

Deciding Against Conciliation: The Nineteenth-Century Rejection of a European Transplant and the Rise of a Distinctively American Ideal of Adversarial Adjudication

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What is the relationship between a society's broader structures of authority—its methods of distributing and regulating power—and its approach to dispute resolution? Drawing on the foundational work of Max Weber, Mirjan Damaska has influentially argued that there is an important relationship between structures of authority and legal process. As he has persuasively suggested, the organization of state authority (whether hierarchical or coordinate) and the prevailing conception of the purposes such authority is to serve (whether reactive or activist) go far towards explaining the particular shape taken by any given society's methods of dispute resolution.² But Damaska's work, while broad-ranging in scope, focuses largely on formalized modes of legal process. A sizeable body of literature, however, suggests that informal methods of dispute resolution—and, in particular, conciliation—flourish (often at the expense of formal

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² MIRJAN R. DAMASKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* (1991).

legal process) in (and only in) societies marked by extensive social hierarchy, as reflected in strong traditions of patronage and deference.³

Such literature, focusing primarily on Asia (and especially Japan) is epitomized by the work of Takeyoshi Kawashima. Emphasizing that Japanese society is “hierarchical in the sense that social status is differentiated in terms of deference and authority,”⁴ Kawashima notes that the great majority of social relationships, ranging from that of kinship to employment, were traditionally structured as long-term patronage relationships. As a result, Japanese men and women have long placed great value on the preservation of group harmony and frowned upon litigation because it “emphasize[s] the conflict between the parties.”⁵ For like reasons, Japanese society traditionally embraced the informal, extrajudicial reconciliation of disputants, often through the assistance of third parties of high social standing. And in the nineteenth century, many of these essentially private methods of informal dispute resolution were gradually absorbed into the state’s own judicial apparatus.⁶ According to Kawashima, conciliation proved so successful for precisely the same reasons that it was deemed desirable—namely, the Japanese tradition of promoting communal harmony by encouraging deference to social superiors. As he explains, “the third person who intervenes to settle a dispute . . . is supposed to be a man of higher status than the disputants” and “[w]hen such a person suggests conditions for

³ See, e.g., 1 DAN FENNO HENDERSON, *CONCILIATION AND JAPANESE LAW: TOKUGAWA AND MODERN* 15-44, 127-81 (1965); Takeyoshi Kawashima, *Dispute Resolution in Contemporary Japan*, in *LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY* 41-72 (Arthur Taylor Von Mehren ed., 1963); William S. Laufer & Iwao Taka, *Japan, Regulatory Compliance, and the Wisdom of Extraterritorial Social Controls*, 18 *HASTINGS INT’L & COMP. L. REV.* 487, 504-06 (1995).

⁴ Kawashima, *supra* note 3, at 43.

⁵ *Id.*

⁶ *Id.* at 52-53.

reconciliation, his prestige and authority ordinarily are sufficient to persuade the two parties to accept the settlement.”⁷

Over the last several decades Kawashima’s arguments have come under increased criticism. A number of scholars have challenged, in particular, his claim that low Japanese rates of litigation follow from a cultural propensity to prioritize group harmony above the assertion of individual self-interest. Scholars such as John Haley and J. Mark Ramseyer suggest, instead, that a number of institutional factors have long served to make litigation less profitable than extrajudicial settlement and that it is the lack of a meaningful financial incentive to file suit, rather than a cultural disdain for litigation alone, that accounts for the relatively low Japanese levels of litigation. But even while rejecting Kawashima’s purely cultural account of Japanese litigation rates, these critics identify as an important institutional factor “the effectiveness of third party intervention” in the form of mediators who “because of position or personal relationships, command respect and are able to exercise some measure of authority.”⁸ Indeed, according to Haley, the reason why third parties are able thus “to command the parties’ trust and their obedience to the settlement” is that, in contrast to the United States, Japan is a “stable, closely-integrated and hierarchical society.”⁹ It is thus widely agreed that conciliation of the kind that has traditionally dominated in Japan hinges on the existence of a hierarchical social structure that promotes obedience to those wielding power.

Given this established tendency to associate conciliation with strong forms of social hierarchy, it is quite surprising to discover that in the mid-nineteenth century, the United States

⁷ *Id.* at 50.

⁸ John Owen Haley, *The Myth of the Reluctant Litigant*, 4 J. JAPANESE STUD. 359, 378 (1978). See also J. Mark Ramseyer, *Reluctant Litigant Revisited: Rationality and Disputes in Japan*, 14 J. JAPANESE STUD. 111, 111-23 (1988).

⁹ Haley, *supra* note 8, at 378.

embarked on an extensive debate regarding whether to adopt institutions termed “conciliation courts,” whose primary function was to promote the amicable, extralegal settlement of disputes. Indeed, equally surprising—though a subject for another paper—such courts were first established by the French Revolutionaries in 1790, as part of their broader effort to construct a truly democratic (and radically egalitarian) legal system. These *bureaux de conciliation*, or conciliation courts, were staffed by lay judges, lacking formal legal training, and selected by those whose disputes they were responsible for resolving. As suggested by their name, the primary purpose of these institutions was not to enforce the strict letter of the law, but instead to reconcile the disputants by persuading them to embrace an equitable compromise.

That conciliation courts thus originated in the French Revolution suggests in and of itself that the link between conciliation and social hierarchy may be quite a bit weaker than the literature on Japan would suggest and, indeed, that there may even be a correlation between conciliation and egalitarian, non-hierarchical social orders. There is certainly evidence that societies *seeking* to establish themselves as egalitarian—including, for example, not only Revolutionary France, but also early Zionist (and socialist) Palestine—embrace informal methods of dispute resolution (such as conciliation) as a way of attempting to avoid the clearly delineated lines of authority that necessarily structure a formal legal system.¹⁰ There are thus other examples, besides the nineteenth-century American debate over conciliation courts, which

¹⁰ See, e.g., Richard D. Schwartz, *Social Factors in the Development of Legal Control: A Case Study of Two Israeli Settlements*, 63 YALE L.J. 471, 471-91 (1954); Ronen Shamir, *The Comrades Law of Hebrew Workers in Palestine: A Study in Socialist Justice*, 20 LAW & HIST. REV. 279, 279-305 (2002).

might be used to question the traditional, Japan-based account. But while worthy of study, these would take me well beyond the scope of these pages and thus must be left to another day.¹¹

For now, the important thing to note about the French *bureaux de conciliation* is that, shortly after they were first established, variants thereof were widely adopted throughout continental Europe. Observing this development, leading American lawyers and politicians— anxious to respond to public complaints about the costly nature of litigation and the growing power of the legal profession, and seeking a solution to the deep social rifts threatened by new forces of urbanization and industrialization—pondered seriously whether the United States ought to follow suit. Debate over whether to embrace such institutions occurred at the very highest of levels—including at the New York Constitutional Convention of 1846, now more famously remembered for merging law and equity by directing the drafting of what was to become the Field Code. Indeed, a series of states enacted constitutional provisions authorizing their legislatures to create conciliation courts. Ultimately, however, despite the widespread interest in such institutions, these were never meaningfully established—except in the notable case of the Freedmen’s Bureau courts of the Reconstruction south.

How should we make sense of this largely forgotten episode in American legal history?

Why would a nation that was radically egalitarian by standards of the time—a nation in which,

¹¹ There is a difference, moreover, between a society’s desire to adopt informal methods of dispute resolution (including conciliation) and its ability successfully to do so. A closer reading of the evidence may well show that whatever a society’s reasons for seeking to embrace conciliation, the technique proves successful only to the extent that disputants can be persuaded to defer to the judge’s authority and that this, in turn, is most likely to occur in close-knit communities marked by clear, deeply embedded social hierarchies. Along these lines, it is striking that the French conciliation courts were directly descended from (and in many ways replicated) the seigneurial courts of the corporatist Old Regime. Antoine Follain, *De la justice seigneuriale à la justice de paix*, in *UNE JUSTICE DE PROXIMITÉ: LA JUSTICE DE PAIX, 1790-1958*, at 33 (Jacques-Guy Petit ed., 2003). Likewise, according to Ronen Shamir, whatever the intentions behind the creation of the Comrades Law system of 1920s Palestine, it quickly became “an instrument of discipline and control.” Shamir, *supra* note 10, at 291.

as Lawrence Friedman has emphasized, most white men were landowners¹²—seriously consider embracing an institution that we tend more commonly to associate with inegalitarian, strongly hierarchical societies? Why in the end, after coming so close to adopting conciliation courts did Americans in fact fail to do so? And what does this episode suggest about the prevailing wisdom that conciliation is suited only to societies imbued with powerful traditions of hierarchy and deference? This paper explores the answers to these questions, and in the process, excavates the origins of the modern, quintessentially American commitment to the virtues of formal, adversarial legal process.

But before proceeding any further, it is important to clarify a few points of terminology. Given the current prominence of alternative dispute resolution, or ADR, readers may be tempted to associate conciliation of the kind described by Kawashima or implemented in European conciliation courts with ADR, and in particular, with modern-day mediation or arbitration. But while there are important parallels between these phenomena, there are also significant differences, which bear emphasis. Modern-day mediation is widely understood to be a means by which a neutral third party helps the disputants to identify their own true interests and to reach a compromise in accordance with these. Accordingly, ADR advocates of mediation often justify it by resort to the language of individual self-determination. In contrast, conciliation of the kind at issue in this paper exhibits little concern for whether the resolution ultimately reached promotes interests that the parties themselves recognize (and embrace) as their own. Seeking to encourage deference to social superiors, rather than individual autonomy, conciliation is thus conducted by

¹² LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 167-68 & n.1 (2005).

a third party who is not a mere neutral, but instead a recognized figure of authority within the community.¹³

Likewise, modern-day arbitration is often understood to be a means by which a third party decides the case in accordance with the formal rule of law, but without the procedural complexities (and thus higher costs) attendant on a formal court proceeding. Thus, arbitral agreements usually contain a choice of law provision, specifying the applicable rules of law. In contrast, conciliation is not at all concerned with whether the ultimate resolution complies with the formal rule of law. It focuses instead on reaching an outcome that is equitable on the facts of the case and that the parties can thus both accept as a basis for restoring their relationship. In this sense, conciliation bears a strong resemblance to what Europeans have long termed amiable composition—namely, a kind of arbitration aimed at the restoration of amicable relations.¹⁴

Because of these differences, conciliation, unlike mediation and arbitration, fails to distinguish between those situations where the disputants embrace the third party's recommendation of their own free accord (mediation) and those where the parties simply agree in advance to submit to these, regardless of whether they happen to agree (arbitration). As Kawashima argues, conciliation tends to elide the distinction between arbitration and mediation

¹³ Proponents of ADR sometimes use the terms mediation and conciliation interchangeably. When used in this manner, conciliation (qua mediation) must be distinguished from the kinds of conciliation examined in this paper. Indeed, even to the extent that advocates of ADR distinguish between mediation and conciliation, they recognize a core commonality in these processes that distinguishes them from the form of conciliation considered below—namely, a shared concern with promoting party autonomy and self-determination. *See, e.g.*, KATHERINE VAN WEZEL STONE, *PRIVATE JUSTICE: THE LAW OF ALTERNATIVE DISPUTE RESOLUTION* 6-7 (2006) (describing both mediation and conciliation as efforts by a neutral third party to encourage the disputants freely to embrace a negotiated compromise, but characterizing mediation as a more formal, structured process).

¹⁴ Amalia D. Kessler, *Enforcing Virtue: Social Norms and Self-Interest in and Eighteenth-Century Merchant Court*, 22 *LAW & HIST. REV.* 71, 83 n.45 (2004); Alan Scott Rau, *Federal Common Law and Arbitral Power*, 8 *NEV. L.J.* 169, 189-92 & n.67 (2007).

since parties who defer to the recommendation of a third party of high social standing can readily be viewed either as acquiescing in his judgment (arbitration) or as freely embracing what he had helped to clarify as their own true interests (mediation).¹⁵ In sum, “the difference between mediation and arbitration is nothing but a question of [the degree of] the [third-party] go-between’s power”—and it is this power to which in, one form or another, the disputants are expected to defer.¹⁶

Having clarified some key points of terminology, let me now turn to the structure of the argument. Section I examines the writings of the man most responsible for bringing the European conciliation court to the attention of the English-speaking world: Jeremy Bentham. According to Bentham, the conciliation court was the closest approximation of his ideal of “natural procedure”—a procedural model that he surprisingly developed on the basis of the natural law theory that he claimed to disdain. As Bentham’s attitudes towards “natural procedure” were themselves quite conflicted, so too was his attitude towards the conciliation court. While the institution appealed to him as a means of avoiding formal litigation and thus making justice more readily accessible, it also struck him as potentially quite dangerous, since it required disputants to compromise their formal legal rights in deference to the persuasive authority of the judge. As he ultimately concluded, and as nineteenth-century Americans themselves came to believe, the use of conciliation courts thus threatened to subvert the rule of law.

Section II examines the nineteenth-century American debate over conciliation courts. After tracing how the English interest in such institutions reached American soil, it explores the primary locus of the American debate. This was the New York State Constitutional Convention

¹⁵ Kawashima, *supra* note 3, 50.

¹⁶ *Id.*

of 1846, now remembered primarily for its highly influential decision to merge the once separate systems of law and equity. Most of the lawyers and politicians who served as delegates to the Convention, as well as leading contemporaries (ranging from Francis Lieber to David Dudley Field) ultimately decided, like Bentham, that conciliation courts were inherently patriarchal—that they functioned successfully only when the disputants were willing to defer to the influence of the judge. It was because European societies remained “feudal” or “despotic” that their peoples continued to show such deference and that conciliation courts therefore proved successful on European soil. In contrast, they argued, Americans were too independent and individualist for such deference-based institutions to take root. A commitment to formal, adversarial adjudication, they therefore concluded, was a distinguishing American feature—one integrally linked to the new nation’s unique capacity to promote both freedom and free enterprise.

Section III explores the demands for the establishment of European-style conciliation courts that continued to be raised well into the second half of the nineteenth century. These demands were never heeded, except in the telling case of the Freedmen’s Bureau courts of the Reconstruction South. Modeled expressly on European conciliation courts, these institutions were embraced by white, northern elites precisely because they drew parallels between the newly freed African-American population and the European peasantry, many of whom were themselves only recently released from the bonds of serfdom. From the perspective of such individuals, both African-Americans and European peasants were childish and ignorant peoples, and it was for this very reason that conciliation proved effective for them. Only inferior peoples, in other words, would be willing to sacrifice their self-interest in deference to the judgment of social superiors. In this sense, the Freedmen’s Bureau courts were the exception that proved the

otherwise prevailing rule: By the time of the Civil War, nineteenth-century elite, white Americans had come to conclude that conciliation was incompatible with the foundations of a free democracy.

Having completed an account of the nineteenth-century American debate over conciliation courts, the paper turns in Section IV to the broader legal context in which this debate occurred. After offering some concluding thoughts concerning the implications of these events for the proposition that conciliation and social hierarchy tend to be interdependent, I consider the contemporary legal (and especially procedural) developments that facilitated the debate and that contributed to the resulting embrace of an ideal of formal, adversarial procedure. I then conclude by reflecting briefly on the enduring legacy of this now mostly forgotten episode of the American legal past.

I. Natural Procedure and Patriarchal Power: Bentham's Conflicting Views of European Conciliation Courts

Although I am interested in tracing the development of a distinctively American conception of adjudication—and the role played in this process by nineteenth-century debates over conciliation courts—Jeremy Bentham is my starting point. This may be surprising, since it is well known that Bentham had relatively little success in his efforts directly to influence American policy.¹⁷ His indirect influence was, however, significant. Antebellum American lawyers and politicians closely followed contemporary English discussions of court procedure and practice. And while Bentham's role in shaping English policy is also a matter of some

¹⁷ JOHN DINWIDDY, BENTHAM 14 (1989) (describing Bentham's early-nineteenth-century efforts to persuade President Madison that he should be permitted to draft a comprehensive code for the United States, as well as subsequent attempts to persuade individual governors that he should do the same for each individual state).

dispute,¹⁸ it is clear that he exerted significant influence on various contemporary leaders, including a major promoter of institutional and procedural reform, Lord Chancellor Henry Brougham.¹⁹ Indeed, much of the procedural reform that ultimately occurred both in England and the United States during the mid- to late-nineteenth century ultimately took precisely the form that Bentham had initially proposed.²⁰ Moreover, as concerns a central focus of this paper—namely, the nineteenth-century American debate over European conciliation courts—the chain of influence is directly traceable to Bentham.²¹

What then did Bentham have to say about conciliation courts? His views were, in a word, confused. He was at once deeply attracted to and repelled by the notion of conciliation courts. And the confused and conflicting attitudes that he expressed would, in turn, characterize subsequent American thinking about such institutions—though, like Bentham, leading nineteenth-century lawyers and politicians would ultimately opt against the establishment of these courts. To understand Bentham’s confusion it is necessary to begin by exploring how conciliation courts entered into his thinking, and this, in turn, requires an analysis of what he

¹⁸ See the useful summary in George Fisher, *The Jury’s Rise as Lie Detector*, 107 YALE L.J. 575, 659-60 (1997).

¹⁹ 2 HENRY PETER BROUGHAM, SPEECHES ON HENRY LORD BROUGHAM, UPON QUESTIONS RELATING TO PUBLIC RIGHTS, DUTIES, AND INTERESTS 287-88 (1838); Paul D. Carrington, “Substance” and “Procedure” in the Rules Enabling Act, 1989 DUKE LAW JOURNAL 281, 299 & n.123; Michael Lobban, *Henry Brougham and Law Reform*, 115 ENGLISH HIST. REV. 1186 & n.3 (2000). Brougham, in turn, was highly influential among contemporary American law reformers. Robert W. Gordon, Book Review, 36 VAND. L. REV. 431, 435 n. 22 (1983).

²⁰ Thomas C. Grey, *Accidental Torts*, 54 VAND. L. REV. 1225, 1239-40 & n.32 (2001). This included the merger of law and equity, the elimination of equity’s written, secrecy-oriented approach to taking testimony, and the abandonment of witness competency rules. Michael Lobban, *supra* note 19, 1186 & n.3.

