



2018

## The Curious Origin of Texas Pleading

Justice Jason Boatright

*Texas Court of Appeals for the Fifth Court of Appeals District*

Follow this and additional works at: <https://scholar.smu.edu/smulr>



Part of the [Civil Procedure Commons](#), and the [Courts Commons](#)

---

### Recommended Citation

Justice Jason Boatright, *The Curious Origin of Texas Pleading*, 71 SMU L. REV. 39 (2018)

<https://scholar.smu.edu/smulr/vol71/iss1/11>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

# THE CURIOUS ORIGIN OF TEXAS PLEADING

*Justice Jason Boatright\**

## ABSTRACT

*For 150 years, judges and legal scholars said that the Texas pleading system came from Spain. They explained that Mexico used a simple Spanish pleading system that English-speaking immigrants to Mexican Texas liked more than the complicated procedure they had known in the United States. After separating from Mexico, the story goes, Texas retained the Spanish system.*

*But that story is probably wrong. The Republic of Texas enacted its first pleading law in 1836. It does not look like Spanish pleading laws; it looks like an 1824 law written by Stephen F. Austin for his colony's alcalde courts. Austin's law looks like an 1805 Louisiana law written by Edward Livingston. The Austin and Livingston laws use the words of English equity.*

*The story does not end there, however. Equity and Spanish pleading are related. And Livingston was influenced by Jeremy Bentham, who admired the simplified judicial procedures of the Arab al-qadi, an ancient judicial office that became the alcalde of Spain, Mexico, and Texas. Above all, Austin and Livingston liked Spanish law and tried to conform their laws to its principles out of sincere respect for Hispanic culture and institutions. So, Texas pleading law is partly Spanish, even if it came from England.*

*Joseph McKnight published more research on the origin of Texas law than anyone else. His scholarship was the key to understanding the true origin of Texas pleading.*

## TABLE OF CONTENTS

I. INTRODUCTION .....	41
II. THE TRADITIONAL STORY: TEXAS PLEADING CAME FROM SPAIN .....	42
A. REASONS TO BELIEVE THE TRADITIONAL STORY .....	43
B. REASONS TO DOUBT THE TRADITIONAL STORY .....	43
1. <i>Texas Had Very Few Licensed Lawyers and            Trained Judges</i> .....	44
2. <i>Spanish Law Books Were Extremely Rare in            Texas</i> .....	47

---

\* Justice, Texas Court of Appeals for the Fifth Court of Appeals District.

3.	<i>Few English-Speaking Immigrants Could Use Spanish Legal Sources</i> .....	49
4.	<i>There Was Little Time to Establish Spanish Practice in English-Speaking Texas</i> .....	51
III.	EARLY TEXAS PLEADING LAW DOES NOT LOOK LIKE SPANISH LAW .....	53
A.	LAS SIETE PARTIDAS, PARTIDA III, TITULO X, LEY III .....	55
B.	NOVÍSIMA RECOPIACION, 1502 ORDINANCE OF FERDINAND AND ISABELLA .....	56
C.	NOVÍSIMA RECOPIACION, 1348 ORDINANCE OF ALCALÁ.....	57
D.	LAS SIETE PARTIDAS, PARTIDA III, TITULO II, LEY XL .....	58
E.	FEBRERO ADICIONADO .....	59
F.	LEYES DE COAHUILA Y TEXAS, DECRETO 277 .....	60
IV.	TEXAS PLEADING CAME FROM ENGLAND THROUGH LOUISIANA.....	64
A.	STEPHEN F. AUSTIN'S 1824 REGULATIONS FOR THE ALCALDES .....	64
1.	<i>No Law Was in Effect in Texas When Austin Founded His Colony</i> .....	64
2.	<i>Austin's 1824 Pleading Law Looks Like the 1836 Texas Pleading Law</i> .....	66
3.	<i>Austin's Pleading Law Was Used Throughout Mexican Rule</i> .....	68
4.	<i>Austin Was Sympathetic to Hispanic Culture and Mexican Law</i> .....	69
B.	AUSTIN'S LAW CAME FROM EDWARD LIVINGSTON'S 1805 ORLEANS PRACTICE ACT .....	72
1.	<i>Joseph McKnight Connected Livingston's 1805 Law with Austin's 1824 Law</i> .....	73
2.	<i>Austin's Law Looks Like Livingston's 1805 Law</i> ..	74
3.	<i>Austin Acknowledged Livingston's Influence</i> .....	75
4.	<i>Livingston's Law Was English, but It Was Inspired by Spanish and Arab Institutions</i> .....	77
a.	<i>Livingston's Law Uses the Words of English Equity</i> .....	77
b.	<i>Livingston's Law Intentionally Connected Equity with Spanish Law</i> .....	80
c.	<i>Livingston Was Inspired by Jeremy Bentham</i> .....	
C.	TEXAS PLEADING RESEMBLES OTHER LOUISIANA TERRITORY LAWS .....	88
V.	SOURCES OF THE CURRENT TEXAS PLEADING SYSTEM.....	90
VI.	CONCLUSION .....	95

## I. INTRODUCTION

**P**LEADING is the way people begin to complain about each other in court. The arguments they make in pleadings are usually the only ones they are allowed to make at trial and on appeal. Those arguments are also the only ones that judges are typically allowed to consider before deciding who will win or lose. Pleading therefore determines where justice will begin and, often, where it will end.

That makes pleading very important. It is so fundamental to the ordering of law and society that a system of pleading tends to reveal important legal values of the culture that uses it. For example, countries in continental Europe use a legal system called the “civil law,” which is based on the law of the late Roman Empire (the name “civil law” is not related to the distinction between criminal and civil law; it is about the *ius civile*—law for the people of Rome—rather than the *ius gentium*—the law of mankind). Spain uses the civil law, as do countries like Mexico that were part of its empire. The civil law pleading system of Spain and Mexico is famously simple, as a centrally-designed plan intended for uniform use across a vast empire probably should be. England and most of the United States tend to use the common law, which is based on Norman-French law and English judicial custom, with a few other legal sources thrown in. The common law pleading system is notoriously complex, as a procedure cobbled together by judges on a case-by-case basis for centuries would be. England and the United States also have a legal system called equity, which was developed to solve legal problems that the common law could not. Equity has its own pleading system.

Texas legal culture is a mix of the civil law, common law, and equity. It was a civil law jurisdiction under Spain for 300 years, but when Mexico became independent in 1821, thousands of English-speaking immigrants settled in Texas, bringing their experiences with the common law and equity with them. In 1836, the Republic of Texas enacted a pleading law that has long been considered a civil law system, a survivor of the transfer of sovereignty from Spain to Mexico to independent Texas. But that conclusion is based almost entirely on a just-so story: the Spanish pleading system is simple, while the common-law system is not. English-speaking immigrants to Mexican Texas liked the simple Spanish pleading system and, when they took Texas from Mexico, the story goes, they took Mexico’s Spanish pleading system with them.

All available evidence suggests that this story is false. Luckily, the true story is better, with interesting characters like a disgraced mayor of New York City, an eccentric English philosopher, an ancient Arab judicial officer, and authors like Shakespeare and Dante.

Naturally, Joseph McKnight wrote more about the origin of Texas pleading than anyone else. He concluded that Texas pleading came from Spain, but a footnote in one of his articles noted some similarities between Austin’s law and Livingston’s law. Professor McKnight’s footnote

has allowed us to reexamine his conclusion and write a new account of the origin of Texas pleading.

## II. THE TRADITIONAL STORY: TEXAS PLEADING CAME FROM SPAIN

The traditional story of the origin of Texas pleading is partly true. Mexico did retain Spanish law when it separated from Spain in 1821.<sup>1</sup> Texas was a part of Mexico, so Spanish law governed Mexican Texas.<sup>2</sup> Mexico began replacing bits and pieces of Spanish law by legislative enactment soon after it separated from Spain, but the old law remained in force unless changed by statute. Spanish pleading law is one of the laws that Mexico retained.<sup>3</sup>

It is also true that the Spanish pleading system consisted of a simple petition and answer,<sup>4</sup> while the common law and equity pleading systems of the United States were formal and complex.<sup>5</sup> In 1840, the Congress of the new Republic of Texas enacted a law to “designate the system of pleading to be observed in our courts.”<sup>6</sup> The 1840 law required that “proceedings in all civil suits shall, as heretofore, be conducted by petition and answer.”<sup>7</sup> Consequently, the system of pleading heretofore in use in the courts of Texas was indeed preserved.<sup>8</sup>

The rest of the traditional story, though, has been conjecture. We have been told that the Spanish system was ideally suited to the needs of English-speaking immigrants and the harsh frontier conditions of Mexican Texas.<sup>9</sup> The immigrants thought the simple Spanish pleading system was easier to use than the common law system back in the United States, so they enacted their preference in the 1840 Texas law and, it has been assumed, kept the Spanish pleading system for Texas.<sup>10</sup>

1. Joseph Webb McKnight, *The Spanish Legacy to Texas Law*, 3 AM. J. LEGAL HIST. 222, 226, n.14 (1959) [hereinafter McKnight, *Spanish Legacy*].

2. Hans W. Baade, *Reflections on the Reception (or Renaissance) of Civil Law in Texas*, 55 SMU L. REV. 59, 61 (2002).

3. Joseph Webb McKnight, *The Spanish Influence on the Texas Law of Civil Procedure*, 38 TEX. L. REV. 24, 28 n.18 (1959) [hereinafter McKnight, *Spanish Influence on Texas Pleading*].

4. SAMUEL HARMAN LOWRIE, *CULTURE CONFLICTS IN TEXAS, 1821–1835*, at 159–61 (1932).

5. John C. Townes, *Sketch of the Development of the Judicial System of Texas*, 2 TEX. HIST. ASSOC. Q. 29, 49–50 (1898).

6. *Underwood v. Parrott*, 2 Tex. 168, 178 (1847).

7. Act approved Feb. 5, 1840, 4th Cong., R.S., §§ 1–37, 1840 Republic of Texas Laws 88, 88–93, 1 H.P.N. GAMMEL, *LAWS OF TEXAS* 262, 262–67 (1898).

8. See, e.g., Joseph W. McKnight, *The Spanish Legacy to Texas Law*, 3 AM. J. LEG. HIST. 222, 227 (1959).

9. Charles T. McCormick, *The Revival of the Pioneer Spirit in Texas Procedure*, 18 TEX. L. REV. 426, 428 (June, 1940) (explaining that “[t]he practice under this system appealed to the robust common sense of the early Texas lawyers. . . . Perhaps also, to borrow a saying of Holmes, ignorance was a great law-reformer”).

10. Act approved Feb. 5, 1840, 4th Cong., R.S., §§ 1–37, 1840 Republic of Texas Laws 88, 88–93, GAMMEL, *supra* note 7, at 262–267; Edward Lee Markham, Jr., *The Reception of the Common Law of England in Texas and the Judicial Attitude toward that Reception, 1840–59*, 29 TEX. L. REV. 904, 909 (1951). Cf. McKnight, *Spanish Legacy*, *supra* note 1, at

### A. REASONS TO BELIEVE THE TRADITIONAL STORY

That has been the story since the early days of the Republic of Texas, well within living memory of Spanish and Mexican rule.<sup>11</sup> It is still the story told today.<sup>12</sup> The learning and accomplishment of the people who have written about this, and the unanimity of their conclusion, tend to suggest that their conclusion is right.

And their conclusion does make sense. The simplicity of the Spanish system seems like the kind of thing that would have appealed to the English-speaking immigrants of Mexican Texas,<sup>13</sup> and the complexity of the common law system would have probably been the kind of thing they disliked.<sup>14</sup> It stands to reason that, after it separated from Mexico, Texas chose the system that was simple instead of the one that was not.

### B. REASONS TO DOUBT THE TRADITIONAL STORY

But there are holes in the traditional story. Perhaps the biggest hole is the text of the laws themselves. Judges and professors who have concluded that Texas pleading law came from Spain have not tried to show that the language, structure, and content of Texas pleading law are like those of Spanish law.<sup>15</sup> A comparison of Spanish and Texas pleading laws shows that they are probably related, but as very distant cousins rather than parents and children.

Then there are the barriers of time, distance, and revolution. Spain ruled Texas for 300 years, but waited over 200 years to plant settlers there.<sup>16</sup> The Spanish governors and military commanders who ruled the small civilian population of Texas spent the next 100 years writing reports

---

224–25 (writing that the 1840 Texas law “was interpreted as legislative authority for the continuation of the Spanish system of pleading,” but also noting that “the act is far from specific in this regard and makes no mention of defensive pleading”).

11. See, e.g., *Fowler v. Poor*, Dallam 401, 403 (1841) (Chief Justice John Hemphill writing for the court, holding that pleadings had been conducted by petition and answer in Texas before the 1840 Texas pleading law).

12. See, e.g., John Cornyn, *The Roots of the Texas Constitution: Settlement to Statehood*, 26 TEX. TECH. L. REV. 1089, 1118 (1995) (explaining that the “act passed on February 5, 1840 rejected arcane modes of common-law pleading in favor of simplified pleading requirements,” and citing *McKnight, Spanish Influence on Texas Pleading*, *supra* note 3, which discussed the suitability of the simple Spanish pleading system for the “ignorance (or lack of training) of local judges”).

13. George C. Butte, *Early Development of Law and Equity in Texas*, 26 YALE L.J. 699, 702 (June 1917).

14. See Stephen F. Austin, Address of the Central Committee to the Convention, April 1, 1833, Austin Papers, Dolph Briscoe Center for American History, The University of Texas at Austin (stating that judges in Texas were ignorant of the law).

15. Instead, they sometimes note the similarity between Texas pleading law and English equity even as they claim that Texas pleading came from Spain. See e.g., *Coles v. Kelsey*, 2 Tex. 541, 552–53 (1847) (observing that “there is a most striking similarity in our forms to the English bill and answer in chancery, so much so as to leave no doubt of their kindred origin. They are both derived from the Roman law, out of which grew up the civil law, which now prevails all over continental Europe with various modifications; ours came to us through the laws of Spain”).

16. DONALD E. CHIPMAN AND HARRIET DENISE JOSEPH, *SPANISH TEXAS 1519–1821*, at 25, 137 (rev. ed. 2010).

and letters longing for more people, more resources, more government, and more law that never really came.<sup>17</sup> Mexico ruled Texas for just 15 years, and for much of that time, the central government was either in chaos<sup>18</sup> or the isolated Anglophone settlements were in some stage of revolt.<sup>19</sup> Spanish and Mexican Texas was not a wilderness void of law and culture—it most certainly did have a Hispanic legal culture that has strongly influenced Texas law to this day<sup>20</sup>—but neither was it the kind of settled, peaceful, prosperous, and effectively governed place that could firmly establish uniform legal practices and pass them on to recent English-speaking immigrants.<sup>EP</sup>]

Part of the problem was a lack of lawyers, judges, and law books in Spanish and Mexican Texas. And that problem was made worse by the fact that only a handful of the English-speaking immigrants would have been able to understand the Spanish-speaking lawyers and judges, or their Spanish law books, anyway. Which is to say that the needs of the Anglophone immigrants and the harsh frontier conditions of Mexican Texas are reason to doubt the traditional story rather than believe it.

To see why, consider the state of the bench and bar in Spanish and Mexican Texas.

### 1. *Texas Had Very Few Licensed Lawyers and Trained Judges*

All judges in Spanish and Mexican Texas were amateurs, even in places like Bèxar that were full of Spanish-speaking settlers, soldiers, and clergy who were in regular contact with the cultural centers of New Spain.<sup>21</sup> For many years, there was effectively no *alcalde* court—a local trial court—in Bèxar at all; the *alcalde* court was run by the governor at the military presidio, rather than a *juez* in a court of law.<sup>22</sup> And when there was an *alcalde*, he was often selected because of family ties, rather than competence. For example, Captain Toribio de Urrutia, the commander of Bèxar, complained to the viceroy in 1740 that the Isleños—recent immi-

---

17. A sample of these kinds of complaints by Texas leaders early in the period of Spanish settlement in Texas is in JESÚS F. DE LA TEJA, *SAN ANTONIO DE BÈXAR, A COMMUNITY ON NEW SPAIN'S NORTHERN FRONTIER* 8–11 (1995). For an extended discussion of the needs and requests of a Texas governor near the end of the period of Spanish rule in Texas, see FÈLIX D. ALMÀRAZ, JR., *TRAGIC CAVALIER, GOVERNOR MANUEL SALCEDO OF TEXAS, 1808–1813*, at 41–60 (1991).

18. ANDRES TIJÈRINA, *TEJANOS & TEXAS UNDER THE MEXICAN FLAG, 1821–1836*, at 95 (1994).

19. EUGENE C. BARKER, *THE LIFE OF STEPHEN F. AUSTIN* 199 (1926) [hereinafter BARKER, *LIFE OF AUSTIN*].

20. TIJÈRINA, *supra* note 18, at 50–51.

21. See Hans W. Baade, *Law and Lawyers in Pre-Independence Texas*, in *CENTENNIAL HISTORY OF THE TEXAS BAR, 1882–1982*, at 241 (State Bar of Texas, 1981) [hereinafter Baade, *Early Texas Law and Lawyers*] (explaining that mastering the Spanish legal system required formal legal training, and that the largest settlement in Spanish Texas was San Antonio, which was a typical frontier military outpost, far from the nearest university was in Mexico City and, after 1792, Guadalajara).

22. GILBERT R. CRUZ, *LET THERE BE TOWNS, SPANISH MUNICIPAL ORIGINS IN THE AMERICAN SOUTHWEST, 1610–1810*, at 152 (1988).

grants to Bèxar from the Canary Islands—were a problem because they selected incompetent *alcaldes*:

The said Isleños govern themselves through two *alcaldes* whom the *cabildo* elect every year from among themselves, and at present the *alcaldes* are father and son-in-law, the notary also being the son-in-law of one and the brother-in-law of the other. . . Those who exercise the posts often, and at present, cannot read nor write, and they are so backward politically that they make no progress.<sup>23</sup>

The problem of illiterate and unqualified judges persisted in Spanish Texas. In 1783, the Bèxar *alcalde* arrested a man for adultery. In an official report about the case, the governor explained that he had criticized the *alcalde* for not charging the defendant according to the requirements of Spanish law. The governor said the *alcalde* responded that he “did not do it because he did not know whether the circumstances were proper for making [a formal charge], for his profession has solely been that of merchant,” and there were no instructions in the town’s archives on how *alcaldes* were to charge people.<sup>24</sup> The next governor of Texas confronted the same problem. Poverty and illiteracy in Bèxar severely narrowed the pool of available judges, so “in many years, the staff of justice and *regidor* posts” —*regidores* were town councilors<sup>25</sup>—“are found in a single family of brothers and sons.”<sup>26</sup>

Inadequate judicial institutions were a problem in Mexican Texas, too. The procedures of the *alcalde* courts remained mostly unwritten and customary throughout the period of Mexican rule.<sup>27</sup> Tejanos complained about the old *hombres buenos* system of trial by conciliation—basically, arbitration by amateur referees.<sup>28</sup> An article of the 1827 Constitution of Coahuila y Texas provided that civil trials by jury should be instituted “as the advantages of this valuable institution become practically known,” but the state never implemented the article.<sup>29</sup>

These amateur judges in Spanish and Mexican Texas presided over cases that were litigated by amateurs. In the whole of northern New Spain—Texas, Nuevo Mexico, and Alta California—there were no government legal counsels.<sup>30</sup> Nor did any university-trained lawyer practice law in Spanish Texas.<sup>31</sup> Lawsuits were supposed to follow pleading rules through the use of non-attorney pleaders, or *procuradores del numero*,

---

23. de la Teja, *supra* note 17, at 141.

24. *Id.*

25. Cruz, *supra* note 22, at 6 n.8.

26. Tijèrina, *supra* note 18, at 155 (quoting Munoz to the Viceory, 7 January 1792, NA).

27. *Id.* at 40.

28. DAVID J. WEBER, *THE MEXICAN FRONTIER, 1821–1846: THE AMERICAN SOUTHWEST UNDER MEXICO* 39–40 (1982).

29. Tijèrina, *supra* note 18, at 41.

30. Hans W. Baade, *The Formalities of Private Real Estate Transactions in Spanish North America, A Report on Some Recent Discoveries*, 38 LA. L. REV. 655, 705 (1978) [hereinafter Baade, *Spanish Formalities*].

31. *Id.* at 702.



but there were none of those either.<sup>32</sup> In 1810, the Spanish Governor of Texas prohibited the practice of using amateur pleaders and named four people as authorized drafters of pleadings in the province, but they probably never had a chance to draft any pleadings.<sup>33</sup> There was an *escribano*, or notary, in Bèxar from 1731–1757 who did perform some crucial legal functions like drafting non-contentious legal business, but he was not a lawyer, and he was never replaced.<sup>34</sup> Toward the end of Spanish rule, the governor accepted the application of a Bèxar resident who wanted to be an *escribano*, but he was never actually hired because there was no money to pay him; the governor appointed a militiaman to perform clerical legal duties instead.<sup>35</sup> Thus, establishing and maintaining Spanish legal procedures would have been extremely difficult in Spanish-speaking areas of Texas. Doing so would have been even more difficult in English-speaking areas, where the people had been long accustomed to a different legal culture.<sup>36</sup>

Certainly, the lack of trained and licensed lawyers, professional judges, and established procedures was not unique to Mexican Texas. These are the kinds of conditions that one would expect to find on any remote and harsh frontier. For example, in the early 19th Century, U.S. Senator Thomas Benton complained about judicial proceedings delayed in Tennessee due to “trifling errors” and “magistrates without legal knowledge,” forcing litigants to “travel a hundred miles across poor roads to Supreme Court sittings and then wait for their cases.”<sup>37</sup> Some people remarked that the legal culture of Spanish and Mexican Texas might have been more sophisticated than the early legal cultures of American states. An immigrant to Texas who had previously settled in Missouri wrote Stephen F. Austin, “I beleave [sic] the laws here are as well administered as they are in Arkansas and perhaps better, and equally as well as they were when I first went to Missouri.”<sup>38</sup>

The topic at hand, though, is not whether Spanish and Mexican Texas had a good or bad judicial system, or whether it was better or worse than

---

32. *Id.*

33. Baade, *Early Texas Law and Lawyers*, *supra* note 21, at 242–43.

34. *Id.* at 243.

