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MERCHANTS, KINGS, AND THE CODIFICATION OF COMMERCIAL LAW

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History has long carried weight in commercial law. The most notable example of the influence of historical models among both advocates of international commercial arbitration and of the current structure of UCC article 2 is the tale of the law merchant. This story, as told in the seemingly obligatory background section of nearly all works on transnational commercial law, and now many on internet commerce,[1] mythologizes the intrepid medieval merchants, who, operating outside any state regulation, devised customs so efficient and so well attuned to encouraging supra-local commerce that they were adopted uniformly across Europe and then enforced in merchant-created tribunals before merchant judges. The medieval unity, so the story continues, broke down during the sixteenth to eighteenth centuries when the newly-muscular early modern states intruded and begin to regulate commerce to suit their own purposes. They subordinated commercial interests to state interests, enforcing these decrees by lawyerizing what had been an informal and collegial form of dispute resolution and moving the disputes into courts of general jurisdiction staffed by professional judges who no longer understood the needs of merchants. The result was to disunite what had been previously a remarkably consistent set of customs and to subject merchants to the complexity of trading across a patchwork of competing sovereign national legal systems.[2]

The moral of this history lesson, the reason its advocates point to it with such insistence, seems to be that because in the Middle Ages merchants could evolve uniform

[1] The list is long and growing, a few examples of works making use of the historical law merchant include: FILIP DE LY, INTERNATIONAL BUSINESS LAW AND LEX MERCATORIA (1992); HERCULES BOOYSEN, INTERNATIONAL TRANSACTIONS AND THE INTERNATIONAL LAW MERCHANT (1995); LEON TRAKMAN, THE LAW MERCHANT: THE EVOLUTION OF COMMERCIAL LAW (1983); A. Goldstajn, *Usages of Trade and Other Autonomous Rules of International Trade According to the UN (1980) Sales Convention* in INTERNATIONAL SALE OF GOODS: DUBROVNIK LECTURES 55 (Peter Sarcevic & Paul Volken eds., 1986); Bernardo M. Cremenades & Steven L. Plehn, *The New Lex Mercatoria and the Harmonization of the Laws of International Commercial Transactions*, 2 B.U. INT'L. L. J. 317 (1984); Harold J. Berman & Colin Kaufman, *The Law of International Commercial Transactions* (Lex Mercatoria), 19 HARV. INT'L. L. J. 221 (1978); Thomas E. Carbonneau & Marc S. Firestone, *Transnational Law-Making: Assessing the Impact of the Vienna Convention and the Viability of Arbitral Adjudication*, 1 EMORY J. INT'L DISP. RESOL. 51 (1986); Leon Trakman, *The Evolution of the Law Merchant: Our Commercial Heritage*, 12 J. MARITIME L. & COMM. 1 (1980); Fabrizio Marrella & Christopher S. Yoo, *Is Open Source Software the Nex Lex Mercatoria*, 47 VA. J. INT'L L. 807 (2006-2007).

[2] *E.g.*, Cremenades, 2 B.U. INT'L L. J. at 319-320; Carbonneau, 1 EMORY J. INT'L DISP. RESOL. at 61-62; Berman, 19 HARV. INT'L. L. J. at 227-28; Trakman, 12 J. MARITIME L. & COMM. at 15, 22-24.

customs to regulate supra-local commerce outside the framework of national laws, it should also be possible now to duplicate such a system. They assume that under the surface of law, merchants have agreed-upon customs that could be used to create a new law merchant. This modern law merchant would, like its supposed ancestor, consist of uniform, universal, merchant-selected and therefore efficient practices.[3]

In the last several years, legal historians have taken a renewed interest in the medieval part of this law merchant story. Most now agree that it is flawed in various respects. Custom was not uniform or universal, and in fact no such creature as the law merchant, in the sense of an identifiable body of rules, may have existed at all.[4] Rather than submit a new entry into an increasingly crowded field of research, however, this paper takes aim at the largely overlooked second part of the law merchant story and asks whether the early modern creation of a nascent national commercial law corresponds to the bleak picture of governmental imposition at the expense of merchant cooperation painted by the standard account. Evidence taken from the narrow field of bills of exchange suggests that rather than imposing unwanted laws, when governments began to regulate commercial law in an orderly fashion, they often did so at the behest and in the interest of the merchants. The motivation for such requests came not only from government self-interest or regulatory capture but in many instances also from the frustration of merchants at the failure of custom to regulate commerce. The paper takes no position on the question of whether uniform customs existed during the Middle Ages. It argues, instead, that even if merchants had once successfully used custom, and whether they did is by no means clear, by the early modern period, custom alone was not an adequate mechanism for regulating supra-local commerce. The merchants not only acknowledged that fact; they also beseeched the governments to fix the problem.

The paper focuses on the regulation of bills of exchange in continental Europe during the seventeenth century. Part one explains this choice, and then offers a short

[3] Goldstajn, *Usages of Trade* at 71; Trakman, LAW MERCHANT at 40-41.

[4] Again, the list of articles is long and growing, but some of the more important include, Charles Donahue, Jr., *Medieval and Early Modern Lex mercatoria: An Attempt at the probatio diabolica*, 5 CHI. J. INT'L L. 21 (2004); Stephen E. Sachs, *From St. Ives to Cyberspace: The Modern Distortion of the Medieval Law Merchant*, 21 AM. U. INT'L L. REV. 685 (2005-2006); J.H. Baker, *The Law Merchant and the Common Law Before 1700*, 38 CAMB. L.J. 295 (1979); Albrecht Cordes, *A la recherché d'une Lex mercatoria au Moyen Age*, in STADT UND RECHT IM MITTELALTER: LA VILLE ET LE DROIT AU MOYEN AGE 117 (Pierre Monet & Otto Gerhard Oexle, eds, 2003).

description of the workings of bills in their economic setting and the attendant categories of rules that had developed to organize the exchange system. Part two provides evidence of merchant participation in the creation of laws governing the use of bills. This section disputes the possibility that this lawmaking was *merely* rentseeking or regulatory capture on the part of the merchants or an attempt to control commercial law on the part of the governments. Part three seeks to answer the question why the merchants would have sought regulation. It argues that custom could not work as the sole mechanism for regulating the market for bills because custom was inherently unstable and incomplete, and because, even if custom had once provided an adequate system, it could no longer do so in an increasingly complex economic world in which merchants traded across networks rather than exclusively within them.