²¹ Bentham’s views of the conciliation court are also worthy of serious consideration—and provide a useful entry point for discussion—for the simple reason that the depth and prescience of his analysis of the relationship between procedure and broader questions of social structure and governance were unparalleled in his era.

considered to be an ideal procedural model. This procedural model was what he called “natural procedure,” and as its name suggests, its roots lay in the modern natural-law tradition.

To claim that Bentham embraced a procedural model based on natural law may seem deeply counterintuitive. Bentham was, after all, famously opposed to natural law theory, deeming it “nonsense upon stilts.”²² Adhering to the view that all law stems from the sovereign will and thus cannot exist prior to social organization and state formation, he is now widely viewed as the father of legal positivism. Yet, for all his animosity towards natural law, his account of “natural procedure” borrows heavily from the natural-law tradition. In particular, just as natural-law theorists looked to the family to identify rules of substantive natural law, so too Bentham looked to the family to identify rules of natural procedure.

Expounded by the likes of Grotius and Pufendorf, modern natural law theory posited the family as a vital, naturally arising institution of human society. As an institution that predated the state and thus existed across different geo-political and religious boundaries, the family was said by natural-law theorists to be universal to the human condition and thus an appropriate locus for the observation of universal laws of human nature—including, most importantly, the law of sociability, which commanded peaceful human intercourse and from which any number of subsidiary rights and obligations could be deduced. Adopting precisely the same familial paradigm on which natural-law theorists relied, Bentham argued that natural procedure was that (universal) set of methods that a father would use to resolve disputes among the various dependents within the (patriarchal) home.

Given Bentham’s disdain for natural law theory, he not surprisingly denied that this highly influential body of thought played any role in the development of his model of natural

²² JEREMY BENTHAM, *BENTHAMANIA: OR SELECT EXTRACTS FROM THE WORKS OF JEREMY BENTHAM* 67 (John Hill Burton ed., Edinburgh, William Tait 1843).

procedure. Indeed, he insisted that in drawing on the paradigm of the family, he was looking not to a pre-political state of nature, but instead to the earliest days of human society. Alluding to the historicist literature associated with such early-modern constitutional law thinkers as Edward Coke in England and François Hotman in France,²³ Bentham observed in his 1825 publication, *A Treatise on Judicial Evidence* that, in general, he thought little of those who insisted on “the pretended necessity of subjecting political constitutions, and above all, popular constitutions, to some undefined operation or another, which is to have the effect of bringing them back to their original principles.”²⁴ Even if such a reversion to the past were possible, which he greatly doubted, he saw little to be recommended in “primitive barbarity.”²⁵ But while as a general matter, he rejected the romantic tendency to celebrate the supposed freedoms of an ancient, barbaric past, Bentham made an exception in the case of procedure: “[T]here is one branch of legislation, in which the primitive ages appear to me to have had the advantage of us; that branch is legal procedure.”²⁶ The great virtue of ancient procedure, he argued, was that, in contrast to its modern counterparts, it was a paragon of simplicity, thus obviating the need for lawyers and ensuring both speedy and cheap dispute resolution. It was to such ancient procedure, Bentham insisted, that moderns now had to return, and they could do so, he claimed, by looking to the methods of dispute resolution employed within the patriarchal family.

In so arguing, Bentham elided the distinction between ancient or primitive man and the state of nature, much like another famous thinker who drew on the discourse of natural law, even

²³ This literature had challenged growing claims to royal absolutism by positing an ancient past of democratic self-rule that preceded the rise of monarchical authority. Because it thus glorified primitive, Germanic liberties, it was consonant with the romantic, nationalist tendencies of Bentham’s own age.

²⁴ JEREMY BENTHAM, *A TREATISE ON JUDICIAL EVIDENCE* 4 (Étienne Dumont ed., London, Baldwin, Cradock & Joy 1825) [hereinafter BENTHAM, *TREATISE ON JUDICIAL EVIDENCE*].

²⁵ *Id.*

²⁶ *Id.* at 5.

while rejecting a great many of its core components. Like Jean-Jacques Rousseau before him, Bentham viewed the patriarchal family as both an institution of primitive society (of man in his natural state) and one natural to the human condition. As such, he explained, it could still be found everywhere in the modern world: “It is not necessary that we should consult history to learn the mode of procedure in early times; we do not need to lose ourselves in erudite researches: the natural model of a good form of procedure is at our hand, it is within the reach of every body, it is unchangeable. A kind father in the midst of his family, regulating their differences, is the image of a good judge; the domestic tribunal is the true type of a political tribunal.”²⁷

True to natural law theory, Bentham embraced the family as the appropriate locus for identifying a procedural model precisely because of its universality—because it predated the state, thus transcending all borders. Indeed, for this very reason, the family served as a kind of prototype or microcosm of the state. In his words, “Families existed before states; they exist even in states. They have a government, laws to be executed, and disputes to be decided. They have a method of arriving at the knowledge of facts. . . . [C]ommon sense, the earliest of legislators, taught it to the first father of a family, and teaches it still to all his successors.”²⁸ Acting as judge and jury within his own family, every father instinctively knew how to proceed in resolving “any dispute [that] arises among those who are dependent on him.” And according to Bentham, it was this “natural procedure,” applied by every father acting as a “natural man,”²⁹ that ought to serve as the procedural model to be applied by the state writ large.

²⁷ *Id.* at 5-6.

²⁸ *Id.* at 6.

²⁹ *Id.*

Bentham argued that “natural procedure” consisted of certain core techniques—many of which were absent in contemporary English law. His model of natural procedure was thus constructed in no small part as the antithesis of all those features of actual, contemporary procedure—or, in his terminology, “technical procedure”—that he sought to reform. In this sense, the paradigm of natural procedure was an ideal type—a theoretical model encompassing the kinds of procedural and evidentiary rules that he hoped to propagate. Nonetheless, there was in his view one actual procedural institution that came close to approximating this ideal type. This was the conciliation court, as it then existed (in one or another form) in various European countries, including Switzerland, Rhenish Prussia, the Netherlands, Denmark, and France. As he explained, conciliation courts were “tribunal[s] proceeding in the mode indicated by natural justice.”³⁰

Bentham never bothered to explain what precisely these institutions were, alluding to particular aspects of their procedure but never providing any kind of comprehensive overview. While this was no doubt, in part, a reflection of his notoriously dense writing style, he likely also assumed that his readers would be familiar with the broad outlines of conciliation courts, since these institutions were the subject of fairly extensive discussion in contemporary social and political accounts, travel narratives, and the popular press. Although the precise nature, structure, and function of these courts differed from one country to the next, the dominant model was that of the *bureaux de conciliation*, headed by justices of the peace, that were established in France during the Revolution of 1789, and thereafter adopted elsewhere in Europe, as a result of

³⁰ JEREMY BENTHAM, *Rationale of Judicial Evidence, Specially Applied to English Practice*, in 6 THE WORKS OF JEREMY BENTHAM 326 (John Bowring ed., Edinburgh, W. Tait 1843) [hereinafter BENTHAM, *Rationale of Judicial Evidence*].

either Napoleonic conquest or French influence.³¹ In these courts, Bentham saw many of the specific procedural techniques that he hoped to propagate and for which he used the term “natural procedure” as a kind of shorthand. For example, like the father in his home, conciliation judges were laymen, rather than trained lawyers; they required all witnesses with relevant knowledge to testify, rather than (as was the practice at both common law and equity) barring the testimony of the parties themselves; and they took all testimony orally, rather than (as was the practice in equity) in writing. Freed by such procedural simplicity to rely, like the good father, on basic common sense, these conciliation judges, Bentham suggested, could rapidly assess the evidence and without great cost or delay reconcile the feuding parties.³²

Not surprisingly, given his view that conciliation courts were the closest real-world approximation of his ideal of natural procedure, Bentham was fascinated by these institutions. Thus, he discusses them in many of his works and made repeated efforts to gain more

³¹ Isaak Meier, *Mediation and Conciliation in Switzerland*, in GLOBAL TRENDS IN MEDIATION 371, 373 (Nadja Alexander ed., 2d ed. 2006); Annemarie Højer Pedersen, *Skranker for Lovtrækkeriets Krumveie’: De Danske Forligskommissioner Deres Nedlægelse Og Genopstaen?* 10-14 (Mar. 2005) (unpublished M.A. Thesis, Copenhagen University) (on file with author); Vibeke Vindeløv, *Mediation in Danish Law: In Retrospect and Perspective*, in GLOBAL TRENDS IN MEDIATION, 123, 124 (Nadja Alexander ed., 2d ed. 2006); Annie J. de Roo & Robert W. Jagtenberg, *The Dutch Landscape of Court-Encouraged Mediation*, in GLOBAL TRENDS IN MEDIATION, 279, 281-82 (Nadja Alexander ed., 2d ed. 2006).

³² In arguing that conciliation courts approximated the ideal type of natural procedure that he so eagerly sought to propagate, Bentham also drew on a body of literature with which he, as the progenitor of the term “international law,” was widely familiar—namely, the literature on “the law of nations.” Key among these works was the writing of Emerich de Vattel, who argued in language liberally copied by many—including prominent Americans such as James Kent and Henry Wheaton—that in relation to one another states operated in a kind of state of nature, unconstrained by the positive law of any sovereign power. In this state of nature, the primary method for resolving disputes—aside from warfare—was through mediation or compromise. EMERICH DE VATTEL, *THE LAW OF NATIONS, OR PRINCIPLES OF THE LAW OF NATURE APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS* 274-89 (Joseph Chitty & Edward D. Ingraham eds. & trans., Philadelphia, T. & J. W. Johnson 1852). Given this well-established view that procedure in a state of nature (or natural procedure) consists primarily of mediation or compromise, it is hardly surprising that Bentham identified conciliation courts, which aimed at precisely these goals, as the main embodiment of his ideal of natural procedure.

information about them from various friends and associates.³³ It is clear, moreover, that Bentham approved of much of what he learned. He argued, for example, that the Danish conciliation courts had done a great deal to promote cheap and rapid dispute resolution, observing that “they obtained such general credit, that more causes were brought before them, than before all the regular tribunals together.”³⁴ Indeed, according to Bentham, such courts removed “from two-thirds to three-fourths . . . of the suits carried before the judicatories acting under the technical system,” thereby freeing a great many people from the travails of ordinary court procedure and making justice more readily available to all, including those without fortune.³⁵

But while thus praising conciliation courts, Bentham also suggested that they were deeply troubling. For example, in drafting a model “constitutional code” in the final years of his life—a code that he hoped would be adopted by emerging new democracies in Portugal, Greece, and

³³ In a September 1809 letter, Aaron Burr, who was then assisting Dumont in editing Bentham’s work, eagerly informed Bentham that he was soon to travel to Copenhagen, where he was to “see the father of the *Comités Conciliateurs*.” Aaron Burr, Gottenberg, to Jeremy Bentham, 13 September 1809, *in* 8 *THE CORRESPONDENCE OF JEREMY BENTHAM* 44 (2000). This was a reference to Christian Colbjørnsen, a leading jurist of the Kingdom of Denmark, and the man responsible for creating the conciliation courts. Whether Burr ultimately succeeded in meeting with Colbjørnsen is unfortunately unclear, but as he recorded in his journal in November 1809, he did manage to meet Andreas Bjørn Rothe, the author of a leading German publication on the Danish conciliation courts, and to discuss with him “committees, councils, etc.” Aaron Burr, Journal (Nov. 8, 1809), *in* 1 *THE PRIVATE JOURNAL OF AARON BURR, DURING HIS RESIDENCE OF FOUR YEARS IN EUROPE, WITH SELECTIONS FROM HIS CORRESPONDENCE* 319 (Matthew L. Davis ed., N.Y., Harpers & Brothers 1838). Given Burr’s close association with Bentham at this time, it seems highly likely that Burr shared with Bentham the information that he acquired concerning these courts. Nonetheless, Bentham continued to search for relevant information. Thus, over ten years later, in 1822, Bentham asked an exiled Danish political writer and poet by the name of Peter Andreas Heiberg if he could identify a book in French concerning the Danish conciliation courts. Peter Andreas Heiberg to Jeremy Bentham (Apr. 20, 1822), *in* *THE CORRESPONDENCE OF JEREMY BENTHAM, JANUARY 1822 TO JUNE 1824*, at 65 & n.1 (Catherine Fuller, ed. 2000).

³⁴ BENTHAM, *TREATISE ON JUDICIAL EVIDENCE*, *supra* note 24, at 63.

³⁵ JEREMY BENTHAM, *Principles of Judicial Procedure, with the Outlines of a Procedural Code*, *in* 2 *THE WORKS OF JEREMY BENTHAM* 47 (N.Y., Russell & Russell 1962) (1838).

Latin America—he was careful to emphasize that there will not be “near so great a demand” for an institution like the Danish conciliation court “as under the system in which it originated, or even under any in which it has been employed.”³⁶ The only justification for such courts, he asserted, was the sorry state of present-day procedure and, in particular, “the enormous amount of the mass of factitious delay, expense, and vexation.”³⁷ In an ideal world, in short, such courts would not exist.

What precisely was the problem with conciliation courts? Bentham’s primary concern was that they blurred the line between the private and the public. Thus, after arguing that natural procedure was akin to that which a father would apply in resolving a dispute between his dependents, he was careful to emphasize that “[w]e must beware . . . of abusing the parallel, so as to make the domestic the exclusive type of the legal form of procedure.”³⁸ Drawing too close a parallel between domestic, natural procedure and public or state-based, judicial procedure ran afoul of Bentham’s positivist conception of law as the product of a sovereign state authority. Far more important, however, than such conceptual difficulties were, in his view, the probable real-world consequences of failing sufficiently to distinguish between domestic procedure on the one hand, and public, state-based procedure on the other. As a form of essentially private procedure, consisting primarily of paternal common sense, domestic, natural procedure hinged on the personal influence and persuasion exercised by the decision-maker, rather than on the neutral

³⁶ JEREMY BENTHAM, *Constitutional Code*, in 9 THE WORKS OF JEREMY BENTHAM 620 (N.Y., Russell & Russell 1962) (1838) [hereinafter BENTHAM, *Constitutional Code*]. Bentham oddly argued that the conciliation courts originated in Denmark and were then transplanted elsewhere, including France. *Id.* at 483. As it is not clear why he would have believed this, it is possible that he made this claim in an effort to distance the institution (aspects of which he so admired) from its actual origins in a revolution that had come to be widely viewed in England as synonymous with dangerous mob rule.

³⁷ BENTHAM, *Constitutional Code*, *supra* note 36, at 620.

³⁸ BENTHAM, TREATISE ON JUDICIAL EVIDENCE, *supra* note 24, at 7.

rule of law. Accordingly, Bentham feared that the importation of such domestic procedure into the public domain threatened to undermine the rule of law.

That Bentham’s primary anxiety about conciliation courts was that they would undermine the rule of law is evident from his analysis of the role that shame plays in such institutions. Shame, he argued, is a common and innate human emotion, experienced by “all those who are not depraved,”³⁹ and the fear of experiencing shame—or “the contempt of an individual, or class of individuals”—often inspires parties and witnesses, fearful that a falsehood might be recognized as such, to speak the truth.⁴⁰ In Bentham’s view, courts could harness this “natural feeling of shame” in service of the truth;⁴¹ and conciliation courts, in particular, had proven themselves very adept in this regard. As he observed, “[t]here have been tribunals, in which there was no oath, no legal punishment, in which honour was the only security of testimony. Such were the Danish tribunals known under the name of *Bureaux de Conciliation*”⁴²

These courts succeeded in harnessing the power of shame by deploying procedure that created optimal shame-inducing conditions. Most importantly, they gathered testimony “*viva voce*—delivered by the deponent in the presence, if not of the adversary, at any rate of a judge, or (what is most usual) an assembly of judges.”⁴³ Faced with the immediate obligation to respond to live questions, the party or witness in the conciliation court felt the immediate brunt of the fear of shame. Moreover, since parties in such courts were typically denied lawyers to speak for them, they were made to feel shame’s full force. It was for this very reason that

³⁹ *Id.* at 63.

⁴⁰ *Id.* at 62.

⁴¹ *Id.*

⁴² *Id.* at 63.

⁴³ BENTHAM, *Rationale of Judicial Evidence*, *supra* note 30, at 327.

“personal appearance—not sham personal appearance, as at the English regular courts, but real personal appearance—attendance . . . is an indispensable requisite.”⁴⁴

Bentham’s emphasis on the power of shame to induce truthful testimony was consistent with his persistent belief—evident in many of his reforming efforts, including perhaps most famously, his proposed Panopticon—that public opinion (and its shame-inducing power) could be effectively deployed as a device for exerting social control. In the case of court procedure, however, Bentham was also well aware that shame had its limits. He recognized, in particular, that people are much more likely to experience shame if they care about the opinion of those who are judging them: “If . . . witnesses . . . are not surrounded by persons of their acquaintance, in cases where they have any interest in lying, the restraint of shame will be altogether insufficient.”⁴⁵ It was precisely the fact that people are more likely to respond to shame when the “public” observing them consists of close personal acquaintances that, in his view, made conciliation courts most effective in addressing familial disputes. Consider, for example, his proposed constitutional code, which calls for the election of “local headmen” to perform a range of quasi-administrative, quasi-judicial functions, including conciliation. In attempting conciliation, he insisted, the local headmen were to focus exclusively on “*family differences*.”⁴⁶ Employing a form of domestic, natural procedure, such conciliation courts, he concluded, were

⁴⁴ *Id.*

⁴⁵ BENTHAM, TREATISE ON JUDICIAL EVIDENCE, *supra* note 21, at 63.