35. Almaráz, *supra* note 17, at 80.

36. Hans W. Baade described a similar problem in Louisiana, which was governed by Spanish officials under the laws of Spain, but that was full of Francophone people steeped in French folkways. Discussing whether Spanish marriage law was ever established in rural Louisiana, Baade wrote that “even as late as 1796, there were only two or three ‘Españoles pobres y sin instrucciün’ (‘poor and uneducated Spaniards’) at the various posts, according to Governor Carondelet, so that there was neither the requisite facility with Castilian language and law at that level, nor the need to supply the marriage contract folkways (if any) of a peninsular population.” Hans W. Baade, *Marriage Contracts in French and Spanish Louisiana: A Study in “Notarial” Jurisprudence*, 53 TUL. L. REV. 1, 58, 75 (1979) [hereinafter Baade, *French and Spanish Louisiana*].

37. Tijèrina, *supra* note 18, at 42 (quoting WILLIAM CHAMBERS, OLD BULLION BENTON, SENATOR FROM THE NEW WEST: THOMAS HART BENTON, 1782–1858, at 28 (1956)).

38. Tijèrina, *supra* note 18, at 42 (quoting Eugene Barker, *The Government of Austin’s Colony, 1821–1831*, S.W. HIST. Q. 21, 252 (1918) [HEREINAFTER BARKER, *Government of Austin’s Colony*]).

the one in Arkansas, Tennessee, or Missouri. The question is whether Spanish judicial procedures were used in Mexican Texas so consistently and frequently that the judges and lawyers of independent Texas could have become familiar with them and retained them in preference to the procedures they had used in common law jurisdictions.

If there had been a bar of licensed Anglophone lawyers in Mexican Texas, immigrants might have had a chance to become familiar with Spanish and Mexican legal practice. But only one English-speaking immigrant received any kind of government permission to practice law in Mexican Texas. For several years, Thomas Jefferson Chambers tried to qualify as a *letrado*, a fully licensed lawyer authorized to argue cases for clients in court, but he was thwarted by a series of obstacles, a typical example of which was his failure to have a certificate of baptism.<sup>39</sup> Chambers eventually qualified as *asesor general*, an office that gave formal legal advice to lay judges. He was not, however, an advocate in court, and he became *asesor* only in 1834, near the very end of Mexican rule in Texas. There is no record showing that he had an opportunity to perform his duties.<sup>40</sup> Chambers resigned after just three months to become the trial judge of a district court that had been created by law, but that was never actually established.<sup>41</sup>

Another immigrant who tried to qualify as an attorney was Samuel May Williams. He was one of the most successful lay *abogados* in English-Speaking Texas, practicing law without training or a license. He tried to become an *escribano* but never qualified for the office.<sup>42</sup> All of this suggests that there was, at best, exceedingly little opportunity for legal practitioners to transmit Spanish and Mexican law or practice to the settlers in English-speaking areas of Texas.

## 2. Spanish Law Books Were Extremely Rare in Texas

The reason Williams failed to become an *escribano* was that he could not study for the *escribano* licensing exam. He would have had to read a multi-volume set of *Febrero Reformado*, but he was told that this book could not be had, even in Saltillo—the capital city and center of legal life in the whole of northern Mexico—“*por ningún dinero*.”<sup>43</sup> However, notwithstanding Williams’s inability to buy a copy of *Febrero*, William B. Travis managed to borrow four volumes of a related work, probably the *Febrero Adicionado*, from a friend on September 6, 1833.<sup>44</sup> Travis evidently considered obtaining the volumes to be a notable accomplishment,

---

39. Stephen F. Austin to Samuel M. Williams, February 5, 1831, Austin Papers, Dolph Briscoe Center of American History, University of Texas at Austin.

40. Baade, *Early Texas Law and Lawyers*, *supra* note 21, at 246.

41. *Id.* at 246–47. Chambers probably wrote this law, Coahuila y Texas Decree No. 277, promulgated April 17, 1834.

42. *Id.* at 246.

43. *Id.*

44. WILLIAM BARRETT TRAVIS, DIARY OF WILLIAM BARRETT TRAVIS 9 (Robert E. David, ed. 1966).

because it merited mention in his diary.<sup>45</sup> *Febrero* was still extremely rare in Texas for years to come. Chief Justice John Hemphill of the Texas Supreme Court wrote in 1843 that he did not have access to *Febrero* except for some quotations from it in Louisiana court opinions.<sup>46</sup>

The lack of written Spanish law was a problem even when Texas belonged to Spain. There were no comprehensive repositories of legislation in Spanish Texas, New Mexico, or California.<sup>47</sup> The archives of the Spanish governors of Texas contained mostly political, administrative rules rather than civil legislation and other law.<sup>48</sup> This forced leaders in Spanish Texas to improvise legislation. In the early years of the 19th century, Texas local officials routinely filed legal documents that did not follow any uniform procedure, so in 1810 the governor formulated some basic rules for preparing land conveyances, preserving legal records, and so forth, and then circulated them to towns in the province. Within two weeks, the guidelines were scrapped because they were either ignored or interpreted so broadly that they were not followed.<sup>49</sup>

Copies of recent Mexican legislation were sometimes available in Texas toward the end of the period of Mexican rule,<sup>50</sup> but even as late as 1829, Stephen F. Austin observed that “laws cannot be published in print so that every man will have a copy of them, and there is no other way but for the people to come and read the manuscript translations that are in the office.”<sup>51</sup>

The vast majority of Mexican laws were bound in Spanish books that Austin would not have been able to copy out by hand. The *Siete Partidas* was the primary source of Spanish law.<sup>52</sup> It was an immense, multi-volume 13th century Castilian compendium of ancient Iberian law.<sup>53</sup> Perhaps the most influential sources of Spanish law in the New World was the *Novísima Recopilacion de las Leyes de España*, a 16th century Castilian law.<sup>54</sup> The *Recopilacion* was an attempt to unify the disparate sources of Spanish law into a coherent whole, but it was incomplete, non-system-

45. Baade, *Early Texas Law and Lawyers*, *supra* note 21, at 247 (citing Travis, *supra* note 44, at 8). Travis borrowed the books on September 6; Williams retained Travis in a land dispute on October 9. *Id.* at 45.

46. Joseph W. McKnight, *Law Books on the Hispanic Frontier*, JOURNAL OF THE WEST, July 1988, at 79 [hereinafter McKnight, *Hispanic Frontier*] (citing Scott & Solomon v. Maynard, Dallam 548, 550 (1843)).

47. Baade, *Spanish Formalities*, *supra* note 30, at 706.

48. *Id.*

49. Almaráz, *supra* note 17, at 81.

50. Baade, *Early Texas Law and Lawyers*, *supra* note 21, at 247.

51. Stephen F. Austin to Josiah H. Bell, April 4, 1829, Austin Papers, Dolph Briscoe Center for American History, The University of Texas at Austin.

52. Peter L. Reich, *Siete Partidas in My Saddlebags: The Transmission of Hispanic law from Antebellum Louisiana to Texas and California*, 22 TUL. EUR. & CIV. L. FORUM 79, 81–82 (2007) [hereinafter Reich, *Partidas*] (discussing the reliance of early Texas judges on the *Partidas*).

53. JOHN THOMAS VANCE, THE BACKGROUND OF HISPANIC-AMERICAN LAW 94, 100 (1942) (explaining that the *Partidas* were begun in 1256 and finished in 1265, but did not come into force until 1348).

54. *Id.* at 124–27.

atic, and chaotic.<sup>55</sup> The *Curia Philippica* was a massive 17th Century treatise on civil procedure that would have been a useful source for someone drafting a pleading law in a former Spanish colony.<sup>56</sup> All available evidence indicates that the *Partidas* and *Recopilaciün* were extremely rare in Mexican Texas and were available only in the 1830s.<sup>57</sup> There is no evidence that the *Curia* was available in Spanish or Mexican Texas.<sup>58</sup>

Nor is there evidence that those sources were available during the first few years of Anglophone settlement, when Texas was developing a few of its own legal institutions. In 1826, Stephen F. Austin wrote to Baron de Bastrop, who represented Texas in the legislature of the State of Coahuila y Texas. Austin thought there needed to be “a complete digest of all the laws in force, published in a bound book and generally circulated gratis to every officer civil judicial and militia throughout the State,” but there was none.<sup>59</sup> Thus, historical evidence indicates that Spanish sources of Mexican law were, at best, extremely rare and difficult to obtain in Mexican Texas.

### 3. Few English-Speaking Immigrants Could Use Spanish Legal Sources

Even if Spanish legal sources had been readily available, however, they would have been hard for the immigrants to use. Almost none of the new settlers understood Spanish.<sup>60</sup> Austin thought that unless laws were translated into English, the “settlers [would] be totally debarred all access to courts of Justice, for not one in a hundred understands Spanish.”<sup>61</sup> And much of the Spanish in the law books was so archaic that it would have been extremely difficult to read—even for the few Spanish-speaking immigrants.

For example, many of the words in one of the Spanish laws that scholars have identified as a source of Texas pleading—Law 40, Part 3, of *Las Siete Partidas*—had very different meanings in the 13th century when the law was written than they did in the 19th century when English-speaking immigrants began moving to Texas in large numbers.<sup>62</sup> One of the words

---

55. *Id.* at 126.

56. IUAN DE HEUIA VOLANOS, CURIA PHILIPPICA, DONDE BREVE Y COM PREHEDOSO SE TRATA DE LOS JUYZIOS, MAYORMENTE FORENSES (Valladolid 1605).

57. Baade, *Early Texas Law and Lawyers*, *supra* note 21, at 247. *But see* Reich, *Partidas*, *supra* note 52, at 81 (citing Baade, *Early Texas Law and Lawyers*, *supra* note 21, at 247–48, for the idea that Anglo-American lawyers did have access to those books prior to Texas independence from Mexico).

58. *See generally* Baade, *Early Texas Law and Lawyers*, *supra* note 21; McKnight, *Hispanic Frontier*, *supra* note 46; Reich, *Partidas*, *supra* note 52.

59. Stephen F. Austin to Baron de Bastrop, November 3, 1826, Austin Papers, Dolph Briscoe Center for American History, University of Texas at Austin.

60. Barker, *Government of Austin's Colony*, *supra* note 38, at 239 (citing Stephen F. Austin to B.W. Edwards, September 15, 1825, Austin Papers, Dolph Briscoe Center for American History, University of Texas at Austin).

61. Stephen F. Austin to Baron de Bastrop, November 3, 1826, Austin Papers, Dolph Briscoe Center for American History, University of Texas at Austin.

62. The meaning of the words are so different, in fact, that there is an entire dictionary solely devoted to the *Partidas* and a few smaller works traditionally attributed to King Alphonse X. *See* HERBERT ALLEN VAN SCOY, A DICTIONARY OF OLD SPANISH TERMS

that Law 40 repeatedly uses is *fecha*, which does not mean in the *Partidas* what it has meant in Spanish for the past 500 years: “date.”<sup>63</sup> In Law 40, *fecha* is actually the Spanish word *hecha*, meaning “made.”<sup>64</sup> The initial consonant “f” in Latin and Old Spanish became an aspirate “h” in Iberia around 1500, likely because the speech of pre-Roman peoples of northernmost Spain used the aspirate “h” instead of the sound corresponding to the one denoted by “f.”<sup>65</sup> The phonology of these northern Iberian peoples accompanied the reconquest south over the peninsula in the late 15th century and eventually influenced the dialects of Spanish speakers in New Spain.<sup>66</sup> There is no evidence that English-speaking settlers who understood then-current Spanish would have been aware of, or understood, those linguistic changes. In this way, Law 40 is a reminder that even if there had been Spanish law books and properly trained and licensed lawyers in Mexican Texas, and even if the laws on pleading scattered among the vast volumes of Spanish legal sources could have been identified and organized into a coherent whole, they might not have been understood.

This was an extremely important problem for continued Mexican control over Texas. In 1829, Austin wrote that his colonists could be thrown “into a ferment and create a prejudice against the civil authorities whenever they pleased.”<sup>67</sup> He explained that “they lack the judgment to discriminate between what is the duty of a public officer, and an abuse of his authority— This want of judgement arises from a want of knowledge of the laws by which the persons in office are obliged to be governed.”<sup>68</sup> The fact that the laws were written in a language almost no one could read was a cause of Texas’s secession from Mexico and limited the development of early Texas law.<sup>69</sup> Concomitantly, it limited English-speaking immigrants’ ability to understand Spanish pleading laws. In 1842, the Texas Supreme Court observed that legal questions regarding Spanish pleading left the justices “to find principles and criteria in a language generally unknown to us.”<sup>70</sup> That was just a few years after Texas separated from Mexico, during a time when the experience of Spanish and Mexican law would have been recent and vivid to Texas lawyers—unless, of course, there had not been much experience with it at all.

---

DEFINED IN THE WORDS OF ALFONSO X (1986) (explaining that King Alfonso, the reputed author of a dictionary of the *Partidas*, created Spanish terms to refer to concepts for which there had only been Latin, French, and Italian terms before; these new Spanish words would have been difficult for Spanish readers of the time to understand).

63. 1 DICCIONARIO DE LA LENGUA ESPAÑOLA, REAL ACADEMIA ESPAÑOLA, 635 (1984) (defining “fecha”).

64. 2 DICCIONARIO DE LA LENGUA ESPAÑOLA, REAL ACADEMIA ESPAÑOLA, 723 (1984) (defining “hecha”).

65. ROBERT K. SPAULDING, HOW SPANISH GREW, 88–91 (1943).

66. *Id.*; RALPH PENNY, A HISTORY OF THE SPANISH LANGUAGE, 104 (1991); D. LINCOLN CANFIELD, SPANISH PRONUNCIATION IN THE AMERICAS 3 (1981).

67. Stephen F. Austin to Josiah H. Bell, March 17, 1829, Austin Papers, Dolph Briscoe Center for American History, University of Texas at Austin.

68. *Id.*

69. Markham, *supra* note 10, at 905.

70. *Whiting v. Turley*, Dallam 453, 454 (1842).

And the few experiences that Texas lawyers might have had with Spanish legal sources would likely have been frustrating. The *Partidas*, *Recopilación*, *Curia*, and *Febrero* were each bound in multiple volumes. This would have made them prohibitively difficult to transport in Texas, where there were very few roads and permanent buildings, and the population was scattered in little farms spread over vast distances. Nor were they the only sources of Spanish law: in the late 18th century, the laws of Spain applicable to ultramarine provinces like Texas and Louisiana were estimated to have been scattered across 89 books of 1,543 titles containing 20,335 laws in 23 volumes.<sup>71</sup> There was no Spanish pleading code or a single section of a book discussing procedure. Instead, many legal sources contributed somewhat different information about various aspects of pleading, all of which spread widely across several sections of the vast volumes.<sup>72</sup> Therefore, Spanish law would have been hard to use, even if the volumes had been easily transportable and readily available in Spanish and Mexican Texas.

That is not a criticism unique to Spanish law. The laws of English-speaking jurisdictions were also unorganized, spread across competing, privately-published treatises on the common law and equity, varying from court to court and year to year.<sup>73</sup> But an English-speaking lawyer immigrating to Mexican Texas would have been familiar with common law and equity principles and would have had difficulty making sense of Spanish law which, in addition to being written in another language, was scattered in multiple sources spanning centuries of evolving thought. And the immigrant lawyer would not have had much time to try to make sense of it anyway because rebellion and independence followed so soon after the advent of widespread English-speaking immigration to Texas.

#### 4. *There Was Little Time to Establish Spanish Practice in English-Speaking Texas*

Stephen F. Austin founded his colony of Anglophone immigrants in 1822 in an area that did not have any permanent settlements.<sup>74</sup> Within

---

71. John H. Tucker, Jr., *Louisiana, Laboratory of Comparative Law*, in AMERICAN BAR ASSOCIATION PAMPHLET, PROCEEDINGS OF THE SECTION OF INTERNATIONAL AND COMPARATIVE LAW 33, 34 n.10 (citing GUSTAVUS SCHMIDT, THE CIVIL LAW OF SPAIN AND MEXICO, 102 (1851)).

72. See, e.g., LAS SIETE PARTIDAS DEL REY DON ALFONSO EL SABIO, COTEJADAS CON VARIOS CÓDIGOS ANTIGUOS, POR LA REAL ACADEMIA DE LA HISTORIA, Tomo II, Partida III, Título X, Ley III, 465 (Madrid en la Imprenta Real 1807); *Id.* at 379 (Título II, Ley XL).

73. See, e.g., GEORGE COOPER, A TREATISE OF PLEADING ON THE EQUITY SIDE OF THE HIGH COURT OF CHANCERY (1809); HENRY JOHN STEPHEN, A TREATISE ON THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS (1824); JOSEPH STORY, COMMENTARIES ON EQUITY PLEADINGS (1838).

74. In 1822, Stephen F. Austin wrote a letter to Anastacio Bustamante, the Captain General of Mexico's Eastern Internal Provinces who agreed to let Austin establish a settlement in Mexico. Austin crossed out a paragraph in a draft of the letter. In that paragraph, Austin wrote that his settlement was the first establishment in a wilderness inhabited by Indians. Stephen F. Austin to Anastacio Bustamante, May 10, 1822, Austin Papers, Dolph Briscoe Center for American History, the University of Texas at Austin.

just 12 years, Austin's Colony contained so many English-speaking immigrants that—in the whole of Texas, not just Austin's Colony—Anglos outnumbered Hispanic Texans about five to one.<sup>75</sup> Formal government was not established in Austin's Colony until 1828, and the trial courts there had no contact with the appeals courts in Saltillo, the state capital hundreds of miles away.<sup>76</sup> By 1833, the first skirmishes in the Texas Revolution had already been fought, and Texas would separate from Mexico just three years later.<sup>77</sup> All of which suggests that there was very little time for the Mexican government to communicate, much less establish and enforce, Spanish pleading practice in English-speaking areas of Mexican Texas.

The term “practice” here is important. Spanish legal customs were known for being “subject to loose interpretation and modification according to local circumstances.”<sup>78</sup> The precise form of trial procedure in Spanish and Mexican Texas varied from case to case; it was less a matter of law than of individual judicial preference.<sup>79</sup> This arrangement was known as *arbitrio judicial*, and it was a recognized source of Spanish law, on equal terms with formal law and written doctrine.<sup>80</sup> It gave rise to an axiom of Spanish law: *Obdezco pero no cumplo*—I obey but I do not comply<sup>81</sup>—reflecting an attitude that was intended to reconcile the power of the crown, which on the frontier of New Spain was absolute in theory but absent in practice, with the flexible, ad hoc legal practices inevitable in courts so far away from Spain. This elastic interpretation of law and procedure had advantages—promoting flexibility and responsiveness to local conditions, among other things—but it had the disadvantage of preventing the establishment of consistent Spanish judicial practice in Mexican Texas.<sup>82</sup>

That is very different from concluding that Spanish law could not have influenced later Texas law at all. It most certainly did, and in profoundly important ways. Spanish law is the direct ancestor of crucial areas of substantive Texas law, including family law and water law.<sup>83</sup> And Texas land titles are necessarily interpreted according to the meaning of laws, like those from Spain, which were in effect when the land was first trans-

---

75. Tijerina *supra* note 18, at 23–24. *Cf.* Lowrie, *supra* note 4, at 31 (showing that the ratio was closer to 3 to 1 than 5 to 1).

76. BARKER, *LIFE OF AUSTIN*, *supra* note 4, at 217–18.

77. *Id.* at 384.

78. DE LA TEJA, *supra* note 17, at 140 (citing Peter Marzahl, *Creoles and Government: The Cabildo of Popayan*, *HISP. AM. HIST. REV.* 54, 636 (1974)).

79. CHARLES R. CUTTER, *THE LEGAL CULTURE OF NORTHERN NEW SPAIN* 34–35 (1995).

80. *Id.* at 35–36.

81. Cruz, *supra* note 22, at 152–53 n.48.

82. CHARLES R. CUTTER, *THE LEGAL CULTURE OF NORTHERN NEW SPAIN* 35–36 (1995).

83. JEAN A. STUNTZ, *HERS HIS & THEIRS, COMMUNITY PROPERTY LAW IN SPAIN & EARLY TEXAS* 139 (2005) (discussing the influence of Spanish and Mexican law on early Texas family law); BETTY EAKLE DOBKINS, *THE SPANISH ELEMENT IN TEXAS WATER LAW* 123 (1959) (discussing Spanish influence on early Texas water law).

ferred, claimed, or used in Texas.<sup>84</sup>

But establishing practice is a different matter entirely. It requires the reception of knowledge and the repeated experience of its day-to-day use, and it requires this reception and use by a large enough number of people to render it the habit of the whole. Circumstantial evidence indicates that the period of English-speaking settlement in areas of Texas governed directly under Mexican law was too brief to allow Spanish pleading to become the practice of Anglophone immigrants.

### III. EARLY TEXAS PLEADING LAW DOES NOT LOOK LIKE SPANISH LAW

To see whether any particular Spanish pleading law might be the source of the 1836 Texas pleading law, it is helpful to compare the Spanish law to the Texas law. Legal scholars have used many different methods of comparison to determine the Spanish sources of later laws in non-Spanish jurisdictions.