1. TIME, PLACE, AND TOPIC

Given the nearly exclusive attention paid in American scholarship to 1) the medieval law merchant; 2) the history of English commercial law; and 3) the unexamined belief that the law merchant has always primarily centered on the law of sales, it may be necessary to justify the choice of the seventeenth century, continental Europe, and bills of exchange as the focus of this study. The lack of more than cursory attention to the period from the sixteenth to the eighteenth centuries is a serious omission for several reasons. First, while very little evidence related to commercial custom and law has been preserved from the Middle Ages, the early modern era offers an abundance of material concerning commerce, permitting historians to test theories rather than merely to speculate or indulge in myth-making.[5] Second, if the standard law merchant story is correct, then it is the early modern period that got us into the mess in which we find ourselves today. Thus, if we want to understand how to undo the damage, we need a better understanding of how it occurred. Furthermore, whatever merchant self-regulation of commerce existed during the Middle Ages, it did not outlast the growth of nation states. If legal scholars today believe that the

[5] Among the sources available are court records from merchant courts and courts of general jurisdiction; expert opinions of merchants and lawyers (called *parères*); merchant manuals, both published and unpublished; juristic commentaries on the 1673 French commercial code; and arbitration agreements.

medieval law merchant can be mimicked under modern conditions, then they need to understand why it did not survive early modern ones.

Within the broader early modern period, the paper concentrates on the seventeenth century. While statutes governing commerce did exist in the sixteenth century, as they did in the centuries before then, it was not until the late-sixteen and throughout the seventeenth centuries that we find a significant increase in purposive and coherent legislation about commercial matters. The first national commercial code, for instance, was the French code of 1673.[6] Denmark promulgated an extensive code governing bills of exchange in 1688. Lyon, Amsterdam, Frankfurt, Augsburg, Bologna, and Genoa were only a few of the major trading cities that legislated about bills of exchange in the seventeenth century.[7] With regard to bills of exchange, the flourishing of regulation at this period can be explained quite simply: the use of bills did not generalize in Northern Europe until the second half of the sixteenth century, and such innovations as negotiability and endorsement were only invented and widely accepted in the century between 1550 and 1650.[8]

The choice of continental Europe, in particular France and the Netherlands, is determined by the actual nexus of commercial law innovation in the seventeenth century. Although the English (and the Dutch) had the most dynamic trading economies, English commercial law did not break away from a relatively slavish dependence on continental sources until the eighteenth century under Mansfield.[9] By contrast, the French took the lead in codifying commercial law, and given its position as the leading entrepôt of Europe, Amsterdam and its laws exerted tremendous importance on other northern European cities.

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[6] FRANÇOIS-ANDRÉ ISAMBERT, 19 RECUEIL GÉNÉRAL DES ANCIENNES LOIS FRANÇAISES, DEPUIS L'AN 420, JUSQU'À LA REVOLUTION DE 1789 92-107 (1829). The Code consisted of twelve titles covering the usual areas of early modern commercial law. The longest titles concerned letters of exchange, bankruptcy, partnerships, and the jurisdiction of the commercial courts. Other titles identified the category of persons (merchants) subject to the Code; regulated apprenticeships; prohibited brokers from acting on their own account; established bookkeeping requirements; regulated imprisonment for debt; and detailed the rules of separation of marital property.

[7] A two-volume work by the seventeenth-century Amsterdam accountant Johannes Phoonsen, DE WISSEL-STYL TOT AMSTERDAM, contains both the original and Dutch translation of dozens of exchange statutes from all over Europe. All references in this paper will be to the 1711 revised Amsterdam edition published by Andries van Damme and Joannes Ratelband.

[8] Herman van der Wee, *Monetary, Credit and Banking Systems*, in 5 THE CAMBRIDGE ECONOMIC HISTORY OF EUROPE 290, 326-29 (1977).

[9] 12 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 525-26 (1938).

The paper does not consider sales law because, although the modern law merchant centers on sales transactions, the historical law merchant did not. When discussing the concept of law merchant (under whatever name[10]), late medieval and early modern writers mentioned monetary instruments, maritime law, bankruptcy, partnership and proto-corporation law, agency, brokerage, and rules regulating the use of written accounts and the training of apprentices. Sales law, where it came up at all, was mentioned only incidentally and in passing. The well-known *Lex mercatoria* of Gerard Malynes, for example, contains almost nothing about sales.[11] This holds true for all the merchant manuals of the period, whether written by merchants or by lawyers. In fact, sales law does not appear to enter the law merchant discourse until the nineteenth century.[12] Furthermore, little of the growing body of commercial legislation concerned sales. The 1673 French commercial code included not a single word about sales. The various Amsterdam statutes about commerce regulated, or more likely attempted to regulate, only one aspect of sales: the timing of cash payment for goods.[13]

Monetary instruments, on the other hand, were the cornerstone of commercial law and practice. Letters of credit and bills of exchange permitted merchants to move money across Europe at a time when paper money did not exist and only small-denomination coins were minted.[14] Bills were for centuries the merchant's hallmark. Nearly every merchant manual throughout early modern Europe explained at great length how bills worked and listed the rules concerning acceptance and protest in different cities and regions.

Bills of exchange should fit perfectly into the law merchant story of universal, merchant-created custom. First, the bill of exchange was a creation of commercial practice and came to be employed all across Europe. Neither the Roman law nor the existing civil customary law had anything similar. By contrast, the other important areas of the law

[10] Donahue, 5 CHI. J. INT'L L. at 27-28.

