of Law and Equity' (n 30) 10.

[40] Clark, 'Handmaid of Justice' (n 30) 310–12; see Schmidt and Funk (n 10) pt I.A.1.

[41] John Norton Pomeroy, *Remedies and Remedial Rights by the Civil Action According to the Reformed American Procedure* (3rd edn, Little, Brown & Co 1894) 24–25; see also John Norton Pomeroy, *A Treatise on Equity Jurisprudence*, vol 1 (AL Bancroft & Co 1881) 115–27.

[42] Pomeroy, *Remedies* (n 41) 25 (emphasis in original).

Whether the injunction carried its old conditions with it, such as the inadequacy of the legal remedy, was precisely what the codes left unstated. The result was a curious inversion of Sir Henry Maine's famous observation that substantive law first appeared 'gradually secreted in the interstices of procedure'. After the codes, the lingering distinctions of law and equity took on the look of remedial anomalies secreted in the interstices of a unified law of substantive rights.[43]

Overall, the debate about fusion remained largely where the New Yorkers had set it in 1846. The federal courts held to the separatist position long after most American lawyers had abandoned it. Fusion, Justice Grier wrote for the Supreme Court in 1858, 'is found to be beyond the power of legislative omnipotence', for '[t]he distinction between the different forms of actions for different wrongs, requiring different remedies, lies in the nature of things'.[44] The Conformity Act of 1872 required federal courts to follow state procedure, but only in causes 'other than equity and admiralty', so that federal judges in code states applied the codes on their law side while sitting as old-fashioned chancellors on their equity side.[45] Field's call for federal fusion as president of the American Bar Association in 1888 went unheeded, and when the Supreme Court finally overhauled its equity rules in 1912, commentators greeted the new rules as a reassurance that the distinction was there to stay.[46] As one commentator complained in 1911, what the codes had really produced was the 'confusion of law and equity'.[47] When the next generation of fusionists took up the cause, they reached for Field's arguments and even his words, insisting that nothing made the old distinctions 'inherent in the nature of things'.[48]

By 1910, then, equity had dramatically expanded through fusionist efforts, but its victory was curiously ill-defined. Pro-fusion lawyers could not agree whether they had abolished equity as a distinct body of law or merely given it the run of the courthouse. The most powerful jurists in the federal system—but hardly anyone else—still defended separate courts of chancery, while equity's procedures had

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[43] Henry Sumner Maine, *Dissertations on Early Law and Custom* (John Murray 1883) 389; see Funk, 'Equity Without Chancery' (n 9) 191.

[44] *McFaul v Ramsey* 61 US (20 How) 523, 525 (1858); see Kellen Funk, 'Equity's Federalism' (2022) 97 Notre Dame L Rev 2057, 2065–72.

[45] Act of 1 June 1872, ch 255, s 5, 17 Stat 196, 197.

[46] *Report of the Eleventh Annual Meeting of the American Bar Association* (Dando Printing & Publishing Co 1888) 69–70; James Love Hopkins, *The New Federal Equity Rules* (1913) v.

[47] Henry H Ingersoll, 'Confusion of Law and Equity' (1911) 21 Yale LJ 58.

[48] Clark, 'Union of Law and Equity' (n 30) 7.

become the default procedures of American civil justice in many state courts. Yet even in the federal courts, as the next part shows, the remedial law for public officials was achieving a kind of practical fusion. Ironically, it was the generally anti-fusionist federal courts that rushed towards public law fusion ahead of the states, among whom even the most pro-fusionist maintained distinct remedial practices for public law.

b. Public Law Equity

The state procedure codes declared the distinction between law and equity abolished in one section, only to revive it in others. In the penultimate section of the 1848 Code, the commissioners provided that '[u]ntil the legislature shall otherwise provide, this act shall not affect proceedings upon mandamus', prohibition, scire facias, that is, the 'prerogative writs' in English legal practice.[49] Unlike most of the Code, the section came with no commentary and bore several typographical errors, strong signs that it was a placeholder hastily inserted as the commissioners raced to report their draft to the legislature. Whatever the reason, the effect was to leave an entire department of public law remedies outside the project of fusion. Under the Field Code, officer suits remained governed by New York's Revised Statutes of 1829 as well as uncodified common law.[50]

The exclusion was odd, because mandamus as New York lawyers pleaded it already looked a great deal like equity. Petitioners 'moved the court' on affidavits narrating their grievances, much as a solicitor would plead a bill for an injunction; judges weighed the merits of disputes over offices and trusts with little regard for the strictures of special pleading; and disobedience of the peremptory writ was punished by imprisonment for contempt.[51] Some judges went so far as to describe mandamus as an all-purpose remedy, to be 'used upon all occasions, where the law has established no specific remedy, and where, in justice and good government, there ought to be one'.[52] If any two remedies seemed ripe for fusion, the writ of mandamus and the bill for an injunction would have seemed an easy place to start.

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[49] 1848 NY Laws c 379, s 390. In addition to the writs named in the text, New York's Revised Statutes regulated proceedings *ad quod damnum*. *Revised Statutes of the State of New York*, vol 2 (1829) 588–90.

[50] Revised Statutes (n 49) 586–88. Field had engineered the constitutional mandate for fusion himself, which makes the commissioners' caution all the more conspicuous. See Funk, *Law's Machinery* (n 9) 84–85.

[51] For a vivid illustration, see *The Case of the Centenary Methodist Episcopal Church* (Lane & Tippett 1848) 4, 34–49, 71–72.

[52] Ibid 49 (quoting *R v Barker* (1762) 3 Burr 1265).

Yet even when the codifiers returned to the prerogative writs in subsequent drafts, they declined to fuse them with equity. Their Final Report of 1850 maintained that their blended civil action was 'in its nature adapted to almost every case requiring the interposition of judicial authority'. Nevertheless, they begrudgingly 'follow[ed] the beaten track already enlightened by the judicial consideration to which the code has been subjected' and preserved mandamus as a 'special proceeding'.[53] The chapter on mandamus borrowed nearly verbatim from the Revised Statutes. Its one innovation, rechristening mandamus the 'writ of mandate' in keeping with the commission's campaign against Latinate phrasing, never caught on.[54] More consequential was the commissioners' attempt to define the writ, something the Revised Statutes had never done. Mandamus 'may be issued to any inferior tribunal, corporation, board or person, to compel the performance of an act, which the law specially enjoins, as a duty resulting from an office, trust, or station'. It could compel a judge to act but 'cannot control judicial discretion', and it would not issue 'in any case where there is a plain, speedy and adequate remedy, in the ordinary course of the law'.[55] Equitable injunctions received no comparable treatment. Scattered sections of the Code defined an injunction as 'a writ or order, requiring a person to refrain from a particular act', specified when it might issue provisionally, and otherwise left the term 'final injunction' undefined, enforced like any judgment requiring the performance of an act by punishment 'as for a contempt'.[56]

The result was one of the Code's enduring mysteries. What did it mean to abolish the distinction between actions at law and suits in equity in one section and then to provide for writs of mandamus and injunction in others? How could mandamus be withheld wherever there was an adequate remedy 'in the ordinary course of the law', when the ordinary course of law now supplied coercive relief in every civil action? Under the Code's terms, mandamus could be sought against officeholders, but officeholders were not excluded from sections on equitable relief, so why seek one rather than the other? Despite the confusion, the Code's conflicting provisions on the writs were nevertheless borrowed verbatim in most of the states

[53] Final Report (n 34) 378, note to tit 11.

[54] Ibid 537–41, ss 1282–94; compare *Revised Statutes* (n 49) 586–88.

[55] Final Report (n 34) 538, ss 1283–84.

[56] Ibid 298–99, ss 714–15; 350, s 830; 411, s 977.

that adopted the Code, so these questions confronted judges and treatise writers across the United States in the decades after 1870.[57]

Three answers emerged, each tracking a clause of the Code's definitions, though none proved fully satisfactory to the profession. The first distinguished the writs by their defendants: mandamus ran against tribunals, officers and corporations. But corporations sat on both sides of any line between public and private law, and by the end of the century hundreds of precedents applied mandamus to corporate officers while hundreds more applied injunctions to similar ends. Treatise writers could do little more than catalogue the outcomes. Equity could decide which church trustees were faithful to their trust, while mandamus tried their title to office; mandamus compelled a clerk to recognize duly installed officers, but an injunction compelled him to record a transfer of stock. The rise of public utilities made the occasions for legal or equitable relief even more of a labyrinth.[58]

A second answer distinguished compulsion from restraint: mandamus commanded performance, while the injunction forbade action. Practice refused to cooperate here too. Mandamus was routinely deployed to negative effects, particularly against corporations, and equity had long since developed the mandatory injunction alongside the prohibitory one, producing so large an overlap with mandamus that courts came to use the two interchangeably. John Norton Pomeroy's influential treatise drove the point home: '[t]he restraining power of equity extends', he thought, ultimately 'through the whole range of rights and duties which are recognized by the law', and equitable power was necessarily both 'affirmative and negative'.[59]

The final answer was temporal: mandamus corrected past failures of duty, while the injunction prevented threatened ones. Justice Joseph Bradley gave the canonical statement in *Board of Liquidation v McComb*, an 1875 opinion that used 'mandamus or injunction' interchangeably before concluding that 'the writs of

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[57] See generally James L High, *A Treatise on Extraordinary Legal Remedies, Embracing Mandamus, Quo Warranto, and Prohibition* (3rd edn, Callaghan & Co 1896); Thomas Carl Spelling, *A Treatise on Injunctions and Other Extraordinary Remedies* (2nd edn, Little, Brown & Co 1901).

[58] Joseph Asbury Joyce, *Actions by and Against Corporations at Law and in Equity* (Banks 1910) 582–84. With noncorporate officers, and especially with judges, mandamus tended to be the more exclusive remedy; most jurisdictions followed New York in folding the writ of prohibition into it. Spelling (n 57) vol 2, 1253–67.

[59] Pomeroy, *Treatise* (n 41) 367–68 and n 2 (emphasis in original).

mandamus and injunction are somewhat correlative to each other'. Where 'a plain official duty … is to be performed, and performance is refused', mandamus would issue; where such a duty 'is threatened to be violated by some positive official act', an injunction would prevent it. In either case, Bradley added, '[a]n unconstitutional law will be treated by the courts as null and void.'[60] James High's treatise insisted likewise that '[m]andamus is never granted in anticipation of a supposed omission of duty, however strong the presumption may be', and then listed contrary authorities in the footnote.[61] The deeper trouble with the temporal theory was its triviality. A judgment in mandamus declared the rights and duties of the parties as surely as a decree in equity did. Should an officer relapse into the same dereliction, a peremptory writ could issue almost at once, backed by the same threat of contempt. The 'retrospective' writ did the work of a 'prospective' decree.

By the turn of the century, then, the codes had left mandamus formally intact but functionally indistinct, a legal writ whose work equity could do at least as well. The irony was that the jurisdictions most committed to fusion preserved the formal distinction between mandamus and injunction, while the federal courts, the most stalwart opponents of fusion, achieved a practical merger of the two with no statutory mandate at all.

How that merger happened is a story less of doctrine than of lawyering. Before the late 1870s, a citizen aggrieved by a federal officer had two familiar remedies, both at law. He could sue the officer personally in trespass or trover, as one citizen did when his local postmaster refused to deliver mail without extra postage. As the demand for extra postage was found contrary to the federal statute, the state courts awarded money damages (of six cents) and costs (of $136 by the time the appeals were concluded). The US Supreme Court affirmed, ruling that the mistaken instructions of the Postmaster General were no defence for the local postmaster when those instructions 'exceed[ed] the law'.[62]

Less commonly, a plaintiff could seek mandamus if the federal officer neglected to perform a ministerial (or nondiscretionary) duty and the litigant could reach the courts of the District of Columbia, the only federal circuit that *Marbury v Madison* and its progeny had left with power to issue the writ against executive

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[60] *Board of Liquidation v McComb* 92 US 531, 541 (1875).

[61] High (n 57) 17, collecting contrary authorities including *Mayor of Brunswick v Dure* 59 Ga 803 (1876) and *Attorney-General v City of Boston* 123 Mass 460 (1877).

[62] *Teal v Felton* 53 US (12 How) 284 (1852).

officers.[63] The venue was not the only feature that made federal mandamus difficult to access. In 1840, the Supreme Court ruled that most official decisionmaking, including even the legal interpretation of statutes, belonged within the remit of official discretion and could not be judicially reviewed.[64] Still, federal courts found occasion throughout the century to compel officials to perform ministerial acts, such as when the Secretary of the Interior was ordered to deliver a patent for public land that had been signed, sealed, and recorded (i.e., *Marbury* all over again, but in a court of proper jurisdiction).[65]

Given the availability of legal remedies, resort to equity against federal officials was vanishingly rare. *Osborn v Bank of the United States* had permitted suits against *state* officers, with the strong implication that such suits could seek coercive relief.[66] By the 1870s, tax suits had made injunctions against state and local officers passingly familiar in federal equity, even as municipal bondholders pursued the same officers by mandamus.[67] The few litigants who sought to enjoin federal officers were turned away, most definitively when the Supreme Court denied Mississippi and Georgia standing to sue the President or cabinet-level officers over Reconstruction policy.[68]

The turn to federal equity for public law remedies seems to have originated in Louisiana, a state whose hybrid civilian-common law system had never cleanly distinguished between legal and equitable relief.[69] Three separate litigations spurred

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[63] *Marbury v Madison* 5 US (1 Cranch) 137 (1803); *McIntire v Wood* 11 US (7 Cranch) 504 (1813); *Kendall v United States ex rel Stokes* 37 US (12 Pet) 524 (1838). On the prerogative writs as the founding-era mode of review, see James E Pfander and Jacob P Wentzel, 'The Common Law Origins of *Ex parte Young*' (2020) 72 Stan L Rev 1269.

[64] *Decatur v Paulding* 39 US (14 Pet) 497, 515–17 (1840); see Pfander and Wentzel (n 63) 1307–09.

[65] *United States v Schurz* 102 US 378 (1880).

[66] *Osborn v Bank of the United States* 22 US (9 Wheat) 738 (1824); see Ann Woolhandler, 'The Common Law Origins of Constitutionally Compelled Remedies' (1997) 107 Yale LJ 77.

[67] *Dodge v Woolsey* 59 US (18 How) 331 (1856); *Davis v Gray* 83 US (16 Wall) 203 (1873); *Cummings v National Bank* 101 US 153 (1879); cf *State Railroad Tax Cases* 92 US 575 (1876) (limiting tax injunctions); *Riggs v Johnson County* 73 US (6 Wall) 166 (1868); Charles Fairman, *Reconstruction and Reunion, 1864–88, Part One* (Macmillan 1971) ch 17.

[68] *Mississippi v Johnson* 71 US (4 Wall) 475 (1867); *Georgia v Stanton* 73 US (6 Wall) 50 (1868); *Gaines v Thompson* 74 US (7 Wall) 347 (1869).

[69] See *Livingston v Story* 34 US (9 Pet) 632, 655–58 (1835) (holding that the federal court in Louisiana must proceed 'according to the principles, rules and usages which belong to courts of equity', although the state had no courts of equity of its own); David S Clark,

what became a national turn to federal equity to review and challenge federal executive action. First were the famous *Slaughter-House Cases* that involved injunctive relief to protect a legislative regulatory monopoly in New Orleans. Best known as the Supreme Court's first authoritative interpretation of the Fourteenth Amendment, *Slaughter-House* included a little-known preliminary decision on interim relief that would have major effects for the history of federal equity.[70] As recent work by Ashton Macfarlane shows, the *Slaughter-House* Court pronounced a general rule that equitable orders would not be suspended pending appeal, in stark contrast to legal relief (including mandamus), where appeals ordinarily operated as a supersedeas of lower court orders.[71] After 1873, plaintiffs had a strong incentive to seek equitable relief in the lower courts if they could get it, as equitable orders would stick through the long progress of appeals.