⁴⁶ BENTHAM, *Constitutional Code*, *supra* note 36, at 620. True to an early-modern perspective that persisted well into the nineteenth century, Bentham conceived of the domestic sphere as extending well beyond the nuclear family to encompass the entirety of the household as a productive economic unit. Accordingly, as he used the term, “family differences” included not only disputes between husband and wife or parent and child, but also those between other close relatives “inhabiting the same household” and between “employer and helper, in any business, especially if inhabiting the same household.” *Id.* (emphases removed). But while Bentham’s pre-modern view of the family meant that he envisioned a wider role for conciliation courts than his use of the term “family differences” might initially suggest, this role was nonetheless fairly restricted.

not likely to operate effectively outside the context of domestic disputes. Bentham's anxiety about state-mandated conciliation, however, extended far beyond such concerns regarding its potentially limited efficacy.

Deference to patriarchal authority was all well and good in the domestic sphere, he suggested, as this was an arena in which society sought to reinforce patriarchal might. Bentham, in fact, asserted that the preservation of the internal power dynamics of the domestic sphere was such an important goal that secrecy ought to be permitted in all conciliation proceedings concerning familial differences: "In causes in which the peace and honour of families is concerned, so long as there is any hope of reconciliation, there cannot be any sufficient objection to secrecy."⁴⁷ Such secrecy would enable family members to preserve their dignity and thus serve as a further inducement to pursuing reconciliation, rather than litigation. At the same time, since conciliation-court proceedings in no way implicated matters of formal law, there was no danger in thus permitting them to remain secret.

But while it was proper, and indeed valuable, for conciliation courts to resolve familial disputes, the same could not be said of non-familial disputes. To permit conciliation courts to address ordinary, non-familial matters, Bentham concluded, was to allow the logic of deference, and thus patriarchy, to escape the private sphere and wreak havoc in the realm of the public. In observing the parallels between the natural, domestic tribunal and the public, state-run judiciary, he thus emphasized that the decisions of a state-appointed judge, unlike those of the father, "must be satisfactory to others as well as himself."⁴⁸ Care had to be taken to remind judges that, while there was much to be gained from their embracing natural procedure, they ought never to

⁴⁷ BENTHAM, *Rationale of Judicial Evidence*, *supra* note 30, at 366.

⁴⁸ BENTHAM, *TREATISE ON JUDICIAL EVIDENCE*, *supra* note 21, at 8.

mistake the state for their own private household. Natural procedure, in sum, entailed a significant risk of unconstrained discretion, and even authoritarianism.

Bentham's clearest account of the dangers posed by domestic, natural procedure appears in his lengthy response to legislation establishing *bureaux de conciliation*, or conciliation courts, that was proposed in 1790 by the Judiciary Committee of the Constituent Assembly of revolutionary France. Ultimately enacted, despite Bentham's vociferous critique, this legislation created local justices of the peace, who were required in a wide range of civil matters to attempt to reconcile the litigants, and only if this failed, formally to adjudicate the dispute. The parties themselves were required to appear (without lawyers) before the justice of the peace, who was to take all testimony orally, and from whose judgments only limited appeals were permitted.⁴⁹ Moreover, as initially contemplated, justices of the peace were to be mere amateurs, lacking any legal training.⁵⁰

Bentham was vehement in his criticism of the proposed (and eventually established) French conciliation courts: "Nothing [is] more admirable than the goal, nothing less efficacious or more contrary to the goal than the means."⁵¹ The problem, he explained, was that when parties agreed to reconcile by embracing some kind of compromise solution, this often meant that one of them had foregone a victory that he or she would have otherwise obtained pursuant to

⁴⁹ ANTHONY CRUBAUGH, *BALANCING THE SCALES OF JUSTICE: LOCAL COURTS AND RURAL SOCIETY IN SOUTHWEST FRANCE, 1750-1800*, at 132, 141 (2001). Only litigants claiming more than 50 *livres* could appeal. GEORGE MARTIN, *LES JUSTICES DE PAIX EN FRANCE: MANUEL PRATIQUE DES JUGES DE PAIX, PRÉCIS RAISONNÉ ET COMPLET DE LEURS ATTRIBUTIONS JUDICIAIRES, EXTRAJUDICIAIRES, CIVILES, ADMINISTRATIVES, DE POLICE ET D'INSTRUCTION CRIMINELLE EN SUITE DE TOUS LES CHANGEMENTS DE LÉGISLATION 2* (Paris, Garnier frères 1880).

⁵⁰ CRUBAUGH, *supra* note 49, at 135-36; Richard M. Andrews, *The Justices of the Peace of Revolutionary Paris, September 1792-November 1794 (Frimaire Year III)*, 52 *PAST & PRESENT* 58-61 (1971).

⁵¹ JEREMY BENTHAM, *De l'organisation judiciaire, et de la codification*, in 3 *ŒUVRES DE J. BENTHAM, JURISCONSULTE ANGLAIS 50* (Étienne Dumont ed., Brussels, L. Hauman et compagnie 1829-30) [hereinafter BENTHAM, *De l'organisation judiciaire*].

the letter of the law. As Bentham observed, “he who says conciliation [*accommodement*] says, in other terms, *partial denial of justice*. I the plaintiff am encouraged to cede a part of that which is my right”⁵² What could possibly make a person willingly abandon his rights? According to Bentham, the answer was obvious: power, and in particular, the omnipresent reality of disproportionate power.

Normally, in the state-run court system, inequalities of power were obviated (at least in theory)⁵³ by the insistence that the rule of law applies equally to all: “The impartial decision of the law does not give a greater advantage to one litigant than to another; it places the simple man at the level of the shrewd one, the easy and generous litigant on the same footing as the intractable and hard one.”⁵⁴ In conciliation courts, however, discrepancies in power were permitted to remain uncorrected. Instead of applying the objective rule of law to decide the dispute, the justice of the peace persuaded one of the litigants to sacrifice his rights to the other—a sacrifice that could be expected to occur precisely because the one overpowered the other: “In the system of conciliation, the equality [that reigns at law] is destroyed; it establishes between the two parties a kind of auction where each bargains on his own behalf, but where all the advantage lies with the one who is more tenacious, more greedy [*avide*].”⁵⁵

The risk that might rather than right would ultimately decide the dispute was, moreover, further exacerbated by the justice’s relative position of power. In Bentham’s view, whichever party the justice favored was that much more likely to win, since the other party would ineluctably succumb to judicial pressure: “A judge who has a secret partiality for the defendant

⁵² *Id.* at 51.

⁵³ In reality, as Bentham often emphasized, the high cost of technical procedure meant that inequalities in wealth continued to matter.

⁵⁴ JEREMY BENTHAM, *De l’organisation judiciaire*, *supra* note 51, at 51.

⁵⁵ *Id.*

has a good means in this system [of conciliation] for giving him a partial victory . . . under the pretext of conciliation. What a prejudice arises against the litigant who refuses the advice to make peace offered by a judge who condescends to assume the modest and touching office of mediator!”⁵⁶ Accordingly, Bentham concluded that despite their many appealing features, conciliation courts ought not to be permitted to hear most ordinary, non-familial civil matters. Only by thus limiting their jurisdictional reach would it be possible to prevent an inappropriate exercise of judicial power and discretion, and thus preserve the rule of law.

II. The Nineteenth-Century American Debate

Bentham’s contradictory attitudes towards conciliation courts—as the embodiment of his ideals of procedural simplicity and common sense, on the one hand, and as a sure path to the authoritarian subversion of the rule of law, on the other—reflected the unique depth of his thinking about procedural matters. For many of his contemporaries on both sides of the Atlantic, the question of whether to establish conciliation courts was far more easily answered—either in the affirmative or the negative. But while many individuals knew where they stood, the overall contours of the debate tended to track the positions set forth in Bentham’s writing, and in the case of the United States, so too did the ultimate conclusion reached. Just as Bentham came to reject conciliation courts (in all non-familial matters), so too did the various American states that considered adopting such institutions, and for precisely the same reasons—namely, concern that these courts encouraged a discretionary exercise of authority that would reinforce power differentials and subvert the rule of law.

⁵⁶ *Id.*

The American debate over conciliation courts was an important, though now largely forgotten component of mid-nineteenth century efforts to promote procedural reform, and as such, it emerged not surprisingly in New York—the state that stood at the center of such reforming efforts and to which other states had looked (since at least the time of Chancellor Kent) for legal inspiration and guidance. The primary locus of this debate was, in particular, the New York State Constitutional Convention of 1846, which has long been viewed as a key, defining moment in this period of reform, since it was there for the first time that a decision was made to merge law and equity (thus giving rise to the Field Code). Given the very prominent role that it came to play in subsequent procedural development, the Field Code has perhaps not surprisingly overshadowed retrospective accounts of the Convention and its procedural concerns. But while ignored in most of the scholarly literature, the Convention did, in fact, devote significant time and energy to debating the merits of conciliation courts, and ultimately enacted a constitutional provision stating that “[t]ribunals of conciliation may be established” by the legislature.⁵⁷

A. Inspiration from Abroad: Examining the European Model of the Conciliation Court

When the constitutional delegates met in Albany in the summer and fall of 1846, European conciliation courts—especially those of the Danish variety—had been for some time in the public eye. Indeed, delegates advocating the establishment of conciliation courts referred to various aspects of the contemporary debate concerning these institutions, including especially the English debate. As delegate Worden observed, in urging that “the subject of conciliation courts

⁵⁷ REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF NEW YORK 11 (William G. Bishop & William H. Attree eds., Albany, The Evening Atlas 1846) (art. VI, sec. 23) [hereinafter REPORT OF THE DEBATES].

was worthy of more consideration than some gentlemen seemed willing to bestow upon them,” such courts “had received great consideration in England.”⁵⁸

The English debate over conciliation courts was launched by the Whig party and its reforming chancellor, Lord Henry Brougham, who proposed the establishment of such institutions as one component of a broader program of governmental reform.⁵⁹ Greatly influenced by Bentham, Brougham is remembered first and foremost for his role in advocating for the Reform Act of 1832, which significantly democratized the electorate. In addition, however, he argued for an extensive restructuring of the judiciary. Beginning with a famous speech to parliament in 1828, and continuing well into the 1850s,⁶⁰ he called for the simplification of court procedure with an eye towards decreasing the costs and delays associated with litigation and thus opening the justice system to more than a privileged, wealthy few. Included as a key component of his plans for procedural reform was a proposal—evidently inspired by Bentham and his fascination with such institutions—to establish conciliation courts. Observing that “[s]uch a tribunal exists in France, under the name of *Cour de Conciliation*; in Denmark it exists; and for certain mercantile causes in Holland also,”⁶¹ Brougham argued that

⁵⁸ *Id.* at 589.

⁵⁹ That Brougham played such a significant role in promoting conciliation courts in England (and indirectly) in the United States may be surprising to many legal scholars because he is widely remembered as a champion of zealous advocacy—of the principle, in other words, that a lawyer’s duty is to place the (adversarial) vindication of his client’s interests over and above all other, more public-minded concerns. See, for example, Norman W. Spaulding, *The Myth of Civic Republicanism: Interrogating the Ideology of Antebellum Legal Ethics*, 71 *FORDHAM L. REV.* 1397, 1420 & n.90 (2003); Fred C. Zacharias & Bruce A. Green, *Conceptualizing Advocacy Ethics*, 74 *GEO. WASH. L. REV.* 1, 2-3 (2005). But as one scholar has recently suggested—and as Brougham’s advocacy of conciliation courts would seem to confirm—this traditional portrait of the chancellor may well be overdrawn. Monroe H. Freedman, *Henry Lord Brougham, Written by Himself*, 19 *GEO. J. LEGAL ETHICS* 1213, 1213-19 (2006).

⁶⁰ Lobban, *supra* note 19, at 1184-85, 1204.

⁶¹ BROUGHAM, *supra* note 19, at 408.

such a court ought to be created in England as well, as it would spare litigants the costs and delays associated with ordinary litigation.

More a politician than a philosopher, Brougham evidently shared (or at least expressed) none of Bentham's doubts about the virtues of conciliation courts, and in particular, the latter's anxieties that they might work to subvert the rule of law. Never pausing to consider how precisely conciliation would be achieved and what it meant for the enforcement of the parties' legal rights, he insisted that simply by pacifying the litigants, conciliation judges would encourage them to comply more readily (and at lower cost) with the formal letter of the law: "If arbitrators were publicly appointed, before whom the parties themselves might go in the first instance, state their grounds of contention, and hear the calm opinion of able and judicious men upon their own statements, their anger would often be cooled, and their confidence abated, so as to do each other justice without any expense or delay."⁶² Indeed, in his view, all that had to be done to ensure that conciliation courts would in no way undermine individuals' legal rights, and thus the rule of law, was to guarantee as a formal matter, the voluntary nature of the decision to participate in these courts' proceedings and to abide by any proposed compromise.⁶³ But however superficial Brougham's analysis, and despite the fact that he ultimately failed in his campaign to establish conciliation courts,⁶⁴ his advocacy of such institutions received widespread attention in both the English and American press, perhaps most importantly in the *Edinburgh*

⁶² *Id.*

⁶³ *Id.* at 408, 523-24.

⁶⁴ In 1867, just shortly before his death, legislation was enacted that authorized the establishment of "Equitable Councils of Conciliation and Arbitration," modeled significantly on the French labor courts, which were themselves widely viewed as a kind of conciliation court. Such councils were, however, never established, and this legislation came to be regarded as a failure. L.L. Price, *The Position and Prospects of Industrial Conciliation*, 53 J. ROYAL STAT. SOC'Y 420, 422 (1890); TRANSACTIONS OF THE NATIONAL ASSOCIATION FOR THE PROMOTION OF SOCIAL SCIENCE, BIRMINGHAM MEETING, 1868, at 472 (Andrew Edgar ed., London, Longmans, Green, Reader & Dyer 1869).

Review—the Whig journal advocating legal and political reform of which he was one of the founding editors and which enjoyed a widespread readership on both sides of the Atlantic.⁶⁵

While Brougham’s arguments in favor of conciliation courts were quite influential, the ground had already been sown in the United States for their favorable reception. Indeed, to the extent that contemporary American lawyers and politicians were interested in promoting informal methods of dispute resolution they had no need to look abroad for inspiration, as there were more local institutions that might have sufficed for this purpose. Most importantly, as Morton Horwitz has observed, there was a long tradition of Quaker anti-legalism that gave rise in colonial Pennsylvania to a system of arbitration boards, in which laymen, sitting as “common peacemakers” endeavored to resolve all conflict. And there are indications that, even as late as the 1790s, Pennsylvania relied on informal “referees” to resolve a great many of the disputes that arose among its citizenry. But as the legal profession succeeded in augmenting its power and prestige in the decades after the American Revolution, and particularly in the early years of the nineteenth century, so too Pennsylvania’s formal state courts found various ways to restrict the independent power and discretion of such referees, thus ensuring a near monopoly on behalf of the (lawyer-driven) courts. Likewise, arbitral traditions first established in colonial New York

⁶⁵ Lauding Brougham, an article in the *Edinburgh Review* observed that conciliation courts had “been tried in many countries,” and that while in some this “experiment . . . has not succeeded, . . . in others, as Switzerland, Denmark, and Hamburgh, its success has been prodigious.” This article was itself then cited and discussed in the prominent English publication, the *Law Magazine, or Quarterly Review of Jurisprudence*. *Lord Brougham’s Local Court Bill, with Full particulars Relating to the Inferior Courts of Scotland, and the Continental Courts of Conciliation*, 4 LAW MAG., OR Q. REV. JURISPRUDENCE 1, 36-37 (1830) (citing and discussing *Edinburgh Review* no. 102, p. 495). See also *Literary Intelligence: The Law Magazine and Quarterly Review of Jurisprudence, No. XI, London—Saunders and Benning*, 3 U.S. L. INTELLIGENCER & REV. 225, 225 (1831) (discussing the aforementioned piece in the *Law Magazine, or Quarterly Review of Jurisprudence*). For a discussion of the *Edinburgh Review*’s readership on both sides of the Atlantic, see Joanne Shattock, *Spheres of Influence: The Quarterlies and Their Readers*, 10 Y.B. ENG. STUD.: LITERATURE & ITS AUDIENCE 95, 95-104 (1980).

and South Carolina (and focused primarily on the resolution of commercial disputes) were similarly undermined, as lawyers worked to ensure that the formal court system would be the sole repository of adjudicatory power.⁶⁶

As the legal profession became increasingly powerful and longstanding animosity towards lawyers and the formal legal system was further deepened and extended,⁶⁷ some calls were heard for a return to these earlier, native traditions of informal dispute resolution. For example, in 1805, Jesse Higgins from Philadelphia published a tract that demanded a reinvigoration of traditional practices of “*reference, adjustment, or arbitration*,” by describing these as approximations of “the ancient trial by jury, before the same was innovated by judges and lawyers.”⁶⁸ As Higgins remarked:

[S]undry religious sects have made it a part of their discipline to settle their own disputes among the members of their own church, on condition of membership, and to avoid litigation. The quakers, to their great honor, were the first to adopt it. . . . The merchants of New-York, at a very early period, established a chamber of commerce for the adjustment of differences on commercial regulations generally; one of which was the submitting to reference, among themselves, their disputes. This hint from New York has been taken by the merchants of this and other cities.⁶⁹

But as suggested by Higgins’ perceived need to write a tract in defense of these early American institutions, they were already well under attack and were thus not to be so easily restored. It was instead a related but nonetheless distinct strand of discourse—namely, arguments in favor of European conciliation courts—that would ultimately prove more successful in galvanizing the

⁶⁶ MORTON J. HORWITZ, *TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 140-59 (1977).

⁶⁷ PERRY MILLER, *THE LIFE OF THE MIND IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR* 96-116 (1st ed., 1965); RICHARD E. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC* 111-22 (1971).

⁶⁸ JESSE HIGGINS, *SAMPSON AGAINST THE PHILISTINES, OR, THE REFORMATION OF LAWSUITS: AND JUSTICE MADE CHEAP, SPEEDY, AND BROUGHT HOME TO EVERY MAN’S DOOR: AGREEABLY TO THE PRINCIPLES OF THE ANCIENT TRIAL BY JURY, BEFORE THE SAME WAS INNOVATED BY JUDGES AND LAWYERS* 31 (2d ed., Philadelphia, B. Graves 1805).