[11] GERARD MALYNES, CONSUETUDO, VEL, LEX MERCATORIA, OR, THE ANCIENT LAW-MERCHANT. IN THREE PARTS ACCORDING TO THE ESSENTIALS OF TRAFFICK (3rd ed. 1686).

[12] Thus far the earliest merchant manual I have located that includes any sales rules is Samuel Ricard, TRAITÉ GÉNÉRAL DU COMMERCE, which, in the two-volume 1781 edition, provides 3 pages of discussion of three rules of sales (perfect tender, right of adequate assurance of performance, and impracticability).

[13] VERVOLG VAN DE HANDVESTEN, PRIVILEGIEN, OCTROYEN, COSTUMEN , ENDE WILLEKEUREN DERSTAD AMSTELREDAM, VAN DEN IARE 1664, 65, 66, 67, 68, EN 1669 904 (1670). The insistent repetition of the law suggests that it was not followed.

[14] ROMUALD SZRAMKIEWICZ, HISTOIRE DU DROIT DES AFFAIRS 77-78 (1989).

merchant—maritime law, bankruptcy, and partnership—were to a greater or lesser extent influenced by preexisting law. Second, bills of exchange fulfilled the criteria commonly associated with the appearance of custom. The transactors interacted repeatedly and in the same fashion over a long period of time; the transactions were reciprocal because merchants would at different times have been both debtors and creditors; the players were basically of a homogeneous social status; and they faced strong social sanctions against default given the importance of good faith and reputation for determining creditworthiness in this society.[15] Furthermore, contemporaries believed that for bills of exchange to function, everyone had to abide by the same formalities.[16] Yet the evidence suggests that merchant custom did not suffice to govern at least those aspects of the exchange that occurred outside close reputational bonds and that the merchants were unable, without the imposition of government regulation, to establish definitive customs in these areas.

As bills of exchange will be discussed in detail here, it may be helpful to provide a quick refresher on how they worked. In the least complicated, most textbook case, the exchange involved four parties in two different locations.[17] Assume a merchant in Amsterdam wished to make a payment to a merchant in Paris. The Amsterdam merchant, the *deliverer*, lent money to an exchange agent—often but not always a banker—in Amsterdam, the *drawer*. The drawer gave the deliverer a bill of exchange drawn on the drawer's agent in Paris, the *payor*. The deliverer sent the bill to the merchant in Paris, the

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[15] Richard A. Epstein, *The Path to the T.J. Hooper: The Theory and History of Custom in the Law of Tort*, 21 J. LEGAL STUD. 1, 11-16 (1992); Lisa Bernstein, *The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study*, 66 U. CHI. L. REV. 710, 714 n. 14 (1999); MATHIAS MARESCHAL, TRAICTÉ DES CHANGES ET RECHANGES, LICITES, ET ILLICITES, ET MOYEN DE POURVOIR AUX FRAUDS DES BANQUEROUTES 10-11 (1625) ("le principal fondement de la Negotiatio[n] est sur le Credit & reputations. . .").

[16] MARESCHAL, TRAICTÉ DES CHANGES at 11-12; ANDRÉ VANDENBOSSCHE, CONTRIBUTION À L'HISTOIRE DES SOURCES DU DROIT COMMERCIAL: UN COMMENTAIARE MANUSCRIPT DE L'ORDONNANCE DE MARS 1673 55, 57 (1976). See also the comment by the English translator and annotator of the DICTIONNAIRE UNIVERSEL DE COMMERCE of Jacques Savary des Bruslons, the son of Jacques Savary, the French commercial code's drafter: "Foreign bills of exchange have long been looked on as the most obligatory and convenient paper-security, that is amongst merchant; not so much by virtue of the laws of any country, as in conformity to the universal customs and usages established among traders themselves, by a kind of unanimous concurrence, for the facilitating a general commerce throughout the world." 1 MALACHY POSTLETHWAYT, THE UNIVERSAL DICTIONARY OF TRADE AND COMMERCE 254 (1751).

[17] Permutations of this basic structure abounded, however. The exchange could involve three, or only two, people, could occur within a single location and in a single currency (the so-called dry exchange), could flow in the reverse direction—the first party taking money drawn on a correspondent rather than lending money, etc. For an accessible description of the other possibilities see JOHN SCARLETT, THE STILE OF EXCHANGES 1-6 (2d ed. 1684).

payee, who presented it to the payor for payment. Bills could be payable on sight, at a certain number of days' delay, after a certain customary delay (called *usance*), or on a date certain. In addition, after accepting the bill, the payor often had a few days' grace before payment was actually due. If the payer refused to pay on the bill, the payee could protest it against the payor and back against the drawer. Bills of exchange were by this time negotiable, so the payee could also pursue any endorsers up the chain in the event of non-payment. A seventeenth century bill would be as simple as: "At ten days' sight, pay to X or bearer the sum of 600 ecus at 10s 5d per ecu, for value received here of Y. Signed, Z." The wording of such an instrument did not require a great deal of regulation,[18] but many complex issues arose concerning presentation, acceptance, and protest of bills.

The bill of exchange system had three kinds of rules, which the paper will call fundamental, advisory, and coordinating. Fundamental rules were those whose operation defined and created the system of exchange. For instance, once the payor gave his acceptance in a certain way, he became bound to pay on the bill, or the drawer remained liable on an unaccepted bill protested for non-payment. These rules appear to have been consistent wherever bills were used. Perhaps this is evidence of the triumph of custom, but these rules composed merely the skeleton of the exchange system. Without them there would be no exchange at all, but they were not themselves sufficient for the system to function. In most instances, fundamental rules seem also to have been mandatory or at least difficult to contract around. Advisory rules might also be called "best practices" rules. These varied over time, from place to place, and from expert to expert. Examples include the practice that the drawer sent of a letter of advice to the payee after a bill had been drawn, or that the deliverer requested the drawer to make up duplicate, numbered, bills and sent them separately so that if one got lost, the other could be presented for payment.