For example, Joseph McKnight compared Spanish and Texas venue laws, concluding that Spanish law was a source of the Texas venue law because it contained similar language and concepts and was structured in much the same way.<sup>85</sup>

Hans W. Baade, a law professor at the University of Texas, had a slightly different method. He examined Spanish and French laws to trace the origin of Louisiana and Texas laws, looking for shared language and concepts between two laws. He also considered circumstantial evidence. So, if a Texas law displayed “literal borrowings” from an earlier law, it was based on that law;<sup>86</sup> if the Texas law did not display literal borrowings, but its concepts corresponded with the earlier law, then it was likely based on the earlier one.<sup>87</sup> And those conclusions could be strengthened if, for example, the people who wrote the later law were in a position where they would have been likely to use the earlier law, or weakened if they were not.<sup>88</sup>

Raphael J. Rabalais, a law professor at Loyola University in New Orleans, took another approach. He listed judicial decisions that interpreted certain Louisiana laws, then noted the nationality of the sources that each decision cited.<sup>89</sup> The frequency with which a particular source was cited in a discussion of a particular law was an indication of where the law came from.<sup>90</sup>

---

84. Hans W. Baade, *Reflections on the Reception (or Renaissance) of Civil Law in Texas*, 55 SMU L. REV. 59, 62–63 (2002).

85. McKnight, *Spanish Influence on Texas Pleading*, *supra* note 3, at 39–40.

86. *See, e.g.*, Baade, *Spanish Formalities*, *supra* note 30, at 733 n.345.

87. *Id.* at 688.

88. *Id.* at 733.

89. Raphael J. Rabalais, *The Influence of Spanish Laws and Treatises on the Jurisprudence of Louisiana: 1762–1828*, 42 LA. L. REV. 1485, 1497–99 (1982).

90. *Id.* at 1499.



Rodolfo Batiza, a professor of Latin American Legal Studies at Tulane, used a very different method. He looked for the sources of the 1808 Louisiana *Projet* by comparing its language with laws from Spanish, French, Latin, and common law jurisdictions. The 1808 *Projet* was written in French, but Louisiana law had been almost entirely Spanish up to that time.<sup>91</sup> Professor Batiza noted whether a section of the Louisiana law was copied verbatim or almost verbatim from, or influenced or partially influenced by, a particular legal source. If the language of the source was not in French, it could not be considered a direct source. If it was in French and verbatim, it was a direct source; if copied almost verbatim it was likely a source. And if it did not share concepts with the Louisiana law, it could not even be a partial influence on it.<sup>92</sup>

Robert A. Pascal, a law professor at Louisiana State University who studied the sources of Louisiana law, criticized Batiza's system for being preoccupied with word origins rather than the substance of laws.<sup>93</sup> Professor Pascal thought that when comparing two laws in order to determine whether one might be the source of the other, it is a mistake to focus on the words they share, because although the language of the law might be borrowed from the language in a Spanish source, it might really express the institutions, principles, and requirements—which Pascal called the “substance”—of a French law.<sup>94</sup> Pascal therefore focused on the shared substance of laws rather than their words. But even he thought common language could help reveal the sources of law.<sup>95</sup>

Applying each of those methods to the Spanish-language laws that judges and professors have previously identified as sources of Texas pleading law, the reader will notice many differences between them, and a few similarities too. Start with the first Texas pleading law.

In 1836, the Congress of the Republic of Texas enacted a pleading law providing that it shall be the duty of the plaintiff or his attorney in taking out a writ or process, to file his petition, with a full and clear statement of the names of the parties, whether plaintiff or defendant, with the causes of action, and the nature of relief he requests of the court.<sup>96</sup> The 1836 Texas pleading law does not prescribe detailed pleading rules, but it does establish a pleading system.<sup>97</sup> And it has several salient characteristics:

---

91. Rodolfo Batiza, *The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance*, 46 TUL. L. REV. 4, 13–14 (1971).

92. *Id.*

93. Robert A. Pascal, *Sources of the Digest of 1808: A Reply to Professor Batiza*, 46 TUL. L. REV. 603, 609 (1971–1972).

94. *Id.* at 608.

95. *Id.* at 615.

96. An Act Establishing the jurisdiction and powers of the District Courts, Section 8 (Dec. 22, 1836) in GAMMEL, *supra* note 7, at 1261.

97. The Texas Supreme Court has explained that the 1840 Texas law requiring that “all civil suits shall, as heretofore, be conducted by petition and answer”—the law that continued the 1836 Texas pleading law—was “evidently not intended to prescribe the rules, but to designate the system of pleading to be observed in our courts.” *Underwood v. Parrott*, 2 Tex. 168, 178 (1847). “The words ‘petition and answer,’” the Court explained, “being used in opposition to ‘the common law system of pleading,’ not to signify the stages of pleading

(1) it is very short, (2) it involves taking out a writ or process, (3) it requires that a petition be filed, and (4) it must have a full and clear statement containing the names of the parties, the causes of action, and the nature of the relief requested.

To determine whether the 1836 Texas pleading law came from Spain, compare it to each of the Spanish laws that scholars have previously identified as its source.

#### A. LAS SIETE PARTIDAS, PARTIDA III, TITULO X, LEY III

Joseph McKnight thought “the law of Spain with respect to commencing of civil suits by a simple petition and answer as laid down in *Las Siete Partidas* became a permanent part of the law of Texas.”<sup>98</sup> He concluded that the relevant source of the Texas petition-and-answer system of pleading was Law 3, Title 10, Part 3 of the *Partidas*. Here is Law 3, accompanied by Professor McKnight’s English translation and the 1836 Texas pleading law:

<p>Law 3 in Spanish Comenzamiento et raiz de todo pleyto sobre que debe seer dado juicio, es quando entran en el por demanda et por repuesta ante el judgador: et esto se debe facer en esta manera mostrando el demandador su demanda por palabra ü por escripto, segunt deximos desuso en las leyes que fablan de los demandadores et de los demandados, et respondienddo el demandado à aquella demanda llanamente si ü non.<sup>99</sup></p>	<p>Law 3 in English The commencement and foundation of every cause upon which judgment ought to be rendered, are the petition and answer, presented to the judge. And this is done by the plaintiff making the demand either verbally or in writing, in the manner we have explained in those laws which speak of plaintiff and defendant, and defendant answering the claim yea or nay.<sup>100</sup></p>	<p>1836 Texas Pleading Law It shall be the duty of the plaintiff or his attorney in taking out a writ or process, to file his petition, with a full and clear statement of the names of the parties, whether plaintiff or defendant, with the causes of action, and the nature of relief he requests of the court.<sup>101</sup></p>
--	--	--

Professor McKnight did not compare the language of the Law 3 and the 1836 Texas pleading law; he simply expressed his learned conclusion that the former was a source of the latter. However, applying the method

---

to which these words give name, but to designate the system to which they belong.” *Id.* The Court continued, “These words, then, were not intended as a restriction or limitation of the pleadings to the answer, but as the designation of a system of pleadings – that being the subject present to the mind of the legislature, who were not treating of a declaration or plea, or of a petition or answer, but of the remedial systems in which those terms are employed.” *Id.* at 178–79.

98. McKnight, *Spanish Influence on Texas Pleading*, *supra* note 3, at 28.

99. LAS SIETE PARTIDAS DEL REY DON ALFONSO EL SABIO, COTEJADAS CON VARIOS CODICES ANTIGUOS, POR LA REAL ACADEMIA DE LA HISTORIA, Tomo II, Titulo X, Ley III, 465 (Madrid en la Imprenta Real 1807) (c. 180 words removed in order to quote only the part of Law 3 that is relevant).

100. McKnight, *Spanish Influence on Texas Pleading*, *supra* note 3, at 28.

101. Act approved Dec. 22, 1836, 1st Cong., R.S., §8, 1836–37 Repub. Tex. Laws 198, 201, in GAMMEL, *supra* note 7, at 1258, 1261.

that he used on Spanish and Texas venue law to compare Spanish and Texas pleading law reveals several important differences between Law 3 and the 1836 Texas pleading law.

Although both laws are about pleading, and they both discuss the plaintiff, defendants, and submitting petitions to a court, Law 3 is different from the Texas law in that: (1) it is much longer than the Texas law, (2) it does not mention taking out a writ or process, and (3) it does not require that a petition have a full and clear statement containing the names of the parties, the causes of action, and the nature of the relief requested. The laws are conceptually related in only the most general way; they are not structured similarly, and they do not have any language in common. Under Professor McKnight's method for finding Spanish sources of Texas law, the 1836 Texas pleading law does not appear to have come from Law 3 of the *Partidas*.

The result would be the same under other law professors' methods of determining the origin of laws in old Spanish jurisdictions. There are none of the "literal borrowings" or shared concepts that would be needed to pass Professor Baade's test;<sup>102</sup> no known Texas case has cited Law 3, so it would fail Professor Rabalais's criteria;<sup>103</sup> there is no verbatim or near-verbatim language, so it would not meet Professor Batiza's requirements;<sup>104</sup> and Law 3 and the 1836 Texas pleading law would probably not have enough substance in common for Professor Pascal.<sup>105</sup> McKnight, Baade, Rabalais, Batiza, and Pascal assign different levels of importance to different factors, but they all engaged in fundamentally the same exercise: looking for similarities between laws that might be the sources of other laws. Having looked for similarities between Law 3 of the *Partidas* and the 1836 Texas pleading law, the two do not appear to be related.

#### B. NOVÍSIMA RECOPIACION, 1502 ORDINANCE OF FERDINAND AND ISABELLA

Professor McKnight also thought a 1502 ordinance of Ferdinand and Isabella found in the *Novísima Recopilación* was a source of Texas pleading.<sup>106</sup> The 1502 ordinance provides in part:

---

102. Baade, *Spanish Formalities*, *supra* note 30, at 733 n. 345.

103. Rabalais, *supra* note 89, at 1497–99.

104. Batiza, *supra* note 90, at 13–14.

105. Pascal, *supra* note 92, at 608–15.

106. McKnight, *Spanish Influence on Texas Pleading*, *supra* note 3, at 28 n. 19.

<p>1502 Ordinance in Spanish          Ordenamos y mandamos, que ántes que al actor, que viene al nuestro Consejo, ù á qualquier de nuestras Audiencias á mover pleyto, se le dé carta de emplazamiento, si viniere en persona, haya de presentar su demanda, y poner su caso de Corte: y si entiende que puede probar su demanda por escrituras, las presente luego con la informacion de caso de Corte; y si no tuviere escrituras, haga juramento, que cree y entiende quetiene testigos con que puede probar su demanda<sup>107</sup></p>	<p>1502 Ordinance in English          We order and send a letter of formal notice, that before the plaintiff comes to our Council or any of our Audiencias to press his lawsuit, if he comes in person, he must present his lawsuit and set his Court case: and if he thinks he can prove his claim with documents, then present them with the Court case information: and if he has no documents, make an oath, that he believes and understands that he has witnesses with which he can prove his claim</p>
--	---

The 1502 Ordinance does mention petitions and plaintiffs, but, like Law 3, (1) it is much longer than the Texas law, (2) it does not mention taking out a writ or process, and (3) it does not require that a petition have a full and clear statement containing the names of the parties, the causes of action, and the nature of the relief requested. Any connection between the 1502 ordinance and the 1836 Texas pleading law would be faint. The ordinance does not appear to be a source of Texas pleading law.<sup>108</sup>

#### C. NOVÍSIMA RECOPIACION, 1348 ORDINANCE OF ALCALÁ

Professor McKnight thought another section of the *Recopilacion* was a source of Texas pleading law, the 1348 Ordinance of Alcalá. It provides in relevant part as follows:

<p>1348 Ordinance in Spanish          Nos, por abreviar los pleytos, establecemos, que en los pleytos que anduvieren en nuestra Corte, y en las ciudades, y villas y lugares de nuestros Reynos, que del día que la demanda fuere puesta al demandado ù su Procurador, sea tenuto à responder derechamente á la demanda, contestando el pleyto<sup>109</sup></p>	<p>1348 Ordinance in English          We, in order to abbreviate the pleadings, establish that, in the pleadings which may be heard in our Court, and in the cities, towns, and places of our Kingdoms, that from the day the petition is brought to the defendant or his Attorney, he answer the pleading, by responding directly to the claim</p>
--	---

107. 5 NOVÍSIMA RECOPIACION DE LAS LEYES DE ESPAÑA, LIBRO XI, TITULO III, DE LAS DEMANDAS, LEY I, D. FERNANDO Y D. ISABEL EN LAS ORDENANZAS DE MADRID DE 4 DE DIC. DE 1502, cap. I, 184 (Madrid 1805) (internal notations and c.540 words removed after the end of the quoted passage in order to include only relevant language).

108. McKnight, *Spanish Influence on Texas Pleading*, *supra* note 3, at 36–40 (finding the Spanish source law of a Texas venue law by observing similarities in language, content, and structure); Baade, *Spanish Formalities*, *supra* note 30, at 733 n. 345 (finding the Spanish sources of Texas mortgage laws by noting shared language, and probative circumstantial evidence); Batiza, *supra* note 90, at 13–14 (determining the sources of Louisiana law by noting verbatim and near-verbatim language between various laws); Pascal, *supra* note 92, at 608–15 (relying primarily on commonalities of substance between two laws to determine whether one was the source of the other). Nor are there any reported Texas appellate court cases that have identified the 1502 Ordinance as a source of Texas pleading law. *Cf.* Rabalais, *supra* note 89, at 1497–1504 (identifying the Spanish, French, and common law sources of Louisiana law by compiling lists of court decisions that cite source laws).

109. 5 NOVÍSIMA RECOPIACION DE LAS LEYES DE ESPAÑA, LIBRO XI, TITULO VI, DE las contestaciones, Ley I, tit. 7. del Ordenamiento de Alcalá, 192 (Madrid 1805) (18 words

The 1348 ordinance is about pleading, it mentions the defendant, and it is short but, like Law 7 and the 1502 Ordinance, (1) it does not mention taking out a writ or process, and (2) it does not require that a petition have a full and clear statement containing the names of the parties, the causes of action, and the nature of the relief requested. Again, this law does not appear to be closely related to the 1836 Texas pleading law.<sup>110</sup> Other Spanish laws, however, might be.

D. LAS SIETE PARTIDAS, PARTIDA III, TITULO II, LEY XL

Several law professors have concluded that the Texas pleading system was based on Title II, Law 40, Part III of the *Partidas*,<sup>111</sup> which provides as follows:

<p>Law 40 in Spanish          Libellus en latin tanto quiere decir como demanda fecha por escripto: et esta es una de las dos maneras por que se puede facer, et la otra es por palabra; pero la mas cierta es la que por escripto se face porque non se puede camiar nin negar asi como la otra. Mas en qualquier destas demandas para seer fechas derechamente deben hi seer catadas cinco cosas; la primera el nombre del juez ante quien debe seer fechas, la segunda el nombre del que la face, la tercera el de aquel contra quien la quiere facer, la quarta la quantia, ó la cosa ó el fecho que demanda, la quinta por qué razon la pide; ca seyendo todas estas cosas puestas en law demanda, cierto puede seer el demandado por ellas en qué manera debe responder, et otrosi el demandador sabrá mas certamente qué es lo que ha de probar, et sobre todo tomará apercibimiento el juez para ir adelante por el pleyto derechamente.<sup>112</sup></p>	<p>Law 40 in English          By <i>libellus</i> in latin is meant a petition in writing. This is one of the two ways in which a suit may be instituted; the other is by words. But the most certain is that which is reduced to writing, as it cannot be changed or denied as the other may be. In whatever manner the suit is brought, however, that it may be legally done five things must be carefully set forth in the petition. The first is the name of the judge before whom the suit is brought; the second, the name of the plaintiff; the third, the name of the defendant: the fourth, the thing, or quantity, or amount, or the fact which is the object of the suit; the fifth the cause of action. For all these things being set forth in the petition, the defendant will know with certainty what to answer, the plaintiff what to prove, and the judge how to inform himself of the whole matter, and to proceed in the cause, according to law.<sup>113</sup></p>
--	--

removed before the beginning of the quoted passage, and c. 70 removed after it, to include only relevant language).

110. McKnight, *Spanish Influence on Texas Pleading*, *supra* note 3, at 28 (finding the Spanish source law of a Texas venue law by observing similarities in language, content, and structure); Baade, *Spanish Formalities*, *supra* note 30, at 733 n. 345 (finding the Spanish sources of Texas mortgage laws by noting shared language, and probative circumstantial evidence); Batiza, *supra* note 90, at 13–14 (determining the sources of Louisiana law by noting verbatim and near-verbatim language between various laws); Pascal, *supra* note 92, at 608–15 (relying primarily on commonalities of substance between two laws to determine whether one was the source of the other). Nor are there any reported Texas appellate court cases that have identified Ordinance of Alcalá as a source of Texas pleading law. *Cf.* Rabalais, *supra* note 89, at 1497–1504 (identifying the Spanish, French, and common law sources of Louisiana law by compiling lists of court decisions that cite source laws).

111. *See, e.g.*, McCormick, *supra* note 9, at 427 (quoting the translation from 1 MOREAU AND CARLETON, *THE LAWS OF LAS SIETE PARTIDAS* 57–58 (1820)).

112. LAS SIETE PARTIDAS DEL REY DON ALFONSO EL SABIO, COTEJADAS CON VARIOS CODICES ANTIGUOS, POR LA REAL ACADEMIA DE LA HISTORIA, TOMO II, Partida Segunda Y Tercera, Partida III, Titulo II, 379 (Madrid en la Imprenta Real 1807). It continues, “And though learned men may well understand what is here laid down, yet as there are many who cannot, we will explain, with more certainty, how a suit is to be commenced, either in writing, or verbally. When, therefore, the plaintiff appears before the judge, he ought to say: ‘before you, Don such a one, judge of such a place, I such a one, complain of

Like the 1836 Texas pleading law, Law 40 requires that a petition contain (1) the parties' names, (2) the cause of action, and (3) the nature of the relief requested. But, (1) it is much longer than the Texas law, (2) it requires the name of the judge, (3) it does not mention taking out a writ or process, and (4) it does not require the full and clear statement. Law 40 is likely not a source of the Texas pleading law, because the three items they both require are described in very different terms, and, of course, each requires items that the other does not.<sup>114</sup> However, Law 40 is similar enough to the Texas pleading law to permit the inference that they are related. As we shall see, they are indeed related, but the Texas pleading law is not a direct descendent of Law 40. The relationship is instead allusive and imitative: the 1836 Texas pleading provision retains vestiges of laws that intentionally used some of the words and ideas of the legal tradition to which Law 40 belongs.<sup>115</sup>

#### E. FEBRERO ADICIONADO

The pleading provision of Febrero quotes some of the oldest language of that legal tradition, Latin verses that tie Spanish pleading to Roman procedure. Here is the section on pleading in an edition of *Febrero* that could have been the one that Travis used, part of a three-volume set printed in Madrid in 1818:

<p>Febrero in Spanish  <i>La demanda ù libelo es un escrito en que se refiere lo que el actor pretende eo juicio. Esta demanda se ha de poner por escrito, y firmar de Letrado conocido. (1) Y contienen los siguientes versos: 'Quis, quid, coram quo, quo jure petator, &amp; a que recte compositus quisque libellus habet.'</i><sup>116</sup></p>	<p>Febrero in English  The petition or lawsuit is a writing that refers to what the actor intends to claim at trial. This petition must be written down, and signed by a known lawyer. And should contain the following verses: "Any orderly petition should include who, what, and before whom justice is sought."</p>
---	---

such a one, that he owes so many maravedis which I lent him, wherefore I pray you to condemn him to pay me.' In this manner all suits are to be brought, changing the expressions, according to the nature of the thing sued for." 1 THE LAWS OF LAS SIETE PARTIDAS, WHICH ARE STILL IN FORCE IN THE STATE OF LOUISIANA, TRANSLATED FROM THE SPANISH BY L. MOREAU LISLET AND HENRY CARLETON 57-58 (1820).

113. Lislet and Carleton, *supra* note 112, at 57-58.

114. McKnight, *Spanish Influence on Texas Pleading*, *supra* note 3, at 36-40 (finding the Spanish source law of a Texas venue law by observing similarities in language, content, and structure); Baade, *Spanish Formalities*, *supra* note 30, at 733 n.345 (finding the Spanish source law of various Texas commercial laws by noting shared language, and probative circumstantial evidence); Rabalais, *supra* note 89, at 1497-1504 (finding the Spanish, French, and common law sources of Louisiana law by compiling lists of court decisions that cite source laws); Batiza, *supra* note 90, at 13-14 (determining the sources of Louisiana law by noting verbatim and near-verbatim language between various laws); Pascal, *supra* note 92, at 608-15 (relying primarily on commonalities of substance between two laws to determine whether one was the source of the other).

115. See *infra* Part IV(B)(4)(b), "Livingston's Law Intentionally Connected Equity with Spanish Law."

116. FEBRERO ADICIONADO, Ó Librería de Escribanos, Parte Segunda, Tomo III, Cap. I, § II, 11-12 (Madrid: 1818) (c. 150 words within the original text of the quoted passage that are not directly relevant have been removed).