⁶⁹ *Id.* at 32.

energies of those who sought to challenge the growing power of the legal profession and the formal court system.

The notion of a conciliation court as a kind of lay system of justice oriented towards quickly and cheaply reconciling the disputants, rather than applying the rigid letter of the law, was deeply appealing to many Americans. Thus, when in 1803, the *Edinburgh Review* published an article discussing the virtues of conciliation courts, this struck a chord in contemporary American political culture. As initially published in the *Edinburgh Review*, the article provided an extensive review of the very first account of the Danish conciliation courts to appear in the mainstream European press: Jean-Pierre Catteau-Callville's *Tableau des états danois, or Portrait of the Danish States*. As suggested by its title, Catteau-Callville's book offered a broad overview of Danish political and social life, and as part of this extensive analysis, devoted significant attention to the conciliation courts. In Catteau-Callville's view, these courts had achieved great success in persuading litigants to settle outside of the ordinary court system, thus sparing them the costs and delays of litigation: "A short experience has sufficed to convince the government of the utility of this institution. During the three years that preceded that of its establishment, 25,521 lawsuits were filed in the trial courts; during the three subsequent years, the number was only 9,653; a difference thus of 15,868."⁷⁰ In its review of the book, the *Edinburgh Review*, while presenting a comprehensive account of the various chapters, focused at some length on its discussion of the conciliation courts, lauding them, like Catteau-Callville himself, for the rapid and cheap justice that they provided.⁷¹

⁷⁰ 1 JEAN-PIERRE CATTEAU-CALVILLE, TABLEAU DES ÉTATS DANOIS, ENVISAGÉS SOUS LES RAPPORTS DU MÉCANISME SOCIAL 298 (Paris, Treuttel et Würtz 1802).

⁷¹ SYDNEY SMITH, *Catteau, Tableau des états danois (Edinburgh Review, 1803)*, in THE WORKS OF THE REVEREND SYDNEY SMITH 270-79 (Boston, Phillips, Sampson & Co. 1858).

The portion of the review concerning conciliation courts (and only that portion) was thereafter copied verbatim in numerous American town newspapers, including *The Weekly Visitor, or Ladies' Miscellany* (New York, New York),⁷² *The Enquirer* (Richmond, Virginia),⁷³ *The Suffolk Gazette* (Sag Harbor, New York),⁷⁴ *Political Observatory* (Walpole, New Hampshire),⁷⁵ *The Green Mountain Patriot* (Peacham, Vermont),⁷⁶ and *The Post-Boy* (Windsor, Vermont).⁷⁷ As suggested by this extensive publication of articles in praise of the Danish conciliation courts, such institutions were very appealing to the many nineteenth-century Americans eager for a mechanism that would enable citizens to resolve their disputes without recourse to expensive and dilatory, lawyer-driven proceedings. Indeed, a July 5, 1805 article published in *The Enquirer* of Richmond, Virginia expressly argued that there was a great need for conciliation courts, because “the governor, the judges, the lawyers and all the advocates of antiquated institutions have avowed their approbation and extended their support to the whole routine of courts of law, their multifarious forms, their counsellors, their numerous, learned and disciplined judges.”⁷⁸

When the New York Constitutional Convention met in 1846—in part for the purpose of eliminating the kinds of “antiquated institutions” and “multifarious forms” of which *The Enquirer* had, like many others, complained—the notion of establishing conciliation courts not

⁷² *From the Present State of Denmark, by Catteau, 1802*, WKLY. VISITOR, OR LADIES' MISCELLANY (N.Y.), June 29, 1805, at 5.

⁷³ *Tribunal of Conciliation*, ENQUIRER (Richmond), July 5, 1805, at 3.

⁷⁴ *From the Present State of Denmark, by Catteau, 1802*, SUFFOLK GAZETTE (Sag Harbor, N.Y.), July 22, 1805, at 1.

⁷⁵ *Extract from the Present State of Denmark, by Catteau, Written in 1802*, POL. OBSERVATORY (Walpole, N.H.), Aug. 3, 1805, at 4.

⁷⁶ *Historical Extract from the Present State of Denmark, by Catteau, Written in 1802*, GREEN MOUNTAIN PATRIOT (Peacham, Vt.), May 13, 1806, at 1.

⁷⁷ *Extract from the Present State of Denmark, by Catteau, Written in 1802*, POST-BOY (Windsor, Vt.), June 3, 1806, at 172.

⁷⁸ *Tribunal of Conciliation*, *supra* note 78, at 3.

surprisingly came quickly to mind. Having been favorably introduced several decades earlier, this possibility thereafter appears to have remained somewhat in the public eye and, moreover, received the approbation of the highly influential Lord Brougham.⁷⁹ And at the precise moment that the Convention met in 1846, conciliation courts were receiving yet further positive press through a well-received and much reported lecture tour given by the renowned Presbyterian minister, Robert Baird. Baird had gained fame in both the United States and Europe through the 1842 publication (and subsequent reissuings and translations) of his *Religion in America*, which sought to explain and justify the role of religious revivalism in American social and political life. Having thus established an international reputation, Baird began in 1844-45 to tour the United States, presenting a series of lectures on the impressions of continental Europe (and especially Scandinavia) that he had gained while traveling to advocate for world temperance reform and for the establishment of an international evangelical alliance.⁸⁰ As reported in contemporary American newspapers, one of the key points that he made in this tour, which continued well into

⁷⁹ See, e.g., *Art. I: Danmarks og Hertugdømmenes Statsret med stadig Hensyn til dens aeldere horfatning, ved Joh. Fred. Wilhelm Schlegel, etc.*, 27 N. AM. REV. 285, 299 (1828) (observing that “experience has shown [the Danish conciliation courts] to be very useful in checking the spirit of litigation”); *Art. V: Mémoire sur l’origine et l’organisation des committés conciliateurs en Dannemarc, par A. B. Rothe, Copenhague, 1803, 16 mo., pp. 126, 102* N. AM. REV. 135, 135-46 (1866); *A Hint on Law Suits*, ALMONER: A PERIODICAL RELIGIOUS PUBLICATION (Lexington, Ky.), Sept. 1, 1814, at 144 (quoting and discussing the *Edinburgh Review* article concerning Catteau-Callville’s book). Conciliation courts, or as he called them, “parish court[s] of mutual agreement,” also received very favorable treatment in the Scotsman Samuel Laing’s 1836 account of his travels in Norway. SAMUEL LAING, *JOURNAL OF A RESIDENCE IN NORWAY DURING THE YEARS 1834, 1835, AND 1836; MADE WITH A VIEW TO INQUIRE INTO THE MORAL AND POLITICAL ECONOMY OF THAT COUNTRY, AND THE CONDITION OF ITS INHABITANTS* 218 (London, Longman, Rees, Orme, Brown, Green & Longman 1836) (arguing, inter alia, that Norway “should be grateful” to its former Danish rulers for having established these courts). Laing’s account, in turn, was widely praised in the English press and, according to Laing himself, was particularly well received by English Liberals (and thus by men like Brougham). Bernard Porter, *Virtue and Vice in the North: The Scandinavian Writings of Samuel Laing*, 23 SCAND. J. HIST. 153, 164 (1998).

⁸⁰ HENRY M. BAIRD, *THE LIFE OF THE REVEREND ROBERT BAIRD, D.D.* 200-07, 287-88 (N.Y., Anson D. F. Randolph 1866).

the 1850s, was how much he admired the Danish conciliation courts.⁸¹ Drawing on a long tradition of Christian thought that associated peace-making with virtue—as well as a distinctly Protestant tradition that decried the evils of lawyers and legalism⁸²—he pointed to such courts as evidence of a “high state of civilization.”⁸³

As suggested by Baird’s arguments, revivalists of the Second Great Awakening looked to conciliation courts as an alternative to formal legal institutions in much the same way that earlier generations of Christian reformers—and, in particular, Pennsylvania Quakers—had embraced common peacemakers and referees. But while nineteenth-century advocates of conciliation courts readily drew on longstanding Christian arguments in favor of informal dispute resolution, they failed to mention such precedents as the Pennsylvania Quaker institutions. Perhaps this was because the Pennsylvania institutions were deemed to be a poor precedent in that they had ultimately failed. Likely also significant is that these institutions were associated with Quakerism and thus with a group that, for all its influence, continued to be viewed as outside the mainstream.⁸⁴ In addition, the rise of utopian communities in New England, New York, and the Midwest during the first half of the nineteenth century—many of them (including New York’s

⁸¹ *Lecture on Norway, Sweden, and Denmark by Dr. Baird*, FRIENDS’ WKLY. INTELLIGENCER (Philadelphia), May 9, 1846, at 41; *The World Abroad, Lectures on Europe by the Rev. Dr. Baird: No. 3, Russia (Continued)—Scandinavia—Holland—Belgium—Germany*, SATURDAY EVENING POST (Philadelphia), May 12, 1849, at 2; *Original Lectures, Rev. Dr. Baird’s Historical Lectures on Europe: The Scandinavian Countries, Norway, Sweden, Denmark, and Germany*, (Philadelphia) *Saturday Evening Post*, May 25, 1850, at 2 [hereinafter *Original Lectures*].

⁸² JAMES Q. WHITMAN, *THE LEGACY OF ROMAN LAW IN THE GERMAN ROMANTIC ERA: HISTORICAL VISION AND LEGAL CHANGE 18-19* (1990).

⁸³ *Original Lectures*, *supra* note 81.

⁸⁴ As late as the American Revolution, many Quakers drew ire for their refusal to provide military service on behalf of the newly constituted Continental Congress. Sydney V. James, *The Impact of the American Revolution on Quakers’ Idea About Their Sect*, 19 WM. & MARY Q. 3D SER. 360, 371-72 (1962).

Oneida Community), religious—surely exacerbated any tendency to associate local, American experiments in informal methods of dispute resolution with the fringe elements of society.⁸⁵

In contrast to such American experiments, European conciliation courts were mainstream institutions, established by the state itself, within recent memory, and with much apparent success. They thus had the potential to be—and, indeed, were—appealing to a broader cross section of American society. Moreover, in a period when many American elites remained quite anxious to demonstrate that the United States was worthy of joining the league of civilized nations, the very fact that these were European institutions—promoted, in turn, by prominent English leaders and intellectuals—likely further enhanced their appeal. Accordingly, when the New York constitutional convention met in 1846 to address, in no small part, complaints about the slow and costly nature of judicial proceedings, advocates of reform turned to the European conciliation court.

Given the leading role that New York (and its legal system) had long played in national life, those seeking the establishment of an alternative to the formal legal system understood that the 1846 Convention was made to order, and calls were quickly issued for the Convention to create European-style conciliation courts.⁸⁶ Thus, for example, on May 9, a few weeks before the convention was to meet, the *Friends' Weekly Intelligencer* of Philadelphia presented an overview of Baird's Scandinavian lecture, which it concluded by calling on “our New York

⁸⁵ JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW?: NON-LEGAL DISPUTE SETTLEMENT IN AMERICAN HISTORY* 49-57 (1983).

⁸⁶ When the New Jersey Constitutional Convention met in 1844 to consider, among other things, civil justice reform, it seriously considered—though ultimately rejected—the possibility of establishing conciliation courts modeled expressly on those of Europe. *JOURNAL OF THE PROCEEDINGS OF THE CONVENTION TO FORM A CONSTITUTION FOR THE GOVERNMENT OF THE STATE OF NEW JERSEY* 63, 79-80, 87, 198 (Trenton, N.J., Franklin S. Mills 1844). Given, however, the cursory nature of the published record of the proceedings, it is unfortunately unclear why the proposed legislation failed.

friends . . . [to] take a lesson, now they are about revising their Constitution from . . . [the] Danish . . . Court of Conciliation”⁸⁷ Such demands for the establishment of conciliation courts were, moreover, evidently heard by those attending the Convention. As observed by delegate John Miller, a farmer from Cortland County, “The attention of the people had been called to th[e] subject [of establishing conciliation courts]; they had earnestly desired to have them to try them; there was a great demand for them throughout the State” and “[t]he PRESIDENT of the Convention himself had been addressed on this subject through the newspapers by able persons who took a deep interest in the subject.”⁸⁸

B. A Near Victory for Those in Opposition: The Debate Over Conciliation Courts Within the New York Constitutional Convention of 1846

Inspired by such demands, a number of delegates at the New York Constitutional Convention called for the establishment of conciliation courts by pointing to their success on European soil. As asserted by delegate Charles Kirkland, a lawyer from Oneida, “[s]everal years ago they were established in Denmark, in Prussia, in France, and in Spain, and in all the countries where they had been in operation, they had uniformly been pronounced to be sources of the greatest blessings to the people.”⁸⁹

While those delegates arguing in favor of conciliation courts had no clear, precise model on which they agreed, they seem to have envisioned an institution whose core features replicated those of the French and (French-based) Danish courts discussed by Bentham. As delegate

⁸⁷ *Lecture on Norway, Sweden, and Denmark by Dr. Baird, supra* note 81.

⁸⁸ REPORT OF THE DEBATES, *supra* note 57, at 833. Likewise, delegate Swackhamer quoted an article penned by Mr. Weed of the *Albany Evening Journal* that specifically called on the Constitutional Convention to establish conciliation courts. In Mr. Weed’s words, “We have felt, ever since the subject of Constitutional Reform was broached, a strong desire to urge the consideration of Conciliation Courts upon the Convention.” *Id.* at 611-12.

⁸⁹ *Id.* at 588.

Kirkland insisted, such institutions would operate not by enforcing a universally applicable legal rule, but instead by “endeavor[ing] to induce [the parties] to adjust their difficulties amicably.”⁹⁰ Given this conception of the courts’ mission, such delegates resisted any involvement of lawyers in the proceedings—either as judges or as advocates. Since the law was not to be decisive, lawyers were unnecessary, and moreover, to the extent that lawyers insisted on the enforcement of formal legal rights, they were a potential detriment to compromise. Thus, Kirkland emphasized “none but the parties themselves” were to appear before the judge.⁹¹ And so too delegate Worden, a lawyer from Ontario County, observed that there are no “counsel or attorneys employed” in European conciliation courts.⁹² Along similar lines, delegate Geo Mann, a merchant from New York City, proposed that should the conciliation court consist of a panel of three judges, as some had suggested, “only one of [these] shall be of the legal profession.”⁹³

Because those advocating for the establishment of conciliation courts viewed them as a method for achieving flexible compromise outside the formal bounds of the law, they also rejected traditional (post-Enlightenment) understandings of the importance of publicity in judicial proceedings—a rejection that is all the more remarkable in that it was precisely this Convention that achieved near universal agreement on the importance of eliminating those aspects of equity-court proceedings that had traditionally occurred behind closed doors.⁹⁴ Much like Bentham, advocates of conciliation courts insisted that there was great virtue in maintaining

⁹⁰ *Id.* (quoting from the proposal to establish conciliation courts that was debated by the New Jersey Constitutional Convention of 1844).

⁹¹ *Id.* (quoting from the New Jersey proposal).

⁹² *Id.* at 589.

⁹³ *Id.* at 799.

⁹⁴ In particular, the Convention agreed on the importance of eliminating proceedings before masters and examiners. This was, in part, to avoid the high costs associated with such proceedings, but also because there was great distaste for the fact that they traditionally took place outside of public view. REPORT OF THE DEBATES, *supra*, at 14.

the secrecy of these institutions' proceedings.⁹⁵ By enabling litigants to shield their dispute from public view—and thus to preserve their dignity—conciliation courts would provide a further incentive to compromise. And since formal law was not to govern such proceedings, there was no need for publicity as a means of constraining the judge to enforce the law or of educating citizens about its content and application. Delegate Kirkland thus noted that “[t]he Courts sit with closed doors. . . . As an absolute rule, nothing that passes in the Court is divulged by the members of it, and is forbidden as evidence in the Courts of law.”⁹⁶ Similarly, delegate Ansel Bascom, a lawyer from Seneca County, cited approvingly the fact that in Danish conciliation courts, judges “cause[d] contending parties . . . to come before them in private”⁹⁷

While advocates of conciliation courts never identified precisely how a compromise would be reached in such lawyer-free and secret proceedings, they placed great emphasis on the parties' willingness to defer to the judge's personal wisdom and discretion. Delegate Bascom, for example, emphasized that the Danish conciliation courts worked by persuading parties to “submit to the influence of the conciliators.”⁹⁸ And delegate Worden, evidently trusting in people's tendency to show deference to elders, suggested that each conciliation court ought to consist of “two of the eldest justices” from the town in which the court was to be established.⁹⁹ In addition, he argued, community sentiment itself—and, in particular, “the moral sense of the community in favor of a peaceful adjustment of difficulties”—could be harnessed as a further

⁹⁵ Significantly, however, Bentham advocated for secret proceedings only in familial disputes. In contrast, advocates of conciliation courts at the Convention argued for such secrecy regardless of the subject matter of the dispute.

⁹⁶ *Id.* at 588 (quoting from the New Jersey proposal).

⁹⁷ *Id.* at 658.

⁹⁸ *Id.*

⁹⁹ *Id.* at 589.

tool in encouraging parties to submit to judicial influence and thus forego the assertion of their formal legal rights.¹⁰⁰

For those delegates advocating the establishment of conciliation courts, one of the great virtues of these institutions was that, by persuading disputants to reconcile, they would prevent (or at least decrease the amount of) formal litigation, and thus save parties the associated costs and delays. As delegate Kirkland asserted, “The object of the tribunal . . . was to prevent litigation.”¹⁰¹ For this reason, both Kirkland and, at a later date, his colleague, Conrad Swackhamer, an artisan [“mechanic”] from King’s County, emphasized that three years after the Danish conciliation courts were established in 1795, they had served to reduce the total number of cases brought to trial from over 25,000 to less than 10,000—a piece of data likely garnered from Catteau-Callville’s book, as reported in the *Edinburgh Review* and then reprinted throughout the American press.¹⁰² Similarly, delegate Worden claimed that conciliation courts, by tending towards “the suppression of litigation and . . . the adjustment of controversies, would do much towards repressing . . . the costs and vexation attendant upon long and protracted legal controversies, which often had no other result than the ruin of those engaged in them.”¹⁰³

In the view of those arguing for conciliation courts, however, litigation was problematic not only because of the costs and delays that it necessarily entailed. At least as troubling was the fact that to litigate was nakedly to assert self-interest and thus to encourage conflict and the concomitant disruption of communal harmony. The core problem, in short, was, as one delegate put it “the spirit of litigation” itself.¹⁰⁴ Advocates of conciliation courts viewed conflict, and thus

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 588.