The coordinating rules were different. They were, to begin with, normally default rules. The drawer and deliverer could contract around them if they did so explicitly in the bill. Second, the default rules varied by locality, and a widely-accepted conflict of laws rule established that the customs of the place of acceptance governed.[19] Third, and perhaps most

[18] Though some codes did include provisions expressly dictating the terms that must be included in a bill. See, *e.g.*, the French commercial code of 1673, article 1 of title 5. 19 ISAMBERT, RECUEIL at 97-98.

[19] SCARLETT, STILE OF EXCHANGES at 14; 1 PHOONSEN, WISSEL-STYL at 15.

importantly, these rules governed the relationship between the payor and the payee and between the payee and the drawer—the pairs who transacted with a person they did not necessarily know. A deliverer would not do business with a drawer whose creditworthiness he had not investigated; while a drawer would not draw on a payee he did not have reason to trust. The deliverer even had some techniques to evaluate the trustworthiness of the payee by, for instance, refusing the deliver the money to the drawer until the payee had indicated his acceptance of the bill. In these relationships, the sanction of reputation and of the desire to maintain relationships had direct impact. Between the payor and the payee or the payee and the drawer, however, these reputational forces were more attenuated.

An example will illustrate this. Imagine that Hans, a merchant in Amsterdam, wished to send money to Jacques, a merchant in Paris to pay for a shipment of wine. Hans went to his banker, a man with whom he regularly did business. Hans and the banker could draw a regular letter, setting no special conditions, or they could insert limits, such as the requirement that the bill not be paid until Hans received a bill of lading indicating the wine had been shipped. But assume no conditions were attached, and the bill simply said that it should be paid to Jacques or on his order at, say, 10 days after sight. The banker in Amsterdam drew the letter on his agent in Paris, a man with whom he had done business before and whom he believed to be solvent. The banker sent a letter of advice to his agent, giving him the details of the bill and thereby forewarning him of his obligation. Hans sent the bill to Jacques by the next post. Jacques, upon receipt of the bill, chose to negotiate it at a discount to Pierre, the shipper to whom he was indebted. Pierre negotiated the bill to Paul, a merchant whose goods Pierre happened to destroy in transit. Paul negotiated the bill to Giovanni, an Italian merchant, in payment for some silk. Giovanni gave the bill to his factor in Paris to present it for payment, then left Paris. The factor waited some time before he presented the bill to the agent in Paris. The agent did not know the factor; the factor did not know the agent or his principal. The factor also did not know the drawer, the deliverer, Jacques, Paul, or Pierre.

Upon presentation, the agent could accept or refuse the bill. If he accepted, he had a certain number of days to pay. Obviously, he might have an incentive to put off payment, in which case he might try to exploit uncertainty about the customs governing the payment period. If he refused, the factor would have to protest the bill. The factor might likewise

have incentives to exploit uncertainties about the order in which he must go after the other parties for payment or the amount of time in which he must make his protest. The agent and the factor, having no relationship with each other, and the factor having no relationship with the drawer or deliverer, reputational sanctions were going to be of less force. While, the drawer would be made aware that the agent had refused to accept the bill, he might be more willing to credit the explanation of the agent—for instance, that the factor waited too long to present the bill or that the endorsements were not correct—over the complaints of the factor, about whom he knew nothing.

The different types of rules and the extent to which merchants were able to police them is a fundamental predictor of the role of government regulation. Merchants wanted little regulation of fundamental rules, except when they were trying to capture rents; governments saw little reason to regulate advisory rules, at least at first, and merchants and governments concurred in the need to regulate coordinating rules.

2. THE ROLE OF MERCHANTS IN THE CREATION OF COMMERCIAL LAWS

Everyone involved in commerce, the merchants and the sovereigns—in this case both monarchs and city governments—wanted commerce to run smoothly. They wanted to minimize litigation and fraudulent (which might in some cases have been a code word for competitive) practices, and to maximize the efficiency of trade. Repeatedly, the prefaces to commercial legislation justified lawmaking on this basis. The 1673 French Commercial Code's preamble, for instance, spoke of "assuring among businessmen good faith against fraud" and of shortening the lengthy litigation process which "takes them away from their business."[20] If the merchants' customs had been able successfully to regulate the use of bills of exchange and thereby to keep litigation and the disruption of commerce to a minimum, there would have been little call for legislation. And yet, in statute after statute across Europe over the course of the latter half of the 17th and early 18th centuries, we read of merchants going to the government and saying, "give us a rule."

[20] "Nous avons cru être obligez de pourvoir à leur durée par des Réglements capables d'assurer parmi les Négociants la bonne foi contre la fraude, & prévenir les obstacles qui les détournent de leur employ par la longeur des process, & consommant en frais le plus liquide de ce qu'ils ont acquis." 19 ISAMBERT, RECUEIL GÉNÉRAL at 93.

The preamble to the 1672 exchange statute of the German town of Breslau, for example, reads, "We the councilors of the town of Breslau publish and make known by the present to all those whom it affects that diverse merchants and businessmen of this town have requested that we establish a positive ordinance concerning exchange in the manner of many other places of commerce, for the advancement of commerce and to prevent disorders, disputes, and suits, which arise too often…."[21] The 1667 statute of Frankfurt explained that, "both for ourselves and for the good of the many good and honest merchants who have requested this of us, we have decided to promulgate a stable regulation, on which everyone can base themselves in the future, on the subject of letters of exchange drawn on this city, whether during the fairs or at other times."[22] The 1673 French commercial code's supposed immediate impulse is said to have come from a request sent to the King by the merchants of Paris in 1669 asking him to promulgate an ordinance regulating commercial law.[23]

Such claims occur so frequently in the preambles that they might easily be discounted as mere tropes. But a trope need not be inaccurate, as demonstrated by one case in France where we can trace the whole arc of the legislation from complaint to promulgation. One matter that "often [gave rise to] intense disputes between merchants, which greatly troubled commerce," was the length of time a payee had to seek payment of a protested letter of exchange from the drawer and from endorsers up the chain.[24] The question came frequently before courts, moving the judges and consuls of the Parisian merchant court to take action.[25] In 1662, they convoked a meeting of the former consuls and other notable bankers and merchants to advise them on the means of remedying this abuse. The group created a set of rules establishing time limits for protests and notice and presented them to the Parlement of Paris. Parlement passed a bill and petitioned the King to ratify it, which he did in January 1664.[26]

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[21] 2 PHOONSEN, WISSEL-STYL at 219.