Second was the aforementioned *Board of Liquidation v. McComb*. Coming two years after *Slaughter-House*, *McComb* offered guidance to pleaders looking to get into equity. Louisiana's Funding Act of 1874 authorized enforcement 'by mandamus, injunction, and criminal procedure' alike, and the Board had both affirmative duties (to repay bondholders) and negative ones (not to dilute the fund). The provision for both remedies to enforce the same rights, and the same limitation on both not to invade official discretion, highlighted the interchangeability of mandamus and injunctions, as Justice Bradley observed. His opinion for the Court strongly hinted that a mistake of remedy would hardly be fatal, but in general a case that could be characterized as a failure to act should seek mandamus, while a restraint on action should be characterized as an injunction. Since in *McComb* the legislature had directed payments in contravention of the original Funding Act, the proper remedy was an injunction to prevent the enforcement of the legislative act.[72]

The third pressure that changed federal practice was applied by the notorious Louisiana Lottery and its fight over the mailing of lottery tickets. Congress had closed the mails to lottery circulars in 1868, and in 1872 it authorized

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'The Civil Law Influence on David Dudley Field's Code of Civil Procedure' in Mathias Reimann (ed), *The Reception of Continental Ideas in the Common Law World, 1820–1920* (Duncker & Humblot 1993) 63.

[70] *Slaughter-House Cases* 83 US (16 Wall) 36 (1873); *Slaughter-House Cases* 77 US (10 Wall) 273 (1869).

[71] R Ashton Macfarlane, 'The First Century of the Interim Docket' (2027) 94 U Chi L Rev (forthcoming) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=7116499>; see *Slaughter-House Cases* (1869) (n 70) 297–98 ('the only effect of the supersedeas is to prevent all further proceedings in the subordinate court').

[72] *McComb* (n 60) 537–38 (quoting the Funding Act of 24 January 1874), 540–41.

the Postmaster General, 'upon evidence satisfactory to him', to withhold the registered letters and money orders addressed to any 'fraudulent lottery'.[73] In the autumn of 1879, emboldened by a new reading of the statute from his department's lawyers, Postmaster General David Key issued sweeping orders against the lottery companies, including one against Maximilian Dauphin, the president of the Louisiana State Lottery.[74] The lotteries were among the richest enterprises in the country, and they retained national counsel. Dauphin's lead lawyer was Matthew Hale Carpenter, the sitting senator from Wisconsin who had successfully defended Louisiana's slaughter-house monopoly before the Supreme Court six years earlier.[75]

The Louisiana Lottery and its allies mostly lost their initial litigations, but they lost in productive ways. The first response of the federal courts was that lottery operators had come to the wrong side of the court. When a Kentucky lottery sought to enjoin the Louisville postmistress from detaining its secretary's letters, District Judge Henry Billings Brown conceded that the withholding was unauthorized and that an action at law for damages might lie. But 'it does not necessarily follow', he reasoned, 'that [the lottery] is entitled to an injunction.' Brown quoted the Pennsylvania supreme court for the proposition that '[n]o one has ventured to assert that every civil wrong may be restrained by injunction' especially 'against any act that a common-law court and jury can redress'.[76] The Kentucky complainant was thus 'left to his remedy at law'.[77]

In the District of Columbia, where mandamus was available, the Louisiana Lottery nonetheless continued to pursue equity, averring that its president Dauphin was engaged in 'a lawful and legitimate business'. The court there answered that such averments were 'conclusion[s] of law', which a demurrer did not admit: 'If the nature of complainant's business had been disclosed, the court might be of opinion that his business is illegal'. It then sustained the statute on the merits, incidentally quoting the *Slaughter-House Cases* back at Carpenter.[78] Dauphin appealed, but the

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[73] Revised Statutes ss 3929, 4041; Wayne E Fuller, *Morality and the Mail in Nineteenth-Century America* (University of Illinois Press 2003) 194–99.

[74] *Report of the Postmaster General* (1889) 39; Fuller (n 73) 199–202.

[75] *Dauphin v Key* 11 DC (MacArth & M) 203 (1880) (listing counsel); *Slaughter-House Cases* (1873) (n 70); Frank A Flower, *Life of Matthew Hale Carpenter* (David Atwood 1883); E Bruce Thompson, *Matthew Hale Carpenter: Webster of the West* (State Historical Society of Wisconsin 1954).

[76] *Commerford v Thompson* 1 F 417, 422–24 (CC D Ky 1880) (quoting *Kneedler v Lane* 3 Grant 523 (Pa 1863)).

[77] Ibid 425.

[78] *Dauphin v Key* (n 75) 206–09, 226–27.

appeal lapsed when Postmaster General Key left office, under a rule developed for mandamus that a suit to compel an officer's action abates with his departure.[79] Even in defeat, the lottery had found itself governed by the law of the writ it had declined to seek.

Nevertheless, the defeat in *Dauphin* was not like the defeat in Kentucky. Judge Brown observed that had the complainant 'made it appear that the letters had no connection with the lottery business, he might have been entitled to the protection of a court of equity'.[80] The objection was no longer that the case was beyond the province of equity, but that the complainant had not given the chancellor the right facts. The lottery's counsel took the lesson to heart. When Postmaster General Walter Gresham revived the order against Dauphin in 1883 and extended it to the New Orleans National Bank, which had advertised itself as the lottery's new address, the bank again sought an injunction. This time it alleged as particular facts that it was a national bank with correspondents across the country; that it had been condemned without charge, notice, or hearing; and that the detention of its mail would work irreparable injury. Its president swore that the bank was not and had never been Dauphin's agent.[81] A state court issued a preliminary injunction.[82]

The government removed the case to federal court under the 1875 grant of jurisdiction over suits 'in equity' arising under federal law, where Judge Don Pardee refused to dissolve the injunction. To measure his own power, Pardee turned to the law of mandamus and trespass: the line between ministerial and discretionary acts drawn in *Marbury* and *Gaines v Thompson*, and the liability of the postmaster in *Teal v Felton*. The Postmaster General's order lacked the requisite factual basis outlined by the statute, so the postmaster's refusal to deliver was a ministerial wrong that equity could restrain. As for clean hands, Pardee entertained 'grave doubts' but held that 'suspicion is not proof'.[83]

The lotteries won their injunction and never had to defend it in the Supreme Court, because by then their zealous opponents had won decisive legislative

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[79] *Report of the Postmaster General* (1889) 39 (describing 'a rule of the Supreme Court which intercepts the prosecution of appeals in cases where the exercise of a mandatory power would reach a person no longer in office'); see *United States v Boutwell* 84 US (17 Wall) 604 (1873).

[80] *Commerford* (n 76) 425.

[81] *New Orleans National Bank v Merchant* 18 F 841, 842–45 (CC ED La 1884); Fuller (n 73) 203–05.

[82] *New Orleans National Bank* (n 81) 843.

[83] Ibid 845–52.

majorities. Pardee's doubts, the Postmaster General reported in 1889, could be addressed by legislation making the Postmaster General's judgment conclusive 'by provisions so plain as to leave nothing to construction'.[84] The Act of 1890, carried on a wave of evangelical petitions, struck the word 'fraudulent' from the statute and extended the Postmaster General's power to any 'agent or representative' of a lottery, 'whether such agent or representative is acting as an individual, or as a firm, bank, corporation, or association'. The Supreme Court upheld the exclusion of lottery matter in 1892, and the Louisiana lottery decamped for Honduras.[85]

In the end, the lottery litigation left no high court precedents about equity, but it did leave a clear path for pleaders to follow. When Congress extended the fraud-order power to all mail in 1895, its targets shifted to bond-investment schemes, mail-order frauds, and quack healers, whose counsel all looked to the lottery bills as models.[86] In 1893, Henry Billings Brown, now a justice on the Supreme Court, held that an officer acting wholly beyond his authority 'is as much subject to an injunction as he would be to a mandamus', invoking Justice Bradley's statement in *McComb* that the two writs were 'somewhat correlative'.[87] Lower courts followed. An action at law would be 'ineffectual' to recover detained mail, one judge reasoned in 1897, because the letters could not be described and the suits would multiply without end.[88] A year later, in a suit by an artificial-flower retailer accused of luring home workers with false promises of steady employment, the Maine circuit court reasoned that an equitable restraining order was not an impermissible 'mandatory injunction'. Although the order would require the postmaster to resume delivery, it was really a 'restraint' on further withholding mail.[89]

Pleading in equity was finally vindicated after the turn of the century in *American School of Magnetic Healing v. McAnnulty*. The School filed its bill against the postmaster at Nevada, Missouri, in 1900, in a form that closely tracked the

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[84] *Report of the Postmaster General* (1889) 40.

[85] Act of 19 September 1890, ch 908, 26 Stat 465; *In re Rapier* 143 US 110 (1892); Fuller (n 73) 207–14.

[86] Act of 2 March 1895, ch 191, s 4, 28 Stat 963.

[87] *Noble v Union River Logging Railroad Co* 147 US 165, 171–72 (1893).

[88] *Hoover v McChesney* 81 F 472, 483–85 (CC D Ky 1897); see also *Enterprise Savings Association v Zumstein* 67 F 1000 (6th Cir 1895).

[89] *Fairfield Floral Co v Bradbury* 87 F 415, 416–18 (CC D Me 1898). On final hearing he dismissed the bill for unclean hands, finding on the proofs that the business was a fraud, and left the complainant 'to its remedy at law'. *Fairfield Floral Co v Bradbury* 89 F 393, 394–97 (CC D Me 1898).

lottery pleadings.[90] This time, the Supreme Court read the pleading as Dauphin had wished his to be read. 'As the case arises on demurrer', Justice Peckham wrote, 'all material facts averred in the bill are, of course, admitted', including the averment that the school's business was not a fraud.[91] An officer's acts 'must be justified by some law', and where an officer violated the law to the injury of an individual, 'the courts generally have jurisdiction to grant relief'. There was 'no adequate remedy at law', and the injunction was 'the only remedy at all adequate to the full relief to which the complainants are entitled'.[92] Six years later, *Ex parte Young* would make the same move against state officers, enjoining a state attorney general from bringing the mandamus actions by which Minnesota enforced its railroad rates.[93]

The lineage of *Magnetic Healing* ran through lawyers' forms rather than judicial precedent. Within a few years of Pound's lament, then, the fusion of legal and equitable remedies against public officers was complete in the federal courts, accomplished without a code, a rule, or a statute, by the steady pressure of pleaders who had learned to ask the chancellor the right question.

II. Equity's Hollow Crown

Equity's triumph turned out to be strangely hollow. Having diffused through the codes while absorbing the prerogative writs, equity seemed to be everywhere in American law. Yet the more completely it prevailed, the harder it became to say what exactly was equitable about its mode of reasoning and adjudication. This Part follows that disappearance through the work of the jurists who tried hardest to give fusion a theory.

a. Equity and Substance

At the 1912 annual meeting of the Association of American Law Schools, Walter Wheeler Cook delivered an address on 'The Place of Equity in Our Legal System'. He began with Maitland, whose posthumous *Lectures on Equity* had appeared three years earlier. Equity, Maitland had said, was not 'a single, consistent system, an articulate body of law' but 'a collection of appendixes', and to teach it as a subject distinct from law would be 'a belated, a reactionary measure'. Cook agreed,

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[90] Bill of Injunction, *American School of Magnetic Healing v McAnnulty*, No 2446 (WD Mo, 30 May 1900), Records of the District Courts of the United States, RG 21, National Archives at Kansas City.

[91] *American School of Magnetic Healing v McAnnulty* 187 US 94, 103 (1902).

[92] Ibid 108–10.

[93] *Ex parte Young* 209 US 123 (1908); see Schmidt and Funk (n 10) pt I.A.2.

and he chose as his illustration of American backwardness the catalogue of the Stanford Law School, which advertised a course on the 'relation between equitable rights and powers and legal rights and powers'.[94] The author of that course description was Wesley Newcomb Hohfeld, and his reply, published in the *Michigan Law Review* the following June, was the most sustained American theory of fusion since Pomeroy's gloss on the codes nearly half a century earlier.

Hohfeld agreed with Cook that equity was no independent system, but he rejected the premise that Maitland and Cook shared: that law and equity did not really conflict, that equity was more of a supplementary system that made law effective rather than set it aside. Maitland had insisted that '[e]quity had come not to destroy the law, but to fulfil it'; the trustee owned the land at law, and equity merely bound him to hold it for the beneficiary.[95] Hohfeld thought the opposite. '[A] very marked and constantly recurring conflict' ran between legal and equitable rules, and whenever it arose 'the equitable rule is, in the last analysis, paramount and determinative'. The losing legal rule had 'only an apparent validity' and was 'of no greater force than an unconstitutional statute'.[96] His supporting examples read like dispatches from a conquest. The life tenant's legal privilege to cut ornamental trees was 'repeal[ed]' by the remainderman's equitable right; the trustee's legal privilege to cut down his own timber was overridden by the beneficiary's equitable claim. 'By the growth of equity on equity, the heart of the common law is eaten out'.[97]

Both Cook and Maitland made much of the fact that the Judicature Act's clause that equity should prevail wherever the rules conflicted was rarely invoked and seemed to have little use in practice.[98] The Field Codes had a similar provision that, likewise, was rarely applied in practice.[99] But Hohfeld thought these clauses

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[94] Walter Wheeler Cook, 'The Place of Equity in Our Legal System' (1912) 3 Am L Sch Rev 173, 173–74, quoted in Wesley Newcomb Hohfeld, 'The Relations between Equity and Law' (1913) 11 Mich L Rev 537, 537–38; FW Maitland, *Equity, Also the Forms of Action at Common Law* (AH Chaytor and WJ Whittaker eds, CUP 1909) 19–20.

[95] Maitland (n 94) 17.

[96] Hohfeld (n 94) 543–44.

[97] Ibid 555, 570 (quoting *Roscarrick v Barton* (1672) 1 Ch Cas 217).

[98] Maitland (n 94) 16–17; Cook (n 94) 173–74; see Hohfeld (n 94) 537 (describing Cook's address as opening with 'an extensive quotation' from Maitland's lectures), 544 (quoting Maitland's remark that the clause had 'produced very little fruit').

[99] Field, 'Law and Equity' (n 11) 579 (noting that some code states had adopted 'an express provision that, when the legal and equitable rules clash with each other, the latter

had done little only because they had been 'added only out of abundance of caution' and were largely superfluous; the supremacy of equity was 'implicit in the language and intent of the act as a whole'.[100] Field himself had said the same in a retrospective on the Code: 'Such a provision may be expedient, from abundant caution, but I conceive it nevertheless to be unnecessary … because it is implied in the blending of the procedure'.[101]

Like Field, then, Hohfeld exchanged the distinction between law and equity for a distinction between substance and procedure, but he gave a different account of the conceptual timeline. 'In regard to substance, as distinguished from form', the nineteenth-century reforms had 'simply affected the modes by which legal and equitable rights are defined and vindicated'.[102] Substantively, fusion had happened long before the codes. '[I]n any sovereign state, there must, in the last analysis, be but a single system of genuine law', so that a legal and an equitable rule in conflict 'cannot be valid at the same moment of time'. That conflict 'as to ultimate jural relations' had been settled in equity's favour since James I resolved the quarrel between Coke and Ellesmere in 1616. What had persisted into modern times was only 'the great indirectness and complexity of the dual procedure involved in vindicating such jural relations'.[103] Hohfeld thus took the third of the positions on fusion described in Part I: substance had been unified for three centuries, and procedure was only catching up. The position allowed him to live comfortably in a world of unfused or partially fused procedure. He freely conceded that 'traces of the old dual system are to be found' in pleading and trial, 'and in the modes of thought and language involved in working out the various jural problems', while treating the substantive unity of the law as an accomplished fact.[104]

What Hohfeld needed, then, was a way to describe a unified body of substantive law in terms that did not depend on the forum in which a relation happened to be recognized. He thus wrote out a grammar in a table that appeared, almost as an afterthought, in a footnote to his equity article: jural opposites and jural

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shall prevail'); see, eg, Conn Gen Stat s 52-1 (originating in Connecticut's Practice Act of 1879).