¹⁰² *Id.* at 588 (Kirkland); *Id.* at 611 (Swackhamer).

¹⁰³ *Id.* at 589.

¹⁰⁴ *Id.* (Worden).

litigation, as an evil to be avoided at all costs—one that would necessarily tend towards social collapse and disharmony. Accordingly, like Robert Baird, they argued for such courts in language appealing to the centuries-old Christian ideal of peace-making. In this vein, delegate Swackhamer, quoting from Jesus’s Beatitudes, observed: “The highest honor is tendered to those who soothe the passions of men.— ‘Blessed are the peace-makers, for they shall be called the children of God,’ —The principles were founded in the Christian spirit of kindness and peace. Friendly advice and kind words would very often accomplish what the law could not obtain—it would not only secure the justice, but calm the anger of man. It was like the morning dew, the summer shower, it cooled and tranquilized the burning passion, leaving freshness and beauty in place of darkness and waste.”¹⁰⁵ Similarly, delegate Bascom urged that conciliation courts “were in consonance with the great doctrine of Christianity, that before we should turn over our offending brother to the judge, we should exhaust every reasonable effort for reconciliation.”¹⁰⁶

As we have seen, such expressions of disdain for litigation reflected the period’s widespread animosity towards an increasingly powerful legal profession, as well as the revivalist sentiment associated with the Second Great Awakening. In addition, however, anxiety that litigation would exacerbate communal conflict stemmed from concerns about the instability of the social fabric that were themselves a product of the tremendous social and economic change that the state was then undergoing. In the decades immediately after the 1825 opening of the Erie Canal, significant improvements in transportation (and the resultant economic expansion), as well as a dramatic rise in immigration led New York to experience a period of extensive and

¹⁰⁵ *Id.* at 612. Likewise, in arguing for the establishment of conciliation courts, delegate Swackhamer asserted that “[t]he supreme law giver had not thought it unworthy his high office to hold out inducements to invite men to upright and neighborly conduct towards each other.” *Id.* at 612.

¹⁰⁶ *Id.* at 658.

rapid urbanization. As a result, urban centers—including especially New York City—came to loom ever larger in the socio-economic, political, and cultural life of the state, as well as the nation as a whole.¹⁰⁷ Accompanying these developments was the growing industrialization of the economy, as reflected not only in the emergence of large factories, but also in the rise of the “sweating system,” which relied on the division of labor to delegate tasks to a dispersed workforce.¹⁰⁸ The twin forces of urbanization and industrialization led to the rise of an urban working class population that was increasingly class-conscious and organized, generating the beginnings of the class conflict that would become increasingly intense during the latter half of the century.¹⁰⁹ At the same time, life in the rural countryside also underwent significant transformation as some regions lost population to new urban areas, as others came to be dominated by new (primarily textile) factories, and as farmers increasingly shifted their focus from mere subsistence to the production of a market-oriented surplus.¹¹⁰ The end result of all these developments was, in short, as Paul Johnson has observed, the “transform[ation] [of] Jefferson’s republic of self-governing communities into Jackson’s boisterous capitalist democracy.”¹¹¹

Those delegates at the New York constitutional convention who argued for the establishment of conciliation courts viewed these institutions as a response to the kinds of social conflict and disruption with which the state’s cities and countryside had been confronted as a

¹⁰⁷ BRUCE LAURIE, *ARTISANS INTO WORKERS: LABOR IN NINETEENTH-CENTURY AMERICA* 25-28 (1989); SEAN WILENTZ, *CHANTS DEMOCRATIC: NEW YORK CITY AND THE RISE OF THE AMERICAN WORKING CLASS, 1788-1850*, at 109-10 (1984).

¹⁰⁸ LAURIE, *supra* note 107, at 28-43.

¹⁰⁹ *Id.* at 47-112; WILENTZ, *supra* note 107.

¹¹⁰ PAUL E. JOHNSON, *A SHOPKEEPER’S MILLENIUM: SOCIETY AND REVIVALS IN ROCHESTER, NEW YORK, 1815-1837*, at 16 (1978); DONALD HUGH PARKERSON, *THE AGRICULTURAL TRANSITION IN NEW YORK STATE: MARKETS AND MIGRATION IN MID-NINETEENTH-CENTURY AMERICA* 3-23 (1995).

¹¹¹ JOHNSON, *supra* note 110, at 9.

result of recent urbanization and industrialization. Arguing that because conciliation courts were an untried experiment, they ought to be introduced at first only into those few places where they were most needed, delegate Bascom proposed their initial establishment in New York City. The reason for this, he explained, was that New York City was the center of the urban industrial revolution that the state was then experiencing: “In the great commercial emporium of the State and the Union, with its thousands of questions of difference constantly arising, not only among its own citizens but among those who congregate for business purposes at that great mart of commerce, there was a necessity for a tribunal where differences could be more promptly and equitably adjudicated upon, than was possible by the existing courts.”¹¹² Of particular concern to Bascom were those urban-industrial disputes that touched on employment and thus class relations, and that thereby raised the frightening possibility of mass social upheaval. Accordingly, he was careful to specify that conciliation courts were not necessary for disputes between New York City merchants, who already had their own “tribunal of arbitrations”¹¹³—presumably a reference to the New York Chamber of Commerce, which had provided merchants with arbitration services since 1768.¹¹⁴ A conciliation court was needed instead for the “immense number of questions arising between employers and contractors, artisans and merchants, owners and builders, for which no provision was made; [and] questions arising too between city and country dealers of every description”¹¹⁵

Other advocates of conciliation courts, while also concerned about the dangers of social upheaval implicit in urban industrial life, questioned the capacity of such institutions to thwart these and argued instead that conciliation courts ought to focus on conflict between small-town

¹¹² REPORT OF THE DEBATES, *supra* note 57, at 658-59.

¹¹³ *Id.* at 659.

¹¹⁴ AUERBACH, *supra* note 85, at 33, 101-02.

¹¹⁵ REPORT OF THE DEBATES, *supra* note 57, at 659.

neighbors—conflict, in short, of the kind that characterized the rural countryside. For example, delegate Worden expressed grave “doubt[s] whether such [conciliation courts] could be made applicable to the state of things existing in our State, and the nature of the various dealings between individuals, or to all the questions that arise of our extensive mercantile transactions.”¹¹⁶ More generally, he saw great “difficulties in making [this system of courts] applicable to the entire state, and to controversies arising between citizens residing in different portions of it.”¹¹⁷ Conciliation courts were instead best suited to disputes between individuals living within the same “town” or perhaps the same “county.” Used in this way, he suggested, such courts would be a means of fighting a rearguard action, helping to preserve those rural neighborly communities that had not yet succumbed to the forces of modernization. The purpose of the proposed conciliation courts, he thus concluded, was to resolve “neighborhood difficulties—personal controversies—that now disturb communities, and call in aid courts and juries.”¹¹⁸

Along similar lines, delegate John Taylor, a lawyer from Tioga county, insisted that conciliation courts would help to preserve a neighborly ideal of small town life. Such courts, he opined, would attract “[t]he better part of the community, men who are not litigious in their habits,” and this in turn, would result in a culture where, eventually “in a certain class of cases, men would be regarded as disposed to be quarrelsome who would not submit their differences with their neighbors to this amicable mode of settlement.”¹¹⁹ While Taylor did not specify the types of cases that he imagined would be best suited to conciliation, he like Worden, seems to have envisioned these courts as designed to restore neighborly relations—to produce, in short,

¹¹⁶ *Id.* at 589.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 738.

communal harmony. Indeed, in his view, harmony in the local neighborhood would redound to the benefit of society as a whole, such that he “doubted not [that the conciliation courts’] influence would be most salutary in neighborhoods and society generally.”¹²⁰

But whether they imagined the locus of the conciliation court as the big city of Manhattan or the small rural town, the delegates supporting the establishment of such institutions envisioned them as a device for quelling conflict and thus preventing the new forces of urbanization and industrialization from culminating in social unrest. Similarly those opposing conciliation courts were driven largely by their views as to how these forces were transforming the landscape of New York state. But for these opponents of the conciliation courts, the social conflict—and thus litigation—threatened by recent socio-economic developments was not an evil to be bemoaned, but instead a source of productive change. The formal adjudication of legal rights in established courts of law was vital, they argued, for a country that embraced freedom and free enterprise and that was reaping the rewards of both in the extraordinary economic growth that it was then experiencing. As Richard Marvin, a lawyer from Chautauque county, asserted,

[I]n a free country like this, there would always be litigation. A country where every man was the equal of his fellow-man, where every citizen had a right to prefer his complaints and demand a patient hearing, where everyone enjoyed the right of launching upon the great ocean of enterprise his little ship whose flag was entitled to respect, where the relation of lord and vassel [sic] did not exist; where freedom was the birth-right of all, in such a country and among such a people, there would be litigation. Men would defend their rights from all encroachments.¹²¹

To seek a world without litigation was to attempt to return to the Old world of Europe, still moored in its feudal heritage, where deference to authority hindered the assertion of the

¹²⁰ *Id.*

¹²¹ *Id.* at 593.

productive self-interest that was so essential to promoting a successful market and that in turn necessarily spurred competition, and thus conflict.

For those delegates who viewed litigation as a core component of the development and protection of individual legal rights—and, in particular, the property rights so essential for promoting commercial enterprise—conciliation courts were potentially quite dangerous. Any attempt to transplant them from European soil might result in a monstrous creature that would jeopardize the individualist and enterprising values so key to American (commercial) liberty. In the words of delegate Ambrose Jordan, a lawyer from Columbia county: “Such courts belonged only to a despotic government, where the people were ignorant, and had a superior class over them, and not for our free Yankee population; who consider they are competent to judge for themselves in such matters.”¹²² Accordingly, he concluded that the very notion of establishing conciliation courts was beneath contempt. The decision whether to create such institutions should thus be left to the legislature, which as a constitutional matter, was free to enact any number of misguided statutes, and thus could even “provide that old women might talk over these matters at a tea table, or that some very wise heads, some few extraordinary old gentlemen, might advise their neighbors not to be cross or litigious.”¹²³ As this highly gendered language suggests, Jordan associated conciliation courts with a backward, pre-modern—indeed, pre-commercial—society, in which everyone knew and deferred to the neighborhood elders. Such a social order was, of course, to be contrasted with the free and manly society of modern New York, where litigation was necessary to encourage the clear, public establishment of the individual rights, and especially property rights, that were so vital for free government and free enterprise.

¹²² *Id.* at 589.

¹²³ *Id.*

While Jordan was especially vociferous in expressing his view that conciliation courts would undermine the rule of law so essential for preserving the American way of life, he was not alone among his colleagues in voicing such concerns. For example, Henry Nicholl, a lawyer from New York City, stated that he was willing to permit the legislature to create conciliation courts as an experiment, but he expressed grave doubts as to the likelihood of their success. To the extent that such courts had proved effective in continental European states, he suggested, this was because these other nations did not share the American spirit of political freedom and free enterprise: “Where these tribunals have existed, and have been a benefit, a far different state of society prevailed from what was to be found in our country—here we were politically, if not socially, equal. No man regarded another as his superior, or perhaps as more capable than himself.”¹²⁴ Nicholl’s colleague, delegate John Brown, a lawyer from Orange County, agreed, suggesting in less excited tones that “[i]t could clearly be demonstrated that such courts had no affinity with our institutions.”¹²⁵ And along similar lines, James Forsyth, a lawyer from Ulster County, observed that he “opposed the system of conciliation courts in any form as unsuited to our system of government.”¹²⁶

The view that conciliation courts were somehow associated with despotic or feudal regimes, where individual rights were made subservient to the will of a ruler or ruling class, was not unique to those delegates at the New York Constitutional Convention who happened to oppose the establishment of such institutions. Indeed, even those delegates who argued in favor of conciliation courts felt obliged to acknowledge that there was some link between these institutions and authoritarian rule. Conrad Swackhamer, for example, admitted that, aside from

¹²⁴ *Id.* at 799.

¹²⁵ *Id.* at 590.

¹²⁶ *Id.* at 800.

its adoption of conciliation courts, Denmark was “in all other respects an arbitrary government.”¹²⁷ Moreover, as we have seen, Bentham voiced concerns about the potential for conciliation courts to subvert the rule of law and thus the protection of individual rights. Similarly, Francis Lieber expressed the opinion that conciliation courts were suited to despotism—and this despite the fact that he was a strong proponent of such institutions.

Now remembered primarily for drafting what became the first modern code of military conduct, Lieber was one of the leading political thinkers of the antebellum period. In his view, “[w]herever [conciliation courts] have been tried in modern times, they have been found of the greatest benefit to the people, for instance, in Prussia and Denmark.”¹²⁸ But while Lieber praised such courts for “produc[ing] a signal decrease of litigation and diminution of expenses,”¹²⁹ he insisted that what he termed “the principle of arbitration cannot be called a characteristic of liberty, for as a characteristic it belongs rather to the patriarchal government, and courts of arbitration may flourish in despotic states.”¹³⁰ Indeed, his sole reason for concluding that conciliation courts were worthy of adoption was that he was an even stronger opponent of the Jacksonian reforms that had led in many states to the election of judges, and in his view, the establishment of conciliation courts was a means of persuading the “people . . . more readily [to] give up on an elective judiciary.”¹³¹

Why precisely, in the view of all these men, were conciliation courts particularly well-suited to despotic or feudal regimes? In part, the mere fact that conciliation courts had first emerged in continental Europe was enough to taint them in this fashion. As of the mid-

¹²⁷ *Id.* at 611.

¹²⁸ FRANCIS LIEBER, ON CIVIL LIBERTY AND SELF-GOVERNMENT 229-30 (Theodore D. Woolsey ed., 3d ed., Philadelphia, Lippincott 1875) (1853).

¹²⁹ *Id.* at 231.

¹³⁰ *Id.* at 229.

¹³¹ *Id.*

nineteenth century, but for a brief flourishing of democracy in 1848, Europe remained a continent of monarchies. Moreover, the legal systems of continental European nations were associated with the Roman-canon, Civil Law tradition, which, dating to the seventeenth-century English revolution, was linked in political and legal discourse with despotic rule, in contrast to the supposedly more liberty-oriented English common law. And such longstanding antipathy towards European legal systems was surely exacerbated by the rise of nativist, anti-Catholic sentiment in the wake of the dramatic 1840s expansion of already sizeable rates of immigration.

It seems clear, however, that anxieties that conciliation courts would tend to support despotism ultimately rested on more than such general antipathy towards continental European government and law, and indeed towards all things European. During the antebellum period, many advocates of legal reform actually looked to Europe and, in particular, to France, as a model for how the law could be simplified by means of codification.¹³² And among those who associated conciliation courts with authoritarian rule were men like the German immigrant Francis Lieber, who expressly repudiated nativism.¹³³ Thus, the prevalent assertions that conciliation courts would somehow foster despotism were not simply the result of long-established, anti-European sentiment.

Another possibility is that such assertions were merely a reflection of guild interests. After all, as traditionally conceived, conciliation courts obviated any need for lawyers, either as counsel to the disputants or as judges. It might thus be expected that such institutions would not be appealing to a growing and increasingly powerful legal profession and that lawyers would

¹³² CHARLES M. COOK, *THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM* 69-118 (1981).

¹³³ JOHN ARKAS HAWGOOD, *THE TRAGEDY OF GERMAN-AMERICA: THE GERMANS IN THE UNITED STATES OF AMERICA DURING THE NINETEENTH CENTURY—AND AFTER* 239 (Arno Press 1970) (1940).

eagerly seek to discredit them however possible. Indeed, as Morton Horwitz has argued, an increasingly powerful legal profession largely succeeded by the early years of the nineteenth century in quashing independent arbitral institutions, which they viewed as a threat to their (court-based) professional practice—a fact which, in turn suggests, that they would be no more sympathetic to the proposed conciliation courts.¹³⁴ But while lawyers’ professional identities no doubt played some role in shaping their attitudes towards conciliation courts, the evidence does not support the conclusion that opposition to such institutions was simply a matter of guild interests—whether these are understood narrowly as interests in financial gain and career advancement, or more expansively, as interests in promoting justice. This is because those delegates at the convention who favored conciliation courts were themselves primarily lawyers. Lawyers thus stood on both sides of the debate. Indeed, many of those arguing both for and against conciliation courts were the presumably elite lawyers who belonged to the Convention’s thirteen-member Judiciary Committee.¹³⁵

Accordingly, while professional interests surely played some role in motivating certain (but by no means all) lawyers to oppose conciliation courts, more is needed to account for the widespread association of such institutions with despotic or authoritarian rule. This, in turn, suggests the importance of taking seriously the language contemporaries actually

¹³⁴ HORWITZ, *supra* note 66, at 140-59. *But see* Carli N. Conklin, *Transformed, Not Transcended: The Role of Extrajudicial Dispute Resolution in Antebellum Kentucky and New Jersey*, 48 AM. J. LEGAL HIST. 39, 39-98 (2006) (arguing that until the Civil War, the legislatures and courts of both Kentucky and New Jersey continued to uphold extrajudicial dispute resolution).

¹³⁵ Delegates Kirkland, Worden, and Bascom (arguing for conciliation courts), and Jordan and Brown (arguing against) were all lawyers and all members of the Judiciary Committee. 2 CHARLES Z. LINCOLN, *THE CONSTITUTIONAL HISTORY OF NEW YORK: FROM THE BEGINNING OF THE COLONIAL PERIOD TO THE YEAR 1905, SHOWING THE ORIGIN, DEVELOPMENT, AND JUDICIAL CONSTRUCTION OF THE CONSTITUTION* 140 (1906). *See also* 3 JABEZ D. HAMMOND, *POLITICAL HISTORY OF THE STATE OF NEW YORK, FROM JAN. 1, 1841, TO JAN. 1, 1847*, at 622 (Syracuse, N. Y., L. W. Hall 1852).

employed—language that emphasized the perceived tendency of conciliation courts to undermine the rule of law. From the perspective of nineteenth-century Americans, much like that of Bentham, these institutions were fundamentally incompatible with the legal underpinnings of a free and democratic society, because they employed secret, lawyer-free proceedings, which demanded deference to the judge’s personal authority, rather than submission to the letter of the law.