[22] *Id.* at 121.

[23] 1 EMILE LEVASSEUR, HISTOIRE DE LA COMMERCE DE LA FRANCE 299 (1911).

[24] 1 JACQUES SAVARY, LE PARFAIT NÉGOCIANT 179. I will refer throughout the paper to the 2-volume revised edition of 1752 published in Geneva by Cramer & Philibert.

[25] *Id.* at 180.

[26] *Id.* 180-81.

The preamble of the King's declaration recounted the bill's origin in the concerns of "[o]ur dear and beloved judges and consuls of our good city of Paris, [who,] having recognized through long usage the prejudice that merchants endure in the absence of a definitive regulation concerning the acceptance, guaranteeing, and protest of letters of exchange . . . , have presented their request to our court of Parlement in the said place, with the intent that there should be provided a good regulation of the making and negotiation of these said letters of exchange."[27]

Evidence of merchants' belief in the efficacy of legislation to solve the problems created by a customary commercial regime can be found in merchants' writings as well. In 1676, an Amsterdam merchant and highly respected and often-quoted expert on bills of exchange named Johannes Phoonsen, listed ten unresolved issues in the law of bills as they related to bankruptcy and then commented:[28]

> To prevent these and similar and hundreds of other questions, disputes, and inconveniences that arise in exchange that I could list and describe, it is only necessary to make a precise order and regulation based on which everyone could regulate and guide themselves, written with knowledge, ordained, and legislated. For it is astonishing and to be complained about that, in this city, which is assuredly the leading commercial and exchange locale in the whole world, no badly-needed ordinance, required and useful to prevent disputes, exists but only a few orders and regulations established from time to time. . . .

Under the merchants' pleas for government assistance hide several different interactions between the merchants and the sovereigns. In some cases, the merchants seem to have been seeking rents or trying to use regulatory capture to further their monopolistic interests. In other cases, the sovereign claimed that merchants had asked for regulation that, in fact, only the state wanted. Some rules, however, cannot be explained either by rentseeking or government self-interest, but appear instead to have been a genuine attempt to organize commerce in the face of the failure of custom.

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[27] 17 ISAMBERT, RECUEIL GÉNÉRAL at 28-29, "Nos chers et bien amés les juges et consuls de notre bonne ville de Paris ayant reconnu par un long usage le prejudice que reçoivent les négocians, faute d'un réglement certain pour l'acceptation, cautionnement et protêt de lettres de change . . . , auroient présenté leur requite à notre cour de parlement dudit lieu, tendante à ce qu'il fût pourvu d'un bon réglement sur le fait et négoce desdites lettres de change. . . ."

[28] 1 PHOONSEN, WISSEL-STYL at 332-336, quoted text at 336.

A common theme in seventeenth-century commercial writing is the decline of good faith. The Parliamentary attorney, Mathias Mareschal, began his authoritative 1625 treatise on bills of exchange and bankruptcy by asking, "Why do we daily see an increase in the number of laws?" His answer: because of the great increase in bad faith, which for him seemed to be synonymous with striving to make money without concern for the social consequences and with a rise in litigiousness.[29] The preambles to exchange statutes often make the same observation. In the 1667 ordinance of Frankfurt, the town council explained that it had promulgated the rules "based on diverse complaints that have been made to us, that for some time great abuses have been introduced with regard to the letters of exchange drawn on this city either at the fairs or at other times, these causing much disorder and confusion and long and contentious suits, and which it is good to remedy in order to prevent the decline and the ruin of business and to avoid the hardship that these abuses could cause our free fairs."[30]

While these complaints could, at least in part, be a reflection of real concerns about how commercial practice, they could also be a cover for rentseeking. One custom in particular was especially despised and frequently regulated against. The practice arose in Lyon that bills could be accepted in such a way as to fail to bind the payor to pay. He might, for instance, accept only conditionally. If the bearer was not aware of this practice, he could end up getting cheated.[31] Lyon merchants brought this practice into other cities, and the resulting disputes led to complaints to the town councils and calls for legislation. The Antwerp ordinance creating rules that eliminated this form of acceptance began by saying, "As it is daily remarked that many abuses and bad customs are introduced regarding the acceptance of letters of exchange payable in this town, such as those which foreigners accept here on condition that they be warned of the due date and others where the accepters accept without signing, by which great disputes are introduced in a commerce that should be done with fidelity and loyalty, in order to remedy this, the said lords have commanded and

[29] MARESCHAL, TRAICTÉ DES CHANGES at 1-2.

[30] 2 PHOONSEN, WISSEL-STYL at 121.