[100] Hohfeld (n 94) 544.

[101] Field, 'Law and Equity' (n 11) 579; see Part I.A above.

[102] Hohfeld (n 94) 549.

[103] Ibid 557.

[104] Ibid. Hohfeld's classification of American jurisdictions into those with dual courts, those with unified courts but separate procedures, and the code states drew on Pomeroy and Hepburn: see ibid 549, 566.

correlatives, right and duty, privilege and no-right, power and liability, immunity and disability.[105] The famous Hohfeldian scheme is now known almost entirely through 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning', which Hohfeld published in the *Yale Law Journal* five months later.[106] Commentators have generally treated the Hohfeldian scheme as a free-standing analytical grammar, and even those who have examined Hohfeld's writing on equity have read the equity essay as an application of the scheme rather than its seedbed.[107] Accepting the bargain of the codifiers to lay aside the distinction between law and equity and mark a distinction between procedure and substance instead, Hohfeld struggled to create a language for a substantively fused concept of law that could shed the language of law and equity.

With his initial grammar in hand, Hohfeld proceeded to sort every jural relation into one of two classes: those 'concurrently legal and equitable' and those 'exclusively equitable'. A third class, the 'exclusively legal', was a mirage, because every such rule conflicted with some 'paramount and determinative equitable rule' and so proved 'only apparent, so far as genuine law is concerned'.[108] Even the chancellor's own authority could be rendered in the same terms: the judge's power to impose an injunction was an 'equitable power' that 'conflicts with his legal disability'.[109]

Hohfeldian terms extended the vocabulary of 'primary' and 'remedial' rights that Pomeroy had developed for the codes, adding a third tier of 'tertiary, or

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[105] Ibid 569 n 33.

[106] Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 Yale LJ 16; Hohfeld (n 94) 539 n 3. On the Hohfeldian scheme generally, see Joseph William Singer, 'The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld' [1982] Wis L Rev 975; Pierre Schlag, 'How to Do Things with Hohfeld' (2015) 78 Law & Contemp Probs 185.

[107] See especially JE Penner, 'Hohfeld's Equity' in Shyamkrishna Balganesh, Ted M Sichelman and Henry E Smith (eds), *Wesley Hohfeld A Century Later* (CUP 2022) 295, 296 (the essay 'reveals more about his understanding of the way his "fundamental legal conceptions" … interact in context' than about equity), 303–04 (criticizing Hohfeld's inference of substantive relations from 'adjective juridical processes' as inconsistent with his later insistence on 'intrinsic' analysis), 310 (the conflict thesis is 'not so much a model of conflict as a model of legislation'); Ben McFarlane, 'Avoiding Anarchy? Common Law v Equity and Maitland v Hohfeld' in Goldberg, Smith and Turner (eds) (n 13) 331. Neither notes that the table of jural relations made its first appearance in the equity essay: Hohfeld (n 94) 569 n 33.

[108] Hohfeld (n 94) 569 n 34.

[109] Ibid 557 (example 60).

adjective' relations to absorb procedure itself.[110] 'Legal' and 'equitable' survived in Hohfeld's grammar only as adjectives marking the provenance of a relation; the relations themselves were jurally identical. A right was a right, and a duty a duty, whatever court had once enforced it. Hohfeld offered a terminological fusion that claimed to leave substance untouched (or to observe a substantive fusion already accomplished). But as Lionel Smith has argument, even when terminological fusion appears 'non-substantive in itself,' it 'is liable to lead to substantive fusion', because reduction to a single vocabulary 'is a kind of translation, and as with all translations, it seems that something is lost in the process'.[111]

What was lost was any distinctive mode of equitable reasoning. Hohfeld acknowledged that the substance of the law could be known only 'by inference from the purely adjective juridical processes', quoting Maitland's dictum that the nature of writs, not the nature of rights, had been the medieval student's theme.[112] But once inferred, the substance floated free of the procedures that had produced it. Equity had conquered law so completely that its conquests were indistinguishable from the territory it had taken. Ben McFarlane has recently turned Hohfeld's own analytics to Maitland's defence. It is 'very hard to argue against Hohfeld's logic' at the level of the jural relation between trustee and beneficiary, McFarlane concedes, but the beneficiary's rights differ in form from legal ownership, and '[i]t is equity's focus on form rather than substance that allows conflict at the level of deeper principle to be avoided'.[113] This kind of rescue depends on precisely the attention to form that Hohfeld had consigned to the realm of procedure. For the realists who inherited Hohfeld's system, the inattention to form was not a loss due to fusion. It was the very point.

Hohfeld died in 1918, and Cook, by then his colleague at Yale, gathered his essays into *Fundamental Legal Conceptions*.[114] Cook became the system's most

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[110] Ibid 553–54, 569 n 32 (describing the division into primary, secondary and tertiary relations as 'adopted merely for convenience of exposition'); compare Pomeroy, *Remedies* (n 41) 24–26.

[111] Lionel Smith, 'Fusion and Tradition' in Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (Lawbook Co 2005) 19, 21–23, 37.

[112] Hohfeld (n 94) 569 n 34 (quoting FW Maitland, 'The History of the Register of Original Writs' (1889) 3 Harv L Rev 97).

[113] McFarlane (n 107) 334, 336; see also Henry E Smith, 'Equity as Meta-Law' (2021) 130 Yale LJ 1050.

[114] Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* (Walter Wheeler Cook ed, Yale University Press 1919);

devoted expositor, and an unpublished lecture from the mid-1930s shows where the grammar had led. Responding to Albert Kocourek, who had accused him of the 'drastic annihilation of any legal claim' in cases where equity would relieve against it, Cook took up a landlord's suit for rent after a fire that, by the parties' actual agreement, should have ended the tenant's obligation. He denied that he had called the landlord's claim 'void'. He had only said that 'so far as net "substantive" legal (jural) effects are concerned' the landlord had no valid claim, though there were '"procedural" effects' that would produce a judgment against a tenant who failed to seek equity's aid. Whether the tenant had to go to a separate chancery court or could plead an 'equitable defense' at law, '[t]he change seems best described as a procedural one'.[115] Reformation of a written instrument was likewise 'a matter of procedural form; it does not create the right'. To explain the point, Cook imagined a special 'Court of Constitutional Law' serving as the only forum in which a statute's validity could be challenged. An unconstitutional statute would then be invalid 'in net substantive legal effect', yet would be enforced against anyone who failed to resort to the proper tribunal.[116]

Cook admitted that the distinction between substance and procedure, on which the whole Hohfeldian edifice now rested, was 'of course purely a practical one', its line drawn 'at different points for different purposes'. It would be 'possible, though doubtless inconvenient, to state the results of the cases without drawing the distinction'.[117] It was, in a sense, as arbitrary as the distinction between law and equity had been: '[N]othing more than shorthand substitutes' for predictions of what a tribunal would do; to say that A had a right against B was to prophesy 'Judgment for the plaintiff'.[118] By then the Hohfeldian vocabulary had been adopted

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see also Wesley Newcomb Hohfeld, 'The Conflict of Equity and Law' (1917) 26 Yale LJ 767.

[115] Walter Wheeler Cook, 'The Relation of Equity to Common Law' (undated typescript, c 1934) 1–4, Walter Wheeler Cook Papers, series 17/24, box 3, folder 4, Northwestern University Archives (the finding aid lists two versions; citations are to the version with twenty-four endnotes); Albert Kocourek, Book Review (1929) 24 Ill L Rev 259, 261–62; see also Walter Wheeler Cook, 'Equitable Defenses' (1923) 32 Yale LJ 645.

[116] Cook (n 115) 8–9.

[117] Ibid, notes 8, 13; see also Walter Wheeler Cook, '"Substance" and "Procedure" in the Conflict of Laws' (1933) 42 Yale LJ 333.

[118] Cook (n 115) 10–11 (quoting AN Whitehead, *An Introduction to Mathematics*).

in the Restatement of Property,[119] and it would soon become the implicit foundation for the Federal Rules of Civil Procedure.[120]

b. The Vanishing of Equity

Lionel Smith has observed that '[a] legal tradition is like a language . . . and if a language is not used, or is used only in formal ways and not as a tool for the communication of ideas, it will die'.[121] For American equity, the place where the language was learned was the law school, and for half a century after Langdell, the law schools taught it with remarkable persistence. A survey of the catalogues and assigned texts of twenty-one American law schools between 1870 and 1925 shows that a course titled 'Equity' or 'Equity Jurisprudence' was offered at eleven of the sixteen schools reporting in 1890, at eighteen of twenty-one in 1910, and at twelve of thirteen in 1924.[122] Far from fading under the codes, the subject grew. By 1924, eight of the twelve schools offering equity taught it in two or three courses, typically 'Equity I' and 'Equity II' alongside a third course 'Equity Pleading' or 'Equity Procedure'. The texts changed as well. The treatises of Story, Adams and Bispham gave way to casebooks, above all James Barr Ames's *Cases in Equity Jurisdiction*, which was assigned at seventeen of the twenty-one schools at some point in the period.[123] Langdell's method was well suited to a subject that, as he put it, consisted of 'a branch of the law of remedies'.[124]

Within that persistent course, however, equity was being broken down along the lines Hohfeld and Cook had urged in the 1910s. From 1903 Chicago divided its course into 'Equity I (Torts)' and 'Equity II (Contracts)'. Harvard supplemented Ames with Roscoe Pound's cases on equitable relief against defamation and injuries to personality and, by the early 1920s, Zechariah Chafee's cases on equitable relief against torts. Yale and Columbia joined 'equitable restitution' to quasi-contract,

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[119] Cook (n 115), note 23.

[120] See Walter Wheeler Cook, 'Statements of Fact in Pleading under the Codes' (1921) 21 Colum L Rev 416; Charles E Clark, 'The Code Cause of Action' (1924) 33 Yale LJ 817; Subrin (n 7).

[121] Smith (n 111) 23.

[122] Data compiled by the author from the catalogues and announcements of twenty-one American law schools, 1870–1925: Albany, Chicago, Colorado, Columbia, Cornell, Georgetown, Harvard, Hastings, Indiana, Iowa, Michigan, New York University, Northwestern, Notre Dame, Pennsylvania, South Carolina, Texas, Tulane, Vanderbilt, Virginia and Yale (on file with author). Not every school reported in every year.

[123] Ibid.

[124] CC Langdell, 'A Brief Survey of Equity Jurisdiction' (1887) 1 Harv L Rev 55, 55. Hohfeld thought the description 'inadequate and misleading'. Hohfeld (n 94) 543 n 7.

while Yale's first-semester course in equity assigned Hohfeld's article on the relations between equity and law.[125] Equity was ceasing to be a jurisdiction with its own principles and becoming a set of remedial supplements to torts, contracts and restitution, the 'cross-sections' of the curriculum that Hohfeld himself had described.[126] By 1925, Cook's own *Cases on Equity* had been adopted at Yale, Chicago, Columbia and Hastings.[127]

The most consequential departure may have been the law of trusts. In 1890 Harvard was the only school in the sample to teach trusts apart from equity; elsewhere, trusts were taught, if at all, from Ames's *Cases on Trusts* within the equity curriculum. By 1924, eleven of thirteen schools offered a freestanding course in Trusts. Austin Wakeman Scott's *Cases on Trusts*, published in 1919, was assigned at thirteen schools within six years.[128] Scott went on to serve as Reporter for the American Law Institute's *Restatement of Trusts* (1935) and to write the treatise that dominated the field for half a century. In his hands, trust law became a body of black-letter rules about fiduciary duties and beneficial interests, organized around the instrument and the parties rather than around the court that had once enforced them.[129] The Restatement still defined the trust by reference to 'equitable duties', but the adjective had become a label of provenance in exactly Hohfeld's sense.[130] The conceptual separation was complete enough that a later generation could explain the trust as a species of contract.[131] The contrast with England, where 'Equity and Trusts' remained a single subject on the law school syllabus and the title of volumes such as this one, is instructive. It was in England and Australia that Walter Ashburner, a Massachusetts native, found an audience for his insistence that the 'two streams of jurisdiction, though they run in the same channel, run side by

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[125] Data (n 122).

[126] Hohfeld (n 94) 539–40 n 3.

[127] Data (n 122); Walter Wheeler Cook, *Cases and Other Authorities on Equity* (West Publishing 1923–24).

[128] Data (n 122); James Barr Ames, *A Selection of Cases on the Law of Trusts* (2nd edn, 1893); Austin Wakeman Scott, *Select Cases and Other Authorities on the Law of Trusts* (1919).

[129] *Restatement of the Law of Trusts* (American Law Institute 1935); Austin Wakeman Scott, *The Law of Trusts* (Little, Brown & Co 1939); see also *Restatement of the Law of Restitution* (American Law Institute 1937), which absorbed the constructive trust into a general law of unjust enrichment.

[130] *Restatement of Trusts* (n 129) s 2.

[131] John H Langbein, 'The Contractarian Basis of the Law of Trusts' (1995) 105 Yale LJ 625.

side and do not mingle their waters'.[132] That description certainly did not match the approach of Ashburner's homeland.

What happened to the equity course after 1925 lies beyond the evidence gathered here, but its outline is familiar. The Federal Rules of 1938 removed the last procedural reason to teach equity pleading. Casebooks on equity continued to appear, Chafee and Simpson's among them, and many schools kept the course well into the postwar decades. But beginning in the 1950s the subject was gradually absorbed, together with damages and restitution, into a new course called Remedies.[133] The genealogy survives obliquely in a title: a leading casebook on remedies is still called *Ames, Chafee, and Re on Remedies*, a descendent of *Ames on Equity Jurisdiction*.[134] In time, the diffusion of equity in America became the dissipation of equity. It vanished, in Smith's sense, by translation, as generations of lawyers learned to speak the grammar of rights, duties and remedies where their predecessors had spoken in the language of equity and good conscience.

Conclusion

In 1878 David Dudley Field could reassure lawyers that the prevalence of equity was 'implied in the blending of the procedure'.[135] By the time Pound wrote after the turn of the century, the blending was largely accomplished, and equity prevailed nearly everywhere: in the codes that made every trial judge a chancellor, in the injunctions that ran against federal postmasters and state attorneys general, in Hohfeld's judgment that every conflicting legal rule was 'of no greater force than an unconstitutional statute', and in law school catalogues that organized contract, tort, trust, and procedure doctrine into courses titled Equity I, Equity II, and Equity Pleading.[136] Equity won. Its fusion with law in the United States was in reality its

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[132] Walter Ashburner, *Principles of Equity* (Butterworth & Co 1902) 23; see RP Meagher, WMC Gummow and JRF Lehane, *Equity: Doctrines and Remedies* (Butterworths 1975) [220]–[222].

[133] Douglas Laycock, 'How Remedies Became a Field: A History' (2008) 27 Rev Litig 161; Zechariah Chafee Jr and Sidney Post Simpson, *Cases on Equity: Jurisdiction and Specific Performance* (published by the editors 1934).