The provision begins with a brief description of what pleading is and how it must be done, followed by the number (1), which refers to a footnote explaining that the passage is related to several sources of Spanish law, including Law 40 of the *Partidas* and the 1502 Ordinance of Ferdinand and Isabella of the *Recopilacion*.<sup>117</sup> The lines beginning, “Quis, quid” are Latin verses that describe what is known as the libellary pleading system of Roman, civil, and canon law (which is the law of the Roman Catholic Church), as well as English equity.<sup>118</sup>

The Febrero pleading provision continues for several thousand words after the Latin verses, providing great detail about the parties, court, and claim. It is similar to the 1836 Texas pleading law in that it requires that a petition be filed that contains the names of the parties and cause of action; but it is different because it (1) is very long, (2) does not require taking out a writ or process and (3) does not require a full and clear statement. Its substance and language appear to be too different from those of the 1836 Texas Pleading law in order for it to be a source of the Texas law.<sup>119</sup> However, the Febrero pleading provision’s quotation of Roman pleading does tie it to elements of both Spanish and English-language legal sources, inviting the same deduction suggested by Law 40: that it might be related, somehow, to the 1836 Texas pleading law.

#### F. LEYES DE COAHUILA Y TEXAS, DECRETO 277

Judges and lawyers have cited one other Spanish-language law as a source of Texas pleading. In 1842, the Supreme Court of the Republic of Texas held that the 1840 act “abolishing the common law system of pleading and requiring suits to be by petition and answer, as theretofore” requires that pleadings “are not to be regulated by the common law, but referred to the doctrines and jurisprudence coming to us through Coahuila.”<sup>120</sup> John Townes, a former Texas district judge and University of Texas law professor, concluded that the Supreme Court was referring to Article 94 of Decree 277, an 1834 law of the Mexican state of Coahuila y

---

117. *Id.* at 50 n.1.

118. JOSEPH STORY, COMMENTARIES ON EQUITY PLEADINGS, AND THE INCIDENTS THEREOF, ACCORDING TO THE PRACTICE OF THE COURTS OF EQUITY, OF ENGLAND AND AMERICA 19 (1840).

119. McKnight, *Spanish Influence on Texas Pleading*, *supra* note 3, at 36–40 (finding the Spanish source law of a Texas venue law by observing similarities in language, content, and structure); Baade, *Spanish Formalities*, *supra* note 30, at 733 n.345 (finding the Spanish sources of Texas mortgage laws by noting shared language, and probative circumstantial evidence); Batiza, *supra* note 90, at 13–14 (determining the sources of Louisiana law by noting verbatim and near-verbatim language between various laws); Pascal, *supra* note 92, at 608–615 (relying primarily on commonalities of substance between two laws to determine whether one was the source of the other). Nor are there any reported Texas appellate court cases that have identified the pleading provision of this work as a source of Texas pleading law. *See* Rabalais, *supra* note 89, at 1497–1504 (identifying the Spanish, French, and Common Law sources of Louisiana law by compiling lists of court decisions that cite source laws).

120. *Whiting v. Turley*, Dallam 453, 454 (1842).

Texas.<sup>121</sup> Decree 277 provides in relevant part:

<p>Decree 277 in Spanish Para entablar juicio por escrito, ocurrirá el interesado al juez de la instancia en la jurisdiccion respectiva, y espondrá su demanda en una peticion sencilla; pero clara. El juez citará inmediatamente al reo por escrito, senalandole dia para contester y es-presando en la citacion el nombre del actor, y el asunto ó materia de la demanda. El sherif notificara la citacion al reontregandole copia certificada de ella.<sup>122</sup></p>	<p>Decree 277 in English In order to commence an action by writing, the complainant shall present himself before the primary judge of the respective jurisdiction, and shall file suit in a simple but clear petition. The judge shall immediately cite the defendant by a written notice, appointing the day of trial, and expressing in the citation the name of the plaintiff and the subject of the demand. The sheriff shall notify the defendant of the citation, and deliver him a certified copy.<sup>123</sup></p>
--	---

The pleading law in Decree 277 requires all of the information that the 1836 Texas pleading law requires. Perhaps more importantly, the Decree requires that the *peticion* be simple—*sencilla*—but clear. That is not quite the same as the “full and clear statement” required by the 1836 Texas pleading law, but it is conceptually similar, describing how information in the petition must be presented. The Decree also uses some wording that the 1836 law uses: the former requires a clear petition, and the latter a clear statement in a petition. These features indicate that the 1836 Texas pleading law is very closely related to the Decree.<sup>124</sup> Circumstantial evidence, however, strongly indicates that, although they are related to one another, Decree 277 is not a Spanish source of Texas pleading law.<sup>125</sup>

In the summer of 1835, English-speaking settlements of Mexican Texas formed a Consultation to plan for imminent war with Mexico and establish a new Texas government.<sup>126</sup> The General Council of the Consultation enacted a Plan for the Provisional Government of Texas that fall. It suspended all civil proceedings, other than actions on certain writs, until the

121. Townes, *supra* note 5, at 49 (referring to his quotation of Article 94 of Decree 277 on pages 37 and 38. He also wrote that, “Theoretically, this law remained in force until the meeting of the Consultation at San Felipe de Austin, on October 15, 1835, and the establishment by it of the provisional government, consisting of a governor, lieutenant governor, and council, who were authorized to administer the affairs of state.” *Id.* at 38.

122. Decreto 277, Artículos 94–96, Sección 6, De la administracion de justicia en lo civil, Par. 2–Del Juicio Escrito, in LAWS AND DECREES OF THE STATE OF COAHUILA AND TEXAS, IN SPANISH AND ENGLISH 265 (Houston, Telegraph Power Press 1839) (internal notations and a reference to arbitration removed).

123. This is the author’s translation. The English translation in circulation during the 1830s uses the phrase “petition plainly and clearly expressed” instead of “simple but clear petition.” *Id.*

124. McKnight, *Spanish Influence on Texas Pleading*, *supra* note 3, at 28; Rabalais, *supra* note 89, at 1497–1504; Batiza, *supra* note 90, at 13–14; Pascal, *supra* note 92, at 608–15.

125. See Baade, *Spanish Formalities*, *supra* note 30, at 733 (using circumstantial evidence to help determine the source of Texas mortgage law).

126. PAUL D. LACK, THE TEXAS REVOLUTIONARY EXPERIENCE: A POLITICAL AND SOCIAL HISTORY 42–43 (1992).



General Council of the provisional government otherwise directed.<sup>127</sup> On January 22, 1836, the General Council approved a judiciary ordinance providing that “courts of justice”—including the Superior Court of Texas, the court system that Decree 277 had created the year before—are declared open,” and “the suspension of civil proceedings shall cease from and after this day.”<sup>128</sup> But the courts that Decree 277 declared opened were never established, and never opened.<sup>129</sup> The General Council approved the judiciary ordinance immediately after it approved a resolution calling for reinforcements at the Alamo,<sup>130</sup> and immediately before it approved a resolution creating a commission to make a treaty with the Comanches.<sup>131</sup> Accordingly, both the Superior Court of Texas and the rules of practice that would govern it were vitiated by war and independence. Which is to say that Decree 277 almost certainly could not have been a source of the 1836 pleading law.

Nor was Decree 277 Spanish. There is nothing like it in the *Partidas*, *Recopilacion*, or *Febrero*. Two sections of an 1858 edition of the *Curia* do use the adjective *sencilla* to describe pleadings, like Decree 277 does: Section 471 refers to “*la naturalidad y sencillez que do suyo exige la narraciün historica*” in pleadings, or the “naturalness and simplicity that the historical narrative requires;”<sup>132</sup> and section 474 provides, “*Debe, pues, este libelo ser ligero y sencilla en la narracion del hecho*,”<sup>133</sup> meaning that the petition must be light and simple in its narration of fact. However, there is no record that anyone in Mexican Texas had a copy of the *Curia*.<sup>134</sup> Nor is there a reference to *sencilla* pleadings in editions of the *Curia* that were available in Mexico and Spain in 1834, when Decree 277 was promulgated. And the references to the term *sencilla* in the mid-19th century edition of the *Curia* are obscure, extremely small parts of an extremely long treatise on civil procedure, but the reference to *sencilla* in Decree 277 is conspicuous, one of a very few features of a short law on pleading. If Decree 277 could have used some earlier version of the *Curia* as a source, it would probably have included terms that were important in the *Curia* and avoided an obscure term like *sencilla*. Perhaps most importantly, the term *sencilla* does not perform the function it performs in De-

127. *Plan and Powers of the Provisional Government of Texas, Article VI*, in GAMMEL, *supra*, note 7, at 911.

128. Ordinances and Decrees of the General Council of the Provisional Government of Texas, An Ordinance and Decree for opening the several Courts of Justice, appointing Clerks, Prosecuting Attorneys, and defining their duties, & c., Section 1, January 16, 1836, in GAMMEL, *supra* note 7, at 1039.

129. Townes, *supra* note 5, at 38.

130. Ordinances and Decrees of the General Council of the Provisional Government of Texas, January 17, 1836 in GAMMEL, *supra* note 7, at 1037 (Resolutions providing for the Troops at Bexar, Section 3).

131. *Id.* at 1047 ( Resolutions appointing Commissioners to treat with the Comanche Indians).

132. CURIA FILIPICA MEJICANA, OBRA COMPLETA DE PRACTICA FORENSE, SUMARIO AL XVI, DE LAS DEMANDAS, § 471, 140 (1858).

133. *Id.* § 473.

134. See generally Baade, *Early Texas Law and Lawyers*, *supra* note 21; McKnight, *Hispanic Frontier*, *supra* note 46; Reich, *Partidas*, *supra* note 52.

Decree 277. In the *Curia*, it describes the pleader's recitation of facts; in Decree 277, the recitation of facts is written by the judge in the citation, and it is the petition rather than the citation that must be full and clear.

And those are not the only reasons to doubt that Decree 277 came from Spain. In the *Partidas*, *Recopilaciün*, *Febrero*, and *Curia*, a *demanda* is a petition,<sup>135</sup> but in Decree 277, a *demanda* is a demand, and a *peticion* is a petition.<sup>136</sup> Similarly, Decree 277 uses the word “*sherif*,” which is *voz inglesa*, an English term referring to an office in English-speaking jurisdictions.<sup>137</sup> The term is not used in the *Partidas*, *Recopilaciün*, *Febrero*, or the *Curia*. Thus, Spanish words like *demanda*, *peticion*, and *sherif* in Decree 277 appear to have been chosen based on how similar they look to common English terms, replacing the terms of art in Spanish pleading laws.

This conclusion is strongly supported by several other pieces of evidence. First, Decree 277 applied only to Texas, where English-speakers vastly outnumber Spanish speakers.<sup>138</sup> It did not apply to the rest of Coahuila y Texas, or to any other Mexican state.<sup>139</sup> Uniquely among the decrees of Coahuila y Texas, it provided that it should be published in English.<sup>140</sup> And parts of Decree 277 introduced trial by jury and other features characteristic of common-law jurisdictions.<sup>141</sup> Finally, authorship of Decree 277 has long been attributed to Thomas Jefferson Chambers, the Alabama lawyer who tried to qualify as a licensed attorney in Mexi-

---

135. FEBRERO, *supra* note 116, at 50 (referring to a petition as a *demanda*, not a *peticion*). Febrero does not refer to a pleading as a *peticion*; it uses the word *peticin* to mean a request for some kind of legal status or right. *See id.* at 28 (referring to a *peticiün herencia*, or petition of heirship).

136. JOHN SAYLES, PRECEDENTS AND RULES OF PLEADING IN CIVIL ACTIONS IN THE COUNTY AND DISTRICT COURTS OF TEXAS 392 (1893) (noting that in the civil law, the “demand was the petition to the judge that he command the defendant to give, to pay, or to do something”). At the time Decree 277 was written, a *demanda* could be a demand or a petition, and a *peticiün* could be a petition. 1 NEUMANN AND BARETTI’S DICTIONARY OF THE SPANISH AND ENGLISH LANGUAGES 154, 415 (1839).

137. DICCIONARIO DE LA LENGUA ESPAÑOLA, REAL ACADEMIA ESPAÑOLA, *Sheriff*, <http://dle.rae.es/?id=XM6HUPq> (noting that *sheriff* is “voz. Ingl.,” and defining a sheriff as follows: “En los Estados Unidos de América y en ciertas regions o condados británicos, representante de la justicia, que se encargade hacer cumplir la ley”). One dictionary published near the time when Decree 277 was promulgated defines the term *esherif* as a “magistrado . . . de Inglaterra.” 2 NEUMANN AND BARETTI’S DICTIONARY OF THE SPANISH AND ENGLISH LANGUAGES 491 (1827), but *sheriff* does not appear to have been a term in common Spanish usage. Many Spanish dictionaries of the time define the word *alguacil*, *see, e.g., Felipe Fernandez, A Dictionary of the Spanish and English Languages*, ALG-ALH (1817), which was the usual term to refer to an officer of the Hispanic world who performed many of the functions associated with a sheriff of the English-speaking world. . . . In Decree 277, the term *alguacil* is used to refer to a constable—an office of the English speaking peoples—who assists the sheriff. Decreto 277, Artículo 22, LAWS AND DECREES OF THE STATE OF COAHUILA AND TEXAS, IN SPANISH AND ENGLISH 257 (Houston, Telegraph Power Press 1839).

138. Tijerina, *supra* note 18, at 23–24.

139. Decree 277, Artículo 140, (April 17, 1834), in LAWS AND DECREES OF THE STATE OF COAHUILA AND TEXAS, IN SPANISH AND ENGLISH 270 (Houston, Telegraph Power Press 1839).

140. *Id.*

141. Townes, *supra* note 5, at 36–37.

can Texas.<sup>142</sup> There is little more than tradition to support the notion that Chambers, specifically, wrote Decree 277, but there is lexical evidence indicating that some English-speaking immigrant did.

Its requirement that a *peticion* be *sencilla pero clara* is exactly like the requirement that Stephen F. Austin included in his colony's 1824 pleading law, that a "petition" state a complaint in "a short but clear" manner.<sup>143</sup> This explains the inclusion of the word *sencilla* in Decree 277 in 1834 much better than an obscure reference in an 1858 edition of the *Curia*.

All of this evidence indicates that the pleading provision of Decree 277 was not based on Spanish legal sources. Ultimately, all of the salient characteristics of Decree 277—that it shares many features with the 1836 pleading law, that it is not descended from Spanish law, and that it appears to be related to an 1824 law written by Stephen F. Austin—point toward the true source of Texas pleading law.

#### IV. TEXAS PLEADING CAME FROM ENGLAND THROUGH LOUISIANA

Many conditions restricted the degree to which Spanish law influenced legal procedure in the English-speaking settlements of Mexican Texas: the short length of time in which English-speaking settlers lived under Mexican rule, the language barrier, the distance from courts and other Mexican governmental institutions, and a lack of legal training and texts were important limitations on Spanish influence. But all of those factors pale in importance to this: the Mexican government formally, officially, and repeatedly decreed that Stephen F. Austin, not Spanish and Mexican law, governed legal affairs in Austin's Colony during the years when English-speaking immigrants were establishing many of the institutions and practices that the Republic and State of Texas would eventually retain.

##### A. STEPHEN F. AUSTIN'S 1824 REGULATIONS FOR THE ALCALDES

To understand the development of pleading law from Austin's Colony to the present day, it is necessary to review the status of Spanish and Mexican law in English-speaking areas of Texas in the early 1820s.

##### 1. *No Law Was in Effect in Texas When Austin Founded His Colony*

In 1821, Texas Governor Antonio Martinez granted Austin permission to establish a colony in Texas for 300 families from the United States.<sup>144</sup>

---

142. Daffan Gilmer, *Early Courts and Lawyers of Texas*, 12 TEX. L. REV. 435, 444 (1934). Charles T. McCormick said that Chambers wrote the Decree. McCormick, *supra* note 9, at 429–30.

143. Civil Regulations for the Alcaldes, Article 3, in STEPHEN F. AUSTIN, ESTABLISHING AUSTIN'S COLONY, 76 (David B. Gracy, II, ed. 1979) [hereinafter *Austin's Alcalde Code*].

144. Barker, *Government of Austin's Colony*, *supra* note 38, at 225 (citing letter from Martinez to Austin, August 14, 1821).

Governor Martinez told Austin that there were no laws and institutions governing his colony, so Austin would have to make up his own:

You will cause the colonists to understand that until the government organizes the authority which is to govern them and administer justice, they must be governed by and subordinate to you; for which purpose I authorize you, as their representative and relying on your faithful discharge of the duty. You will inform me of whatever may occur, in order that such measures may be adopted as may be necessary.<sup>145</sup>

Austin wanted to make sure that the governor's decision was legal, so he went to Mexico City to lobby congress to pass a law confirming Austin's authority.<sup>146</sup> While Austin was lobbying in Mexico City, Emperor Iturbide dissolved the congress and created a junta,<sup>147</sup> which decreed that

[U]ntil the government of the settlement is organized, [Austin] is charged with the administration of justice, settling all differences which may arise among the inhabitants, and preserving good order and tranquility, rendering an account to the government of any remarkable event that may occur.<sup>148</sup>

On his way back to Texas, Austin stopped in Monterrey to ask the commandant general of Texas, Coahuila, and Nuevo Leon to give him instructions or copies of laws to help him govern his colony in conformity with Mexican law.<sup>149</sup> The commandant forwarded Austin's request to the provincial deputation, which decreed that, until formal government was established, Austin had the "power to administer justice," and that the "colonists should recognize Austin's power and obey his orders."<sup>150</sup> The commandant then sent a letter to Baron de Bastrop, who was at that time the Mexican commissioner for Austin's colony, instructing him to tell the colonists that

Austin is authorized by the government to administer justice in that district . . . which you will make known to the inhabitants of said district, in order that they may recognize the said Austin, invested with said powers, and obey whatever he may order.<sup>151</sup>

---

145. *Id.*

146. Gilmer, *supra* note 142 at 437–38.

147. HUBERT HOWE BANCROFT, HISTORY OF MEXICO, THE WORKS OF HUBERT HOWE BANCROFT 785 (A.L. Bancroft & Co., 1885).

148. DUDLEY G. WOOTEN, 1 A COMPREHENSIVE HISTORY OF TEXAS 1685 TO 1897, at 474 (William G. Scarff 1898) (reprinting the Decree of the Emperor, Andres Quintana, Mexico City, February 18, 1823).

149. Stephen F. Austin to Felipe de la Garza, May 27, 1823, Austin Papers, Dolph Briscoe Center for American History, The University of Texas at Austin; *accord* Barker, *Governments of Austin's Colony*, *supra* note 38, at 226.

150. Luciano Garcia to Bastrop, July 16, 1823, Austin Papers, Dolph Briscoe Center for American History, the University of Texas at Austin (quoting de la Garza's June 16, 1823 letter).

151. Wooten, *supra* note 148, at 477–78 (reprinting letter from El Baron de Bastrop to James Cummings, [Provisional Alcalde on the Colorado] at Castleman's, August 5, 1823).

Bastrop did so, issuing a proclamation in 1823 explaining that the governor had ordered him “to inform the inhabitants of the Colorado and Brassos” that Austin

[H]as full powers to administer justice and preserve good order in the colony until it can be regularly organized agreeably to the constitution and laws of the nation. The Govr. therefore commands you to recognize Mr. A as invested with the above powers and that you cause the men under your command to do the same. Obeying his orders in all things relative to the good order prosperity and defense of his settlement, and the service of the nation.<sup>152</sup>

In this way, the Mexican government formally decreed that Austin’s orders were the law of his colony, and the settlers in his colony were officially informed of the decree.

Austin responded by promulgating the Regulations for the Alcaldes in 1824. Part of the first draft of Austin’s law survives in the Austin Papers at the University of Texas. Austin scratched-through text in almost every section and rewrote it. His edits show that he was not copying laws from another source, but composing his own as he went along. Austin himself said that the regulations “were drawn up by me hastily and while I was subject to continual interruptions and without the aid of any books or forms or precedents. . . .”<sup>153</sup> It is likely that the only reason any part of his rough draft survives is that he reused part of the paper on which he wrote it. Austin filled the facing side of the paper with the docket sheet of the first court to be governed by his laws, and he had to save the docket sheet because it was an official government record.<sup>154</sup> The distinct impression that these records leave with the reader is that Austin had very few resources, and that the first important legal business of his colony was done ad hoc, by hand, and without any aid of law codes or forms.

## 2. *Austin’s 1824 Pleading Law Looks Like the 1836 Texas Pleading Law*

Article 3 of Austin’s civil regulations provided pleading rules for cases in alcalde courts.<sup>155</sup> Compare Article 3 to the 1836 Texas pleading law:

---

152. Bastrop to Colonists, August 4, 1823, Austin Papers, Dolph Briscoe Center for American History, The University of Texas at Austin.

153. Stephen F. Austin to John P. Coles, Alcalde of the Brazos, January 25, 1824, Austin Papers, Dolph Briscoe Center for American History, The University of Texas at Austin.

154. Civil Regulations for the Alcaldes, Austin Papers, Dolph Briscoe Center for American History, The University of Texas at Austin (showing, on one half of a sheet of paper, a draft of what would become Articles 26 and 27 of the Civil Regulations, and, on the other half, the 1824 Brazos District Alcalde Court Docket).

155. *Austin’s Alcalde Code*, *supra* note 143, at 76.