[31] 1 SAVARY, PARFAIT NÉGOCIANT at 152. PHILIPPE BORNIER, ORDONNANCE DE LOUIS XIV SUR LE COMMERCE 216 (1681).

ordered…."[32] Amsterdam also banned the practice,[33] as did the French commercial code everywhere except Lyon.[34]

Another example of possible rentseeking or regulatory capture is found in the Amsterdam statute of Jan 20, 1679, which commences, "The justice ministers of the city of Amsterdam have, on the remonstration of the merchants of this city concerning the damage and inconveniences that arise in the exchange business, found it good to order, legislate, and ordain …."[35] The problem at issue was that Amsterdam merchants did a great deal of trade at the fairs of Frankfurt, but when the deliverer handed over money to a drawer at the fair, the drawer did not write up a bill of exchange or promissory letter, making instead merely an oral promise to have the money repaid in Amsterdam. Consequently, upon their return to Amsterdam, the deliverers had no proof to give to the drawer of any debt, and this led to disputes. "For which reason," the statute continued, "it is highly necessary that something be done, so it is ordered, etc., by the ministers that" exchanges have to be represented in a writing given by the drawer, which had to be in his hand, signed, and detailing the promise that was contracted for.[36]

These two rules fit into the framework of regulatory capture, because the group adversely affected by the unregulated behavior and seeking to limit the entry of the objectionable foreigners is both limited in size and a more powerful constituent of the government than the group engaging in the offensive behavior.[37] The merchants of Antwerp or Amsterdam who did not like the questionable practices introduced by the Lyonnais had more influence over their local city government than did the foreigners, and the fact that the foreigners could get away with violating a fundamental rule by which the locals were expected, at the expense of loss of reputation, to abide, would have united both drawers and payors. (Since merchants and merchant-bankers would normally have served as both at various times, the real distinction was between those who felt they could get away

[32] 2 PHOONSEN, WISSELSTYL at 29-30.

[33] *Id.* at 15-16.

[34] Art. 2, tit. 5. 19 ISAMBERT, RECUEIL GÉNÉRAL at 98.

[35] 2 PHOONSEN, WISSELSTYL at 12.

[36] *Id.* at 13.

[37] George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECONOMICS & MANAGEMENT SCIENCE 3, 5 (1971);

with conditional acceptances and those who felt bound by the more traditional rules.) A similar phenomenon could have been at work with regard to the oral contracts made at the Frankfurt fairs, where the real costs were born in Amsterdam.[38]

Relatedly, merchants may have wanted the government to act as the gorilla and use its weight and authority to corral those apt to question established norms. We see this in Amsterdam in the use—and most importantly in the recording—of "turbes" or inquiries about existing customs put to a jury of experts. A merchant who disputed the existence of a custom would ask the city government to summon a group of experts—which seems to have commonly included both experienced merchants and practicing lawyers—and have the question put to the group. The jurymen could dissent from or add clarification to the verdict of the others. Several such *turbes* are recorded in the Amsterdam statute books, and their notable characteristic is the normal unanimity of the jurymen.[39] This unanimity, which would otherwise indicate that custom was working satisfactorily as a regulatory mechanism, suggests that the merchants in favor of the asserted custom were using the statute book to get into writing a practice that they were concerned might be challenged or in the process of changing. Giving such practice the imprimatur of government authority provided a means by which it could be fossilized—perhaps to the benefit of a certain powerful group.

On the flip side, some evidence, particularly in aspects of the 1673 French commercial code, indicates that the sovereign opportunistically deployed the trope of merchant pleas to cover the imposition of rules in furtherance of its own economic or political interests. However, any theory of government imposition must be handled carefully in this era because the simple fact that a law was on the books did not mean that the sovereign had the power to enforce it.

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[38] These two aspects of the exchange transaction might have been ripe for regulation because the customary norms were easy to violate. In the case of the Lyonnais conditional acceptance, the reputational sanctions governing the relationship between payor and payee were relatively weak, as discussed above. The Frankfurt oral contract involved no third parties with an interest in enforcement. For custom to function, it must have that external reinforcement.

[39] 2 PHOONSEN, WISSEL-STYL at 2-4 (turbe from 1601 concerning bills drawn by agents); *id.* at 7-9 (turbe from 1663 concerning protesting of bills); ORDONNANTIE EN WILLEKEUREN VAN WISSEL EN WISSEL-BANK DER STAD AMSTERDAM, MET DEN AANKLEEVE VAN DIEN 46-51 (1775) (turbe from 1716 concerning non-payment of bills and bankruptcy).

For example, the 1673 French commercial code banned compound interest, which French merchants commonly charged.[40] Lest this example be used to reinforce the claim that commercial laws were ruinous to commercial practice, note the response of one early commentator to this provision: "This article is entirely contrary to the usage of the exchange of Lyon, and when, in litigation, one wished to allege the rule in this article, the court ignores it."[41] This was not the only instance of courts or merchants permitting those portions of the Code that they did not like to fall into desuetude. Article 5 of title 5 of the Code set the length of *usance* in France at 30 days.[42] Traditionally, *usance*, a customary period of time after the drawing of a bill of exchange that the payor of the bill had to make payment, had been measured in months, regardless of how many days the month had.[43] Despite the fact that the drafters admitted the existence of the custom, the Code changed the rule because, the drafters claimed, the existence of an agreed-upon custom had not prevented disputes from arising about when the *usance* period tolled, because months had different numbers of days.[44] Nonetheless, although the government made this rule, that did not mean merchants abided by it. In the early eighteenth century, for instance, the chamber of commerce of Normandy pronounced itself in favor of the per month *usance*.[45] The point is that the king could ordain a law, but he was not powerful enough to ensure it was accepted and followed, not even by the royal courts.

The explanations offered so far for merchant-sovereign cooperation, or apparent cooperation, in the regulation of commerce still leave one important set of rules unaccounted for. These are the coordinating rules dealing primarily with the acceptance and protest of bills, and they turn out to be the rules that predominated in the seventeenth-century regulation of bills of exchange. Neither rentseeking/regulatory capture nor

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[40] Title 6, article 2. 19 ISAMBERT, RECUEIL GÉNÉRAL at 101.

[41] VANDENBOSSCHE, CONTRIBUTION À L'HISTOIRE DES SOURCES DU DROIT COMMERCIAL at 10. This critical commentary comes from an anonymous manuscript work ("Anonymous") that its editor dates to 1678-1686. The identity of the author of the Anonymous presents an interesting puzzle. He was, from all appearances, a Roman-law trained lawyer with an extensive knowledge of commercial practice. Vandenbossche, at 9, expresses the belief that the author was a practicing attorney.