[134] Samuel L Bray and Emily Sherwin, *Ames, Chafee, and Re on Remedies: Cases and Materials* (4th edn, Foundation Press 2024), by way of Chafee and Simpson (n 133). See Richard R Powell, Book Review (1935) 2 U Chi L Rev 669 (calling Chafee and Simpson 'a direct descendant' of Ames).

[135] Field, 'Law and Equity' (n 11) 579.

[136] Hohfeld (n 94) 544.

diffusion to nearly every kind of case and circumstance. But in such conditions of fusion by diffusion, what remained of equity?

In answering with 'Decadence', Pound saw in the triumph of equity the hollow victory of fin de siècle imperialism generally. What triumphed was not the chancellor's conscientious scrutiny of the fact-bound case before him, but rather equity's remedies and categories, made available to every litigant through the pleader's art. The codes exchanged the chancellor's discretion for positive rights and an open menu of remedies, and treatise writers spent the following decades trying to classify which rules belonged to which remedy. The officer suits that brought equity into federal public law were won and lost on demurrers, on the sufficiency of averments rather than the proof of facts.[137] Hohfeld's grammar described equity's supremacy in a vocabulary from which equity itself had been subtracted, and Cook reduced the whole matter to predictions of judgment. The law of trusts, the heart of the chancellor's original jurisdiction, became a restatement of rules. Facts and discretion receded; rules and categories advanced.

Equity, in short, had become the thing Pound most feared in jurisprudence: a mechanical art. American lawyers who wished in later years to recover equity's distinctive habits of mind would find its forms everywhere but its reasons difficult to locate. They could still issue injunctions, appoint receivers, and enforce trusts. The harder question, which fusion had obscured, was how to do these things equitably.

[137] *Magnetic Healing* (n 91) 111; Order of Injunction, *American School of Magnetic Healing v McAnnulty*, No 2446 (WD Mo, 21 December 1902), RG 21, National Archives at Kansas City.

The Varieties of Religious Experience with the Mails

American School of Magnetic Healing v. McAnnulty has been treated by scholars as the ur-case of challenges to federal administrative action.[1] On several accounts, the case illustrates the way federal equity and general federal question jurisdiction worked together to allow regulated entities to challenge the government without an express statutory authorization for judicial review,[2] or without recourse to the "prerogative writs" that had been a staple of officer suits in the previous century.[3]

But the opinion was also an exercise in theology, one that scholars have left unexplored. What, the Supreme Court asked itself, were the borders of belief at the dawn of the twentieth century? The Postmaster General had issued a fraud order halting the mail to the American School of Magnetic Healing, but was the practice and sale of magnetic healing a fraud? Could it be? The Court did not have to pose the question in this way. It could have struck down the order simply on the grounds that it delegated an unreviewable judicial discretion to an Executive Branch official; or it could have affirmed the order on what the Court would call "ordinary facts" of fraud in how the School ran its particular operations.[4] Instead the Court chose to talk about metaphysics, presumably because it wanted to talk about metaphysics differently from the way other courts had when addressing the American School of Magnetic Healing.

The Supreme Court was not the first to bring metaphysical questions to bear on the mail fraud statute. Over the previous thirty years, the vice crusader Anthony Comstock had made the mail fraud statute a centerpiece of evangelical moral reform. Comstock too was obsessed with the question of fraud and the freedom of belief—an issue he posed in the very title of the book defending his life's work, *Frauds Exposed*. In Comstock's theology, every vice had its roots in fraud, and clearing fraud from the marketplace was a chief end of governmental authority. Even so, Comstock generally

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[1] Aditya Bamzai, The Origins of Judicial Deference to Executive Interpretation, 126 Yale Law Journal 908 (2017), 965–67; Hart & Wechsler's Federal Courts and the Federal System (8th ed., 2025), 1348.

[2] John F. Duffy, Administrative Common Law in Judicial Review, 77 Texas Law Review 113 (1998); Thomas W. Merrill, Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law, 111 Columbia Law Review 939 (2011); Henry Paul Monaghan, A Cause of Action, Anyone: Federal Equity and the Preemption of State Law, 91 Notre Dame L. Rev. 1807 (2016).

[3] James E. Pfander & Jacob P. Wentzel, The Common Law Origins of Ex parte Young, 72 Stanford Law Review 1269 (2020).

[4] American School of Magnetic Healing v. McAnnulty, 187 U.S. 94, 104 (1902).

went easy on psychics and devotees of the New Thought, permitting customers to, as he perceived it, throw their money away on fanciful healings if they wanted to.

Then there was the School itself. Perhaps unsurprisingly for a competitor in a crowded market, what the School actually believed seemed to shift with the scrutiny of the observer. It was akin to Christian Science, if you were a court sympathetic to religious liberty claims. On the other hand, if you were a Christian Scientist, the School offered you *real* science unlike anything Mary Baker Eddy wrote about. Magnetic healing was thoroughly Christian, thoroughly secular, at its essence communal, at its essence individualistic, the heart and soul of the Law's Spirit, the bare surface of technical compliance. Magnetic healing fundamentally was a belief, perhaps, in belief itself, the power of belief to change a world that was not purely the construction of mind but could be infinitely manipulated by mind. Or perhaps not infinitely. What magnetic healing could *not* cure, the School said, was politics. It could not settle the labor question or bring the Gilded Age robber barons to heel, but it could give an individual mastery over oneself.

The courts struggled with whether that was a bargain they could condone. Some declared magnetic healing dangerous to the public, or at least manifestly against the common sense of the community. And yet in making these pronouncements, courts had to overturn jury awards favoring the healers, an indication that common sense was not so common as the courts might have liked. Others were happy to decide not to decide, leaving it to the Postmaster General to sort out what was false and true, dangerous and benign. But not until the case arrived at the U.S. Supreme Court were any appellate judges willing to embrace the mystery and tie the Government's hands.

This paper offers a survey of these theological exercises. I am continuing to think about the upshot of this survey and how far to connect the ideas observed here to broader moves in philosophy and jurisprudence at the time, such as Durkheim's notion of religion as collective social reality (a philosophy with strong resonances in early Legal Realism), or, in anthropology, Frank Boaz's cultural relativism and historical particularism. Each of these intellectual trends, in their way, demanded observers to enter a kind of committed relationship with belief to access knowledge, what William James in 1896 called "The Will to Believe" and what Christian scholastics had long summarized with the slogan *credo ut intelligam*. Perhaps the upshot is that in the modernist turn in law, as in the modernist turn in so many other domains, one had to believe to see.

The Gospel According to Weltmer

Magnetic healing was a crowded market in the late 1890s, and Stephen A. Weltmer had to work hard to distinguish his brand. As one historian has noted, even in the small town of Nevada City, Missouri (population 7,500), where Weltmer set up shop, no fewer than fifteen distinct institutions offered services and instruction in the art of magnetic healing.[5]

Fittingly for an institution dubbed the "American School" of magnetic healing, Weltmer's approach employed a distinctively American blend of progressive Christianity and an obsession with legality. Weltmer's 300-page explanation of magnetic healing opened with, "The peculiar feature of my teaching is this: I believe that every person is born with equal rights."[6] The equal rights were endowed by a Creator, and "all things, animate and inanimate, have their continual being in accordance with the laws of this Creator."[7] By "laws," Weltmer meant much more than scientific laws. Usually capitalized in Weltmer's works, Law was a synonym for God himself. "This Creator in action is Law, and this Creator is known by the names Law, Law of Nature, Law of Being, God, and designated by Jesus Christ as 'My Father which is in Heaven.'"[8]

With God as Law and his creatures as free agents of equal rights, the key to magnetic healing in Weltmer's account was "compliance with law," summarized in Weltmer's terminology with the word Agreement.[9] Weltmer derived this from Matthew 18:19, a verse quoted in nearly every one of Weltmer's materials (which were many) and put at the forefront of his opus, *The Mystery Revealed* (published while the Supreme Court appeal was pending in 1901).[10] In the King James Version: "Again I say unto you, That if two of you shall agree on earth as touching anything that they shall ask, it shall be done for them of my Father which is in heaven."[11] Weltmer declared this promise to be "both theological and scientific in its meaning," and the foundation

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[5] Patrick Brophy, Weltmer, Stanhope, and the Rest: Magnetic Healing in Nevada, Missouri, 91 Missouri Historical Review 275 (1997), 277.

[6] S. A. Weltmer, The Mystery Revealed, or the Handbook of Weltmerism (Hudson-Kimberly Pub. Co., 1901), 10.

[7] Weltmer, The Mystery Revealed, 5–6.

[8] Weltmer, The Mystery Revealed, 6.

[9] Weltmer, The Mystery Revealed, 72.

[10] Weltmer, The Mystery Revealed, 15, 20, 68, 70, 80, 89, 106, 136.

[11] As quoted in Weltmer, The Mystery Revealed, 59.

for his philosophy of healing, which consisted "solely in [one's] ability to grasp the meaning of the Law that governs him and to comply with it."[12]

So how was magnetic healing actually done? Without magnets, sorry to say. "Magnetism," Weltmer explained, was a "misnomer" that came from Franz Anton Mesmer's theory of "animal magnetism," a theory that supposed an invisible fluid-like substance could be attracted or repelled among human subjects.[13] "In fact, magnetism and thought are one and the same thing," Weltmer stated.[14] The principle of magnetic healing was thus a matter of right thinking. "The one who desires to heal must first believe or assume to be true the statement that healing through this method can be done," a central passage in *The Mystery Revealed* explained. That made the healer a "positive" force for thought. The recipient's job was to assume a "passive" role to receive the healthy thought of the healer.[15]

The positive and passive attitudes adopted, the parties were now in place to perform the all-important "AGREEMENT," which "between two or more minds means concentration of all concerned upon ONE purpose."[16] It was here that Weltmer's philosophy began to loop in on itself. "Agreement is compliance with the law," but in the next line, "Agreement still more abstractly considered is the Law."[17] It was more than a legal contract, which engaged only the conscious faculties.[18] "The Law of Being, the Creative Force of the universe, the Father in heaven, God, is Law, and there is no way known to man by which this Law will act for man except through agreement."[19] Agreement was Law, God was Law, Law was Agreement, and all together, God, Law, and Agreement were health.

For a more concrete explanation, Weltmer referred to emerging technologies in electricity and radio. Electricity could be routed through metal wires because those wires agreed with the nature of electricity.[20] Thought could vibrate from one mind to resonate in another like a tuning fork.[21] "This may sound strange, but it is not more

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[12] Weltmer, The Mystery Revealed, 6.

[13] Weltmer, The Mystery Revealed, 190, 191. See also, James Wyckoff, Franz Anton Mesmer: Between God and the Devil (1975).

[14] Weltmer, The Mystery Revealed, 191.

[15] Weltmer, The Mystery Revealed, 67–68, 112.

[16] Weltmer, The Mystery Revealed, 64, 62.

[17] Weltmer, The Mystery Revealed, 62–63.

[18] Weltmer, The Mystery Revealed, 69.

[19] Weltmer, The Mystery Revealed, 64.

[20] Weltmer, The Mystery Revealed, 63–65.

[21] Weltmer, The Mystery Revealed, 112–13.

strange than wireless telegraphy, and operates on the same principle," Weltmer wrote just before turning back to Matthew 18. "The efficacy of the healthful thought sent out will depend upon the steadiness and rhythm with which it is sent by the operator, and will depend in some degree upon the condition of the diseased person's mind."[22] The closer healer and patient came to steady synchronization, the more easily they could achieve the agreement of Matthew 18.

The radio analogy served to provide Weltmer with his most controversial technique, the so-called "Absent Treatment." In a short chapter called "The Laying on of Hands," Weltmer explained that physical contact between the healer and patient was mostly "a superfluous act."[23] Since the "Law of Being . . . is the efficient cause in any act of healing," and this Law was accessed by thought, the physical sensation of a vibrating or warmed hand was simply an aid to suggestive thought.[24] The positive and passive attitudes of the healer and patient were what counted, and just as radio signals might be received over the distance of hundreds of yards, so Weltmer surmised that the positive vibrations of the healer's thought might be received by the passive patient notwithstanding a distance of hundreds of miles. After all, "[h]ow much more delicate" was "that wonderful battery, the cells of the brain," than the wireless telegraph? "[A]nd so mind can send forth a thought that shall be projected outwardly, and another mind, also delicately constructed, can receive these vibrations and the force thereof, just as effectively as the instruments made by human skill out of the material element," that is, the radio.[25] When this happened, "the two minds will synchronize and blend, and there will be an agreement."[26]

The fusion of modern technology with Christian scripture in Weltmer's account is striking. Numerous practitioners of mesmerism and animal magnetism had no use for Christian theology,[27] while the Christian Science of Mary Baker Eddy was, despite its name, fairly uninterested in technological science.[28] Weltmer's Christianity was also of a markedly more progressive cast than Baker Eddy's Christian Science. Much of Baker Eddy's work was concerned with the dangers of animal magnetism,

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[22] Weltmer, The Mystery Revealed, 58.

[23] Weltmer, The Mystery Revealed, 129.

[24] Weltmer, The Mystery Revealed, 128 and generally ch. 14.

[25] Weltmer, The Mystery Revealed, 57.

[26] Weltmer, The Mystery Revealed, 59.

[27] See, e.g., Frank Podmore, Mesmerism and Christian Science: A Short History of Mental Healing (1909); Jonathan Barry, Raising Spirits: How a Conjuror's Tale Was Transmitted across the Enlightenment (2013).

[28] See, e.g., Harold Bloom, The American Religion (1992), 131–40.

the origins of evil and sin in "malicious" magnetism, and the need for atonement from both.[29] But "atonement" never appears once in Weltmer's writings, and the only reference to "sin" in *The Mystery Revealed* was the observation that John the Baptist proclaimed Jesus as taking away the "sin"—singular—of the world, not the "sins" plural.[30] From this Weltmer drew the conclusion that sin was a general disbelief in man's spiritual nature, and nothing more.[31] We might say Weltmer was the Henry Ward Beecher to Baker Eddy's hellfire revivalist (not an inapt analogy, as one of Weltmer's few passages speculating about the afterlife tracked remarkably closely with Henry Ward Beecher's sermon announcing his ambivalence about the doctrine of hell.[32])

In a 1901 issue of *Weltmerism* magazine, the School drew other distinctions between Weltmer's philosophy and the Christian Science of Baker Eddy. In "answer to the numerous inquiries" the School received, it asserted that "Christian science is a religion, capable of scientific demonstration," while "Weltmerism is a science, capable of religious interpretation." Where Christian Science treated disease as an illusion, "Weltmerism recognizes disease as an inharmonious relationship" within physical beings. Nor did Christian Science distinguish between "disease and injury," but the School did, and it would "not enter the field of surgery." In sum, "Christian Science denies the existence of matter," while "Weltmerism recognizes the forms of being."[33]

One might be forgiven for missing this distinction in *The Mystery Revealed*. Obliquely referencing Anselm, Leibniz, and Descartes, Weltmer embraced a monism of "Universal Substance" that was not far off from the monism of Baker Eddy.[34] As the humorist Mark Twain parodied it, "There is nothing in Christian Science that is not explicable; for God is one, Time is one, Individuality is one, and may be one of a series, one of many, as an individual man, individual horse; whereas God is one, not

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[29] See Mary Baker Eddy, Science and Health with Key to the Scriptures (1875), chs. II and V.

[30] Weltmer, The Mystery Revealed, 105.

[31] Weltmer, The Mystery Revealed, 105–06.