Ultimately, because sentiment both for and against conciliation courts was so fierce, a number of delegates to the New York Constitutional Convention proposed a compromise position: They would support the establishment of such institutions, but only if these departed in significant ways from the traditional secrecy-oriented and lawyer-free model. Such a compromise was suggested by Henry Nicholl, a lawyer from New York City, in response to a recommendation by delegate Mann that, in any given panel of conciliation-judges, only one of the three ought to be a lawyer. While expressing grave doubts as to whether conciliation courts were suited to the freedom-loving citizenry of the United States, Nicholl stated that he was willing to attempt the experiment, as long as lawyers were not thus banished from these institutions. As he explained, “It seemed to him an absurdity to exclude that profession to the extent proposed, from these tribunals. When men were bent on going to law, they generally had some confidence in their own views of their legal rights. Whose duty ought it to be to advise them? Assuredly one who was competent by his knowledge, learning, and experience. . . . [T]hese courts would not afford the relief expected unless constituted of lawyers—men in whom the people had confidence in respect to matters of law.”¹³⁶ In so arguing, Nicholl betrayed his hope that, thus staffed by legally trained judges, conciliation courts—despite their name—would

¹³⁶ REPORT OF THE DEBATES, *supra* note 57, at 799.

focus more on enforcing the letter of the law than on promoting equitable compromise. And since Mann's recommendation to limit the number of lawyers who might serve as conciliation-court judges was thereafter firmly rejected, there were evidently many others who shared Nicholl's aspiration.

Another, less successful approach to tackling the perceived dangers posed by conciliation courts was attempted by Robert Morris, who like Nicholl, was a lawyer from New York City. Whereas Nicholl sought to encourage conciliation courts to enforce the letter of the law by thwarting efforts to limit the number of lawyers who might serve as judges in these institutions, Morris addressed the problem more directly. In particular, he argued that the proposed constitutional provision authorizing the establishment of conciliation courts ought to include language that would require them to apply formal law and procedure: "Such tribunals shall be governed by the law of the land and the evidence in the case."¹³⁷

Morris, however, ultimately withdrew the proposal prior to a vote.¹³⁸ That he did so is a reflection of the support that existed at the Convention for the traditional European model of the conciliation court, with its secret, lawyer-free proceedings, oriented towards equitable compromise, rather than the strict enforcement of the letter of the law. Morris (and the other opponents of conciliation courts) surely also concluded, however, that such a withdrawal was politically pragmatic, since victory could be more easily achieved simply by postponing the decision—or rather, delegating it back to the legislature. Accordingly, the convention agreed on a constitutional provision that authorized the legislature to establish conciliation courts, but was otherwise largely silent as to the structure and function of such institutions: "Tribunals of conciliation may be established, with such powers and duties as may be prescribed by law; but

¹³⁷ *Id.* at 813.

¹³⁸ *Id.*

such tribunals shall have no power to render judgment to be obligatory on the parties except they voluntarily submit”¹³⁹

In this way, die-hard advocates of conciliation courts could continue to envision these as traditionally conceived—as the secrecy-oriented and lawyer-free institutions described by Bentham. And at the same time, their opponents could rest confident that, if the legislature did eventually act, the conciliation courts that it established would not necessarily differ greatly from ordinary, lawyer-based and rule-bound civil courts. Indeed, the only substantive feature of these institutions on which delegates managed to reach agreement was on the importance of their proceedings being voluntary in Brougham’s narrow, formalist sense of the term.¹⁴⁰ By thus steering the convention towards a provision that left the basic structure and function of the conciliation courts undefined and that delegated to the legislature even the decision whether to establish such institutions in the first place, the opponents of such courts successfully postponed making any real decision. As time would prove, they thereby achieved near total victory.

III. The Failure of Conciliation Courts to Take Root and the Freedmen’s Bureau Exception

While in retrospect it is clear that the constitutional provision authorizing the establishment of conciliation courts would remain largely a dead letter, this was not the case as of the conclusion of the New York constitutional convention in the fall of 1846. Calls for the establishment of conciliation courts continued to emerge from many different quarters throughout the decade following the promulgation of the 1846 Constitution. Newspaper articles

¹³⁹ *Id.* at 11 (art. vi, sec. 23 of the 1846 constitution).

¹⁴⁰ The possibility that, as Bentham had insisted, parties might be persuaded voluntarily to consent to proposed compromises that were, in fact, contrary to both their interests and the formal letter of the law had been raised by those delegates opposing conciliation courts, but was never definitively resolved.

demanding legislation that would establish these institutions were penned by a wide variety of interests, including merchants,¹⁴¹ Unitarians,¹⁴² and farmers.¹⁴³ And in their “annual messages” to the state legislature, several New York governors issued calls for the enactment of such legislation that were evidently heard throughout the country. Thus, for example, when in January 1850, Governor Hamilton Fish proposed the establishment of conciliation courts, a leading Philadelphia newspaper expressed the “hope that New York will try these [c]ourts . . . , and let the rest of the Union see how they work.”¹⁴⁴ Along similar lines, a letter to the editor of the *Boston Cultivator*, inquired “if our Governor would not do well to follow the example of Gov. Fish, of New York, and recommend a Court of Conciliation”¹⁴⁵ Indeed, looking to New York, many states considered the possibility of establishing conciliation courts, and some—like Ohio,¹⁴⁶ Michigan,¹⁴⁷ Indiana,¹⁴⁸ Wisconsin,¹⁴⁹ California,¹⁵⁰ and North Dakota¹⁵¹—enacted similar constitutional provisions.

¹⁴¹ The *New York Observer and Chronicle* cited a report from the *Journal of Commerce* that the Chamber of Commerce had “referred to a committee to consider and report upon the expediency of memorializing the legislature to create a Court of Conciliation in . . . [New York] [C]ity, for commercial purposes” *Domestic: Court of Conciliation*, N.Y. OBSERVER & CHRON., Apr. 10, 1847, at 59.

¹⁴² D. M. Mahon, *Tribunals of Conciliation*, CHRISTIAN INQUIRER (N.Y.), Sept. 18, 1852, at 1.

¹⁴³ An Observer, *Litigation*, 6 CULTIVATOR (Albany), Oct. 1849, at 315.

¹⁴⁴ *A Good Recommendation*, SATURDAY EVENING POST (Philadelphia), Feb. 9, 1850, at 2. Thereafter, in January 1856, Governor Myron Clark urged the adoption of courts of conciliation, whose “beneficent workings,” he claimed, had been well established by “[t]he experience of other countries.” *Governor’s Message*, N.Y. DAILY TIMES, Jan. 17, 1856, at 2. In such institutions, he claimed, the “[m]isapprehension of rights, and the conflict of interests among neighbors, by conciliating intervention are amicably adjusted.” *Id.*

¹⁴⁵ S. Lindsey, *A Court of Conciliation*, BOSTON CULTIVATOR, Mar. 30, 1850, at 101.

¹⁴⁶ STEVEN H. STEINGLASS & GINO J. SCARSELLI, THE OHIO STATE CONSTITUTION: A REFERENCE GUIDE 193 (2004) (discussing art. IV, sec. 19 of the Ohio Constitution of 1851); *Small Claims and Conciliation Court, Hearings Before the Comm. on D.C., U.S. Senate, Seventy-Fifth Cong., First Sess. on S. 1835* (“A Bill Establishing a Small Claims and Conciliation Branch in the Municipal Court of D.C. for Improving the Administration of Justice in Small Cases and Providing Assistance to Needy Litigants, and for Other Purposes”) 70 (1937) [hereinafter *Small Claims and Conciliation Court*].

In the end, however, little came of all this activity. With few exceptions, most state legislatures failed to act on the new constitutional provisions authorizing them to create conciliation courts.¹⁵² In New York itself, legislation establishing conciliation courts was proposed several times, including in 1847¹⁵³ and 1855,¹⁵⁴ but it repeatedly failed to pass. And

¹⁴⁷ Frank Ravitch, *The Four Michigan Constitutions*, in *THE HISTORY OF MICHIGAN LAW* 134 & n.81 (Paul Finkelman & Martin J. Hershock eds. 2006) (discussing art. VI, sec. 23 of the Michigan Constitution of 1850); *Small Claims and Conciliation Court*, *supra* note 146, at 70.

¹⁴⁸ WILLIAM WHEELER THORNTON, *THE GOVERNMENT OF THE STATE OF INDIANA, FOR USE IN THE PUBLIC SCHOOLS* 223 (Terre Haute, Ind., Inland Publishing Co. 1898) (setting forth art. VII, sec. 134 of the Indiana Constitution of 1851); *Small Claims and Conciliation Court*, *supra* note 146, at 70.

¹⁴⁹ *Small Claims and Conciliation Court*, *supra* note 146, at 70 (discussing Wisconsin Constitution of 1847); John B. Winslow, *Tribunals of Conciliation*, 10 *REP. OF PROC. OF MEETINGS OF THE ST. B. ASS'N OF WIS., FOR THE YEARS 1912—1913—1914*, at 206 (1915). Interestingly, the Wisconsin Constitution did not simply authorize the legislature to create conciliation courts, but in fact required it to do so. The legislature, however, evidently ignored this constitutional provision. Winslow, *supra*, at 206.

¹⁵⁰ *CONSTITUTION OF THE STATE OF CALIFORNIA* 540-41 (W.F. Henning ed., 2d ed., Los Angeles Chas. W. Palm Co. 1899) (setting forth art. VI, sec. 13 of the California Constitution of 1849).

¹⁵¹ *Small Claims and Conciliation Court*, *supra* note 146, at 70 (discussing North Dakota Constitution of 1893).

¹⁵² Indiana and North Dakota both adopted conciliation courts, but these quickly failed. As established on June 11, 1852, the Indiana conciliation courts were expressly designed to settle cases “according to *conscience* and *right*, without regard to technical rules.” J. H. BINFORD, *HISTORY OF HANCOCK COUNTY INDIANA, FROM ITS EARLIEST SETTLEMENT BY THE “PALE FACE” IN 1818 DOWN TO 1882*, at 392 (Greenfield, Ind., King and Binford 1882). Conciliation proceedings were available, however, only in a relatively narrow class of cases and, moreover, were strictly voluntary. Winslow, *supra* note 149, at 224. As these courts were evidently not well received by the public, they were abolished in November 1865. BINFORD, *supra*, 392-93; *THE HISTORY OF INDIANA LAW*, 259 (David J. Bodenhamer & Hon. Randall T. Shepard, eds. 2006); Winslow, *supra* note 149, at 224. Similarly, North Dakota established conciliation courts in 1893, shortly after its admission to statehood. Such conciliation proceedings, however, were to be brought only after a formal lawsuit had been commenced and, as established by an 1895 statute, upon the consent of both parties. These courts thus rapidly fell into disuse. *Small Claims and Conciliation Court*, *supra* note 146, at 70; Eric H. Steele, *The Historical Context of Small Claims Courts*, 6 *AM. B. FOUND. RES. J.* 293, 312 (1981); Winslow, *supra* note 149, at 224.

¹⁵³ *Adjournment of the Legislature*, N.Y. *EVANGELIST*, May 20, 1847, at 79 (noting that a “bill organizing Courts of Conciliation” was under consideration).

¹⁵⁴ *State Affairs: Courts of Conciliation*, N.Y. *DAILY TIMES*, Jan. 29, 1855, at 1. According to this article, Samuel Blatchford (later to become an associate justice of the U.S. Supreme Court) had proposed a bill to establish conciliation courts with “jurisdiction in cases of libel, slander,

while the 1850 draft of the Field Code provided for the establishment of conciliation courts, this draft itself was never enacted. As discussed below, it was only for a brief, three-year period in the midst of the Civil war that an entity called a conciliation tribunal was finally created in New York, and it, in fact, bore little resemblance to the traditional European model of the institution.

That no meaningful attempt was made to create conciliation courts followed from the widespread uncertainty as to their merits that was reflected not only in the debate at the 1846 constitutional convention, but also in the 1850 draft of the Field Code. As promulgated by the legislature in 1848, the Field Code—written to comply with the convention’s decision to overhaul civil procedure—made no mention of conciliation courts. It was only the final draft of the Code, completed in 1850, that established such institutions. In their Report to the legislature concerning this draft, the commissioners responsible for drafting the Code specifically highlighted the provisions creating conciliation courts as an important new addition: “By means of the courts of conciliation for which, in accordance with the Constitution, provision has been made . . . it is to be hoped there will be fewer cases requiring the decision of the Courts, and not more than they can readily dispatch as fast as they are brought before them.”¹⁵⁵ But despite the hopes thus expressed in their Report, there were clear signs that the Code commissioners themselves—much like the delegates at the constitutional convention—struggled with the question of the extent to which such courts ought to be permitted to deviate from the formal rule of law. Indeed, the draft Code’s provisions concerning conciliation courts were proposed at the

malicious prosecution, breach of promise of marriage, assault, battery, false imprisonment, and claims for debt not exceeding \$100.” *State Affairs: Courts of Conciliation, supra*, at 1. This language appears to have been largely, though not entirely, copied from the 1850 draft of the Field Code. *See also Courts of Conciliation*, N.Y. EVANGELIST, February 15, 1855, at 26 (noting that legislation had been proposed).

¹⁵⁵ DAVID DUDLEY FIELD, *Final Report of the Practice Commission, December 31, 1849*, in 1 SPEECHES, ARGUMENTS AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD 293-94 (A. P. Sprague ed., N.Y., D. Appleton and Co. 1884).

recommendation of only two of the three Commissioners—namely, David Dudley Field and Arphaxed Loomis.¹⁵⁶ Moreover, these two commissioners vacillated between the traditional secrecy-oriented and lawyer-free model of the conciliation court described by Bentham, and the more formalist, public and lawyer-based version advocated by Lord Brougham.

On the one hand, the commissioners expressed great interest in the traditional European model of the conciliation court. And they argued that the lesson to be drawn from the European experience with such institutions was that it was crucial to their success that they be controlled by judges who possessed significant persuasive influence over the parties. Thus, they observed in their report to the legislature that conciliation-court proceedings in Norway were “a mere form, because the judges are inferior magistrates, without influence over litigants.”¹⁵⁷ And in France, the *bureaux de conciliation* had “almost entirely . . . [failed] in the large towns, and especially in Paris, where the justices of the peace, having in general little knowledge of the persons who come before them, can exercise but a feeble influence.”¹⁵⁸ On the other hand, the very fact that the efficacy of conciliation courts thus seemed to hinge on the judges’ persuasive influence was troubling to the Code commissioners, as it confirmed fears that these institutions might subvert the formal rule of law. For this reason, the commissioners agreed that conciliation courts ought to be empowered not only to encourage the parties to embrace some kind of equitable compromise and thereby reconcile, but also to impose the strict letter of the law through summary proceedings akin to arbitration.

¹⁵⁶ *Id.* at 294. The third commissioner, David Graham, dissented.

¹⁵⁷ THE CODE OF CIVIL PROCEDURE OF THE STATE OF NEW-YORK, REPORTED BY THE COMMISSIONERS ON PRACTICE AND PLEADING 642 (Albany, Weed, Parsons, & Co. 1850) (comments on Tit. VII, concerning “Proceedings in the Courts of Conciliation”) [hereinafter CODE OF CIVIL PROCEDURE].

¹⁵⁸ *Id.* at 642 (quoting from Rogron, *Les codes français expliqués*).

As outlined in the draft Code, should the parties request conciliation, the conciliation court would seek to settle their dispute by helping them to reach a compromise, negotiated without concern for whether this should happen to coincide with the result dictated by the law.¹⁵⁹ The parties could, however, opt instead for a kind of arbitration proceeding, whereby they would “submit their matters in difference to the court, and agree to abide the judgment.”¹⁶⁰ And while the draft Code does not define exactly what this procedure would entail, its emphasis on the vital importance of conciliation-court judges knowing the law suggests that (like arbitration today) this was to be a means by which the court would apply the formal letter of the law, but pursuant to a more informal (and thus speedier and cheaper) procedure than otherwise available. As explained by the Code commissioners, it was precisely because it was so crucial that conciliation-court judges be legal experts that they had opted against appointing justices of the peace to the task, as some at the 1846 Constitutional Convention had proposed.¹⁶¹ Justices of the peace, they observed, were mere laymen, and “[i]t strikes us as indispensable, that the officers before whom the parties appear, should be able to given them advice respecting their rights, in which they can confide.”¹⁶² Accordingly, the draft Code provides that New York county-court judges—themselves professional lawyers—would serve as judges of the conciliation courts.¹⁶³

Given that the 1850 draft of the Field Code thus hesitated fully to embrace the traditional European model of the conciliation court, and in fact, flirted significantly with Brougham’s more formalist, rule-based model, it is not surprising that the “tribunal of conciliation” that was briefly established during the Civil War—and that appears to have been inspired by the 1850 draft

¹⁵⁹ *Id.* at 643 (Tit. VII, sec. 1528 and sec. 1530).

¹⁶⁰ *Id.* at 644 (Tit. VII, sec. 1532).

¹⁶¹ See, for example, the (failed) proposal by delegate John L. Russell, a lawyer from St. Lawrence County. REPORT OF THE DEBATES, *supra* note 57, at 836.

¹⁶² CODE OF CIVIL PROCEDURE, *supra* note 157, at 641.

¹⁶³ *Id.* at 641, 642 (Tit. VII, sec. 1523).