<p>Austin's Civil Regulations, Article 3 Any person having cause of complaint against another within the jurisdiction of an alcalde must present a written petition to the alcalde of the proper district, stating in a short but clear manner the cause and nature of his complaint, to which the <i>alcalde</i> will attach a summons in the form following: "Austin's Colony, District of _____. The constable of said district is commanded to summons the above-named C.D., if to be found in the above district, to appear before me, A.B., <i>Alcalde</i> of said district, at my office (or wherever the suit is to be tried), between the hours of nine o'clock A.M. and three o'clock P.M., on the ____ day of ____, to answer the above complaint of E.F., and on or before that day this summons and the proceedings thereon must be returned to my office. Given this ____ day of ____. A.B., <i>Alcalde</i>.<sup>156</sup></p>	<p>1836 Texas Pleading Law It shall be the duty of the plaintiff or his attorney in taking out a writ or process, to file his petition, with a full and clear statement of the names of the parties, whether plaintiff or defendant, with the causes of action, and the nature of relief he requests of the court.<sup>157</sup> 1836 Consultation Summons Form To E. P. Sheriff of the municipality of ____: We command you, that you summons, or attach, the body of A. B., so that he be and appear before ____, first Judge of the municipality of ____, on the ____ day of ____, in the year ____, at the town of ____, to answer to C. D. in a plea of ____ to his damage and as you faithfully execute this, so you will answer. Witness E. F. our said Judge of the aforesaid municipality, on the ____ day of ____ A. D., __ at the town of __. F. H., Clerk. Issued on _ A.D.<sup>158</sup></p>
--	---

The 1824 and 1836 laws require a written petition, taking out a process, and the inclusion of the same information. They even use the same language: "clear," "cause," "nature," "stating," and "statement." There is far more similarity between the language and content of the 1824 and 1836 laws than there is between the Spanish-language laws and the 1836 law. The term "causes of action" is not the same as "cause of the complaint," the "nature of relief he requests" is not quite the "nature of the complaint," and a "full" statement can be very different from a "short" one. But even these terms constitute multiple, near-verbatim copies of language. The shared language, concepts, and structure of Austin's 1824 pleading law and the 1836 Texas pleading indicate that the former is a source of the latter.<sup>159</sup>

Professor McKnight noted that the 1836 pleading law "reiterated" the requirement in Austin's law that a legal proceeding begin by a petition "stating in a short but clear manner the cause and nature of the complaint."<sup>160</sup> Based on the similarities between Austin's law and the 1836 pleading law, Professor McKnight concluded that "Hispanesque procedu-

156. *Austin's Alcalde Code*, *supra* note 143, at 82.

157. Act approved Dec. 22, 1836, 1st Cong., R.S., §8, 1836–37 Repub. Tex. Laws 198, 201, *in* GAMMEL, *supra* note 7, at 1258, 1261.

158. Ordinances and Decrees of the General Council of the Provisional Government of Texas, An Ordinance and Decree for opening the several Courts of Justice, appointing Clerks, Prosecuting Attorneys, and defining their duties, &c., Section 1, January 16, 1836, *in* GAMMEL, *supra* note 7, at 1044.

159. Baade, *Spanish Formalities*, *supra* note 30, at 733 n.345 (finding the Spanish sources of Texas mortgage laws by noting shared language); Batiza, *supra* note 90, at 13–14 (determining the sources of Louisiana law by noting verbatim and near-verbatim language).

160. Joseph W. McKnight, *Stephen F. Austin's Legalistic Concerns*, 89 S.W. Hist. Q. 239, 250 (1986) [hereinafter *McKnight, Austin's Legalistic Concerns*].

ral law, which was considerably more straightforward than the English, was perpetuated through Austin's regulations along with Spanish modes of trial."<sup>161</sup> To support his conclusion, he cited a series of Texas Supreme Court cases, none of which explains the court's reasons for concluding that Texas pleading law came from Spain, or identifies which Spanish law might have been the source of Texas pleading law.<sup>162</sup> In this way, Professor McKnight recognized that Austin's 1824 pleading law was a source of the 1836 Texas pleading law, but his conclusion that it transmitted Spanish pleading law to the Republic of Texas was evidently based on assumptions in caselaw.

As comparisons of Spanish pleading laws and the 1836 law demonstrate, however, there is so little in common between the Spanish laws on the one hand, and the 1836 Texas law on the other, that the former appears not to be sources of the latter. Some of the Spanish laws share just enough similarities with the 1836 Texas pleading law to indicate that there is a tenuous connection between the two bodies of law, but their similarities in language and ideas are not nearly as numerous or strong as those between Austin's law and the 1836 law. Which is another way of saying that, under Professor McKnight's method for determining the Spanish sources of Texas law, Austin's 1824 law would have qualified as a source of the 1836 Texas law, and the Spanish laws that he had assumed were its sources would not. Several pieces of circumstantial evidence also support the conclusion that the 1836 Texas pleading law was based on Austin's 1824 law. Consider, first, the longevity of Austin's law.

### 3. *Austin's Pleading Law Was Used Throughout Mexican Rule*

Austin wrote his *alcalde* codes under authority that was set to expire in 1828, when formal local governments, or *ayuntamientos*, were established under the 1827 Constitution of Coahuila y Texas.<sup>163</sup> However, the *ayuntamientos* in English-Speaking areas of Mexican Texas did very little of the work they were required by law to do.<sup>164</sup> And the Mexican government never replaced Austin's pleading rules with state or federal statute law.<sup>165</sup>

The *alcalde* court's records are not preserved,<sup>166</sup> but bits and pieces of pleadings that relate to land and probate records survive, including an

---

161. *Id.*

162. *Id.* citing Fowler, Dallah 401, 403 (1841); Whiting v. Turley, Dallah 453, 454 (1842), Underwood, 2 Tex. At 178-79 (1847); Carter & Hunt v. Wallace, 2 Tex. 206, 209-10 (1847); Horn v. Texas, 3 Tex. 190, 191 (1848).

163. Barker, *Government of Austin's Colony*, *supra* note 38, at 228.

164. Stephen F. Austin to Josiah H. Bell, March 17, 1829, Austin Papers, Dolph Briscoe Center for American History, University of Texas at Austin. In this letter, he wrote that the "ayto of last year did not comply with the duties required by law in any one particular."

165. See John C. Townes, *Sketch of the Development of the Judicial System of Texas*, 2 TEX. HIST. ASS'N Q. 29, 38 (1898) (explaining that the courts created by Decree 277 of the State of Coahuila y Texas were never opened, which means that the pleading law promulgated by the Decree was never in effect).

166. Barker, *Government of Austin's Colony*, *supra* note 38, at 249.

1833 summons on a petition in a dispute over a decedent's estate. The form of the summons is exactly the same as the one that Austin's *alcalde* code required.<sup>167</sup> And although the 1836 Texas pleading law does not provide a form of summons, the 1836 judiciary ordinance of the provisional government of Texas does provide one, and it is extremely similar to the one in Austin's 1824 law.<sup>168</sup> The 1836 pleading law and summons applied to newly-created district courts, which were the successor courts to Austin's *alcalde* courts.<sup>169</sup> The fact that Mexican and Spanish pleading rules did not require or provide a writ of summons in anything like the form in the 1833 case or the 1836 judiciary ordinance indicates that the civil law pleading rules were not in effect during the period of Mexican rule. And the striking similarity between the 1836 pleading law and Austin's 1824 law, combined with the fact that the 1836 and 1824 laws applied to the same courts, indicates that Austin's law was used throughout Mexican rule in Texas.

#### 4. Austin Was Sympathetic to Hispanic Culture and Mexican Law

One of the reasons Austin could write, from scratch, a pleading law that was approved by Mexican officials—a law which, after it was adopted in substance by the Republic of Texas in 1836, was assumed by generations of judges and professors to be a Spanish law—was that Austin grew up in a Hispanic world. He was raised in Missouri when it belonged to Spain.<sup>170</sup> His father had taken the oath of allegiance to the Spanish crown in the late 18th century, and his family lived near St. Genevieve, which was largely French-speaking but had been governed under Spanish law.<sup>171</sup> Living in the recently-acquired Louisiana Territory gave Austin an “instinctive, sympathetic understanding” of Hispanic institutions.<sup>172</sup>

He served in the Missouri Territorial Legislature in 1815, just twelve years after the territory had been acquired in the Louisiana Purchase, and introduced several bills to reform court procedure and the judicial system.<sup>173</sup> At that time, Missouri retained some elements of Spanish law.<sup>174</sup>

---

167. Michael Rugeley Moore, *Celia's Manumission and the Alcalde Court of San Felipe de Austin*, 5 J. TEX. SUP. CT. HIST. SOC. 38, 43 (Fall 2015) (showing a summons of witnesses dated May 14, 1833, in the Alcalde Court of the Department of Bexar, Municipality of Austin in the case of James B. Miller v. John M. Allen).

168. Ordinances and Decrees of the General Council of the Provisional Government of Texas, An Ordinance and Decree for opening the several Courts of Justice, appointing Clerks, Prosecuting Attorneys, and defining their duties, &c, Section 19, January 16, 1836, in GAMMEL, *supra* note 7, at 1044.

169. See Clarence Wharton, *Early Judicial History of Texas*, 12 TEX. L. REV. 311, 323 (1934) (noting that the clerk of the district court of Brazoria issued an execution in 1837 to enforce an 1834 *alcalde* court judgment).

170. BARKER, LIFE OF AUSTIN, *supra* note 19, at 13.

171. LOUIS HOUCK, II THE SPANISH REGIME IN MISSOURI XXI (1909).

172. BARKER, LIFE OF AUSTIN, *supra* note 19, at 12.

173. McKnight, *Austin's Legalistic Concerns*, *supra* note 160, at 243–44.

174. McKnight, *Hispanic Frontier*, *supra* note 46, at 27 n.34 (explaining that lower Missouri retained some Spanish laws for a while after statehood, and citing cases in post-statehood Missouri which relied on Spanish law).



Austin briefly served as a circuit judge in 1820 in Arkansas, which had also been a Spanish-law jurisdiction in the Louisiana Territory.<sup>175</sup> In early 1820, he was living in New Orleans, the old Spanish capital of Louisiana.<sup>176</sup> Austin was thoroughly versed in the folk memory of Civil Law practice.<sup>177</sup>

When Austin arrived in Texas, he fully committed himself to becoming a citizen of his new country. “I bid an everlasting farewell to my native country, and adopted this, and in so doing I determined to fulfill rigidly all the duties and obligations of a Mexican citizen.”<sup>178</sup> He learned Spanish well enough to write letters to the Mexican government, and developed “a sympathetic but very accurate understanding of Mexican” life.<sup>179</sup> He called himself Estevan and signed his letters under that name, not just in letters to Mexican officials, but even to his family.<sup>180</sup> And Austin defended the Mexican government time and time again, often at great personal risk.<sup>181</sup> For example, he tried to put down the Fredonian Rebellion, an uprising in late 1826 and early 1827 of Anglophone settlers around Nacogdoches, by telling the insurgents: “I will befriend you all so far as I can consistent with my duty to the Govt but I am a Mexican citizen and officer and I will sacrifice my life before I will violate my duty and oath of office.”<sup>182</sup>

Austin certainly had reservations about the organization and conduct of Mexican government, but he appears to have sincerely believed that Mexico’s problems were relatively small, and that they would be surmounted.<sup>183</sup> He even told his colonists that the Mexican state government was superior to those of the early United States:

The mexican Govt, is yet in its infancy, the Govert. of this State Quahuila and Texas is as it were just beginning to be, its constitution is not yet formed, its organization is therefore as yet incipient and provisional and in such a state of things temporary embarrassments in the administration of justice are to be expected, they are a natural consequence, and those who look back to the first organization of

---

175. Robert L. & Pauline H. Jones, *Stephen F. Austin in Arkansas*, 25 *ARK. HIST. Q.* 336, 350 (1966).

176. BARKER, *LIFE OF AUSTIN*, *supra* note 19, at 32–33.

177. Even after he moved to Texas, Austin continued to deal with legal and business affairs arising from his upbringing in old Louisiana. *See, e.g.*, Stephen F. Austin to Henry Elliot, Agreement to accept a plot of land owned by Sylvanus Castleman in the “Common Field” of St. Genevieve, Mo., in exchange for debt on Texas land, March 1, 1822, Austin Papers, Dolph Briscoe Center for American History, The University of Texas at Austin. Castleman was elected the first alcalde of San Felipe de Austin in 1823. Election Returns for the San Felipe de Austin Alcalde Election, December 20, 1823, Austin Papers, Briscoe Center for American History, The University of Texas at Austin.

178. BARKER, *LIFE OF AUSTIN*, *supra* note 19, at 77 (quoting a letter from Stephen F. Austin to Samuel Williams, February 5, 1831).

179. *Id.* at 78.

180. *See, e.g.*, Letter from Stephen F. Austin to James E.B. Austin, December 25, 1822, Austin Papers, Briscoe Center for American History, The University of Texas at Austin.

181. BARKER, *LIFE OF AUSTIN*, *supra* note 19, at 195–96.

182. *Id.* at 196.

183. *Id.* at 266–67 .

the State Govts. in the U. S. of the north will probably find more collision and as much cause of complaint arising out of the delays necessarily produced by overturning one Govt. and establishing another than can be found in this country besides, the new emigrants in general are unacquainted with the language and the customs and existing laws of this country translations of which have not as yet been furnished owing to the want of time to do it justice and candour therefore certainly requires that we should not hastily condemn the whole govt. even altho some might suppose from a want of the necessary information to enable them to judge, that a subordinate officer had done them an in justice—This Govt will never wantonly do an act of injustice to any person and the liberality of their policy towards emigrants is a convincing proof of the wise and broad principles of Liberty and Justice that govern their councils—<sup>184</sup>

This was not a ploy to make the Mexican government more generous and tolerant toward the new immigrants; it was sincere. Austin's policy was "founded essentially on loyalty and was shaped by sincere sympathy for the Mexican people."<sup>185</sup> Until the very end of the period of Mexican rule over Texas, Austin tried to placate his restive colonists.<sup>186</sup>

Austin's sympathy toward Mexico was reflected in the laws that he wrote. Austin composed a draft constitution for Mexico that retained many features of Spanish law. In Austin's proposed constitution, he included provisions governing *alcalde* courts. These were not procedural rules and did not include rules of court, but were substantive legal provisions, and Austin borrowed them directly from the Spanish Constitution of 1812. For example, he wrote that "Alcaldes shall be elected in each Pueblo in the same manner established by the Spanish Constitution and existing laws," then listed 14 articles that were to be copied from the Spanish Constitution. One article provided that "All Spaniards possess the right, of which they cannot be dispossessed, of settling their differences by arbitration, at the will of the parties. The alcalde of every village shall, in himself, exercise the office of conciliator; and he who has to complain of civil and personal injury, shall apply for his mediation."<sup>187</sup> Austin's proposed constitution was adopted in substantial part in a provisional constitution called the *Acta Constitutiva*, which was the first form of the Mexican Federal Constitution of 1824.<sup>188</sup>

Three years later, he attended a trial in the *alcalde* court of Jose Miguel de Arciniega at Béxar.<sup>189</sup> The case was tried by two people whom Austin called "referees," Jose Antonio Navarro and Erasmo Seguin. All three

---

184. Austin to His Colonists, January 5, 1827, in EUGENE BARKER, 2 THE AUSTIN PAPERS 1571 (Am. Hist. Ass'n 1924).

185. BARKER, LIFE OF AUSTIN, *supra* note 19, at 281.

186. GREGG CANTRELL, STEPHEN F. AUSTIN, EMPRESARIO OF TEXAS 144 (1999).

187. Stephen F. Austin, Proposed Constitution for the Republic of Mexico, March 29, 1823, Articles 280 and 282, Austin Papers, Dolph Briscoe Center for American History, University of Texas at Austin.

188. BARKER, LIFE OF AUSTIN, *supra* note 19, at 84–85.

189. Note from Stephen F. Austin, July 28, 1823, Austin Papers, Dolph Briscoe Center for American History, University of Texas at Austin.

men were towering figures in Texas history. Arciniega came from a family that had been active in the military and political events of northern New Spain for generations; Seguin and Navarro were born in San Antonio and would become prominent political leaders in Mexico and the Republic of Texas.<sup>190</sup> They were not trained lawyers. The referees and the *alcalde* decided the preliminary matters of the case, and they did so without taking testimony,<sup>191</sup> in a process that was similar to, but not quite the same as, the Spanish institution of arbitration.<sup>192</sup> Austin included an analogous provision in his *Alcalde Regulations*.<sup>193</sup>

Austin's inclusion of provisions of the 1812 Spanish Constitution in his draft Mexican Constitution in 1824, and his installation of a conciliation procedure in his *alcalde* codes that was similar to the process he had witnessed in a Spanish-language court in Béxar, show that he was willing to enact Spanish law when he knew what it was. His adaptations of Spanish law are also attempts by Austin to keep Mexican law Spanish, and to make Texas law Mexican, which he likely would have done only if he were interested in maintaining the civil law tradition of Mexican Texas.

Nor was this interest something that Austin kept to himself. In 1829, many of his colonists thought that three recently enacted Mexican laws were oppressive. Austin addressed their concerns, explaining that each of the laws was not an example of Mexican oppression, but sensible legislation. He also revealed that he helped make them. "The three measures I have spoken of—the tax—the vagrants—and the notice to report births and deaths every three months, were all adopted with my advice and knowledge."<sup>194</sup>

#### B. AUSTIN'S LAW CAME FROM EDWARD LIVINGSTON'S 1805 ORLEANS PRACTICE ACT

The facts that Austin was raised in a partly Hispanic culture, that he proposed Mexican laws that were based on Spanish sources, and that he publicly defended unpopular Mexican law all tend to support the notion that Austin might have based his colony's court procedure on Spanish and Mexican practice laws if he had access to them. However, the text of Austin's pleading law, in particular its form for serving process, is so different from anything in Spanish legal authorities that it invites the infer-

190. TIJERINA, *supra* note 18, at 96 (regarding Arciniega), at 115–16 (regarding Navarro), at 115 (regarding Seguin).

191. Note from Stephen F. Austin, July 28, 1823, Austin Papers, Dolph Briscoe Center for American History, University of Texas at Austin.

192. Among the many variations between the trial practice and the Spanish laws governing arbitration, there here to have been a schedule drawn up by a notary public, or bearing the seal of a notary public, showing all matters in dispute, see *LAS SIETE PARTIDAS*, TITULO IV, PARTIDA III, LEY XXIII (Madrid 1805) (requiring that a schedule of all matters in dispute must be drawn up by a notary public), but there was no notary public in Béxar, and there was always a shortage of stamped paper. ALMARAZ, *supra* note 17, at 78.

193. Art. 9 in *Austin's Alcalde Code*, *supra* note 143, at 77.

194. Stephen F. Austin to Josiah H. Bell, March 17, 1829, Austin Papers, Dolph Briscoe Center for American History, University of Texas at Austin.

ence that Austin's law could not have come from them. Instead, it likely came from a very short law written for a new American territory carved out of the Louisiana Purchase. Joseph McKnight appears to have been the only person to have noted this.

1. *Joseph McKnight Connected Livingston's 1805 Law with Austin's 1824 Law*

In 1986, Professor McKnight wrote an article about Stephen F. Austin's experience performing "lawyerly functions."<sup>195</sup> He noted that Austin had been a legislator in Missouri in 1815 and a circuit judge in Arkansas in 1820.<sup>196</sup> He also wrote that Austin trained as an apprentice in 1821 to Joseph Hawkins, a New Orleans attorney.<sup>197</sup> Professor McKnight explained that, although "Austin has left no direct record of his training in Hawkins's office, the work he performed there is not hard to infer," and observed that Austin would "have learned the rudiments of civil, as well as criminal, process" during his apprenticeship.<sup>198</sup>

To support his argument, Professor McKnight noted that two "and a half years after leaving Hawkins's office, Austin still remembered the forms of summons" and other bits of Louisiana law so well "that he could reproduce them all from memory for inclusion in the Civil Regulations for his colonists."<sup>199</sup> Professor McKnight noticed that Austin's 1824 form of summons was based on a "prototype," an 1805 Louisiana statute that was in effect while Austin was a legal apprentice in New Orleans.<sup>200</sup>

That law was written by Edward Livingston, a former Mayor of New York City and United States Attorney who fled to New Orleans in 1804 under a cloud of scandal.<sup>201</sup> The United States had purchased Louisiana from France in 1803, but the area had been governed by Spain since 1763, and the vast majority of its laws were Spanish at the time of the Louisiana Purchase.<sup>202</sup> Livingston was tasked with writing the first laws for the Orleans Territory, which was the portion of the Purchase south of the thirty-third parallel, roughly equivalent to the present state of Louisiana. One of the laws Livingston wrote for the Orleans Territory included a form of summons that plaintiffs were to attach to their petitions.<sup>203</sup>

---

195. McKnight, *Austin's Legalistic Concerns*, *supra* note 160, at 239–44.

196. *Id.*

197. *Id.* at 244.

198. *Id.*

199. *Id.*

200. *Id.* at n. 25.

201. CARLETON HUNT, ADDRESS AT THE LIFE AND SERVICES OF EDWARD LIVINGSTON 11–12 (1903). Funds that were entrusted to Livingston's office were missing. This was not Livingston's fault, but he took full responsibility for it anyway, and repaid the missing money several decades later.

202. Rodolfo Batiza, *The Influence of Spanish Law in Louisiana*, 33 TUL. L. REV. 29, 30–31 (1958).

203. Acts Passed at the First Session of the Legislative Council of the Territory of Orleans, 210, 211 (1805) Laws of the Territory of Orleans Chapter XVI, An Act Regulating the Practice of the Superior Court, in Civil Causes, Sections 1 and 2, Approved April 10, 1805.

Professor McKnight did not quote the 1805 law's form of summons to explain what it meant, nor did he identify who wrote it. And he certainly did not argue that the 1805 law was a source of Texas pleading law. Professor McKnight simply used the similarity between its form of summons and Austin's as evidence that Austin had legal training, which was the subject of Professor McKnight's article. But his observation is nevertheless the key to understanding the origin of Texas pleading law. His citation to the Orleans Territory law has allowed his readers to read the pleading law, compare it to Austin's, and determine for themselves whether they look like they are related.