[32] Compare Weltmer, The Mystery Revealed, 15–16, with Henry Ward Beecher, "The Gentleness of God," Sermon Preached at Plymouth Church, Brooklyn, New York, October 9, 1859, in Gaius Atkins, ed., Master Sermons of the Nineteenth Century (1940), 98.

[33] Weltmerism, Apr. 1901, 2, Ernest C. Weltmer Collection, State Historical Society of Missouri, Columbia, Mo. (hereafter ASMH Archives).

[34] Weltmer, The Mystery Revealed, 17 (Anselm), 18 (Leibniz), 19 (Descartes), 20 ("Universal Substance").

one of a series, but one alone and without an equal."[35] Like a number of modernist Christians at the time, Weltmer believed the immanence of God and the oneness (or not quite) of Being were the clear teachings of primitive Christianity before its Romanization. Strikingly, Weltmer attributed theological distinctions to Greek and Roman political culture, and not the other way around. "The Greek was not separate from the authority of the state," Weltmer mused. "[H]e was one with the state and one with his fellow-Greeks," and therefore the Greek New Testament scriptures were attuned to a God who "was the immanent, the abiding, the indwelling God."[36]

"The Latin," on the other hand, "was not a sovereign, he was a subject."[37] The Caesar "sat aloft on a throne of dignity and might be approached by only a favored few," and consequently, the Christian God in Roman hands "was no longer the indwelling, the abiding Deity, but the transcendental God, separate from the universe."[38] Weltmer thought that "the very terms of the theology" in the conventional Christianity of his day were so shot through with "terms of the Latin forum and the Latin court" that primitive ideals of St. Paul had become obscured.[39] In this sense, the "New Thought" of progressive modernism was "yet the 'Old Thought.' It is the thought of Jesus of Nazareth, of Saul of Tarsus, of the Greek ante-Nicene fathers, of the Gospel of St. John."[40]

Weltmerism was otherwise slight on political theology. Magnetic healing apparently did not contain a theory of the state or of legitimate government authority. Even during the height of the contest with the federal government, Weltmer's writings avoided the language of rights, liberties, or duties. One glimpse of Weltmer's politics shines briefly through an 1899 tract titled *Self-Protection*. Modern society was obsessed with a single thought, the tract asserted: "That thought is, that a portion of mankind is oppressed by the other portion."[41] Summarizing without endorsing this strain of thought, Weltmer wrote that some observed that "labor is arrayed against capital, . . . the rich have become richer and the poor poorer," while "the masses" crawled around

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[35] Mark Twain (Samuel L. Clemens), Christian Science (1907), 17.

[36] Weltmer, The Mystery Revealed, 24.

[37] Weltmer, The Mystery Revealed, 25.

[38] Weltmer, The Mystery Revealed, 26.

[39] Weltmer, The Mystery Revealed, 27. Weltmer read St. Paul's quotation of the pagan poem "In Him we live and move and have our being," as an endorsement of the Greek view. *Id*. at 25.

[40] Weltmer, The Mystery Revealed, 28.

[41] S.A. Weltmer, Self-Protection: Some Points on Personal Magnetism (1899), 5, ASMH Archives.

in ruins "scratching their heads and wondering 'where they are at.'"[42] Weltmer proclaimed he was once among those masses, but had now liberated himself by learning "that the only freedom man can experience must spring out of this own individualism, and in no way does his freedom or success depend upon his knowledge of men and things, but entirely upon his knowledge of, and his mastery of himself."[43] The study of class conflict and labor organizing could not compare with the personal knowledge of Infinite Being.

For all Weltmer's talk of Spirit and compliance with the Law of Being, Weltmer took a highly technical approach to complying with the actual law of using the mails. After the trial court denied a preliminary injunction against the Postmaster General's fraud order on June 16, 1900, Weltmer dissolved the American School of Magnetic Healing and, three days later, incorporated the Weltmer School of Healing.[44] *Weltmerism*, a journal proclaiming itself to be a bi-monthly publication of the School,[45] explained that "[w]hile the S. A. Weltmer School of Healing occupies the quarters formerly used by the American School of Magnetic Healing, it is in no sense its successor." The American School's "dissolution was final and absolute and there is, and can be, no successor."[46] Weltmer's partner and corporate secretary J. H. Kelly was left out of the Weltmer School's structure and remained a party to the American School's litigation, while Weltmer himself withdrew from the suit.[47] The next issue of *Weltmerism* directed correspondents to send money orders and bank drafts "payable to Weltmer School of Healing,"[48] thus evading the fraud order, which only stopped mail to the "American School" and its secretary Kelly.[49]

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[42] Weltmer, Self-Protection, 6.

[43] Weltmer, Self-Protection, 6.

[44] The precise chronology of the court filings is established in Postal Laws Violated, Morning Olympian (Olympia, Wash.), June 17, 1900.

[45] The only extant issues of *Weltmerism* appeared during key periods in the litigation: November 1900, April 1901, and January 1903. None of the issues is numbered. It is possible these issues were preserved, perhaps randomly or perhaps because they comment even if obliquely on the litigation. However it seems equally likely these were the only issues published from 1900 to 1903. Even across just these three issues, much of the information and some of the testimonials are repeated.

[46] S.A. Weltmer Stands Alone, Weltmerism, Nov. 1900, *17, ASMH Archives.

[47] Order Granting Motion to Withdraw, Transcript of Record, American School of Magnetic Healing v. McAnnulty, No 17,887 (U.S. S. Ct. Aug. 23, 1900), 3.

[48] How to Send Money, Weltmerism, Apr. 1901, 4.

[49] Fraud Order No. 475, May 15, 1900 (suspending mail to "the said concern," American School of Magnetic Healing), Registers of Fraud Orders, Office of the Postmaster General, Records Group 28, National Archives, Washington, D.C.

(We can be sure that the re-founding of the school did not represent a personal break between Weltmer and Kelly, for, sure enough, as soon as the American School won its case at the U.S. Supreme Court, Kelly was prominently featured on the cover of *Weltmerism* as the "Manager of the Weltmer School of Healing."[50])

Weltmer and associates made a similar move responding to the federal indictments brought against them under the mail fraud statute. Each pleaded guilty while his counsel petitioned for leniency since "the business of their clients was in the nature of a belief similar to Christian Science and that they were sincere in it." All assured the court that "the law would hereafter be respected."[51]

What that apparently meant was discontinuing the Absent Treatment, at least insofar as the School promised the single-minded attention of a distant healer at a designated hour of the day. But the subsequent issues of *Weltmerism* toed the line as closely as they could. The Absent Treatment, they declared, was now to be known as the "Home Treatment." An article explained that all along, Weltmerism "is really a series or system of instructions, which . . . enable the student to obey nature's laws and thus heal *his own* ailment."[52] How did that accord with Weltmer's emphasis on Matthew 18 and the all-important agreement of two minds? A second article explained that while "the agreement of two minds is the condition under which the Law takes effect," it was not the two minds nor the agreement that did the work so much as the Law itself. "Whenever your attitude toward the power that can heal is the proper one, the results you wish for and ask for are attained," no second mind required after all.[53] The upshot was that subscribers could continue to send the School money for the School's general assurances of healthy mindfulness, no appointment necessary.

Weltmer was not just a savvy defendant during these years. At least on one occasion he went on the offensive, filing a suit for libel against a Methodist minister who declared the magnetic healers of Nevada City generally to be "miserable charlatans."[54] So far I have only the state supreme court opinion and not totally reliable press reports to go on (the Methodist's name was Bishop—I invite the reader to imagine how vexing it is to search for a Methodist *named* Bishop), but a history of the local bench and bar declared the suit "the most celebrated of recent years," one that

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[50] Weltmerism, Jan. 1903, ASMH Archives.

[51] The proceedings are recorded in Only Fined the Healers, Kansas Semi-Weekly Capital (Topeka, Kan.), Apr. 30, 1901.

[52] Absent or Home Treatment, Weltmerism, Apr. 1901, 16 (emphasis added).

[53] S. A. Weltmer's Home Method of Healing, Weltmerism, Apr. 1901, 16.

[54] Weltmer v. Bishop, 71 S.W. 167, 168 (Mo. 1902).

"created a widespread interest throughout the country."[55] Weltmer reportedly sought $20,000 in damages, but perhaps more impressively actually won a judgment of $750 from the jury.[56] The defendant Methodist pleaded that the business "was a fraud practiced on the public; and that the defendant deemed it his duty to expose the fraud."[57] The School for its part produced "[q]uite a number of witnesses" to testify to the success of Weltmer's treatment, including as distantly as Chicago.[58]

It does not seem like the School struggled to drum up its witnesses. *Weltmerism* was, like many snake oil catalogs, filled with testimonials. But unlike them, the testimonials were from people whose identifies could be verified, including local businessmen, state senators, and prominent(ish) physicians and lawyers—many of them with their portrait accompanying the testimonial. In the criminal fraud case, Weltmer and associates defended on the ground of their sincerity, and the civil trial court put the question of the witnesses' sincerity to the jury. It is never easy to tell with these sorts of things, but Weltmer may well have believed his own philosophy.

Comstockery

Anthony Comstock was a true believer too. Founder of the New York Society for the Suppression of Vice at age twenty-nine, Comstock rarely missed a chance to define his work in terms of an evangelical gospel of unquestionable orthodoxy. From the New York Society, Comstock lobbied for legislation that colloquially continues to bear his name (including a May 14, 2026 citation to "The Comstock Act" by Justice Clarence Thomas[59]). Under that legislation, Comstock received an appointment as a special agent of the U.S. Postal Service, as position he held—without salary—for almost thirty-five years. As book titles like *Roundsman of the Lord* and the *The Man Who Hated Women* suggest, historical commentators tend to loathe or revere the man.[60] Notorious for his banning and burning of obscene literature, Comstock is again rising

[55] Howard Louis Conrad, ed., Encyclopedia of the History of Missouri (1901), 1:344.

[56] Weltmer v. Bishop, 71 S.W. at 168.

[57] Weltmer v. Bishop, 71 S.W. at 168.

[58] Weltmer v. Bishop, 71 S.W. at 168–69.

[59] Order on Application for a Stay, Danco Laboratories, LLC v. Louisiana, No. 25A1208 (May 14, 2026) (Thomas, J., dissenting).

[60] Heywood Broun & Margaret Leech, Anthony Comstock: Roundsman of the Lord (1927); Amy Sohn, The Man Who Hated Women: Sex, Censorship, and Civil Liberties in the Gilded Age (2021).

in notoriety today as his legislation against abortifacients gains renewed enforcement interest.[61]

Comstock wrote a book-length defense of his work—his first and only—in 1880. The 600-page, 32-chapter volume chronicled Comstock's crusades against the Louisiana Lottery,[62] New York's pornography ring,[63] a variety of medical "quacks," and "Liberal" peddlers of free love and abortifacients.[64] So it is especially fascinating that Comstock titled the book *Frauds Exposed*.[65] For Comstock, the moral threads connecting his life's work, from obscenity to vice, were wound from "infamous plots to rob and defraud."[66]

The title seems deliberate, in that the book put serious effort into explaining each of Comstock's targets as a species of fraud. "Bogus Bankers and Brokers" was easy enough, as these characters were "the most respectable in appearance, and by their deceptive presence defraud more honest and reputable people."[67] Lotteries were fraudulent in their claims "to be legal, fair, and run by respectable men," when really "[t]he whole thing is a lie."[68] But Comstock especially wanted his readers to understand that his theological and political opponents were united in one vast "Liberal Fraud."[69] Those who sought to repeal vice regulation in the name of free speech and thought were part of a cause "which promises a morality better than that offered by the Word of God, a system of government better than the grand institutions of Free America, a religion purer and nobler than that of our Lord Jesus Christ, a

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[61] See Reva B. Siegel & Mary Ziegler, Comstockery: How Government Censorship Gave Birth to the Law of Sexual and Reproductive Freedom, and May Again Threaten It, 134 Yale Law Journal 1068 (2025).

[62] On the evangelical assault on the Louisiana Lottery, see Wayne Fuller, Morality and the Mail in Nineteenth-Century America (2003), 192–221; John W. Compton, The Evangelical Origins of the Living Constitution (2014), 95–99, 125–28.

[63] See Donna Dennis, Licentious Gotham: Erotic Publishing and Its Prosecution in Nineteenth-Century New York (2009).

[64] Alan C. Carlson, Godly Seed: American Evangelicals Confront Birth Control, 1873–1973 (2017); Helen Lefkowitz-Horowitz, Victoria Woodhull, Anthony Comstock, and the Conflict over Sex in the United States in the 1870s, 87 Journal of American History 403 (2000).

[65] Anthony Comstock, Frauds Exposed; Or, How the People Are Deceived and Robbed, and Youth Corrupted (J. Howard Brown, 1880).

[66] Comstock, Frauds Exposed, 6.

[67] Comstock, Frauds Exposed, 6.

[68] Comstock, Frauds Exposed, 6.

[69] Comstock, Frauds Exposed, 7.

hereafter more glorious than the eternal heavens."[70] The freedom of liberalism was itself one giant species of fraud.

As these sentiments make clear, Comstock's vice regulation was premised on an explicitly Christian theology. "Not yielding to weakness, temptation, and sin, but fighting and praying to overcome and get the victory over our appetites, our passions—over temptation and sin—this is living," Comstock wrote in the penultimate paragraph of *Frauds Exposed*.[71] And it was quite clear in Comstock's account that the federal government had a role to play in helping people to live as they ought. At the same time, Comstock was careful not to make the state a rigorous guardian of orthodoxy. He expressed it as his personal, not public, sentiment that "no joy of earth can compare with the consciousness of having done the Master's will,"[72] and noted, "I bow with respectful deference to the person who honestly doubts, and who uses rational means to secure the facts."[73] As we'll see, in his on-the-ground enforcement practices, Comstock chose to abide clairvoyants and metaphysicals much more than those who could be nailed on what the Supreme Court would call the "ordinary facts" of fraud.[74]

Scholarship on late-nineteenth-century law and religion has struggled to account for the duality that Comstock's evangelical paternalism seemed to exhibit. On the one hand, as Steven K. Green has shown, this period was marked by a "Second Disestablishment," as formerly Christian laws against blasphemy and protecting the sabbath either died out or were reinscribed on a secular foundation of generally keeping the peace and protecting public health.[75] On the other hand, the period was the high-water mark of what David Sehat has called the "moral establishment," as Christianity became an overt source of morals regulation as well as an all-powerful trump against general regulation—as when the Supreme Court created an atextual exception to immigration restrictions for ministers on the reasoning that America "is a Christian nation."[76] Somehow American law became both more and less Christian,

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[70] Comstock, Frauds Exposed, 7.

[71] Comstock, Frauds Exposed, 538–39. Or at least, the penultimate paragraph of the original draft. Before press, Comstock added a few more chapters to relate his debate with the Baptist minister A. Stewart Walsh (see below).

[72] Comstock, Frauds Exposed, 538.

[73] Comstock, Frauds Exposed, 537.

[74] See American School of Magnetic Healing, 187 U.S. 94, 104 (1902).

[75] Steven K. Green, The Second Disestablishment: Church and State in Nineteenth-Century America (2010).

[76] David Sehat, The Myth of American Religious Freedom (2010); Church of the Holy Trinity v. United States, 143 U.S. 457, 471 (1892).

with a jack-in-the-box faith leaping up in morals regulation while refusing to pounce elsewhere.[77]

In other writing, I have tried to explain this duality as a legacy of evangelical abolitionism.[78] The morals regulations of the late nineteenth century, I argued, had a strong and often explicit antislavery logic to them. Antebellum slavery had stymied evangelical theologies of free moral agency. Private property and public power insulated the plantation from evangelical persuasion to the extent it became clear that "just evangelize the plantation" could never be a viable strategy for addressing the sin of slavery. What state power had erected in the form of gag laws and absolute authority of plantation masters, state authority would have to strip away for the appeal to moral agency to gain any ground on which to operate.