Code—reflected the same hesitation. Established in Delaware County between 1862 and 1865, this court was, as provided in the draft Code, to be headed by the local county-court judge and to offer litigants a choice between conciliation, or instead a highly simplified model of formal adjudication. Indeed, as suggested by the Report on the proposed tribunal drafted by the New York Assembly’s Judiciary Committee, those advocating for its establishment seem to have been entirely uninterested in its capacity to promote conciliation and envisioned it instead primarily as a means of providing cheap and rapid formal adjudication.

According to the Committee Report, the delegates to the 1846 Constitutional Convention who agreed on a provision authorizing the legislature to establish conciliation courts were inspired by “similar tribunals [that] existed in several of the countries of Europe.”¹⁶⁴ However, the Report then emphasizes, these delegates were also well aware that “in consequence of the forms of government, habits, and institutions in Europe differing so essentially from those of our own, . . . all the features and peculiarities of those tribunals could not be adopted here.”¹⁶⁵ As the Report never once discusses how the tribunal of conciliation would actually promote conciliation, it would appear that, in the Judiciary Committee’s view, conciliation itself was—despite the court’s name—precisely such a “feature[] and peculiarit[y] . . . that could not be adopted here.” The Report’s focus was, instead, on the court’s ability to provide cheaper, more accessible formal adjudication in a county that was “one of the largest . . . in the state,” and where—because of the great distance between inhabited areas and the highly limited nature of the access provided by railroads—parties seeking to “attend court with their witnesses” could not

¹⁶⁴ Document no. 72, Feb. 14, 1862, of the Comm. of the Judiciary, on the B. Entitled ‘An Act to Establish a Tribunal of Conciliation in the County of Delaware’, *in* 4 DOCUMENTS OF THE ASSEMBLY OF THE STATE OF NEW YORK, EIGHTY-FIFTH SESSION, 1862, at 1 (Albany, Charles Van Benthuyzen 1862).

¹⁶⁵ *Id.*

do so “without great pecuniary sacrifice.”¹⁶⁶ In this respect, the relative strength of the tribunal of conciliation was that, in contrast to New York’s ordinary state trial courts, which held trials only at the county seat, it would hold trial “in the town where the majority of the witnesses reside and where the interests of the parties may require that such trial be held.”¹⁶⁷

As I have been unable to locate any records that the court produced, it is impossible to determine how it actually functioned during its brief existence.¹⁶⁸ It would seem highly unlikely, however, that the institution embraced a conciliation-function that it was never really intended to serve. The creation of the tribunal of conciliation in Civil War New York was thus in no way an exception to the general failure of the European model of the conciliation court to take root in the nineteenth-century United States. And while the successful movement for the establishment of small-claims courts that emerged in the early-twentieth century drew on this longstanding interest in European-style conciliation courts—an interest that, in turn, led to many of these institutions being called courts of “small claims and conciliation”¹⁶⁹—these new courts bore relatively little resemblance to their supposed European ancestors. Like the tribunal of conciliation established in New York during the Civil War, they focused at least as much on formal adjudication as on informal conciliation. Moreover, they were staffed by judges who were themselves legal professionals and whose discretion was thus limited, as Eric H. Steele

¹⁶⁶ *Id.* at 2.

¹⁶⁷ An Act to Establish a Tribunal of Conciliation in the Sixth Judicial District, *in* 4 STATUTES AT LARGE OF THE STATE OF NEW YORK, COMPRISING THE REVISED STATUTES, AS THEY EXISTED ON THE 1ST DAY OF JULY, 1862, at 603, 605 (John W. Edmonds ed., Albany, Weare C. Little 1863) (Ch. 451, sec. 7).

¹⁶⁸ Letter from Deborah Lambrecht, Records Management, Delaware County Clerk’s Office, Delhi, New York to author (Oct. 12, 2007); E-mail from James Folts, Head of Reference Services, New York State Archives, Albany, New York to author (Oct. 1, 2007).

¹⁶⁹ Steele, *supra* note 152, at 305-13.

writes, by their “training and professional socialization and often by [their] close administrative relationship with the other branches of the municipal court.”¹⁷⁰

There does, however, appear to have been one exception to this general failure of Europe-style conciliation courts to take root in American soil—namely, the establishment of Freedmen’s Bureau courts throughout the Reconstruction-era south. As an exceptional case, these courts reveal a great deal about the reasons why, as a general rule, the United States ultimately failed to embrace the European model of the conciliation court.

The problem of reconstructing the south, and in particular, of finding a way to integrate the newly freed African-American population into southern institutions of government and civil society was one that consumed much thought in the North in the years leading to the end of the Civil War and immediately thereafter. In 1863, Secretary of War Edwin Stanton appointed the American Freedmen’s Inquiry Commission to outline procedures for facilitating the former slaves’ transition to freedom.¹⁷¹ The Commission, in turn, proposed the creation of a Freedmen’s Bureau—a quasi-judicial, quasi-administrative agency conceived as a kind of centralized version of the various freedmen’s programs that had been established by the military in its efforts to provide African-Americans with food and employment.¹⁷² As set forth in the Commission’s Report, one of the central tasks of the Freedmen’s Bureau would be to assist freedmen in obtaining meaningful access to justice.¹⁷³

¹⁷⁰ *Id.* at 334.

¹⁷¹ GEORGE R. BENTLEY, *A HISTORY OF THE FREEDMEN’S BUREAU* 25-26 (Philadelphia, Univ. of Pa. Press 1955).

¹⁷² *Id.* at 16-25.

¹⁷³ In discussing contemporary, Reconstruction-era discourse concerning freedpeople, I employ the term “freedmen,” as this was the one commonly used at the time. It bears emphasis, however, that, as a number of historians have recently argued, the story of the Reconstruction South cannot be told without taking into account the experience of freedwomen, along with that of freedmen. *See generally* LESLIE A. SCHWALM, *A HARD FIGHT FOR WE: WOMEN’S*

Since it was clear that freedmen were not likely to obtain justice in southern courts, the Commission proposed instead that the Bureau itself help to resolve disputes involving freedmen by functioning as a kind of conciliation court: “It should be specially recommended to the department superintendent [serving as a Bureau agent], in the settlement of all personal difficulties between these people [the freedmen], to act as arbitrator rather than as formal judge, adopting the general principles governing courts of conciliation.”¹⁷⁴ The report failed to specify what such “general principles” were, evidently assuming that, given the contemporary interest in conciliation courts, these were widely understood. But while the report is short on specifics, it is nonetheless possible to glean the basic outlines of how the Commission envisioned such Bureau courts would proceed. In the words of the Commissioners, “[I]t is confidently believed by the Commission that if [the Bureau agent] shall succeed in gaining the confidence of the freedmen under his charge he will, with rare exceptions, be able amicably and satisfactorily to adjust such difficulties without further resort to law.”¹⁷⁵ As this reasoning suggests, the Bureau courts were to operate pursuant to the traditional, European model of the conciliation court: Exercising a kind of patriarchal authority, the Bureau agent would resolve the conflicts that emerged among those “under his charge” by promoting equitable compromise, rather than enforcing the strict letter of the law.

The Freedmen’s Bureau was officially established by a statute of March 3, 1865, and Oliver Otis Howard, a Union general, was appointed as Bureau Commissioner, to be aided by

TRANSITION FROM SLAVERY TO FREEDOM IN SOUTH CAROLINA (1997); LAURA F. EDWARDS, GENDERED STRIFE AND CONFUSION: THE POLITICAL CULTURE OF RECONSTRUCTION (1997).

¹⁷⁴ United States War Department, Report of the American Freedmen’s Inquiry Commission, New York, June 30, 1863, in CORRESPONDENCE, ORDERS, ETC., FROM JANUARY 1, 1863, TO DECEMBER 31, 1863, SER. III, VOL. 3, THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES 448 (Joseph W. Kirkley & Fred C. Ainsworth ed., Washington, D.C., Government Printing Office 1899).

¹⁷⁵ *Id.*

various assistant commissioners, also selected by the president. One of Howard's first acts as Bureau Commissioner was to issue a circular on May 30, 1865, directing his assistant commissioners to appoint agents to hear all disputes involving African-American litigants when state courts were not functioning or when, as was more commonly the case, these courts were operational, but denied African-Americans the right to testify.¹⁷⁶ Such adjudicatory activity quickly became a central component of the Bureau's workload. Indeed, Howard estimated that the Bureau resolved on the order of 100,000 disputes during each of the approximately four years that it was in existence.¹⁷⁷ Most of these disputes arose out of the Bureau's efforts to ensure that the former slaves would be quickly reemployed by white planters—though now on the basis of (at least formally) free contract. Such labor contracts gave rise to a great many disputes regarding conditions of employment, payment of salary, and allegations of cruelty.¹⁷⁸ In addition, the Bureau courts assumed jurisdiction over many cases in which freedpeople were accused of petty crimes, as well as disputes between freedpeople themselves, concerning such matters as property, debt, and marital relations.¹⁷⁹

In practice, the various courts established by the Bureau across the South were not all structured identically and did not all follow the same procedure. Sometimes, as envisioned in the Commission's Report, the local Bureau agent alone constituted the court.¹⁸⁰ In other areas, a

¹⁷⁶ BENTLEY, *supra* note 172, at 152; DONALD G. NIEMAN, *TO SET THE LAW IN MOTION: THE FREEDMEN'S BUREAU AND THE LEGAL RIGHTS OF BLACKS, 1865-1868*, at 5 (1979).

¹⁷⁷ BENTLEY, *supra* note 172, at 152.

¹⁷⁸ AUERBACH, *supra* note 85, at 58; BENTLEY, *supra* note 172, at 160; James Oakes, *A Failure of Vision: The Collapse of the Freedmen's Bureau Courts*, 25 *CIVIL WAR HIST.* 68 (1979); PAUL SKEELS PEIRCE, *THE FREEDMEN'S BUREAU: A CHAPTER IN THE HISTORY OF RECONSTRUCTION* 144 (Iowa City, Univ. of Iowa Press 1904).

¹⁷⁹ BENTLEY, *supra* note 172, at 160; NIEMAN, *supra* note 176, at 11.

¹⁸⁰ BENTLEY, *supra* note 172, at 152-54; PEIRCE, *supra* note 178, at 144.

local army officer or civil magistrate was instead appointed to serve as judge.¹⁸¹ And in yet other regions—most notably in Virginia, where Howard himself was responsible for so directing—the Bureau court (in disputes between freedmen and planters) took the form of a three-judge panel, consisting of the local Bureau agent and two additional arbitrators, one chosen by the planter and the other by the freedman.¹⁸² As concerns the procedure applied by these courts, this too varied a great deal. Except in the relatively rare situations where a local magistrate was appointed to the position, most Bureau judges lacked legal training and thus do not appear to have given much thought to—and indeed, were incapable of applying—the formal law. Thus, they often administered a kind of rough justice, ordering the litigants to comply with whatever outcome they deemed best, and frequently relying on the continued presence of federal troops to help enforce the judgment.¹⁸³ In many cases, however, and especially in those that constituted the heart of their docket—namely, labor disputes—the Bureau courts appear to have focused primarily on persuading the parties to accept a negotiated compromise, and thus much more closely approximated the traditional model of the conciliation court.¹⁸⁴ Indeed, it was precisely for the purpose of facilitating conciliation in labor disputes that Howard had urged his assistant commissioners—with little success outside Virginia—to adopt a three-judge court, with each litigant (African-American laborer and white planter) entitled to select his own representative to

¹⁸¹ BENTLEY, *supra* note 172, at 152-54.

¹⁸² BENTLEY, *supra* note 172, at 152-54; AUERBACH, *supra* note 85, at 58; PEIRCE, *supra* note 178, at 144.

¹⁸³ BENTLEY, *supra* note 172, at 160-62.

¹⁸⁴ John C. Rodriguez, *The Freedmen's Bureau and Wage Labor in the Louisiana Sugar Region*, in *THE FREEDMEN'S BUREAU AND RECONSTRUCTION 202-05* (Paul A. Cimbala & Randall M. Miller, eds. 1999); FRANK A. ROLLIN, *LIFE AND PUBLIC SERVICES OF MARTIN R. DELANY: SUB-ASSISTANT COMMISSIONER BUREAU OF REFUGEES, FREEDMEN, AND OF ABANDONED LANDS, AND LATE MAJOR 104TH U.S. COLORED TROOPS 256* (New York, Kraus Reprint 1969) (1868).

serve. As the Freedmen's Inquiry Commission had anticipated, conciliation was thus a core component of the Bureau courts' procedural practice—though by no means the only one.

Even while, in practice, the Bureau courts did not conform to a pure model of the conciliation court, they continued to be conceptualized as such. And for those who defended them against the many challenges to their continued existence, it was precisely their role in providing conciliation that served as their primary justification. Consider, for example, a remarkable article that appeared in the January 1866 volume of the *North American Review*.¹⁸⁵ Published anonymously, this article was ostensibly a review—more than a half-century after its initial 1803 publication—of a book by Andreas Bjørn Rothe concerning the Danish Conciliation Courts. As suggested by the oddity of the decision to review a book so many decades after it first appeared, Rothe's work served merely as a point of entry for broaching the article's real purpose. This, in turn, was to argue for the critical importance of maintaining conciliation courts in the Reconstruction South—an argument that, at the time the article appeared, constituted a not so veiled defense of the proposed second Freedmen's Bureau bill, then pending before Congress.

The second Freedmen's Bureau bill was an attempt by the Republican-controlled Congress to augment the powers of the Bureau and thus to thwart President Johnson's efforts quickly to return southern governments to power. At the time the Bureau was established, Johnson had directed it to restore jurisdiction to southern state courts as soon as legislation denying African-Americans the right to testify was repealed. Eager to oust the Bureau of its jurisdiction, many states complied with this minimally interventionist presidential mandate, while at the same time enacting Black Codes that served largely to recreate the conditions of

¹⁸⁵ *Art. V: Mémoire sur l'origine et l'organisation des committés conciliateurs en Dannemarc, par A. B. Rothe, Copenhague, 1803, 16 mo., pp. 126, 102 N. AM. REV. 135-46 (1866) [hereinafter Art. V: Mémoire sur l'origine].*

slavery, pursuant to the formal language of free contract. As a result, the jurisdiction of the Bureau courts began to shrink by the end of 1865, even as the possibilities for freedpeople to obtain justice in southern courts grew no better, or even worsened. Responding to this situation, leading congressional Republicans proposed a second Freedmen's Bureau bill that would, among other things, expand the Bureau courts' jurisdiction broadly to encompass all claims of deprivation of civil rights.¹⁸⁶

Drafted in December, the proposed legislation was debated in January 1866 and passed in early February, only to be vetoed by Johnson.¹⁸⁷ While Congress would ultimately succeed in enacting a Second Freedmen's Bureau Bill on July 16, 1866, this left it to the President to issue rules and regulations governing the Bureau courts' activity—an undertaking that President Johnson was none too eager to pursue.¹⁸⁸ Thus, despite the eventual passage of the bill, and despite Howard's ongoing efforts to resist state-court jurisdiction, Bureau courts in many states had transferred much of their jurisdiction to civil authorities by the spring and summer of 1866.¹⁸⁹ Thus weakened, the Bureau courts came to a final end in December 1868, when pursuant to statute, the Bureau and its agents were withdrawn from the south.¹⁹⁰

It was in January 1866, as the Second Freedmen's Bill was under congressional debate, and the survival of the Bureau courts thus in significant jeopardy, that the North American Review published its article reviewing Rothe's book concerning the Danish conciliation courts. Observing the existence of widespread, transatlantic interest in conciliation courts during the first half of the nineteenth century, the article begins by noting that attempts to establish such

¹⁸⁶ NIEMAN, *supra* note 176, at 4, 103-15.

¹⁸⁷ *Id.* at 107-15.

¹⁸⁸ *Id.* at 143-47; BENTLEY, *supra* note 172, at 162-63.

¹⁸⁹ NIEMAN, *supra* note 176, at 119-21.

¹⁹⁰ *Id.* at 221; BENTLEY, *supra* note 172, at 165-67.

institutions had not all fared equally well. In both England and New York, conciliation courts had never really taken root. And while they were successfully established in various continental European countries, these courts differed in their ability effectively to promote conciliation. The most effective of such continental institutions were those established in France and Denmark. In France, however, the *bureaux de conciliation* were widely viewed as being much more effective in the rural countryside than they were in urban centers. In contrast, the article asserts, Danish conciliation courts had achieved near universal acclaim: “[T]he Danish writers speak[] with great pride and satisfaction of their success.”¹⁹¹

What was the reason for the distinctive success of the Danish conciliation courts? Here the article’s answer is precisely what Bentham might have predicted. Conciliation courts worked well in Denmark because the poor peasant population that they served was so lacking in sophistication, so infantile in attitudes and behavior, that the conciliation judges, intervening as kindly fathers, were easily able to reconcile the disputants. Echoing Bentham’s account of conciliation courts as modeled on the patriarchal household, the article remarks: “Disputes arising among such a rude peasantry cannot often be of much detail or complication. They must be as easy of settlement as the quarrels of servants or children. How different are the questions which come before the courts in this country! Springing as they often do out of the most involved transactions in a highly civilized state of society, they present a variety of incident and a multiplicity of detail, to unravel which demands patient and skillful examination.”¹⁹² The infantile nature of the peasant class meant not only that its disputes could be easily comprehended and an appropriate compromise quickly identified, but also that disputants could be readily persuaded to embrace this compromise. As the article observes, “To give the

¹⁹¹ *Art. V: Mémoire sur l’origine*, *supra* note 185, at 141.