## 2. *Austin's Law Looks Like Livingston's 1805 Law*

They look very closely related indeed. The summons in the 1805 Louisiana law is attached to instructions for pleading in the Superior Courts of the Orleans Territory. The combination of the pleading law and summons is nearly the same as Austin's 1824 pleading law:

<p>Livingston's 1805 Practice Act All suits in the superior court shall be commenced by petition, addressed to the court, which shall state the names of the parties, their places of residence, and the cause of action, with the necessary circumstances of places and dates, and shall conclude with a prayer for relief, adapted to the circumstances of the case. And every such petition shall be free from unnecessary prolixity, and from any matter scandalous, libellous, or impertinent, and shall be filed with the clerk, whose duty it shall be to endorse thereon the day on which the same is filed. [A]fter filing such petition, the clerk shall on the request of the petitioner or his attorney, make a fair transcript of the same, together with a citation in the following form: Mr. A. B. you are hereby summoned to appear at the ___ and comply with the prayer of the annexed petition, or file your answer thereto, in writing, in the office of the clerk of the superior court, at ___ in ___ days after service thereof. Witness C.D. presiding.<sup>204</sup></p>	<p>Austin's Civil Regulations, Article 3 Any person having cause of complaint against another, within the jurisdiction of an alcalde must present a written petition to the alcalde of the proper district, stating in a short but clear manner the cause and nature of his complaint, to which the alcalde will attach a summons in the form following— "Austin's Colony, District of ___ the constable of said district is commanded to summons the above named C. D., if to be found in the above district, to appear before me, A. B., Alcalde of said district, at my office (or wherever the suit is to be tried,) between the hours of 9 o'clock A. M. and 3 o'clock P. M., on the ___ day of ___, to answer the above complaint of E. F and on or before that day this summons and the proceedings thereon must be returned to my office— Given this ___ day of ___. A.B., Alcalde."<sup>205</sup></p>
--	--

The 1805 and 1824 laws have much the same language and form of summons, and they require the same content. Even the 1824 law's "short but clear" statement is embodied in the 1805 law's prohibition against

204. Acts Passed at the First Session of the Legislative Council of the Territory of Orleans, 210, 211 (1805) Laws of the Territory of Orleans Chapter XVI, An Act Regulating the practice of the Superior Court, in Civil Causes, Sections 1 and 2, Approved April 10, 1805.

205. Art. 3 in *Austin's Alcalde Code*, *supra* note 143, at 76.

“unnecessary prolixity.” They share language, concepts, and structure.<sup>206</sup> Accordingly, Livingston’s 1805 law was likely a source of Austin’s 1824 law.

### 3. Austin Acknowledged Livingston’s Influence

Circumstantial evidence also indicates that Austin’s law was influenced by Livingston’s.<sup>207</sup> Austin himself implied that it was in 1832, when he wrote a long letter to Livingston asking for advice on a new system of land and debt laws.<sup>208</sup> The letter appears to have been extremely important to Austin. He wrote a first draft of the letter and kept it,<sup>209</sup> something that was unusual for Austin to do: one of the only other draft documents preserved in Austin’s papers is the partial draft of his Regulations for the Alcaldes. And Austin wrote the letter at a time when he was racked by anxiety about unrest in his colony and the future of Texas.<sup>210</sup> He was a representative in the legislature of Coahuila y Texas, and he was torn between his loyalty to Mexico—which had begun showing signs of rejecting the classically liberal settlement embodied in the Constitution of 1824, a law that Austin himself had strongly influenced—and his colonists, who were increasingly dissatisfied with the Mexican government. Just before Austin wrote the letter to Livingston, the governor had written Austin informing him that the legislature passed an urgent resolution asking Austin to attend the legislative session.<sup>211</sup> Austin wrote the letter in Matamoros, where he had stopped on his way to attend the state legislature in Saltillo.<sup>212</sup> Austin’s letter to Livingston mentions Austin’s thoughts on his colonists’ behavior and the Mexican government’s response, and it discusses his misgivings about the Mexican legal system at great length.

But before it goes into those topics, which weighed so heavily on Austin’s mind, his letter begins with lavish praise of Livingston’s law codes and ideas about government and jurisprudence:

You stand before the public in the character of a philanthropist. By your labors to ameliorate the condition of your fellow citizens in

---

206. See McKnight, *Spanish Influence on Texas Pleading*, *supra* note 3, at 28 (finding the Spanish source law of a Texas law by observing similarities in language, concepts, and structure); Rabalais, *supra* note 89, at 1497–1504; Batiza, *supra* note 91, at 13–14; Pascal, *supra* note 93, at 608–15.

207. Baade, *Spanish Formalities*, *supra* note 30, at 733 n.345.

208. Stephen F. Austin to Edward Livingston, June 24, 1832, The Edward Livingston Papers, Firestone Library, Princeton University. The letter is over 2,500 words long.

209. Stephen F. Austin Papers, Briscoe Center for American History, University of Texas at Austin. In his classic biography of Austin, Eugene Barker quoted from the draft of Austin’s letter in the University of Texas archives and wrote, “whether he ever sent it we do not know.” BARKER, *LIFE OF AUSTIN*, *supra* note 19, at 228. We now know that Austin did send it, and that it was received. The copy preserved in Livingston’s papers at Princeton indicates that it was also read: someone—apparently Livingston—made marginal notes in several sections of the letter.

210. BARKER, *LIFE OF AUSTIN*, *supra* note 19, at 385.

211. *Id.* at 384.

212. *Id.*

their various relations with each other through the medium of the tribunals of justice—your *codes* designed for the particular use of Louisiana but embracing [general], principles applicable to all civilized communities you seem to have given to the people of all countries a species of tacit claim upon the richly stored resources of your mind in relation to the political organization of society and the general principles of jurisprudence.<sup>213</sup>

Austin's decision to praise Livingston's judicial tribunals, codes, and principles of jurisprudence at the beginning of the letter, during a time of great personal anxiety and heavy public duty, suggests that Austin thought Livingston's laws and ideas of jurisprudence were very important. This suggestion is supported by the fact that the word "*codes*" is one of the only words that Austin underlined in the letter.<sup>214</sup>

Austin specifically states that principles of Louisiana laws are applicable to other places, and he claims that people outside Louisiana use Livingston's principles of jurisprudence. Austin gives no indication that he is talking about other people only; his obsequiousness suggests that he is one of the people who have been the beneficiary of Livingston's law codes and ideas about jurisprudence. In his letter, Austin proposed general outlines of a new land and debt law for Texas. After describing his proposal, he writes:

This system would probably greatly reduce the number of lawsuits about 99/100 which would of course greatly diminish the number of lawyers—this would be an important point gained—I wish you to understand that I have no prejudices against lawyers merely because they belong to that profession. My objections are to the system of laws that renders such a swarm of agents necessary to administer them [& I wish to remedy].<sup>215</sup>

In Austin's draft, he did not include the phrase, "& I wish to remedy." Instead, he wrote a description of his philosophy of lawmaking:

justice ought to be prompt plain simple and not expensive—to be so the laws must be plain, as few as possible, and accessible to the understanding of everyone—not loaded down by a labarinth of forms, nor by the precedents and decisions of centuries past, which no one but a very well read lawyer can comprehend.<sup>216</sup>

Austin crossed this passage out, and it is not included in the finished

---

213. Stephen F. Austin to Edward Livingston, June 24, 1832, The Edward Livingston Papers, Firestone Library, Princeton University.

214. *Id.* It is not underlined in the draft that Austin kept in his papers. Stephen F. Austin to Unknown, June 24, 1832, Stephen F. Austin Papers, Briscoe Center for American History, University of Texas at Austin. This suggests that Austin wanted to make sure Livingston knew that his codes were important to Austin.

215. Stephen F. Austin to Edward Livingston, June 24, 1832, The Edward Livingston Papers, Firestone Library, Princeton University.

216. Stephen F. Austin to Unknown, June 24, 1832, Stephen F. Austin Papers, Dolph Briscoe Center for American History, University of Texas at Austin.

letter that survives Livingston's papers.<sup>217</sup> Nevertheless, it is a nearly perfect description of Edward Livingston's philosophy of lawmaking, and it points to the sources of Livingston's 1805 law.

#### 4. *Livingston's Law Was English, but It Was Inspired by Spanish and Arab Institutions*

Livingston drew from the "richly stored resources" of his mind to create a new law with several ancestors. The most important of these was English equity, but the simplicity of Spanish procedure and the philosophy of Jeremy Bentham were important, too.

##### a. Livingston's Law Uses the Words of English Equity

Livingston's inclusion of the phrase "free from unnecessary prolixity, and from any matter scandalous, libellous, or impertinent" is probably the most conspicuous way that his 1805 law differs from Austin's 1824 law. And the phrase reveals the most important legal source for Livingston's law. A 1661 Order of the High Court of Chancery in England—one of the courts that developed English equity practice—provided that

counsel shall take care that deeds, writings, or records, be not unnecessarily set out therein *in haec verba*; but that so much of them only as is pertinent and material be set out or stated, or the effect and substance of so much of them only as is pertinent and material be set out or stated, or the effect and substance of so much of them only as is pertinent and material be given, as counsel may deem advisable, without needless prolixity; and that no scandalous matter be inserted therein.<sup>218</sup>

Standard treatises on pleading in equity proceedings during Livingston's time were full of warnings against petitions containing prolixity, impertinence, and scandal.<sup>219</sup> For example, one of the books in Livingston's library was *Coopers Equity Pleadings*.<sup>220</sup> It explains that an attorney signing a pleading in equity practice must "guard against bills containing scandal and impertinence, or irrelevant matter, which the records of the court might otherwise be made vehicles of."<sup>221</sup>

---

217. Stephen F. Austin to Edward Livingston, June 24, 1832, Edward Livingston Papers, Firestone Library, Princeton, New Jersey.

218. Order VIII, Pleadings and Written Proceedings Generally, No. 2, May 22, 1661, in THE CONSOLIDATED GENERAL ORDERS OF THE HIGH COURT OF CHANCERY 296 (V. R. Stevens and G. S. Norton, Oxford 1860).

219. See, e.g., GEORGE COOPER, A TREATISE OF PLEADING ON THE EQUITY SIDE OF THE HIGH COURT OF CHANCERY 19 (1809); RALPH BARNES, INQUIRY INTO EQUITY PRACTICE 47 (1827) (noting that "forms of Pleadings are, by the orders of the Court, to be short and succinct, but in practice they are open to the charge of unnecessary prolixity"); MATTHEW BACON, 4 A NEW ABRIDGEMENT OF THE LAW 90 (1796) (instructing practitioners at law to avoid prolixity in pleading). See also Mitchell Franklin, *Libraries of Edward Livingston and of Moreau Lislet*, 15 TUL. L. REV. 401, 414 (1940–1941) (listing "Coopers Equity Pleadings" and "Bacons Abridgement" in Livingston's Library, but not listing the year or edition of either work).

220. Franklin, *supra* note 219, at 414.

221. COOPER, *supra* note 219, at 19.



The prohibition against unnecessary matter in chancery pleadings was not just common, it was also very old and famous. Cooper notes that “[p]rolixity appears to have been anciently a fault in a bill” that is too long, and “[t]he letter of this rule of pleading has been long done away, but the principle of it still remains in the existing rules of the court as to scandal and impertinence.”<sup>222</sup> A contemporary of Cooper’s noted that a “striking instance of the vigour with which [the Lord Chancellor] strove to correct the prolixity of the written pleadings in his Court” is the 1597 case of *Mylward v. Weldon*.<sup>223</sup> In that case, the Lord Chancellor observed that a scrivener named Richard Mylward had filed a replication—a pleading in equity practice—“of six score sheets, all the matter thereof which pertinent might have been well contrived in sixteen [sheets of paper].”<sup>224</sup> The Chancellor ruled that

such an abuse is not in any sort to be tolerated— proceeding of a malicious purpose to increase the defendant’s charge, and being fraught with much impertinent matter not fit for this Court, it is therefore ordered, that the Warden of the Fleet shall take the said Richard Mylward into his custody, and shall bring him into Westminster Hall on Saturday about 10 of the clock in the forenoon, and then and there shall cut a hole in the myddest of the same engrossed Replication, which is delivered unto him for that purpose, and put the said Richard’s head through the same hole, and so let the same Replication hang about his shoulders with the written side outward, and then, the same so hanging, shall lead the same Richard, bareheaded and barefaced, round about Westminster Hall whilst the Courts are sitting, and shall show him at the bar of every of the three Courts with the Hall.<sup>225</sup>

At the time, this punishment was sensational; a merciless, humiliating spectacle redolent of star chamber.<sup>226</sup> It was so shocking, in fact, that Shakespeare wrote a joke about it. A few months after the Lord Chancellor ruled in *Mylward*, while the punishment was still news in England, Shakespeare published *Henry IV*. In one of the play’s most famous scenes,<sup>227</sup> Sir John Falstaff, who is a farcical character, conspires with five of his friends to rob several travelers at an inn. Two of the conspirators, Prince Hal and Poins, leave the scene while Falstaff and the others rob

222. *Id.* at 19–20.

223. JOHN LORD CAMPBELL, *THE LIVES OF THE LORD CHANCELLORS AND KEEPERS OF THE GREAT SEAL OF ENGLAND* 180 (1851).

224. *Id.* at 180–81 (1851) (citing *Mylward v. Weldon*, Reg. Lib. A. 1596, f. 267). Campbell thought the ruling on this case was issued in 1596, but this is a mistake based on a misunderstanding of the “Old Style” calendar; the correct date of the decision was February 10, 1597. CHARLES PHELPS, *FALSTAFF AND EQUITY* 138 (1901). Phelps was a law professor and judge who wrote, among other things, a treatise on chancery practice called “Juridical Equity.” *Ibid.* Title Page.

225. CAMPBELL, *supra* note 223, at 180–81. Campbell noted that this “order should have gone on to require that a print of the unlucky Richard, with his head peeping through the volumes of sheep skin, should, *in terrorem*, be hung-up in the chambers of every equity draftsman.”

226. PHELPS, *supra* note 224, at 78.

227. *Id.* at 2.

the travelers. Hal (who is the Prince of Wales, heir to the throne of England) and Poins then decide to don masks and rob Falstaff of the loot in disguise, just to be able to joke about it later. They hide as Falstaff divides the stolen goods, and watch as he tells the remaining conspirators:

Come, my masters, let us share, and then to horse before day. An the Prince and Poins be not two arrant cowards, there's no equity stirring: there's no more valour in that Poins than in a wild-duck.<sup>228</sup>

Here, Falstaff ostensibly uses the term “equity stirring” in earnest: if there's any justice in the world, Prince Hal and Poins are cowards. But Shakespeare's audience would know that an earnest remark would be out of character for Falstaff, and that the heir to the throne was about to rob the man who was calling him a coward. Indeed, Shakespeare uses the term as an ironic aside to the audience. He plays on their knowledge of the notorious punishment that a court of equity had just imposed on a scrivener for filing pleadings that were unnecessarily prolix, part of a wider conflict between the courts of law and the rising court of equity which was grabbing headlines and power.<sup>229</sup> Shakespeare is saying that equity *is* stirring, with the prince and Falstaff, and with the Lord Chancellor and English law. So when Livingston mentions prolixity, scandal, and impertinence, he is using the language of a very long line of English thought, one that influenced the most important institutions of English-speaking law and culture: he is using the language of English equity.

Equity was also the source of the form of the summons in Livingston's 1805 pleading law. The form for a summons in equity reproduced below was promulgated by Acts of Parliament after Livingston's death, but it embodies orders of the High Court of Chancery during Livingston's lifetime. The Chancery orders, in turn, were only very slight variations on writs of subpoena, which were developed in early medieval England, and were predecessors of writs of summons in equity.<sup>230</sup> Both forms use much the same language as Livingston's —and Austin's—form of summons.

---

228. WILLIAM SHAKESPEARE, 1 HENRY IV. ACT II SCENE 2. Livingston likely had a copy of this play. Franklin, *supra* note 219, at 409 (listing an eight volume set of “Shakespeare” in Livingston's library).

229. PHELPS, *supra* note 224, at xiv, 75–78. See also THE SHAKESPEARE SOCIETY OF NEW YORK, 10 SHAKESPEARIANA 189 (1893) (noting that “in the spring of the same memorable year, 1597, while ‘equity was stirring’ and shaking Westminster Hall with Homeric or rather Elizabethan laughter in the person of the unlucky scrivener with his bare head protruding through the hole cut by the chancellor's order in his too voluminous replication in the chancery case of Mylward vs. Weldon.” Shakespeare himself was mired in a large chancery case in 1597 called Shakespeare v. Lambert).

230. EDMUND ROBERT DANIELL, 1 A TREATISE ON THE PRACTICE OF THE HIGH COURT OF CHANCERY 558–59 (1837).

<p>Writ of Subpoena To X. Y. greeting. We command you, that within ___ days after service of this writ on you, exclusive of the day of such service; laying all other matters and excuses aside, you do cause an appearance to be entered for you, in our high Court of Chancery, to a Bill filed against you by A. B., and that you do answer concerning such things as shall be then and there alleged against you; and observe what our said Court shall direct in this behalf, upon pain of an attachment issuing against your person; such other process for contempt as the Court shall award. Witness ourself at Westminster, the ___ day of ___ in the ___ year of our reign.<sup>231</sup></p>	<p>Summons in Equity In the High Court of Justice, Chancery Division, Between A. B., Plaintiff, and C.D., Defendant. To C. D., of ___, in the county of ___. We command you, that within ___ days after the service of this writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you in an action at the suit of A. B.; and take notice that in default of your so doing the plaintiff may proceed therein, and judgment may be given in your absence. Witness, ___, Lord High Chancellor of Great Britain, the ___ day of ___, in the year of our Lord, One Thousand nine hundred and ___.”<sup>232</sup></p>
---	---

Even the terms “petition and answer” Livingston’s law indicate that it came from equity,<sup>233</sup> as this description of the basic elements of equity pleading shows:

A suit in equity is commenced by bill, which is a *petition* setting forth the subject of complaint, with such allegations as tend to corroborate the statement, or to anticipate and controvert the claims of the adverse party, closing with a prayer for the appropriate relief, and for process against the defendant to compel him to appear and answer. . . . By the *answer* the defendant either controverts the case stated by the plaintiff, or denies some parts of it, or admits the case as stated by the plaintiff, and submits to the judgment of the court upon it, or relies upon new matter stated in the answer. . . . If the defense is by *answer*, it must be sworn to. If the answer admits the allegations made by the plaintiff in the bill, the cause is set down to be heard on *bill* and *answer*.<sup>234</sup>

b. Livingston’s Law Intentionally Connected Equity with Spanish Law

The terms “petition and answer” are not just from equity; they are also English translations of Spanish and ancient Roman terms for pleadings.

231. Order of Lord Brougham, December 21, 1833, in REPORTS OF CASES ARGUED AND DETERMINED IN THE HIGH COURT OF CHANCERY DURING THE TIME OF LORD CHANCELLOR BROUGHAM AND SIR JOHN LEACH, MASTER OF THE ROLLS XXI (London 1834).

232. Order of the High Court of Chancery II, Rule 3. Form 1 (1875), in WILLIAM DOWNES GRIFFITH, THE SUPREME COURT OF JUDICATURE ACTS, 1873, 1875, & 1877, at 479 (London 1877). A similar form of summons had been promulgated by an Act of Parliament in 1832 for cases at law. 2 Will. IV. Cap. 39. The Act noted its purpose was to remedy the “great variety and multiplicity” of “the process for the commencement of personal actions in his Majesty’s superior Courts of Law at Westminster” which was “very inconvenient in practice.” *Id.* This suggests that the form embodies other forms that had already been in use.

233. Robert Wyness Millar, *The Fortunes of the Demurrer*, 31 ILL. L. REV. 596, 604 (1937) (arguing that Livingston’s law “provided for the conduct of the suit by petition and answer, on principles largely drawn from the system of chancery pleading”).

234. SAYLES, *supra* note 136, at 387, 389.

Thus, even when Livingston's law uses the language of English equity, it is suggesting the influence of the civil law, and it does this for a very good reason.

The law of Louisiana was predominantly Spanish from 1769 to 1803. During those years, the Louisiana judicial system was administered under the same rules as other Spanish colonies,<sup>235</sup> with *alcaldes* presiding over its trial courts.<sup>236</sup> Prior to the Louisiana Purchase, its law was based mostly on sections of the *Recopilacion* and *Partidas*, with the Custom of Paris and the 1667 Ordonnance Civil of France mixed in.<sup>237</sup> When Livingston's 1805 pleading law replaced the Spanish pleading system that had been in use in Louisiana,<sup>238</sup> it was part of a broader replacement of the old Spanish and French law with new laws from English-speaking immigrants, but the civil law was still very popular: in 1808, Louisiana enacted a Civil Code, about 95% of which was from civil law jurisdictions of continental Europe.<sup>239</sup>

Livingston himself was an admirer of the civil law and eventually became the most important civil law theorist for the Louisiana French.<sup>240</sup> Soon after he arrived in Louisiana, some American lawyers filed a suit seeking a judicial declaration that the common law was in force in Louisiana.<sup>241</sup> Livingston led a group of civil law attorneys who argued that the law in Louisiana was based on Roman law, not English, and that the laws of Spain that had been in effect at the time of the Louisiana Purchase were still in force.<sup>242</sup> Livingston won, to the great relief of the people of the territory.<sup>243</sup> The American governor of , however, wanted its laws to be Americanized, with more common law and less civil law.<sup>244</sup>

Responding to the judicial victory and popularity of the civil law on the one hand, and pressure to introduce American law on the other, the territorial legislature called on Livingston in early 1805 to draft a new civil and criminal law code for the Territory.<sup>245</sup> It would have to incorporate "British Statute and Common Laws, and the codes of all the States" into

---

235. See Rabalais, *supra* note 89, at 1487–88 (citing Baade, *French and Spanish Louisiana*, *supra* note 36, at 3).

236. EVERETT SOMERVILLE BROWN, CONSTITUTIONAL HISTORY OF THE LOUISIANA PURCHASE 92 n.35 (1920).

237. Rabalais, *supra* note 89, at 1487–88.

238. Henry P. Dart, *The Place of the Civil Law in Louisiana*, 4 TUL. L. REV. 163, 169 (1930).

239. Batiza, *supra* note 91, at 11–12. Around 87% was French, and 8% was Spanish. *Id.*

240. Mitchell Franklin, *The Place of Thomas Jefferson in the Expulsion of Spanish Medieval law from Louisiana*, 16 TUL. L. REV. 319, 321 (1942).