After the Civil War, evangelical reformers saw other industries mimicking the Slave Power, especially the liquor and lottery industries. What we today would describe in terms of addiction, morals reformers described in terms of moral enslavement. "[I]t may be as certain that an intemperate man will drink to excess," the Presbyterian minister Lyman Beecher proclaimed, "as if the liquid were poured down his throat by an irresistible power."[79] Studies by Michael Young and Richard Hamm have similarly shown how evangelicals repeatedly understood intemperance, gambling, and prostitution to be moral equivalents of antebellum slavery. In Young's summation, "chattel slavery and intemperance equally robbed individuals of that freedom [of moral agency]. It enslaved them to the desires of man, placing an obstacle between man and God."[80] For many, state power offered a solution, at least partially. Stopping short of establishing a state church or blessing an official orthodoxy, governmental authority could nevertheless "clear the ground," as it were, providing a baseline of freedom on which moral agency could do its work.[81]

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[77] Jon Butler, Jack-in-the-Box Faith: The Religion Problem in Modern American History, 90 Journal of American History 1357 (2004).

[78] Kellen Funk, Shall These Bones Live? Property, Pluralism, and the Constitution of Evangelical Reform, 41 Law & Social Inquiry 742 (2016).

[79] Lyman Beecher, The Bible a Code of Laws: A Sermon Preached in Park Street Church, Boston, September 3, 1817, 6.

[80] Michael Young, Bearing Witness Against Sin: The Evangelical Birth of the American Social Movement (2006), 167.

[81] Beecher, The Bible a Code of Laws, 30; Richard Hamm, Shaping the Eighteenth Amendment: Temperance Reform, Legal Culture, and the Polity, 1880–1920 (1995); Funk, Shall These Bones Live, 766–67.

This antislavery logic helps to explain why some areas of moral regulation intensified dramatically while others were discarded in the late nineteenth-century. Adultery, sabbath-breaking, and blasphemy were no less sinful in the evangelical imagination at the time, but such sins exhibited the *abuse* of moral agency, not the *lack* of it. The opprobrium of voluntary societies and the discipline of the churches were the proper countermeasures in such cases, not the application of state power.[82]

Anthony Comstock's political theology seems to have been a natural extension of this antislavery impulse to a domain that social commentators increasingly came to identify as a void of moral agency: the domain of childhood. "The sentimental story paper, the dime novel, the boys and girls' papers, the sensual weekly journals, are each in their way warring against our youth," Comstock concluded his book, "leading them to become vapid, sentimental, lustful, and criminal."[83] The degrading effects of obscene literature were so obvious, "there ought no argument be necessary, to defend or advocate the enforcement of law, designed for the protection of the morals of the young."[84] Numerous works have chronicled the re-theorization of childhood during the Victorian era as a period of moral formation and lack of agency.[85] In the hands of Comstock (and the Young Man's Chirstian Association he represented[86]), the youthful want of moral agency paired easily with the paternalist measures of the abolitionist state.

The abolitionist drive to protect the freedom of the will also lay at the heart of Comstock's crusade against fraud. Fraudulent enterprises used "the legitimate channels of trade—the newspapers and mails" to transmit "lying advertisements, worded in most deceptive manner, containing most flattering 'references' (of cases that never existed)" but "often so skilfully [sic] worded as to deceive the very wisest."[87] Various frauds operated on the common lusts of mankind, but Comstock supposed the medical "quack" to be the worst, since "[t]he quack counts on the

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[82] Funk, Shall These Bones Live, 767–68.

[83] Comstock, Frauds Exposed, 539.

[84] Comstock, Frauds Exposed, 539.

[85] See Holly Brewer, By Birth or Consent: Children, Law, and the Anglo-American Revolution in Authority (2007); Amberyl Malkovich, Charles Dickens and the Victorian Child: Romanticizing and Socializing the Imperfect Child (2011); Thomas E. Jordan, Victorian Child Savers and Their Culture: A Thematic Evaluation (1998); Elliott West, Growing Up with the Country: Childhood on the Far Western Frontier (1989).

[86] See Mark Engebretson, Anthony Comstock, the YMCA, and the New York Society for the Suppression of Vice, Jan. 24, 2018, https://libnews.umn.edu/2018/01/anthony-comstock-ymca-new-york-society-suppression-vice/.

[87] Comstock, Frauds Exposed, 308, 309, 310.

desperation or the eager hope of recovery of those who are afflicted with disease"—that is, quack doctors preyed upon hope, not lust, and by targeting chronic sufferers, "deceive and curse the sick."[88] While the state had to keep vice off the market in order to protect children in the market, it had to keep fraud off the market so that the market could be genuinely free. Against those who propounded rights to free speech and press, Comstock responded that "[s]urely, such a mighty medium, power, and agency as the enlightened press of the nineteenth century in free America, ought not to become the tool of the villain, the vampire nor the ghoul, to rob the simple-minded, honest laborer; or oppress, curse, and destroy the sick and afflicted."[89]

To expose fraud, Comstock the enforcer had two statutes upon which to draw. His own Comstock Act made it a federal misdemeanor to send various obscene materials through the mails (including contraceptives, abortifacients, or information about either) and empowered postal agents (like himself) to seek a warrant from a federal court to seize and destroy such materials wherever the court had probable cause to think the materials would be found.[90] The mail fraud statute, enacted one session before the Comstock Act, had a different set of procedures and remedies. It empowered the Postmaster General, "upon evidence satisfactory to him" that a party was "conducting any [kind of] scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretences" to instate a "fraud order" that would stop delivery to the offender and return all mail either to the sender or to the Dead Letter Office.[91]

Comstock claimed he was unaware of the mail fraud statute when he lobbied for his eponymous legislation, and he bristled at liberal critics who mistakenly attributed the statute to his authorship.[92] Nevertheless, he was quite familiar with the statute by the late 1870s and devoted several chapters of his book to explaining and defending the procedure of fraud orders.[93]

In Comstock's view, the postal service was "the agent of the sender," at least "from a moral standpoint" if not a legal one.[94] Postal money orders were thus monies

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[88] Comstock, Frauds Exposed, 309, 310.

[89] Comstock, Frauds Exposed, 309–310.

[90] Act for the Suppression of Trade in, and Circulation of, Obscene Literature and Articles of Immoral Use (Comstock Act of 1873), 17 Stat. 598 (Mar. 3, 1873).

[91] Act of June 8, 1872, ch. 335, §§ 149 and 301, 17 Stat. 302 and 323.

[92] Comstock, Frauds Exposed, 521.

[93] See Comstock, Frauds Exposed, chs. 29–32.

[94] Comstock, Frauds Exposed, 522.

received in trust, "and when a known thief or swindler calls for it, and from a knowledge of his business we know the sender will lose every cent if placed in his hands, what is there in law and equity," Comstock asked his readers, "to prevent the sending of the money back to the party who entrusted the same to our safe keeping?"[95] To deliver the money to frauds "is to make the postal service the agent and tool of the thief, swindler and smut dealer" rather than the agent of the sender.[96]

Comstock seems to have recognized that this system vested enormous discretion on the Postmaster General, but he declared himself unworried for two reasons. First, Comstock knew from experience that "our Postmaster-General requires legal and positive evidence of a business being unlawful and fraudulent before he acts," and he assured his readers that postal agents regarded "[l]egal evidence against those schemers [as] the first essential."[97] Second, Comstock minimized the discretion of the Postmaster General by emphasizing his law enforcement mandate. While the President of the United States had "the pardoning power," the duty of subordinate Executive Branch officers was "to detect crime, and secure legal evidence to punish offenders."[98] In essence, the Postmaster had little discretion to decide what was a tolerable or slight fraud. On Comstock's account, it was the officer's duty to prosecute fully and fiercely and leave questions of discretionary mercy to the President.

Nevertheless, the chapters on medical frauds in Comstock's book were, unlike the chapters on obscenity and lotteries, surprisingly light on tales of prosecution. Mostly they served to illustrate how frauds operated and gave credulous consumers advice like "[n]ever send money to any one who advertises cures, by mail, as an 'M.D.'" or anyone who "styles himself 'Rev.'"[99] The worst of the schemers, Comstock figured, preyed upon young men who compulsively resorted to "self-abuse" and out of a sense of shame, preferred trying any snake oil remedy through the anonymity of the mails rather than consulting qualified doctors or ministers.[100] Less harmful were the clairvoyants. Although Comstock wrote in a sinister tone that "the name of this particular class of frauds is Legion," he apparently found them amusing enough to reprint their advertisements in the book without risking harm to his readers

[95] Comstock, Frauds Exposed, 524.
[96] Comstock, Frauds Exposed, 524.
[97] Comstock, Frauds Exposed, 525.
[98] Comstock, Frauds Exposed, 535–36.
[99] Comstock, Frauds Exposed, 322.
[100] Comstock, Frauds Exposed, 315, 313.

(see appendix).[101] By detailing the extensive efforts of one Calvin to pawn off a divining rod, Comstock hoped to illustrate how those with "more money than wits" got taken advantage of.[102]

As the latter comment implies, Comstock found some frauds so patently obvious that some of the moral blame had to lie on consumers who let themselves be taken in. Perhaps that is how Comstock felt about magnetic healing, which practice was nowhere addressed in *Frauds Exposed*.[103] Or perhaps he found the practice harmless enough (or even creditable?) so long as the healers complied with corporate law. One chapter documented the prosecution of the "Clinton Medical and Surgical Institute" along these lines.[104] What had begun as an obscenity prosecution for trafficking in abortifacients turned into a full-scale de-registration of the corporation for fraud, but only because, Comstock said, the Institute struck first. The proprietor of the Institute, James Bryan, launched a civil suit and had Comstock arrested (no doubt fittingly, in Bryan's mind) on the charge of making a false arrest.[105] Using newly minted procedural rights for discovery under New York's Code, Comstock turned the tables and examined Bryan under oath at length, ultimately revealing that Bryan had falsified his articles of incorporation.[106] Comstock then filed a suit of his own in Albany to have the corporation dissolved.[107]

Opposition to Comstock arose from many other places, of course, but I will highlight two attacks that came from opposite directions—the Baptists' and the Liberals'—that ended up converging.

A number of Baptists criticized Comstock on grounds that had become a common feature of Baptist political theology in the nineteenth century—the notion that penal law did little to address underlying sin and was a poor substitute for bringing souls into the care and discipline of the church.[108] Others went further and accused

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[101] Comstock, Frauds Exposed, 275, 271.

[102] Comstock, Frauds Exposed, 285, 270–86.

[103] Only one reference to "magnetic treatment" appears in *Frauds Exposed*, in a block quotation of an exposé of "free-lovers, prostitutes, and women who advertise as 'mediums,' to give 'brain rest by magnetic treatment,' etc." Comstock, Frauds Exposed, 497.

[104] Comstock, Frauds Exposed, 287.

[105] Comstock, Frauds Exposed, 294. The case file appears extant and has been ordered from the New York County Clerk's Office, 31 Chambers St., New York.

[106] Comstock, Frauds Exposed, 304–05.

[107] Comstock, Frauds Exposed, 306.

[108] See Funk, Shall These Bones Live, 764–65. For a resounding example see Sunday Mails, Report of Senator Richard Mentor Johnson (1830), in American State Papers (1834), 7:231.

Comstock of committing the very kind of fraud he was crusading against in his methods of enforcement. One wrote to the *New York Tribune* as Comstock was finishing his book to "protest against the whole system of spies and the lying thereby enacted." The best cure for fraud of all sorts was "let buyers sicken of the business just as outsiders do of stock buying, by reaping a crop of disappointment." Objecting to Comstock's sting operations, which many critics labeled "decoys" and "inducements" to commit crime, the Baptist pastor closed his editorial by calling Comstock's enforcement methods "dishonesty and fraud" and warned they established "principles that undermine our liberty and put us back toward despotism."[109]

The Baptist pastor did not sign his name to the editorial. If he thought anonymity would spare him from Comstock's ferocious investigation, he was mistaken. Comstock interrogated every Baptist minister in New York City until he had identified the author as A. Stewart Walsh, pastor of the Thirty-Third Street Baptist Church whose only other remarkable writing was a 600-page volume devoted to Mary, "Queen of the House of David" (not very characteristic of a Baptist!).[110] Pressed by Comstock to retract, Walsh followed up with a more mild (signed) editorial in the *Tribune* professing that his "intention was chiefly to criticize those laws under which [Comstock] acts," not Comstock personally. "I do not believe a 'special officer' should be permitted by law to exercise judicial functions, and at will seize suspected letters in transit through the mails."[111] In response, Comstock sidestepped the point about unreviewable power and simply promised his readers that mail was never intercepted and opened on suspicion of carrying contraband. "There is not a better postal service in the world, nor one where a person's mail is more sacredly guarded from all meddling than our service," he assured.[112]

Ultimately, then, the Baptist Reverend Walsh landed on the critique of state power as his sharpest criticism of Comstock. That is also where the decidedly non-Baptist "Liberals" concentrated their attack. In a provocative tract titled *Who is the*

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[109] Quoted in Comstock, Frauds Exposed, 541–42. The original is at Anthony Comstock's Work, New York Tribune, Mar. 1, 1880.

[110] A. Stewart Walsh, Mary: The Queen of the House of David and Mother of Jesus (1887); Comstock, Frauds Exposed, 542–44.

[111] Quoted (while withholding Walsh's name) in Comstock, Frauds Exposed, 545–46. The original is in Anthony Comstock's Work, New York Tribune, Apr. 5, 1880.

[112] Comstock, Frauds Exposed, 549. A lengthy correspondence with Comstock, Walsh, and other Baptists follows in *Frauds Exposed*, but it mostly cycles fruitlessly through each side claiming the personal attacks of the other's is an affront to honor. See *id*. at 549–62.

Enemy: Anthony Comstock or You?, the Kansas anarchist Edwin C. Walker charged that Comstock's "object is more the suppression of religious and social heresy than the 'protection' of children."[113] Walker was the son-in-law (or would have been, had a marriage been legalized) of Moses Harman, editor of *Lucifer* magazine who was prosecuted dozens of times under the Comstock Act.[114] Walker's 70-page tract ranged widely through the usual course of attacks against Comstock, charging Comstock with prudery, fear of sex and of modern society (see appendix).

But then the tract shifted to focus especially on what it called "The 'Fraud Order' Fraud." The section recounted a recent prosecution of magnetic healers in Florida, where bureaucratic "stool-pigeons of the [Postal] Department" instituted a fraud order without hearing the witnesses produced by the healers.[115] "Of course it is wholly immaterial whether Mental Healing is or is not a science, or whether [the healer] does or does not give the 'absent treatment' she advertises," Walker wrote. "It is not the business of the Post Office Department to protect persons from their own credulity."[116] Walker was gobsmacked that a federal judge, reviewing a similar order, had ruled that "Congress had a right to decide what mails should be transported, and to the executive, the Postmaster General, has been delegated the power to judge. . . . The Postmaster General takes the entire responsibility, and it is not within the province of this court to review or demur it."[117] Even "if it be true that the Congress has given the Postmaster General absolute power over the reputation and business of every inhabitant of the United States," Walker wondered, "is there nothing more to be said? What is the attitude of the Constitution toward such a terrible invasion of the rights of the citizenry?"[118]

Perhaps recognizing that the fraud order rant was getting far afield of the tract's attack on Comstock, who was not involved in prosecuting magnetic healers, Walker brought it back to a central point by raising the recent "Weltmer case."[119] Walker saw that in the papers Weltmer was declaring that the efficacy of magnetic healing had been

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[113] Edwin C. Walker, Who is the Enemy: Anthony Comstock or You? (1903), 11.