[42] 19 ISAMBERT, RECUEIL GÉNÉRAL at 98.

[43] BORNIER, ORDONNANCE at 248; FRANÇOIS BOUTARIC, EXPLICATION DE L'ORDONNANCE DE LOUIS XIV CONCERNANT LE COMMERCE 45 (1743).

[44] 1 SAVARY, PARFAIT NÉGOCIANT at 150.

[45] VANDENBOSSCHE, CONTRIBUTION À L'HISTOIRE DES SOURCES DU DROIT COMMERCIAL at 67 n.3.

government self interest can explain these rules. As mere coordinating rules—did a payor have nine days or ten days to pay on a bill—their specific content was meaningless to the sovereign. As long as a rule existed that kept commerce flowing and disputes out of court, the government neither cared about, nor necessarily had the power to insist on, the content of the rule. Anyway, in most places the merchant class controlled, entirely or in part, the city government. The government of Amsterdam, to name the most extreme example, was throughout the seventeenth century dominated by business interests.[46] Such men had no reason to pass legislation antithetical either to their own businesses or that of their social and commercial associates. Furthermore, since merchants acted variously as both payors and payees, a rule that benefited debtors would disadvantage those same people when they were creditors. Thus no single, coherent group had an interest in joining together to seek rents and either try to get regulation or to influence the choice of the rule. Instead, this appears to be an area of commercial law in which the plaints of the merchants can be taken at face value. They really did see the need for a rule; custom really was unable to provide it; and the best solution really was to get a law passed.

3. Regulation of Coordinating Rules

Merchants seem to have sought legislation to regulate coordination rules governing bills of exchange either because no custom existed or because no consensus existed about which of several practices should prevail. A rather famous example of the first, mentioned by several French commentators,[47] demonstrates that, even in what would seem to be a source of routine disputes, the merchant community had not always generated a rule. The question at issue was how much time the bearer of a bill of exchange payable at a certain number of days' sight had to present the bill after coming into possession of it. The problem came to a head after the capture of Trier by the Dutch in 1673 during the Franco-Dutch war of 1672-1678. A Frenchman stationed at Trier in the service of the king of

[46] D.J. Roorda, *Het Hollandse regenten patriciaat in de 17de eeuw*, *in* VADERLANDS VERLEDEN IN VEELVOUD 232, 238-39 (G.A.M. Beekelaar et al eds., 1975).

[47] This account comes from Jacques Depuis de la Serra's *L'art des lettres de changes,* reprinted in 1 Savary, LE PARFAIT NÉGOCIANT after page 856, on the separately-paginated pages 20-21, chapter 6, numbers 5-14. Also mentioned by Anonymous in VANDENBOSSCHE, CONTRIBUTION À L'HISTOIRE DES SOURCES DU DROIT COMMERCIAL at 65-67, who says that the 1673 Code should have included a rule dealing with this situation.

France wrote in May to his brother, a merchant in Paris, asking him to draw a bill of exchange on him (the soldier in Trier, henceforth the *Payer*) payable on short notice for 2000 *livres*. In other words, the soldier had the money, and he wanted to move it to Paris. The brother (the *Drawer*) gave a banker in Paris a bill of exchange payable at 8 days' sight. The banker negotiated the letter to another banker (the *Bearer*).

At the time, regular mail service ran between Trier and Paris twice a week, taking about five days each way. This mail service ran until the Dutch took Trier in early August. Throughout the summer the Drawer and the original banker asked the Bearer to send the bill to Trier to be paid. The Bearer claims to have sent it, but the bill was not presented before Trier was captured. All this time the Payer had been holding the money to pay the bill, but when the Dutch took the city, he was made prisoner and his money was taken by the enemy.

At that point, the Bearer brought the bill back to the Drawer demanding payment because he knew that he could no longer go to the Payer in Trier. The Drawer claimed that he was not liable for payment because the Bearer had delayed too long in seeking payment from the Payer in Trier even though the Drawer had asked him not to delay. The Drawer asserted that because the Bearer had lost the opportunity to receive his payment through his own negligence, the fault rested with him alone.

Merchants consulted about the dispute were divided on the question of who bore the risk in this situation.[48] Some felt that the brother was liable because the bill was payable on a certain number of days' sight, leaving the Bearer the choice when to present it. Others believed that, given the fact that the Payer had been ready to pay, the Bearer delayed at his own risk. Apparently no custom existed to resolve the issue.[49]

Merchant custom had also failed to provide a statute of limitations on seeking payment on a bill. Courts had employed the Roman law thirty-year prescription period as a gap-filler, but this was obviously inadequate "as in the matter of bills of exchange everything

[48] De la Serra at page 21, chapter 6, numbers 12-14.

[49] See also the Danzig exchange ordinance of 1701, "…the noble and venerable council of this said city, having recognized that often the absences which are found in the laws and statutes which have been made on this subject have been used as a pretext or excuse for the irregular procedures that have arisen, it has judged it appropriate to establish a fixed and equitable ordinance, on the example of most other cities, on the subject of letters of exchange." 2 PHOONSEN, WISSEL-STYL at 141.

should be quick. . . ."[50] To solve this problem, Article 21, Title 5 of the 1673 French commercial code put a limitation of five years on the ability to seek payment on a bill.[51] In this instance, it took a piece of legislation to create a rule more congenial to business.