241. Elizabeth Gaspar Brown, *Legal Systems in Conflict: Orleans Territory 1804–1812*, AM. J. LEG. HIST. 1, 38–39 (1957).

242. *Id.* at 39–40.

243. Hunt, *supra* note 201, at 116.

244. BROWN, *supra* note 241, at 37 (citing a letter from William C.C. Claiborne, Governor of the Orleans Territory, to James Madison, U.S. Secretary of State, October 29, 1804).

245. John H. Tucker, *Source Books of Louisiana Law, Part II, The Code of Practice*, 7 TUL. L. REV. 82, 83 (1934) (citing Acts passed at the first session of the Legislative Council of the Territory of Orleans in 1805).

the codes while maintaining the bulk of Louisiana's civil law system.<sup>246</sup> The American Governor of the Orleans Territory worried that the codes would introduce more common law provisions into the laws of the territory than its people would be willing to tolerate.<sup>247</sup> Accordingly, Livingston's task was to compose codes that brought Louisiana law closer to that of the rest of the United States, but without appearing to stray too far from the civil law.

The finished product was a success. The civil code's procedural provisions remained in effect for the next 25 years, and later Louisiana laws substantially retained them.<sup>248</sup> One of the reasons they endured was their seamless mix of civil law and American legal traditions. The ways in which Livingston's pleading provision did this were ingenious.

Notice his use of the word "libellous" in the 1805 Orleans Territory pleading law. None of the Spanish, equity, or common law rules of pleading specifically prohibit libelous matter in pleadings. Instead, those sources use an identically-sounding noun, *libellus*, which is Latin for "little book," to refer to a petition. *Libellus* was considered by some equity practitioners to be the root word for the English "bill," which is a petition in equity pleading.<sup>249</sup> In Latin and Spanish practice, *libellus* does not mean "libelous," nor does the English term "libelous" describe pleading. Livingston's use of the word "libellous" to describe a petition is, therefore, a pun. It tries to create irony by tying three different things together—English equity, libel law, and Roman law—through the use of a single word. To understand more clearly what Livingston was trying to do and why he was trying to do it, consider a similar joke in a book that Livingston owned, a comedic poem called the *Pleader's Guide*.<sup>250</sup>

The poem features a series of characters explaining differences in pleading under common law, equity law, admiralty law, canon law, and Roman (or civil) law systems.<sup>251</sup> One of the characters tries to make fun of the pleading system of civil law jurisdictions like Spain:

Since Edward from his subjects broke  
The bondage of the Roman yoke  
Are but a vain and empty shade  
Without the sanction and the aid,  
The forms, the process, and the mode  
Coercive of the British Code.  
How vain's the Civil Law's *Citation*,  
The *Libel*, Oath, and *Fulmination*.<sup>252</sup>

---

246. BROWN, *supra* note 241, at 40 (citing letter from James Brown to John Brackenridge, January 22, 1805).

247. *Id.* at 38–39.

248. *Id.* at 44.

249. ROGER FOSTER, A TREATISE ON PLEADING AND PRACTICE IN EQUITY IN THE COURTS OF THE UNITED STATES 109–110 (1890).

250. Franklin, *supra* note 219, at 409.

251. THE PLEADER'S GUIDE, A DIDACTIC POEM 24 (1796).

252. *Id.* at 29.

In that passage, “Edward” is King Edward I, who began to replace Roman law with what developed over many centuries into various branches of English law. “Citation,” the editor of the *Pleader’s Guide* explains, is “a summons to appear before an ecclesiastical judge.”<sup>253</sup> And “*Libel*” is “*Libellus*, in the Ecclesiastical Courts,” which the editor illustrates with the verses that are found in many English treatises on equity pleading and in Spanish legal sources like *Febrero*:<sup>254</sup>

*Quis, quid, coram quo, quo jure petatur, et a quo,  
Recte compositus quisque Libellus habet.*<sup>255</sup>

In this way, the *Pleader’s Guide* connects the English word “libel” to the Roman (and Spanish) *libellus*. And the way it connects them is a joke because, right after the character says that English law conquered Roman law, the author of the poem demonstrates that the Roman law survives in the language and practices of English law. Livingston’s use of the word “libellous” performs the same task. It is a pun demonstrating that his pleading system uses the language of English equity, but is ultimately derived from Roman—and Spanish—practice. Joseph Story’s *Equity Pleadings*, one of the books in Livingston’s library, makes exactly that point.<sup>256</sup>

The pleadings in Equity were probably borrowed from the Civil Law, or from the Canon Law (which is a derivative from the Civil Law), or from both. The early Chancellors were for the most part, if not altogether, Ecclesiastics, and many of them were bred up in the jurisprudence of Civil and Canon Law; and it was natural for them, in the administration of their judicial function in the Court of Chancery, to transfer into that Court the modes of proceeding, with which they were most familiar. Hence, at almost every step, we may now trace coincidences between the pleadings and practice in Chancery, and the pleadings and practice in a Roman suit and in an Ecclesiastical suit.<sup>257</sup>

Therefore, Livingston’s use of the word “libellous” connects his pleading system with the civil law system of Spain, which had been in effect in Louisiana until the enactment of his 1805 law. In fact, it almost certainly

253. *Id.* at 26.

254. See *supra* notes 116-118 and accompanying text.

255. THE PLEADER’S GUIDE, *supra* note <CITE \_Ref494568512“>, at 30. Roughly translated, this means that any petition correctly written must state with certainty to what court application is made, who complains, of whom he complains, what wrong he did, and the amount of damage done. For centuries, commentators on English equity have explained that these Latin verses form the “common distich,” as the matter of a Bill, and that it “is applicable to all pleadings.” It answers to the declaration at common law, to the libel or *libellus articulatus*, of the civil and common law. JOSEPH STORY, COMMENTARY ON EQUITY PLEADINGS 21 (1844). It equally applies to pleadings under the codes, and to pleadings of a defendant where he files a cross complaint, or statement for affirmative relief.” WILLIAM HUGHES, 2 PROCEDURE, ITS THEORY AND PRACTICE 1105 (1905). The distich is also in *Febrero Adicionado*, see *supra*, note 116, Livingston had seven volumes of *Febrero* in his library. Franklin, *supra* note 219, at 413.

256. Franklin, *supra* note 219, at 414 (listing “Storys Pleadings”).

257. STORY, *supra* note 73, at 11–12. This work is cited in almost all the annotations on English and American rules of chancery practice.

accounts for the reason that Law 40 of the *Partidas* appears to be a cousin of the 1836 Texas pleading law: Livingston's punning allusion to the *libellus* of Spanish pleading law signaled his keen awareness of, and interest in, the Spanish pleading law of the *Partidas*. In this way, Austin's reliance on Livingston's law, and the 1836 Texas pleading law's reliance on Austin's law, transmitted a shadow of Spanish law to independent Texas.

The pun also associates his law with the law of the Church of Rome, which used the petition and *libellus*, and was part of the foundation of the civil law.<sup>258</sup> Livingston's law did eliminate the procedure of the Spanish pleading system,<sup>259</sup> but it also intentionally rejected the common law system,<sup>260</sup> and its allusion to Spanish practice reminds the reader that the procedure it introduced, English equity, was thoroughly Roman—more civil law than common law—and therefore related to Spanish practice.

The connection between English equity and civil law pleading was not only lexical, it was also substantive. For example, the prohibition against prolixity was a common feature of the civil law in continental Europe, and had been since ancient times. One of the most important law codes in European history, and the foundation for much of the *Partidas* and English equity, was the Code of Justinian, written in the 6th century. Much of the introduction to Justinian's Code criticized the wordiness of existing law, and called for simplification and concision in the new law. This was so important and well known in medieval Europe that Dante wrote about it in the *Divine Comedy*:

Cesare fui, e son Giustiniano,  
 Che, per voler del primo Amor, ch'io sento  
 D'entro alle leggi trassi il troppo e 'l vano<sup>261</sup>  
 Which has been translated as:  
 Caesar I was, and now Justinian stand,  
 And primal love so urged me that to clear  
 The laws of bale and bulk I gave command<sup>262</sup>

Dante is alluding to several passages in Justinian's Code prohibiting unnecessary prolixity. Among them is *omne jus antiquum supervacua prolixitate liberum atque enucleatum*,<sup>263</sup> which means that new law must be free from the unnecessary prolixity—*supervacua prolixitate*—of the old law. Justinian was explaining that he included former laws into his Digest and Institutes, but “only after its prolixity and lack of clarity had

258. JAMES A. BRUNDAGE, *MEDIEVAL CANON LAW* 130 (1995).

259. Rabalais, *supra* note 89, at 1491. (citing DART, *supra* note 238, at 169).

260. Edward Livingston to Jeremy Bentham, July 1, 1830, in 11 JOHN BOWRING, *WORKS OF BENTHAM*, 52 (Edinburgh 1838). Bentham wrote that his 1805 pleading law was the “rejection of the common law procedure in civil suits.” *Id.*

261. DANTE ALIGHIERI, *LA DIVINA COMEDIA, CANTO VI, ARGOMENTO, LL. 10–12* (Venezia 1760).

262. JAMES WILLIAMS, *DANTE AS A JURIST* 13 (1906).

263. *Id.* at 13 n.2 (1906) (citing in *De Emendatione Codicis Justinianie*, section 1).

been eradicated.”<sup>264</sup> Livingston would have known this: he had four different editions of Justinian’s works in his library.<sup>265</sup> In fact, Livingston was described in Louisiana’s chief newspaper of the time as an “American Justinian” for his mastery of Roman law.<sup>266</sup>

The English equity prohibition against prolixity was an ancient and famous feature of Roman law and continental European culture. Livingston’s use of the phrase “unnecessary prolixity” in his 1805 pleading law was a way to use the language of equity to enact the principles of the European legal tradition to which Spanish law belonged. Indeed, Livingston’s mentor, Jeremy Bentham, thought Spanish practice and equity were branches of the same family tree. Bentham wrote that “the trunk (I speak of Rome-bred procedure) such is it in four at least of its branches: Continental law in general; English equity law; English Spiritual law; English (coinciding with Continental) Admiralty law.”<sup>267</sup>

### c. Livingston Was Inspired by Jeremy Bentham

Bentham was an English philosopher and a famous advocate of codification. In fact, he coined the term “codification.”<sup>268</sup> He was also a law reformer who took a particular interest in simplifying civil procedure.<sup>269</sup> Bentham detested technical procedure rules, and wanted to prohibit dismissal of cases on procedural technicalities.<sup>270</sup>

Livingston was one of Bentham’s earliest and most devoted followers.<sup>271</sup> They were also friends and frequent correspondents. In 1830, Livingston wrote to Bentham to let him know “how much my work is indebted to yours for those parts of my attempts to reform the laws of my state, which have found favour from the public.”<sup>272</sup> In that letter, Livingston discussed just two of the many laws that Bentham had influenced: one is the Louisiana Civil Code of 1823, and the other is 1805 Louisiana Practice Act. Livingston wrote that the 1805 law was more important, and explained why:

A simple system was substituted, based upon the plan of requiring each party to state, in intelligible language, the cause of complaint, and the grounds of defence. I comprised it in a single law of a few

---

264. HALCYON WEBER, A HYPOTHESIS REGARDING JUSTINIAN’S *Decisions* and the Digest, *ROMAN LEGAL TRADITION* 42, 113–14 (Ames Foundation, Harvard Law School, 2015).

265. Franklin, *supra* note 219, at 408–14.

266. Franklin, *supra* note 240, at 325 n.12.

267. JEREMY BENTHAM, *SCOTCH REFORM, CONSIDERED WITH REFERENCE TO THE PLAN, PROPOSED IN THE LATE PARLIAMENT, FOR THE REGULATION OF THE COURTS, AND THE ADMINISTRATION OF JUSTICE IN SCOTLAND* 80 (1808).

268. Richard A. Posner, *Blackstone and Bentham*, 19 *J. LAW & ECON.* 569, 594 (1976).

269. Dean Alfange, Jr., *Jeremy Bentham and the Codification of Law*, 55 *CORNELL L. REV.* 58, 61 (1969).

270. GERALD J. POSTEMA, *BENTHAM AND THE COMMON LAW TRADITION* 346 (1986).

271. Charles Noble Gregory, *Bentham and the Codifiers*, 13 *HARVARD L. REV.* 5, 344, 353 (1900).

272. Edward Livingston to Jeremy Bentham, July 1, 1830, in 11 *JOHN BOWRING, WORKS OF BENTHAM* 51 (Edinburgh 1838).



pages; and although, from its novelty, many questions may be naturally supposed to arise under it, before the court and suitors become accustomed to its provisions; yet our books of Reports, from 1808 to 1823, contain fewer cases depending on disputed points of practice, than occurred in a single year, 1803, in New York, where they proceed according to the English law, which has been in a train of settlements by adjudication so many hundred years.<sup>273</sup>

Livingston told Bentham in the same letter that he could teach new lawyers the civil procedure under the 1805 law in about a day.<sup>274</sup>

That would have pleased Bentham, who detested complicated procedure in general, and common law pleading in particular,<sup>275</sup> so much so that he proposed abolishing written pleadings altogether, and mocked lawyers who disagreed. “What? Put an end to Written Pleadings?” he asked rhetorically. “Rob us of our business? Knock up our profession? Substitute Turkish to Scotch and English justice? Whence comes this man?”<sup>276</sup>

Bentham’s reference to “Turkish . . . justice” is an important clue to the source of his ideas about pleading. He thought that the ideal form of government was embodied in family life, which he called domestic government. Bentham admired its simplicity and efficiency, its emphasis on substantive decisions, and the absence of procedure. The judge, not outside rules or those being judged, controls domestic adjudication. And Bentham thought that the nearest that any political and judicial arrangement comes to the domestic system is that of the Turkish *cade*. Bentham wrote that the “whole train of Adjective law”—meaning procedural law—is dispensed with in Despotic Government, which comes nearest in its simplicity to the domestic. The *Cade* without form or precept takes cognizance of a complaint, and without delay of pleading or the intervention of official functions, issues his definitive command upon the spot.<sup>277</sup>

The Turkish *cade* or *cadi* is the Arab *al-qadi*, a judicial office that became the Spanish *alcalde*.<sup>278</sup> The political and judicial leaders of towns in León, Castile, and Portugal were called a *iudex* in Roman times, then a *juez* in early medieval times, who was assisted in the administration of justice by an *al-qadi*, or *alcalde*.<sup>279</sup> The *al-qadi* sat by himself in his home or in a court house, with a secretary taking only oral testimony.<sup>280</sup> Under the terms of a typical commission, a *qadi* was to ask questions of the litigants, listen to witness testimony, and issue a judgment without

---

273. *Id.* at 52.

274. *Id.*

275. Bentham proposed to destroy 90% of English common law pleading, and improve on the remaining 10%. Bentham, *supra* note 267, at 60.

276. *Id.* at 57.

277. POSTEMA, *supra* note 270, at 350 n.18 (quoting a Bentham manuscript in University College, London Library Box 99, page 119).

278. Karen B. Graubart, *Learning from the Qadi*, 95 HISP. AM. HIST. REV. 2, 204 n.32 (2015). The *alguacil*, or justice, came from the Arab *wazir*, or adviser, minister.

279. JOSEPH F. O’CALLAGHAN, A HISTORY OF MEDIEVAL SPAIN 270 (1983).

280. ALBERT HABIB HOURANI, A HISTORY OF THE ARAB PEOPLES 114 (2002).

delay.<sup>281</sup>

Bentham's praise of this figure was intentionally provocative. In England, the idea of the *cadi* represented everything that was arbitrary and dangerous in foreign thinking.<sup>282</sup> But Bentham thought formalism and technicality were also very dangerous because they delayed justice at best, and thwarted justice at worst. Procedural rules were enemies of justice, Bentham reasoned, because they allow the party who follows procedural technicalities to win at trial even if he disobeyed substantive law before trial, and they allow the party who misses a procedural technicality at trial to lose, even if he obeyed substantive law before trial.<sup>283</sup> And Bentham thought the rich had no advantage before the *cadi*, because they could not purchase the services of a lawyer who might outmaneuver a poor adversary in procedure. For that reason, the *cadi*, who had no use for formal procedural rules, was more likely to dispense justice than judges who were bound by pointless technicalities.

By those who have nothing to give, a Cadi will not be bribed: those whom he knows nothing of he will have no motive to favour or to oppress. To those from his treatment of whom supposing it to be just, he has nothing to fear, nor supposing it to be unjust, to hope, he will have no motive to treat with more favour than is due to them, or with less. In this predicament lies the bulk of the poor: that is of the great body of the people. A Cadi then as far as his intelligence extends will generally do justice to the great body of the people. He will give the redress which is their due to those who come before him in the capacity of plaintiffs: he will give the protection that is their due to those who are brought before him in the capacity of defendants.<sup>284</sup>

For Bentham, praising the *cadi* was not only a way to argue in favor of simplified judicial procedure; it was also a way to attack both the common law, which Bentham thought was pointlessly intricate,<sup>285</sup> and the English judge and legal theorist William Blackstone, whom Bentham famously loathed.<sup>286</sup> Several decades before Bentham praised the *cadi*, Blackstone criticized Turkish judicial procedure:

In Turkey, says Montesquieu, where little regard is shewn to the lives or fortunes of the subject, all causes are quickly decided: the basha, on a summary hearing, orders which party he pleases to be bastinadoed, and then send them about their business. But in free states the

---

281. O'CALLAGHAN, *supra* note 279, at 114 (citing *Historia de los jueces de Cürdoba*, 7–8).

282. POSTEMA, *supra* note 270, at 350–51.

283. *Id.* at 351 n. 19 (quoting a manuscript in University College, London Library, Box 99, page 178).

284. *Id.*

285. *Id.* at 147.

286. See Posner, *supra* note 268 at 569–70 (calling Bentham “Blackstone’s severest critic,” who “damned” Blackstone “with uncommon violence”). See also ALFANGE, *supra* note 269, at 66 (1969) (noting that Bentham’s “chief adversary in the area of the common law” was, among many other, lesser, adversaries, “Blackstone”).

trouble, expense, and delays of judicial proceedings are the price that every subject pays for his liberty . . . the formalities of law increase, in proportion to the value which is set on the honour, the fortune, the liberty, and the life of the subject.<sup>287</sup>

In this way, the *cadi*, or *al-qadi*—the future *alcalde* of Spain, Mexico, Louisiana, and Texas—was doubly important to Bentham. The practices of the office represented a provocative rejection of common law procedure, which he spent much of his life criticizing, and it was the best example of the kind of simple, quick, summary justice that he spent much of his life trying to enact.

And when Livingston said that he was indebted to Bentham for a simple pleading law of a few pages, a law that reduced litigation and could be learned in a day, he was crediting a philosophy of judicial procedure that rejected common law procedure, and that was founded on the practices of the office that would become the *alcalde* in Texas.

### C. TEXAS PLEADING RESEMBLES OTHER LOUISIANA TERRITORY LAWS

Just before Austin sent his approved pleading law to the *alcaldes* in May of 1824, he wrote his mother and sister asking for a copy of a book called Geyer's Digest.<sup>288</sup> Austin was a delegate to the Territorial Legislature of Missouri in 1818, and one of his colleagues was Henry Geyer, who published a Digest of the Laws of Missouri that year.<sup>289</sup> Geyer's Digest contains two pleading provisions: one for suits at law, the other for equity. The provision pleading in chancery proceedings looks like a cross between Austin's law and the 1836 Texas pleading law. Compare all three:

---

287. SIR WILLIAM BLACKSTONE, KNT, 3 COMMENTARIES ON THE LAWS OF ENGLAND 328 (Birch and Small, Philadelphia 1803). Bentham also disliked Montesquieu, who praised the "technical system" of British judicial procedure. R. HARRISON, THE PEOPLE IS MY CAESAR, 3 JEREMY BENTHAM: CRITICAL ASSESSMENTS 926 (1993).

288. Stephen F. Austin to His Mother and Sister, May 4, 1824, Austin Papers, Dolph Briscoe Center for American History, The University of Texas at Austin. He wrote, "Pray do not forget to bring Me a Copy of the Laws of Missouri, Gyers digest, or if there is a later one bring it, also the Constitutions of Missouri and Illinois do not forget this. . . ."