[114] Max McCoy, The Devil and Political Dynamite, Kansas Reflector, Dec. 1, 2024, https://kansasreflector.com/2024/12/01/the-devil-and-political-dynamite-kansas-sex-radicals-moses-and-lillian-harman-are-newly-relevant/.

[115] Walker, Who Is the Enemy, 55.

[116] Walker, Who Is the Enemy, 57.

[117] Quoted in Walker, Who Is the Enemy, 50. For the original, see New York Times, July 25, 1903.

[118] Walker, Who Is the Enemy, 53.

[119] Walker, Who Is the Enemy, 57.

"recognized by our government" because of the School's victory in the case.[120] Walker was a savvy enough reader to understand that an order restraining ultra vires action was not the same thing as a vindication of the School's claims about its craft, but the bigger problem, Walker thought, was the School's desire to have magnetic healing "recognized" in any fashion by the state.[121] "What sane man wants to be 'recognized'?" Walker asked. Recognition was an admission the Post Office had the power to approve "what *they* think is a 'sound and true philosophy.'"[122] But in a truly free state, "[a]ll that is demanded is that the government, no less than the mob, let them alone, leave them unmolested to be accepted or rejected by any and every other man and woman, individually."[123]

The convergence of moralistic Baptists and radical free lovers on a libertarian ideal for the mails strained the consensus of late-nineteenth-century morals reformers, for it sounded in the free market ideals of the antislavery logic that undergirded morals legislation. An executive official with unreviewable power over the mails—and the deplatforming and debanking potential that represented—could do far more than clear the ground on which free moral agency operated. Indeed, most evangelicals could have agreed with the radically unevangelical Edwin Walker's sentiment that "[t]he power to harry and destroy always gives the opportunity, the incentive and temptation, to buy and sell immunity."[124] What was to keep Comstockery from endorsing an orthodoxy and substituting government discipline for the discipline of the churches?

Comstock's book was published two decades before the magnetic healing case and Walker's tract, but we can detect an emerging political theology in response to the converging Baptist and liberal critique. "Every household has a right under the law to defend and keep pure its circle," Comstock declared near the end of *Frauds Exposed*. Instead of a constitution of negative rights setting a baseline of free moral agency, Comstock tentatively proposed a set of positive rights to "protect and keep our children pure."[125] Comstock detected this principle in the long history of the common law, and given that history, "[t]he controlling of the baser passions, the restraining of the libertine and rake from poisoning the minds of our youth, *is not a crime*."[126] The

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[120] Walker, Who Is the Enemy, 55. For one such brag, see Sustained by the Supreme Court of the United States, Weltmerism, Jan. 1901, 2.

[121] Walker, Who Is the Enemy, 57.

[122] Walker, Who Is the Enemy, 57–58.

[123] Walker, Who Is the Enemy, 58.

[124] Walker, Who Is the Enemy, 52.

[125] Comstock, Frauds Exposed, 514–15.

[126] Comstock, Frauds Exposed, 512.

liberal position, on this account, was not a bid for freedom, but for a counter-vailing right, a "right, as liberals, to utter and publish that which corrupts and affects the morals of the young, no matter whose child is debauched, or whose home is rendered worse than desolate!"[127] What liberals called "free speech" and "free press" was really "free crime," equally at odds with the "common laws in all civilized countries" and the statutes and decisional law of the United States.[128]

A contest of conflicting rights set morals reform on a new path. As both evangelicals and their critics recognized, a conflict of rights was a zero-sum game. The government was either for vice or against it, either in favor of protecting families or exposing them.[129] This was not necessarily a departure from antislavery political logic, for the antislavery debates too had come to recognize by the 1850s that the federal government could not be neutral as between slavery and antislavery.[130] But postbellum morals reform had, by and large, supposed that once the government had established a baseline of freedom by liberating its citizens from slavery and intemperance, it could remain neutral on morality and the market from there. But that is precisely what made Comstock's notion of fraud so destabilizing. If a market had to be free of fraud to be truly free, then the state had no choice but to actively engaged across many, ever-developing fronts, for the name of "frauds is Legion."[131]

The Metaphysical Court

Until Justice Rufus Peckham came along, the American School of Magnetic Healing had a tough time in the courts. By the time the Supreme Court handed down its opinion in *Magnetic Healing*, a federal criminal court, federal circuit court, and state supreme court had ruled against the School and sustained charges of fraud. Each court gave a different reason, however, which we can take in turn.

The first opinion to sustain the Postmaster General's fraud order was handed down by Judge Amos Thayer, sitting as a circuit judge (a trial judge, under the Evarts Act of 1891) in the Western District of Missouri in the middle of June, 1900.[132] Upon

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[127] Comstock, Frauds Exposed, 512.

[128] Comstock, Frauds Exposed, 512.

[129] See, for instance, the continuing exchange with A. Stewart Walsh in Comstock, Frauds Exposed, 549–62.

[130] See especially James Oakes, Freedom National: The Destruction of Slavery in the United States, 1861 – 1865 (2014).

[131] Comstock, Frauds Exposed, 275.

[132] American School of Magnetic Healing v. McAnnulty, 102 F. 565 (W.D. Mo. 1900).

the immediate application of the School's counsel when the fraud order was received in Nevada City in May, Thayer had preliminarily enjoined the return of the School's mail until the parties could be heard. The June opinion was thus the first review of the fraud order on the merits.

Merits did not necessarily mean facts, however. Although the School and Postmaster General disputed the facts upon which the finding of fraud rested, Judge Thayer had to address a preliminary issue of law: Who got to decide what facts amounted to fraud? The statutes were crystal clear that the Postmaster General did, so on this point the School pressed the objection the Baptists and Liberals had been raising against Comstock: The statutes themselves had to be unconstitutional, because they gave an unreviewable judicial discretion to a mere political appointee.[133] Although the mail fraud statutes had been upheld on this very ground in a (Comstock-fueled) case against a lottery,[134] the Schools' counsel argued that fraud was different, "involving as it does, a decision of mixed questions of law and fact," which, "when a property right is involved, belongs exclusively to the judiciary."[135] Given the judicial hostility to the School, it is not so clear the School would have fared any better with its fraud defenses before a federal judge. Still, between a Postmaster who had already ruled against the School and a federal judge who had not, the School must have figured it was better off with the latter.

Judge Thayer, however, could not agree that determinations of fraud were an exclusively judicial function. Determining what counted as an illegal lottery ticket could be just as difficult factually and legally as discerning fraud—perhaps more so, given how obvious the ploys of certain snake oil salesmen were.[136] More importantly, Thayer agreed with other courts that regarded the transmission of mail as "a mere privilege created by legislative enactment, which may be modified or withdrawn by the same authority that created it."[137] What the School called property Thayer perceived as gratuity, and in that domain, Congress's power was unquestionable. In exercising its power, Congress had chosen to given unreviewable discretion to the Postmaster, and if that discretion were sometimes arbitrarily abused, "it is sufficient to say that . . . the fact that a particular authority may be abused is in itself no reason why a court

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[133] See Brief for Orators, American School of Magnetic Healing v. McAnnulty, No. 2446 (W.D. Mo. June 12, 1900), Archives of the Western District of Missouri, Records Group 21, National Archives Kansas City Division [hereafter "ASMH District Archives"].

[134] Enterprise Saving Association v. Zumstein, 67 F. 1000 (6th Cir. 1895).

[135] 102 F. at 567.

[136] 102 F. at 568.

[137] 102 F. at 568 (citing Dauphin v. Key, 11 D.C. 203 (1880).

should assume a jurisdiction . . . which does not belong to it."[138] Congress had given the power to the Postmaster and not the courts, and that was the end of it.

The School's next proceeding before a federal judge came nearly a year later, when in April, 1901, the School's officers pled guilty to the Government's indictments for fraud. Since the indictments concerned specific advertisements about the Absent Treatment, counsel for the School likely advised that a guilty plea might garner lenient treatment without conceding anything about the overall soundness of magnetic healing.[139] A U.S. Senator who seemed to specialize in fraud order defenses, Joseph Ralph Burton, appeared on the School's behalf.[140] Burton emphasized his clients' sincerity, setting them apart from those who knowingly "gave 'sugar' pills and let the mental effect on their patients do the rest."[141]

Judge John Finis Philips was not impressed. A Kansas paper delightedly reported his "vigorous thrust at 'absent treatments,' 'mental processes' and kindred systems of healing sickness," noting the judge was "decidedly pessimistic as to the ability of anyone to improve the physical, financial or mental conditions of this life by suggestion." Similar to Thayer, Judge Philips observed that the School had a right to pursue these schemes if it wanted to, "so long as [the] postal facilities are not employed to further them." Even on an indictment for fraud, Philips thought the question of belief could be held off. The Government did "not undertake to decide whether the institution at Nevada had all the virtues that were claimed for it," not really anyway. "Under the law a man has a right to believe what he pleases so long as the practice of that belief does not operate at a danger to the public."[142]

But what was the harm to the public after all? All Judge Philips offered by way of answer was that the School was assaulting the common sense of the public itself, and that was danger enough. "No man has a right to set up his individual opinion against common sense and the average intelligence of the public as expressed in the

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[138] 102 F. at 568–69.

[139] Such at least was Weltmer's recollection years later. See, for instance, Weltmer Journal, vol. 10, no. 14 (1906), at *16 (advertisement for stock in the Weltmer Institute of Suggestive Therapeutics, claiming "Our agents had strict orders and instructions from us that nothing should be misrepresented, but in some instances our agents entrusted the advertisements to other agents, and there were two advertisements for Absent Treatment that were misrepresentations.").

[140] Indeed, Burton would become the first sitting senator in U.S. history to be convicted of a crime for his work in a fraud order case. See Frank W. Blackmar, ed., Kansas: A Cyclopedia of State History (1912), 1:125.

[141] Only Fined the Healers, Kansas Semi-Weekly Capital (Topeka, Kan.), Apr. 30, 1901.

[142] Only Fined the Healers.

statutes." To allow otherwise would make every individual a sovereign to excuse his own crimes. "The same plea might have been made in behalf of Guiteau when he slew President Garfield. It would apply also to the Hindoo mother who throws her babe into the Granges [sic]; or the Mormons and their belief in polygamy."[143] As in the *Reynolds* polygamy case, belief had to be separated from practice, and practice regulated to protect the community.[144] Only in Judge Philip's eyes, it was the beliefs of the community that the mail fraud statute protected.

The state trial involved the libel suit against the Methodist minister. As noted above, the jury awarded the School $750 in damages. The same month the U.S. Supreme Court decided *Magnetic Healing*, the Missouri Supreme Court vacated the award with a dyspeptic opinion. The defendant had pleaded truth as a defense to the alleged libel (of calling the magnetic healers "miserable charlatans"). The trial court instructed the jury that if it believed, "from all the evidence and the facts and circumstances in evidence," that Weltmer's business was "an imposition and fraud upon the general public," they were to find for the defendants. But in making up their judgment they were to "consider the general character of the business . . . as well as the results of their said business methods with the general public," and if the jury believed "that their said business was and had been substantially beneficial to the general public, and their methods had substantially produced the results claimed for them by plaintiffs, then the same is not a fraud or imposition."[145]

Nonsense, responded the supreme court. "Courts are not such slaves to the forms of procedure as to surrender their own intelligence to an array of witnesses testifying to an impossibility." Yes, the School had produced numerous witnesses, but that did not mean the jury could be directed to "surrender their own intelligence to the preponderance of statements of witnesses, irrational though such statements were." In the court's view, the burden was on the plaintiffs to show that magnetic healing was "entitled to the protection of the law." Juries were not otherwise "required to give credence to a statement that would falsify well-known laws of nature, though a cloud of witnesses swear to it," nor could "a man come into court claiming

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[143] Only Fined the Healers.

[144] On the belief-practice distinction and its embrace by the *Reynolds* Court, see Sarah Barringer Gordon, The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth Century America (2002); Winnifred Fallers Sullivan, The Impossibility of Religious Freedom (2007).

[145] Weltmer v. Bishop, 71 S.W. 167, 169 (Mo. 1902).

to possess supernatural powers, and bring with him witnesses who swear he has done for them that which we know is impossible."[146]

In the original opinion, the Missouri supreme court did not state exactly what was unbelievable about magnetic healing that set it beyond the purview of the jury. After the School requested rehearing in light of the U.S. Supreme Court's decision, the Missouri court remained firm in its opinion. Because of the posture of the case, the U.S. Supreme Court had accepted as fact the School's pleadings that it engaged in "practical scientific treatment" and did not engage in "what is commonly known as 'Divine Healing' and 'Christian Science.'"[147] But the Missouri trial, on the other hand, had produced record evidence showing that the plaintiffs "were men without pretense of scientific learning" who "professed to possess miraculous power to heal all diseases," exerting "the same powers that Jesus Christ exerted to cure diseases 1900 years ago" and which the Missouri court labeled "magic." The court took particular aim at the Absent Treatment, noting that Weltmer struggled on the stand to account for time zone differences in scheduling distant treatments.[148]

Still, the court held the ultimate question of belief at arm's length. It noted that "in the realm of science much is yet undiscovered," and "[d]ifferent schools of medicine contend with each other over vital questions." So long as "the contest continues with reason, it cannot be said that the right of either, as above the other, has been demonstrated." Still, schools of medicine "must appeal to our intelligence, and discuss the subject on the basis of natural laws" to persuade the public—and the public's courts—of the legitimacy of the business. In the court's view, the magnetic healers were promoting magic, not science, and thus the charge of charlatanism could not be libelous.[149]

In each of their ways, the courts had managed to distinguish the freedom to believe in magnetic healing from the freedom of an institution to promote and practice its belief using the mails. Judge Thayer characterized mail service as a gratuity that could be arbitrarily revoked, leaving magnetic healers to practice their beliefs on only the most local scale. Judge Philips went even further. For him, certain socially destructive beliefs could not be practiced at all, locally or otherwise, at least not without suffering criminal penalties. Meanwhile the Missouri supreme court agreed

[146] 71 S.W. at 169.
[147] 71 S.W. at 170.
[148] 71 S.W. at 168.
[149] 71 S.W. at 169, 170.

that beliefs had secure their footing in empirical evidence before their practices could be protected by the law of defamation.

In the appeal of Thayer's decision, U.S. Supreme Court Justice Rufus Peckham saw the world differently. Although the notion of "falsifiability" would not be popularized until Karl Popper's 1934 treatise,[150] Justice Peckham's decision for the Court essentially anticipated it and carved out a category of metaphysical beliefs that were beyond the reach of the law of fraud. Peckham called this category (over twenty times in the brief decision) "opinion." The postal statutes self-evidently did "not assume to deal with mere matters of opinion upon subjects which are not capable of proof as to their falsity," Peckham wrote.[151] "Unless the question may be reduced to one of fact," he concluded (elsewhere using the term "ordinary fact"[152]), "we think these statutes cannot be invoked for the purpose of stopping the delivery of mail matter."[153]

It was not difficult to see which category magnetic healing belonged to. "There can be no doubt that the influence of the mind upon the physical condition of the body is very powerful," but just how powerful "these claims are borne out by actual experience may be a matter of opinion."[154] Magnetic healing was like the emerging technology of vaccination, which "is believed by many to be a preventative of smallpox, while others regard it as unavailing for that purpose."[155] For such cases, dueling witnesses were beside the point. When false pretenses were "the subject of proof as of an ordinary fact," like say, passing counterfeit bills, the balance of credible testimony on one side could outweigh the other.[156] But in matters of opinion, conflicting witnesses only demonstrated that "[t]here is no exact standard of absolute truth by which to prove the assertion false and a fraud."[157]

Almost as if responding to Judges Thayer and Philips, Peckham argued that the realm of opinion defied the categorial rules of law the lower courts had tried to impose. When "[e]ven intelligent people may and indeed do differ among themselves as to the extent of this mental effect" of magnetic healing, "who can say that it is a fraud, or a

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[150] See Karl Popper, Logik der Forschung (1934), or in English translation, Karl Popper, The Logic of Scientific Discovery (1959).