¹⁹² *Id.* at 143.

institution [of the conciliation court] its effect, the suitors must look up to the opinion and advice of the judge as only an ignorant and dependant people can look up, with a readiness to yield their opinions and wishes to one whom they personally revere as higher than themselves.”¹⁹³ The peasant class of Denmark constituted precisely such an infantile and subservient people because the “remains of the feudal system” continued to operate in Denmark, “to a greater extent . . . than in any other nation of Western Europe.”¹⁹⁴ This meant, in particular, that Danish society continued to be based on a “distinction between classes,” such that those elites who served on the conciliation courts—“[t]he grand bailiff who holds the court in the country, or his deputy, who is often the clergyman of the parish”—were “invested with a temporal or spiritual power” that in turn endowed their advice “with the weight of a command to [their] tenants or parishioners.”¹⁹⁵

Having thus undertaken an extensive analysis of European conciliation courts—and, in particular, those of Denmark—the article then concludes by expressly addressing why these ought to be of interest to its American readers. Lest these readers had somehow failed to draw the not-so-subtly suggested parallel themselves, the article explains that the newly freed population of the American South was comparable to the continental European peasantry. And like European peasants, only recently freed from the bonds of feudal obligation, American freedmen were in desperate need of paternalist protection: “The situation of the recently enfranchised slaves presents many of the features which have made these courts successful among the peasantry of Denmark. They are a poor people, an agricultural people; their dealings are confined to their own neighborhood; their quarrels are generally about simple matters; they have just been freed from slavery, and have many of its trammels still hanging about them.

¹⁹³ *Id.* at 144.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

Though an irascible, they are a very placable people, and when they do respect one of the lately dominant race, they will submit to his opinion and advice with a readiness which exceeded the docility of any European peasantry.”¹⁹⁶ This analysis, in turn, suggested that conciliation courts were entirely unsuited to the white population, whose characteristic features were long identified by way of contrast to the racist stereotype of the African-American as infantile, docile, and lazy. Mature, self-assertive, and industrious, the white population of the United States could of course never be expected to compromise legal rights merely out of deference to the conciliation judge: “The least elevated and educated Yankee holds his opinions on matters affecting his own purse and person too tenaciously, and with too much independence, to be ready to surrender them at the advice of any one, even though he be a justice of the peace or the parish minister.”¹⁹⁷ Accordingly, the article concludes that any attempt to subject white Americans to the jurisdiction of the conciliation courts would prove a failure “even in the most rural districts of the Northern States.”¹⁹⁸

In thus advocating the use of conciliation courts to provide justice to the freedmen, the *North American Review*—a quintessential institution of the northern elite—gave voice to what had become the dominant American understanding of the conditions under which conciliation courts might work effectively. Pursuant to this understanding, conciliation and formal adjudication were radically distinct processes, seeking different kinds of results and aimed at different types of disputants. Conciliation focused on promoting social harmony by resolving disputes with as minimal expenditure of time and money and as little conflict as possible.

Towards this end, it encouraged litigants to compromise their legal rights in deference to the

¹⁹⁶ *Id.* at 146.

¹⁹⁷ *Id.* at 144-45.

¹⁹⁸ *Id.* at 144.

persuasive influence of the conciliating judge. And it was only from a subservient class of people that such deference could be expected. In contrast, formal adjudication sought to define and protect the legal rights undergirding all social activity by encouraging individuals aggressively to assert and defend their interests. From this perspective, conflict was a value to be promoted and the judge's role was not to exert personal influence in an attempt to generate compromise, but simply to serve as a neutral umpire, ensuring that each litigant adhered to the rules regulating judicial combat. Moreover, only a free and independent people could be expected to have the confident self-assurance necessary thus to assert their legal rights and interests. It was therefore in opposition to Europeans (deemed to inhabit a feudal Old World) and to African-Americans (considered to be docile and subservient) that nineteenth-century American elites identified the self-interested, adversarial assertion of legal rights as a defining feature of American freedom.

As for how to assess the efforts of the Freedmen's Bureau Courts (and indeed, the Bureau as a whole), this is a question that has long divided historians, who disagree about the extent to which these institutions helped to promote African-American freedom or instead contributed to the rise of Jim Crow.¹⁹⁹ In many cases—and especially those involving disputes between freedpeople, or where a freedman was charged with a criminal offense against a white victim—it seems likely that the Bureau Courts afforded freedpeople justice that they would not have been able to obtain in southern state courts. So too in the case of labor disputes, it appears that the Bureau Courts were sometimes able to protect freedpeople from the very worst abuses.²⁰⁰ And a number of historians have suggested that the very fact that the Bureau Courts afforded

¹⁹⁹ *Preface to THE FREEDMEN'S BUREAU AND RECONSTRUCTION* at ix (Paul A. Cimballa & Randall M. Miller, eds. 1999).

²⁰⁰ NIEMAN, *supra* note 176, at 11.

freedpeople the opportunity to assert their rights and interests was in itself significant in providing them with a new sense of empowerment and control.²⁰¹ These historians, however, have tended to focus (though by no means exclusively) on disputes between freedmen and - women—and, in particular, on complaints by women against their husbands (for physical abuse, theft of property, and the like). And even in such cases, the evidence suggests that the overall effect of the Bureau Courts' intervention was, in Leslie Schwalm's words, to create "a tolerant environment for the continuing postbellum assault on the families of freedpeople."²⁰²

More importantly, the reality of the power dynamics that then pertained in the South ensured that, in the many cases that involved a conflict between freedmen and white planters, the latter were often able to use these courts to their own advantage—securing settlements from those they cowed into deference, frequently with the assistance of Bureau personnel.²⁰³ Indeed, to the extent that the Bureau courts helped to reestablish and stabilize the southern agricultural economy, they did so in no small part by reinstating (through the formal mechanisms of free contract) a system by means of which a dominant white planter class exploited a subordinated African-American community. Thus, as Jerold Auerbach has persuasively argued, "Freedmen's Bureau arbitration exposed the vulnerability of non-legal dispute settlement without community autonomy."²⁰⁴ Such results were, moreover, predictable. Having embraced conciliation courts as an institution suited to a subordinated class, nineteenth-century elites quite naturally deployed it, in part, to reinforce the very conditions of subordination that were its animating value.

²⁰¹ EDWARDS, *supra* note 173, at 63-64, 97-98; SCHWALM, *supra* note 173, at 260-68.

²⁰² SCHWALM, *supra* note 173, 237-38.

²⁰³ AUERBACH, *supra* note 85, at 58-60; PETER W. BARDAGLIO, RECONSTRUCTING THE HOUSEHOLD: FAMILIES, SEX, AND THE LAW IN THE NINETEENTH-CENTURY SOUTH 127 (1995); NIEMAN, *supra* note 176, at 15-16.

²⁰⁴ AUERBACH, *supra* note 85, at 60.

IV. The Broader Context

The nineteenth-century American debate over conciliation courts was the procedural counterpart to a broader set of political debates that marked the first half of the nineteenth century—debates about how rapid social and economic change would and should transform the new American republic. As the foundations of the modern capitalist economy took root in the early decades of the nineteenth century, older commitments to local control—to Jefferson’s ideal of a republic of yeoman farmers—took on a decidedly modern cast, as a growing number of people came to fear that powerful forces of urbanization and industrialization would result in widespread dislocation and dispossession. To the extent that the social fabric thus became unraveled, how would a nation that had become increasingly committed not only to republican self-government, but also to democracy, or the mass exercise of political power, continue to sustain itself? It was, in no small part, in response to fears of these kinds that conciliation courts presented themselves as a much-needed solution. In the view of those who advocated for their establishment, these institutions had the power to restore sundered relationships, and in so doing, to preserve (or recreate) the communal harmony so vital for collective, democratic self-governance.

Why then did conciliation courts ultimately fail? The answer, as this paper explores, is that nineteenth-century Americans came to view conciliation courts as incompatible with the egalitarian individualism that they hoped firmly to establish as the foundation of the new American democracy. However appealing the ideal of conciliation and its promise of communal harmony may have been, they determined that such harmony would likely be purchased at the expense of the kind of free and democratic society and government that they hoped to establish. Overemphasis of communal harmony, in short, would detract from the individualist impulse

necessary to promote a free market and to prevent the formation of deeply embedded social hierarchies that would, in turn, be reflected in the nation's political structure. Accordingly, contemporaries concluded that conciliation lent itself only to hierarchical social orders. And reflecting this conclusion, they developed what they conceived to be conciliation courts only on behalf of newly freed, but still subordinated African-Americans. In this sense, the nineteenth-century American debate over conciliation courts operates as a kind of case study for the proposition (based primarily on studies of Japan) that conciliation tends to flourish only in strongly hierarchical societies, where individuals can be expected readily to defer to their social superiors.

But while the American experience lends important weight to the proposition that conciliation and social hierarchy tend to go hand in hand, it also serve as a valuable cautionary lesson against over-reliance on such sociological generalizations. It reminds us that at the end of the day the connection between a particular society's broader structures of authority and its approach to dispute resolution is the product of any number of local, contextual factors—the product, in short, of history. Thus, however unlikely it was as a matter of sociological probabilities that conciliation courts would take meaningful root in the nineteenth-century United States, the fact remains that contemporaries did indeed seriously consider establishing them. That they were not in fact established is therefore not merely a reflection of existing social conditions—and, in particular, the absence of a cultural and institutional tradition of deference. It is also a reflection of politics—of a set of particular, contingent choices made about the kind of society in which contemporaries hoped to live, and the kind of dispute-resolution mechanisms that they deemed consonant with these aspirations. Put differently, the maxim that conciliation

tends to be associated with social hierarchy tells us what is likely to happen, but not what will, and perhaps even more importantly, not *how*.

The “how” here turned out to be quite important, as it was in the process of opting against conciliation courts that nineteenth-century American opted in favor of an ideal of formal, adversarial legal process. Indeed, it was the American debate over conciliation courts that led to the first clear enunciation of the principles underlying such process—and, in particular, to the theory that it is essential for the vindication of individual legal rights, and thus the rule of law in a free and democratic society. Of course, many of the constitutive techniques of adversarial civil procedure, including most importantly, representation by counsel and cross-examination, well predated the mid-nineteenth century (at least within the common-law courts, if not in equity).²⁰⁵ But individual techniques do not in themselves constitute a procedural theory. And while there was a long tradition of associating the common law with English constitutional liberties, and thus the rights of free men,²⁰⁶ this was a tradition that tended to focus piecemeal on particular (especially criminal law) institutions and devices, such as habeas corpus, the right against self-incrimination, and the jury. Such institutions and devices, in other words, were not conceptualized as particular components of a broader system of distinctively procedural law. It was only in the course of rejecting conciliation courts that a full-blown theory of common-law, adversarial legal process was developed. At this time, an important (and influential) group of American lawyers and politicians seeking to promote a market economy and to affirm their

²⁰⁵ See Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1204-10 (2005) [hereinafter Kessler, *Our Inquisitorial Tradition*], which describes how, pursuant to traditional equity procedure, witnesses were examined by court officials on the basis of written interrogatories, such that counsel was denied the opportunity to undertake an oral cross-examination.

²⁰⁶ See generally J.G.A. Pocock, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH-CENTURY; A REISSUE WITH A RETROSPECT* (1987).

national (and racial) superiority, decided that dispute resolution as such ought not to be an end in itself, and that disputes must instead be resolved so as to ensure the development of clear, individual rights under the law—and especially those rights necessary to promote a society based on both freedom and free enterprise. This, in turn, was a function, they determined, that only formal, adversarial adjudication could serve.

That the debate over conciliation courts provided an occasion for developing such a theory of common law, adversarial process was a product not only of its initial impetus—namely, arguments advanced by those advocating for such institutions—but also of the broader legal context in which the debate arose. The late eighteenth and early nineteenth centuries witnessed a set of key transformations in jurisprudence, as the common law was changed from a mass of procedural writs into a coherent system of substantive rights.²⁰⁷ The separating out of writ from right, or procedure from substance, raised for the first time the problem of what precise functions procedure as such was supposed to serve. While significant thought had been previously devoted to particular mechanisms that we would now characterize as procedural, it was only in this period that the overarching category of procedure came to be developed as a crucial and distinct component of any legal system. And it was, in fact, Bentham himself who played perhaps the key role in propagating the distinction between substance and procedure, thus helping to crystallize the latter as a separate body of law.²⁰⁸ Yet, until the late nineteenth century, standard American legal dictionaries did not even include the term “procedure” and contained entries instead for the more traditional (writ-based) notions of

²⁰⁷ WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830*, at xv-xvi (2d ed. 1994); Daniel J. Hulsebosch, *Writs to Rights: ‘Navigability’ and the Transformation of the Common Law in the Nineteenth Century*, 23 *CARDOZO L. REV.* 1049, 1050-54 (2002).

²⁰⁸ Grey, *supra* note 20, at 1231 n.10.

“pleading” and “practice.” As the Supreme Court of the United States observed in an 1883 opinion, “The word ‘procedure,’ as a law term, is not well understood, and is not found at all in Bouvier’s Law Dictionary, the best work of the kind in this country.”²⁰⁹ Moreover, the 1897 edition of this dictionary, in finally defining “procedure,” was careful to emphasize that “[t]he term is, with respect to its present use, rather a modern one.”²¹⁰

The emergence of a new conception of procedure meant that the problem of developing an appropriate procedural system—and one expressly conceptualized as such—suddenly emerged as a vital one to be solved. It is thus no coincidence that the debate over conciliation courts took place at exactly the same time that (many of the same) contemporary lawyers and politicians were struggling to define a new, coherent and less costly system of procedure. In this context, debate over conciliation courts led quite naturally to deeper thinking about the very purposes of a procedural system. And indeed, precisely because conciliation courts were deemed to be so very alien to American sensibilities, they provoked more direct and profound analysis of the core functions of procedure than did contemporary efforts to reconfigure the existing procedural systems of law and equity—efforts that all too easily became enmeshed in a mass of technical detail.

²⁰⁹ *Kring v. Missouri*, 107 U.S. 221, 231 (1883). See also Bruce A. Kimball & R. Blake Brown, “*The Highest Legal Ability in the Nation*”: *Langdell on Wall Street, 1855-1870*, 29 L. & SOC. INQUIRY 39, 72-73 (describing Bouvier’s Law Dictionary as being “among the best of its genre” and noting the “eminence” of the various lawyers, including judges and politicians, who were responsible for drafting its entries).

²¹⁰ 2 BOUVIER’S LAW DICTIONARY 764 (Boston, Boston Book Co. 1897) (“Procedure”). That a new conception of procedure had arisen, however, well before the end of the century is evident in the changing definition of “practice” that appears in earlier editions of *Bouvier’s Law Dictionary*. For example, the 1843 edition defined “practice” primarily as “[t]he form, manner, and order of carrying on suits” 2 BOUVIER’S LAW DICTIONARY 348 (Philadelphia, T. & J. W. Johnson 1843) (“Practice”). In contrast, the 1860 edition defined it primarily as “[t]he course of procedure in courts” and thereafter observed that “[i]n a general sense, *practice* includes *pleading*, though it is usually distinguished from it.” 2 BOUVIER’S LAW DICTIONARY 319 (N.Y., John S. Voorhies 1860) (“practice”).

At the same time, developments in the substantive law served themselves to help steer such procedural analysis in the direction of formal, adversarial process—or at least to steer it towards that set of justifications identified on behalf of such process. In particular, the emerging conception of case law as a substantive body of rights led to a new view that jurisprudence was itself a means of framing social policy.²¹¹ In Morton Horwitz’s words, early-nineteenth century “judges began to conceive of common law adjudication as a process of making and not merely discovering legal rules.”²¹² While some have disputed Horwitz’s specific claims about the ways in which early nineteenth-century American judges sought to transform the law of contract and tort, there is broad agreement that this period marked the rise of an increasingly instrumentalist view of jurisprudence. This was an instrumentalism, moreover, that as several legal historians have suggested, served in various ways to promote commercial development and market expansion.²¹³ As legal treatise-writers and common-law judges sought to create a jurisprudence that would not only resolve disputes, but also help to promote the development of an individualist, market-based society, so too nineteenth-century lawyers and politicians pondering legal reform embraced formal, adversarial adjudication as crucial for providing the institutional and procedural framework in which such a jurisprudence might emerge. The rise of a distinctive commitment to formal, adversarial adjudication is thus a procedural counterpart to the familiar story of the emergence of a new substantive and instrumentalist conception of the common law and of judicial law-making more generally.

²¹¹ NELSON, *supra* 207, at 69-88; Hulsebosch, *supra* note 207, at 1049-1106.

²¹² HORWITZ, *supra* note 66, at 2.

²¹³ See, e.g., Harry N. Scheiber, *Federalism and the American Economic Order, 1789-1910*, 10 LAW & SOC’Y REV. 57, 65 (1975) (“It is now well accepted that the ‘style’ of judicial law-making, at least before 1860, was predominantly instrumental, reflecting pragmatic concern to advance productivity and material growth.”).

There were profound consequences to this mid-nineteenth-century American embrace of formal, adversarial procedure. The very same New York Constitutional Convention of 1846 that seriously debated whether to establish conciliation courts and ultimately succeeded only in enacting a constitutional provision that authorized the legislature to do so, also directed the merger of law and equity. And it directed merger in a way that, as I have observed elsewhere, sought to preserve the common law tradition of adversarial, party control, rather than equity's practice of quasi-inquisitorial, judicial control.²¹⁴ While the reasons for this abandonment of equity's quasi-inquisitorial tradition are manifold and complex, the contemporary debate over conciliation courts—and the resultant embrace of formal, adversarial procedure—surely played a significant role. As we have seen, opposition to conciliation courts stemmed in no small part from anxieties that these placed far too much authority in the hands of the judge. As developed by those who opposed conciliation courts, a similar logic militated against equity's traditions of quasi-inquisitorial judicial power. These were thus readily jettisoned.

The rejection of European conciliation courts (and the concomitant abandonment of equity's quasi-inquisitorial tradition) served to ensure the triumph of an ideal of formal, adversarial procedure as a defining feature of the American republic. Forged in the debate over conciliation courts, this procedural ideal was from the outset grounded in a comparative frame. American legal culture, in short, was defined in opposition to that of European nations. The notion that the American approach to procedure was exceptional emerged as part of a broader effort to develop a distinct American identity—to define a legal, social, and political culture that was separate from, and indeed, superior to that of the United States' European ancestors (and geo-political competitors) and that would help clearly to establish its “manifest destiny.” There

²¹⁴ Kessler, *Our Inquisitorial Tradition*, *supra* note 205, at 1224-38.

is thus good reason why, to this day, a commitment to formal, adversarial adjudication is generally viewed as a key example of American exceptionalism: It was intended to serve precisely this purpose.