289. McKnight, *Austin's Legalistic Concerns*, *supra* note 160, at 248 n.40.

<p>Geyer's 1818 Digest [T]he complainant may, on filing a bill or petition with the clerk of the general (superior) court, stating the nature of his complaint, obtain from said clerk, a summons which shall be served and returned by the sheriff as in ordinary cases. It shall be the duty of every person who obtains a summons as aforesaid, to deliver to the sheriff a copy of his bill or petition filed as aforesaid, which copy the sheriff shall deliver to the defendant.<sup>290</sup></p>	<p>Austin's Civil Regulations Any person having cause of complaint against another, within the jurisdiction of an alcalde must present a written petition to the alcalde of the proper district, stating in a short but clear manner the cause and nature of his complaint, to which the [alcalde/ will attach a summons in the form following— "Austin's Colony, District of ___ the constable of said district is commanded to summons the above-named C. D., if to be found in the above district, to appear before me A. B., alcalde of said district, at my office (or wherever the suit is to be tried), between the hours of nine o'clock A.M. and three o'clock P.M., on the ___ day of __, to answer the above complaint of E.F and on or before that day this summons and the proceedings thereon must be returned to my office— Given this ___ day of __. A.B. alcalde.<sup>291</sup></p>	<p>1836 Texas Pleading Law It shall be the duty of the plaintiff or his attorney, in taking out a writ or process, to file his petition, with a full and clear statement of the names of the parties, whether plaintiff or defendant, with the causes of action, and the nature of relief, which he requests of the court.<sup>292</sup> 1836 Consultation Summons Form To E. P. Sheriff of the municipality of __: We command you, that you summons, or attach, the body of A. B., so that he be and appear before __, first Judge of the municipality of __, on the ___ day of __, in the year __, at the town of __, to answer to C. D. in a plea of __ to his damage and as you faithfully execute this, so you will answer. Witness E. F. our said Judge of the aforesaid municipality, on the ___ day of __ A. D., __ at the town of __. G. H., Clerk. Issued on ___ A.D.<sup>293</sup></p>
--	--	---

The Missouri Territory was the northern part of the old Louisiana Purchase; the Orleans Territory—the territory Livingston wrote his law for—was the southern part. The Missouri Territory was known as the Louisiana Territory from 1805 until 1812.<sup>294</sup> The pleading law in Geyer's Missouri Digest was a law of the Louisiana Territory that had been passed in 1810, and had gone into effect in 1811.<sup>295</sup> Before 1810, the Louisiana Territory appears to have had no pleading law of its own.<sup>296</sup> Instead,

290. Chancery Proceedings, §§ 1, 2, in HENRY GEYER, DIGEST OF THE LAWS OF MISSOURI 105–06 (1818).

291. Art. 3 in *Austin's Alcalde Code*, *supra* note 143, at 76.

292. Act approved Dec. 22, 1836, 1st Cong., R.S., §8, 1836–37 Repub. Tex. Laws 198, 201, in GAMMEL, *supra* note 7, at 1258, 1261.

293. Ordinances and Decrees of the General Council of the Provisional Government of Texas, An Ordinance and Decree for opening the several Courts of Justice, appointing Clerks, Prosecuting Attorneys, and defining their duties, &c., Section 1, January 16, 1836, in GAMMEL, *supra* note 7, at 1044.

294. William Wirt Howe, *Law in the Louisiana Purchase*, 14 YALE L. J. 77, 79 (1904).

295. Laws of Louisiana Territory, An Act Regulating the mode of Judicial proceedings in certain cases, and extending certain powers to the General Court, Sections 1 and 2, Passed 26 October 1810, In force 1 January 1811.

296. The Louisiana Territory was known as the District of Louisiana from 1804 to 1805 and, during that time, it was administered by the Territory of Indiana. The pleading law of

legislation creating each iteration of the territory continued all laws in force at the time of each act,<sup>297</sup> and the only pleading law that was in force in a jurisdiction of the former Louisiana Purchase was Livingston's 1805 law. Like the Orleans Territory, the Missouri Territory was largely French-speaking, but had been governed by Spanish law before it was acquired by the United States.<sup>298</sup> Based on this evidence, it stands to reason that 1810 Louisiana Territory pleading law—the law in Geyer's Digest—used Livingston's Orleans Territory law as a source.

Similarities in language between the two laws support that conclusion. The Missouri pleading law was designed for chancery practice and, like Livingston's law, uses the words of English equity. It looks quite a lot like the 1836 Texas pleading law<sup>299</sup> and, if the Missouri, i.e., Louisiana Territory, law was a source of the Texas pleading law, it would be additional evidence that the 1836 Texas pleading law is directly descended from English equity through the early pleading laws of the former Louisiana Purchase and Stephen F. Austin's rules for his colony's *alcaldes*.

## V. SOURCES OF THE CURRENT TEXAS PLEADING SYSTEM

Texas amended the 1836 pleading law in 1846 with very few changes, none of them substantive.<sup>300</sup> The resulting law was so simple that, by 1877, Chief Justice Oran Roberts concluded that new rules were “necessary to establish some system of . . . practice in the courts” because it “was generally understood, and acted on, that there was no such thing as

---

the Indiana Territory was a purely common-law provision, and it was passed in 1807, two years after the District of Louisiana became the Territory of Louisiana and was no longer administered by the Territory of Indiana. An Act regulating the Practice in the General Court, and Court of Common Pleas, and for other purposes, Approved September 17, 1807, in *THE LAWS OF THE INDIANA TERRITORY 1801–1809* 443–59 (Francis S. Philbrick, ed. 1930).

297. HOWE, *supra* note 294, at 80.

298. HOUCK, *supra* note 171, at 182.

299. The Missouri pleading law shares language, concepts, and structure of both Austin's law and the 1836 Texas pleading law, so it is likely related to them. McKnight, *Spanish Influence on Texas Pleading*, *supra* note 3, at 28 (finding the Spanish source law of a Texas venue law by observing similarities in language, content, and structure); BATIZA, *supra* note 91, at 13–14 (determining the sources of Louisiana law by noting verbatim and near-verbatim language between various laws); PASCAL, *supra* note 93, at 608–15 (relying primarily on commonalities of substance between two laws to determine whether one was the source of the other). There was also an opportunity for Austin to have learned the Missouri law through his association with Geyer and his experience with the laws of Missouri. See Baade, *Spanish Formalities*, *supra* note 30, at 733 n.345 (finding the Spanish sources of Texas mortgage laws by noting shared language and probative circumstantial evidence). There are, however, no reported Texas appellate court cases that have identified the pleading provision of this work as a source of Texas pleading law. See Rabalais, *supra* note 89, at 1497–1505 (identifying the Spanish, French, and common law sources of Louisiana law by compiling lists of court decisions that cite source laws).

300. Compare Act approved Dec. 22, 1836, 1st Cong., R.S., § 8, 1836–37 Repub. Tex. Laws 198, 201, in GAMMEL, *supra* note 7, at 1258, 1261, with An Act to Regulate Proceedings in the District Courts, Institution of Suits, approved May 13, 1846, 1st Cong., R.S., 1846–1847 Repub. Tex. Laws 363, in GAMMEL, *supra* note 7, at 1671.

a system of pleading in Texas.”<sup>301</sup> Accordingly, the Legislature amended the Texas pleading law in 1879, this time with a few substantive changes from the 1846 law:

<p>1846 Texas Pleading Law [T]he petition may be filed by the plaintiff or attorney, and shall set forth clearly the names of the parties and their residence, if known, with a full and clear statement of the cause of action and such other allegations, pertinent to the cause, as he may deem necessary to sustain the suit, and also a full statement of the nature of the relief he requests of the court. . . . It shall be the duty of the clerk, when a petition is filed, and the regulations herein before provided are complied with, to issue a writ or citation, directed to the sheriff or other proper officer of the county or counties in which the petition alleges that the defendant or defendants are, requiring him to summon the defendants to appear at the proper term of the court, then and there to answer the plaintiff's petition, a certified copy of which shall accompany each writ or citation. . . .<sup>302</sup></p>	<p>1879 Texas Pleading Law The pleadings in all civil suits in the district and county courts shall be by petition and answer. The pleadings in said courts shall be in writing and signed by the party, or by his attorney, and filed with the clerk of the court. The pleadings shall consist of a statement, in logical and legal form, of the facts constituting the plaintiff's cause of action, or the defendant's ground of defense.<sup>303</sup> The petition shall set forth clearly the names of the parties and their residences, if known, with a full and clear statement of the cause of action, and such other allegations, pertinent to the cause, as the plaintiff may deem necessary to sustain his suit, and without any distinction between suits at law and in equity, and shall also state the nature of the relief which he requests of the court.<sup>304</sup></p>
---	--

The 1879 law added the requirement that “pleadings shall consist of a statement, in logical and legal form, of the facts constituting the plaintiff's cause of action.”<sup>305</sup> This language is from common law pleading treatises.<sup>306</sup> This new common law language overlaid the existing equity language and concepts of the previous Texas pleading laws.<sup>307</sup> Texas

301. William V. Dorsaneo, III, *The History of Texas Civil Procedure*, 65 BAYLOR L. REV. 713, 719 (2013) (quoting O.M. ROBERTS, *THE ELEMENTS OF TEXAS PLEADING* 12–16 (1890)).

302. An Act to Regulate Proceedings in the District Courts, Institution of Suits, approved May 13, 1846, 1st Cong., R.S., §§ 5, 9, 1846–1847 Repub. Tex. Laws 363, in GAMBEL, *supra* note 7, at 1671–72.

303. TEX. REV. CIV. STAT. ARTS. 1185–87 (1879) (punctuation and internal notations changed).

304. *Id.* Art. 1195 (punctuation and internal notations changed, part of subdivision (b) removed because it was irrelevant).

305. *Id.* Art. 1187 (punctuation and internal notations changed).

306. SIR WILLIAM BLACKSTONE, KNT., 2 COMMENTARIES ON THE LAWS OF ENGLAND 225 n.1 (New York 1848). Professor William Dorsaneo has concluded that this phrase is evidence that the Texas pleading rule resembled Code Pleading. DORSANEO, *supra* note 301, at 720 (citing CHARLES E. CLARK, *HANDBOOK OF THE LAW OF CODE PLEADING* § 7, at 21–23 (2d ed. 1947)). Code pleading is different from common law pleading in many ways, but the New York Superior Court has held that, although the phrase “statement in a logical and legal form of the facts which constitution the plaintiff's cause of action” comes from the common law, it is no different from a requirement in the New York Field Code—a famous example of code pleading—that a statement contain “a plain and concise statement of the facts constituting a cause of action without unnecessary repetition.” Dows and Carey v. Hotchkiss, N.Y. Supreme Court, Munroe County, 1852, in 10 THE NEW YORK LEGAL OBSERVER 284 (1852).

307. SAYLES, *supra* note <CITE \_Ref494566977“>, at 390–91.

pleading therefore resembled common law pleading in part, and equity in part, creating increased technicality, formality, and incongruity.<sup>308</sup> The desire to simplify and systematize Texas pleading rules culminated in Texas Rules of Civil Procedure 45 and 47, which the Texas Supreme Court promulgated in 1941.<sup>309</sup> The committee that drafted Texas Rules of Civil Procedure 45 and 47 said the new language came from Federal Rule of Civil Procedure 8.<sup>310</sup>

Rule 8 is based on former Federal Equity Rule 25.<sup>311</sup> Compare them with the 1941 version of the new Texas pleading rules:

<p>Federal Equity Rule 25 (1918) [A] bill in equity shall contain, in addition to the usual caption: first, the full name, when known, of each plaintiff and defendant, and the citizenship and residence of each party. Second, a short and plain statement of the grounds upon which the court's jurisdiction depends. Third, a short and simple statement of the ultimate facts upon which the plaintiff asks relief, omitting any mere statement of evidence.<sup>312</sup></p>	<p>Federal Rule of Civil Procedure 8 A pleading that states a claim for relief must contain: a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support; a short and plain statement of the claim showing that the pleader is entitled to relief; and a demand for the relief sought, which may include relief in the alternative or different types of relief.<sup>313</sup></p>	<p>Texas Rules of Civil Procedure 45 and 47 (1941) Pleadings in the district and county courts shall be by petition and answer; consist of a statement in plain and concise language of the plaintiff's cause of action or the defendant's grounds of defense. . . ; contain any other matter which may be required by law or rule authorizing or regulating any particular action or defense; be in writing, signed by the party or his attorney, and be filed with the clerk. All pleadings shall be so construed as to do substantial justice.<sup>314</sup> A pleading which sets forth a claim for relief, whether an original petition, counterclaim, cross-claim, or third party claim, shall contain a short statement of the cause of action sufficient to give fair notice of the claim involved, and a demand for judgment for the relief to which the party deems himself entitled.<sup>315</sup></p>
---	---	---

308. *See Mateer v. Cockrill*, 45 S.W. 751, 753 (Tex. Civ. App. 1898, writ ref'd) (noting that the 1879 Texas pleading law is "very analogous to those which obtain in the courts of equity of England and of the United States"). *See also* SAYLES, *supra* note 136, at 390-91.

309. DORSANEO, *supra* note 301, at 721.

310. *Id.* at 739.

311. FED. R. CIV. P. 8 (annotations).

312. In 1918, Federal Equity Rule 24 provided that every "pleading shall be signed by a solicitor certifying that 'no scandalous matter is inserted in the pleading; and that it is not instituted for delay.'" JAMES LOVE HOPKINS, *THE NEW FEDERAL EQUITY RULES* 82, 86 (1918).

313. FED. R. CIV. P. 8.

314. TEX. REV. CIV. STAT. (1942), TEXAS RULE OF CIVIL PROCEDURE 45. The annotations provide: "Source: This rule embraces in part Art. 1997, Texas Rules 1 and 32 (for the District and County Courts), and Federal Rule 8(f). Change: No change in Art. 1997 except the addition of the final sentence and the elimination, in paragraph two, of the requirement that the allegations be statements of fact."

315. TEX. REV. CIV. STAT. (1942), TEXAS RULE OF CIVIL PROCEDURE 47. The annotations provide: "Source: Federal Rule 8(a). Change: Omission of the Federal requirement

Former Federal Equity Rule 25 is based on former Federal Equity Rules 20 and 26, which were promulgated in 1842,<sup>316</sup> and were based on orders of the English High Court of Chancery.<sup>317</sup>

The annotations to Rules 20 and 26 discuss prohibitions against “impertinence” and “scandal” at length.<sup>318</sup> They explain that these prohibitions are

necessary to the speedy and efficient administration of justice, and is one of the inherent powers of a court of chancery, which has been exercised without question since the establishment of such courts. Prolivity, tautology, scandal, and impertinence have been among the common faults of bills in equity time out of mind.<sup>319</sup>

The annotations even mention the Lord Chancellor’s order that “no sheet should contain more than 15 lines, and an excess of the allotted quantity furnished good ground for demurrer.”<sup>320</sup> Rules 20 and 26 are therefore strikingly similar to Livingston’s 1805 law, which was based on precisely the same equity sources as the old Federal Rules of Equity.

<p>Federal Equity Rules (c. 1842–1911) Every bill, in the introductory part thereof, shall contain the names, places of abode and citizenship of all the parties, plaintiffs and defendants, by and against whom the bill is brought. The form, in substance, shall be as follows: “To the Judges of the Circuit Court of the United States for the District of ___: A. B. of ___, and a citizen of the State of ___, brings this his bill against C. D. of ___, and a citizen of the State of ___, and E. F. of ___, and a citizen of the State of ___. And thereupon your orator complains.” Every bill shall be expressed in as brief and succinct terms as it reasonably can be, and shall contain no unnecessary recitals of deeds, documents, contracts, or other instruments, in haec verba, or any other impertinent matter, or any scandalous matter not relevant to the suit.<sup>321</sup></p>	<p>Livingston’s 1805 Law All suits in the superior court shall be commenced by petition, addressed to the court, which shall state the names of the parties, their places of residence, and the cause of action, with the necessary circumstances of places and dates, and shall conclude with a prayer for relief, adapted to the circumstances of the case. And every such petition shall be free from unnecessary prolixity, and from any matter scandalous, libellous, or impertinent, and shall be filed with the clerk, whose duty it shall be to endorse thereon the day on which the same is filed. [A]fter filing such petition, the clerk shall on the request of the petitioner or his attorney, make a fair transcript of the same, together with a citation in the following form: Mr. A. B. you are hereby summoned to appear at the ___ and comply with the prayer of the annexed petition, or file your answer thereto, in writing, in the office of the clerk of the superior court, at ___ in ___ days after service thereof. Witness C.D. presiding</p>
---	--

that jurisdictional grounds be stated. The Federal Rule requires ‘a short and plain statement of the claim showing that the pleader is entitled to relief,’ for which wording that of subdivision (a) above has been substituted.”

316. Hopkins, *supra* note 312, at 47, 48.

317. *Id.* at 164.

318. *Id.* at 88 (citing Sanborn, J. in Kelley v. Boettcher, 85 Fed. Rep. 55, 29 (C.C.A. 14).

319. *Id.*

320. *Id.*

321. *Id.* at 82 (for Rule 20) and 88 (for Rule 26).



In this way, the current Texas pleading rule is based on English equity from two sources: the 1836 Texas pleading law, which was based on Austin's and Livingston's laws, both of which were written in the language of equity; and the Federal Rules of Civil Procedure, which were based on Federal Equity Rules and Chancery practice of England. But equity might not be the only source of the current Texas pleading law.

Promulgation of the Federal Rules of Civil Procedure in the early 1920s was the culmination of a broader movement to simplify, and then codify, civil procedure.<sup>322</sup> In an early stage of that movement, New York enacted a systematic codification of its law in 1848, now known as the Field Code.<sup>323</sup> Its pleading provision is an example of what has become known as code pleading.<sup>324</sup>

Some legal scholars have concluded that the Federal Rules of Civil Procedure are descended from the Field Code and Livingston's Louisiana law:

The movement in favor of a clear, simple, and concise method of practice began with the criticisms of Bentham very early in the century, and resulted, first, in the adoption of the Code of Procedure of Louisiana, as drafted by Edward Livingston, and subsequently, in 1846, in the New York Code of Procedure, as drafted by David Dudley Field and adopted and continued for a period of nearly thirty years.<sup>325</sup>

Some scholars have claimed that anyone "familiar with Edward Livingston's efforts toward simplification of procedure in Louisiana will rise from a study of the new Federal Rules with a feeling that his spirit has helped to guide and direct the work of the Supreme Court Committee."<sup>326</sup> The "connection between [Livingston's] Louisiana codes and the movement for codification having its home in New York and spreading thence, in the matter of practice and procedure at least, to a majority of the several States . . . seems obvious."<sup>327</sup>

Certainly, very few scholars have concluded that the Federal Rules of Civil Procedure are descended from Livingston via the Field Code; some have even concluded that the Federal Rules are not descended from the Field Code at all.<sup>328</sup> Nevertheless, the language and concepts in the Livingston, Field Code, and Federal provisions are very similar. The Field Code required that a complaint contain "[a] statement of the facts constituting the cause of action, in ordinary and concise language, without repe-

---

322. Stephen N. Surbin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 924-25 (April 1987).

323. *Id.* at 932.

324. CHARLES HEPBURN, *THE HISTORICAL DEVELOPMENT OF CODE PLEADING IN AMERICA AND ENGLAND* 12-13 (1897).

325. Gregory, *supra* note 271, at 356.

326. Ira S. Flory & Henry G. McMahon, *The New Federal Rules and Louisiana Practice*, 1 LA. L. REV. 45, 78 (1938-1939).

327. Gregory, *supra* note 271, at 356.

328. Surbin, *supra* note 322, at 925.

tion,”<sup>329</sup> and if “irrelevant or redundant matter be inserted in a pleading, it may be stricken out.”<sup>330</sup> Like Livingston’s 1805 pleading law, the Field Code’s simple pleading system, and the language it used, was based on English equity.<sup>331</sup> Consequently, the Field Code’s language resembles the language in the 1825 Louisiana Code of Practice, which Livingston wrote, and which replaced his 1805 Practice Act.<sup>332</sup> The 1825 Louisiana law’s pleading provision required that the petition “contain a clear and concise statement of the object of the demand, as well as of the nature of the title, or the cause of action on which it is founded; it must not contain any insulting or impertinent expression.”<sup>333</sup> The federal rules require that a complaint contain a “short and plain statement of the grounds for the court’s jurisdiction,” and for the plaintiff’s relief.<sup>334</sup> Their common language and requirements are evidence that the Livingston, New York, and Federal laws are closely related to one another, apparently in a single line of descent. And because Texas pleading came from Austin’s pleading law, and Austin’s law came from Livingston’s, Texas pleading would be both a descendent of the Federal Rules of Civil Procedure through the Texas rule amendments in 1941, and an ancestor of the Federal Rules through Livingston and the Field Code.

## VI. CONCLUSION

A fair summary of the genealogy of today’s Texas pleading rules is therefore something like this:

Today’s Texas pleading rule is descended, separately, from five different legal sources, each of which is related to all the others. One, Texas pleading came from English equity through Edward Livingston’s 1805 Orleans Territory Practice Act, Stephen F. Austin’s 1824 alcalde codes, and the 1836 Texas pleading law. Two, Livingston and Austin drafted their pleading laws in a way that rejected common law pleading, and that was not inconsistent with the appearance of Spanish practice. Three, Texas pleading came from English equity through the High Court of Chancery in England, the former Federal Equity Rules, and the Federal Rules of Civil Procedure. Four, equity came from canon law and the civil law, which are source laws of Spanish pleading. And Five, early Texas pleading was a very early event in the movement to simplify judicial procedure, which used features common to Spanish pleading and equity to replace the complexity of common law procedure.

---

329. The Code of Procedure of the State of New York, Title VI, Chapter I, § 142, in *THE CODE OF CIVIL PROCEDURE OF THE STATE OF NEW YORK* 44–45 (Albany, Weed Parsons & Co. 1849).

330. *Id.* at 49.

331. Surbin, *supra* note 322, at 932.

332. Brown, *supra* note 241, at 44.

333. Section III, Article 172, in *THOMAS GIBBES MORGAN, CODE OF PRACTICE IN CIVIL CASES FOR THE STATE OF LOUISIANA* 108–09 (1861).

334. FED. R. CIV. P. 8.

That is very different from the traditional story of the origin of the Texas pleading system. Perhaps someone will find additional evidence—a document at an archive in Madrid, or some textual clue that other readers have seen before but misunderstood—that will rewrite the story again. The evidence is probably out there. In the tradition of Professor McKnight: let's go find it.