[151] 187 U.S. at 104.

[152] 187 U.S. at 104.

[153] 187 U.S. at 106.

[154] 187 U.S. at 103–04.

[155] 187 U.S. at 106.

[156] 187 U.S. at 104.

[157] 187 U.S. at 104.

false pretense or promise within the meaning of these statutes?"[158] Judge Thayer thought that the Postmaster General could say, or at least that Congress had directed him to. Peckham's rhetorical question offered a different answer. Only the individual believer could decide questions of opinion. While Judge Philips thought the common sense of the community had to be protected, Peckham asserted that "even though the great majority may be of one way of thinking, the efficacy of any special method is certainly not a matter for the decision of the Postmaster General within these statutes relative to fraud."[159]

[What brought Peckham to these conclusions so different from his brethren on the federal bench? At this early stage in the research I am still trying to find out more. Peckham's papers were burned, so reconstructing his intellectual biography is a difficult task. There are strong resonances in the opinion with William James's "The Will to Believe," an address delivered (and published) six years before Peckham wrote *Magnetic Healing*.[160] As a member of the upstate gentry in New York, it is certainly possible Peckham moved in the circles that would have brought him under James's influence, though evidence of a direct connection remains scarce. Oliver Wendell Holmes, the most obvious path of connection, did not join the U.S. Supreme Court until two weeks after *Magnetic Healing* was handed down, but both Peckham and Holmes sat on their respective state's highest court from 1886 to 1895 so may have been acquainted beforehand.]

In the end, Peckham concluded that his category of "opinion" allowed the Court to escape the "grave questions of constitutional law" raised by the arguments about unreviewable judicial discretion, while nevertheless affording the School relief.[161] Congress often tasked Executive Branch officials with making determinations of fact in order to administer federal programs, such as distribution of the public lands.[162] So long as the Postmaster General confined himself to "questions of fact," he remained within the ordinary ambit of official discretion, and the courts would not second guess his determinations.[163] But declaring an opinion to be fraudulent was, by its nature, to do something other than decide a question of fact. In essence, it extended the Postmaster General's jurisdiction by bringing metaphysics under the purview of

[158] 187 U.S. at 104.
[159] 187 U.S. at 105.
[160] See William James, The Will to Believe, 5 The New World 327 (1896), 327–47.
[161] 187 U.S. at 103.
[162] 187 U.S. at 108–09.
[163] 187 U.S. at 109.

the statute when Congress had not drawn it up that way. Put this way, the Postmaster General's decision was essentially "a question of law simply," a question of his jurisdiction, and courts were not bound to accept the Postmaster's declaration of his own jurisdiction as conclusive.[164]

Of course, the line between belief and fact was not self-evident. The efficacy of electro-shock therapy, vaccination, and mental healing were all offered by Peckham as examples of belief, despite being fields of intense empirical scrutiny during this era.[165] Like many doctrines of apparent deference, then, *Magnetic Healing* significantly widened the scope of judicial review even as it professed to withdraw the courts from overseeing the Postal Service's factual determinations.[166] The question of whether an inquiry even belonged to the Postmaster General was now a legal question to be posed to the courts in the first instance, and many magnetic healers would pose that question in the years following the School's case. It is to that litigation my attention will soon turn.

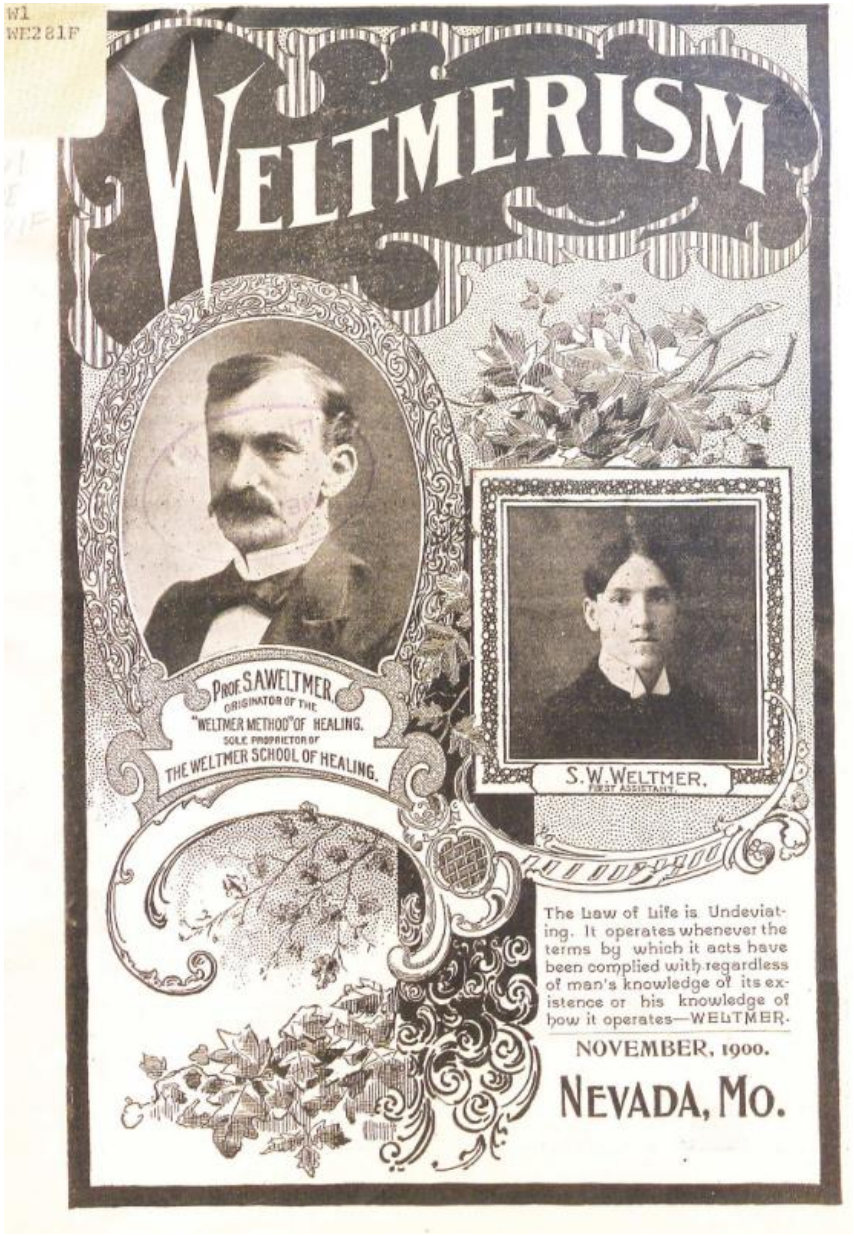
[In place of a true conclusion, I direct readers back to the introduction, where I am still puzzling about the upshot of this study.]

[164] 187 U.S. at 109–10.

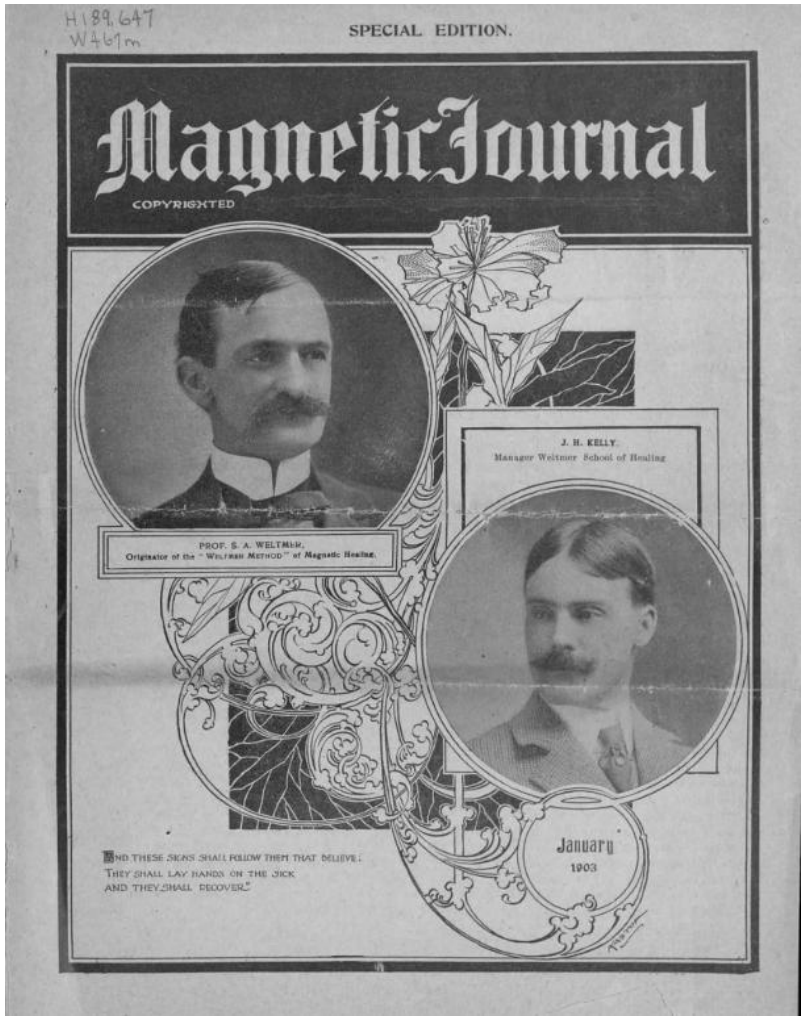
[165] 187 U.S. at 103–07.

[166] For a similar argument about the Political Question Doctrine, see Tara Leigh Grove, The Lost History of the Political Question Doctrine, 90 N.Y.U. Law Review 1908 (2015).

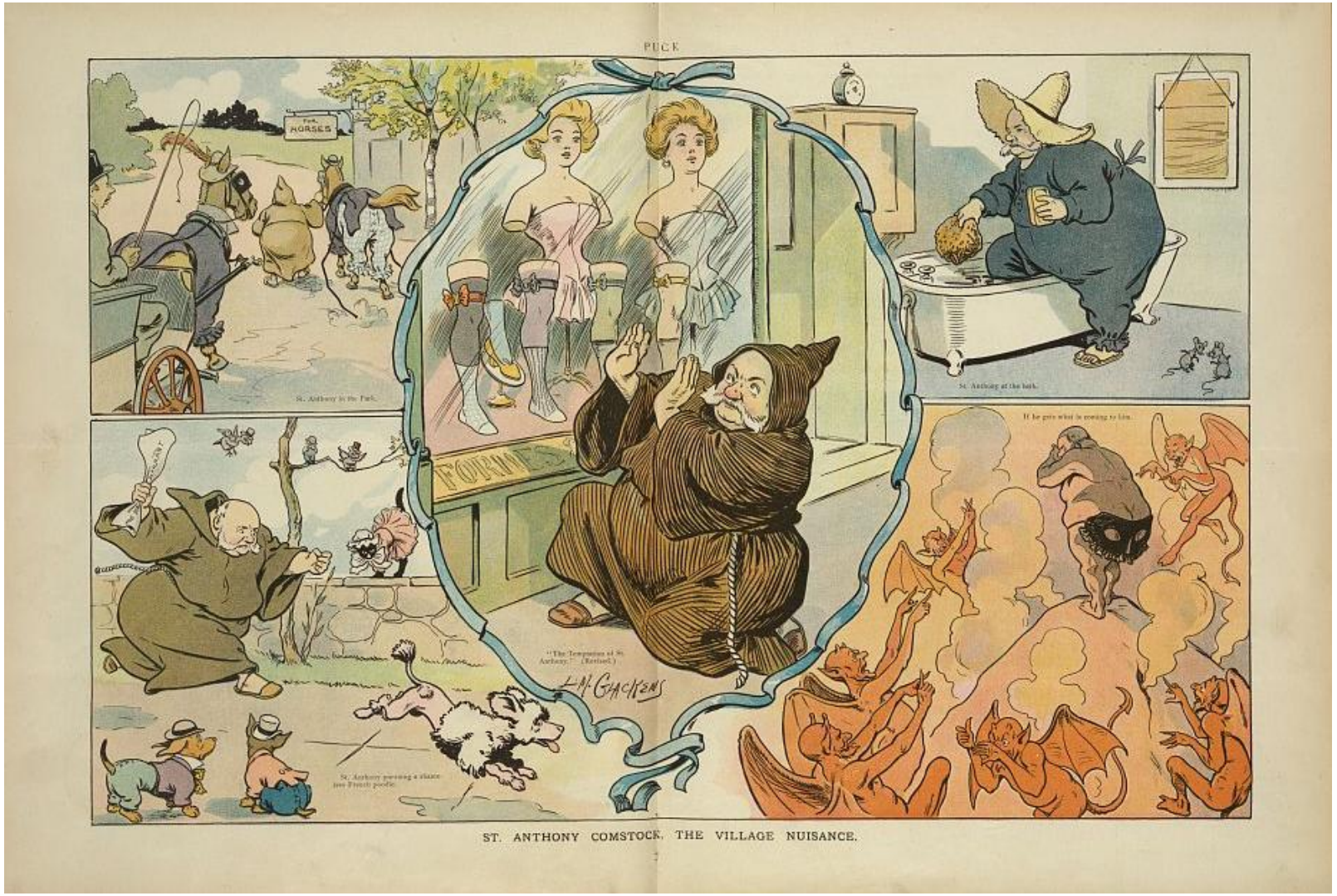
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The School's official journal announcing the dissolution of the American School of Magnetic Healing (Nov. 1900), and the triumph of the School at the Supreme Court (Jan. 1903).

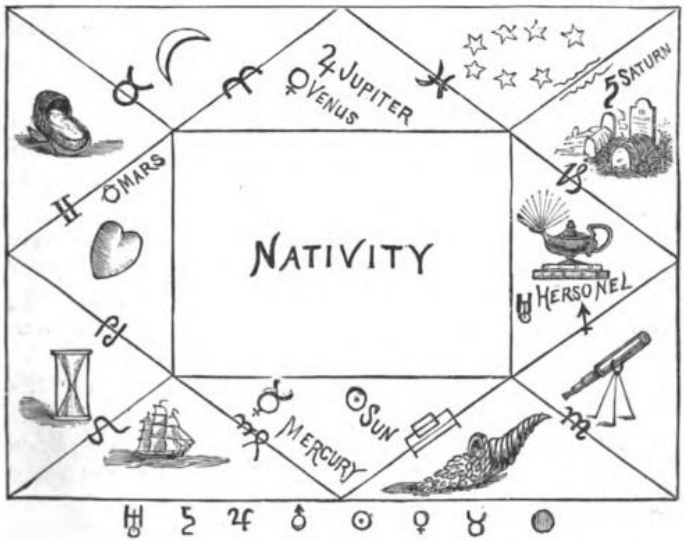


A typical depiction of Comstock as a puritanical "nuisance"—a legal term evangelical reformers like Comstock deployed to great effect against the liquor and lottery industries.

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Comstock included this advertisement as an amusement in his book, *Frauds Exposed*. The title, "The Wonderful Calvin," is Comstock's.