The law merchant advocates have traditionally assumed that customs were universal across Europe, and they certainly have presumed that customs were uniform within a particular locality. It turns out that neither assumption is correct. The sources contain many instances of confusion and disagreement about practices even within a given town. For example, a certain delay after the presentation of a bill before protest could be made was apparently customary in France.[52] The unresolved question was how long that delay should be and when to begin counting it. In 1628 the royal court of the Châtelet of Paris heard a dispute about the issue. One party claimed that these so-called "days of grace" lasted 10 days and the other that they lasted 8 days. To resolve the dispute, the court first:

> heard out several notable burghers and bankers, together with the masters and officers of the six guilds of merchants[53] of the town of Paris . . . about the form and usage that they were accustomed to follow in the protest of letters of exchange and the time in which the protest must be made . . . . [T]hese were all unanimous that until then the usage had been that the letters of exchange were protested in eight or ten days after their maturity, but that the said time had not yet been limited by any ordinance, and all the said burghers, bankers, and officers of the six guilds requested the court, in judging the suit, to regulate and prescribe the time within which the protest of letters of exchange must be made for the good and utility of commerce."[54]

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[50] 1 SAVARY, PARFAIT NÉGOCIANT at 306, "Il faut observer qu'avant cette Ordonnance les Lettres de Change ne se prescrivoient que dans trente ans, de même que les Promesses, Obligations ou autres; mais comme en matière de Lettres de Change tout doit être bref, que le payement en doit être sommaire, & qu'il faut peu de tems pour les procedures & diligences des protests & poursuites en garantie; Sa Majesté par les soins particuliers qu'Elle a eu du Commerce, a voulu distinguer les Lettres & Billets de Change d'avec les autres Actes, & faire cette Loi particuliére en leur faveur, de réduire la prescription à cinq ans, pour mieux assurer la fortune de ceux qui font la profession mercantille." The regulations of the Exchange of Lyon had a similar limit of three years.

[51] 19 ISAMBERT, RECUEIL at 99.

[52] HENRI LÉVY-BRUHL, HISTOIRE DE LA LETTRE DE CHANGE EN FRANCE AU XVIIE ET XVIIIE SIÈCLES 180 (1933).

[53] A perhaps imperfect translation of the "Gardes de six Corps des Marchands." See 2 JACQUES SAVARY DES BRUSLONS, DICTIONNAIRE UNIVERSEL DE COMMERCE 211 (1723) *s.v.* Garde.

[54] 1 SAVARY, PARFAIT NÉGOCIANT at 165-66, "la Cour après avoir entendu plusieurs notables Bourgeois & Banquiers, ensemble les Maîtres, & Gardes des six Corps des Marchands de la Ville de Paris . . . sur la forme & l'usage qu'ils avoient accoutumé de garder aux protests des lettres de change, et le tems dans lequel le protest se devoit faire . . . lequels auroient tous unanimément dit que jusques alors l'usage avoit été, que les lettres de change avoient été protestées dans les huit ou dix jours après l'échéance d'icelles, quoique ledit tems n'eût encore été limité par aucune Ordonnance, & tous lesdits Bourgeois, Banquiers, & Gardes des six Corps,

The court picked ten days and ruled accordingly.

This decision did not end the dispute, however, because the merchants also could not agree on when to begin counting the days of grace. Some said that the ten days began on the day of maturity and others that it began on the following day. The dispute came before the court of the Parlement of Paris in 1642 on appeal in another case. Before giving an opinion, the court ordered the parties to convene certain Parisian merchants and bankers before an officer of the court, who inquired of them about the disputed timing of protests. These findings were reported to the court, which in 1643 decided that the ten-day period began the day after the letter came due.[55] This rule was adopted by the 1673 French commercial code because, according to the code's drafter, "It is certain that this opinion served to regulate the subject of protests and that after it the ten days of grace were never counted otherwise than from the day after the date of maturity. . . ."[56]

When confronted with commercial questions, early modern judges, even those sitting on non-commercial courts, consulted merchant experts, (contrary to the claims of the law merchant myth, which assumes that the commercial and legal spheres were completely separate). However, those merchants could not always provide a definitive answer. The Parliamentary attorney, Mathias Mareschal, observed that commercial statutes were necessary because "very often judges find themselves prevented from ruling [for lack of knowledge of the customs] and then they submit the question to merchant experts, who themselves often cannot offer assured advice."[57]

Mareschal related the story of a person who drew a bill on a merchant of Rouen. The payer did not pay the bill during the three days allowed for payment, because during

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auroient requis la Cour en jugeant le Procès vouloir régler & prescrire le tems dans lequel les protests des lettres de change se devroient faire pour le bien & utilité du Commerce. La Cour, dis-je, auroit ordonné par cette Arrêt, *que tous porteurs de letters de change en cette Ville de Paris, seroient tenus de faire le protest d'icelles dans les dix jours d'échéance de lettres de change. . . .*" See also Bornier, ORDONNANCE at 233-236 where he details the different practices concerning the time for protest in cities all over Europe.

[55] 1 SAVARY, PARFAIT NÉGOCIANT at 166. Savary does not tell us what the merchants said.

[56] *Id.* at 166-167, "Il est certain que cet Arrêt a servi de Réglement au sujet des protests, & que suivant icelui les dix jours de faveur ne se sont jamais comptés autrement que du lendemain de l'échéance des letters de change. . . . Sa Majesté n'a point entendu déroger, c'est de quoi je puis parler comme sçavant, parce que lorsque la question des dix jours de faveur fut agitée au Conseil de la reforme sur laquelle j'ai eu l'honneur de donner mon avis & de rapporter les deux Arrêts ci-dessous mentionées, la chose passa tout d'une voix. . . ."

[57] MARESCHAL, TRAICTÉ DES CHANGES ET RECHANGES at 16.

those three days he went bankrupt. The question arose who bore the risk of the bankruptcy. The Parlement of Paris posed the question to six merchants of Paris, three of whom traded at the fairs of Lyon and the other three of whom traded in Rouen. The court then discovered that the issue was decided differently according to the different usages of the cities.[58] The problem, it seems, is that those matters about which all customs agreed were of a fairly high level of generality (an accepted bill must be paid, for example). The variety arose in the specifics (*e.g.*, when the bill must be paid).

Thus by the early modern period, merchants saw monarchs, non-commercial courts, and the governments of trading cities as important sources of rules that their informal mechanisms of agreement could not (or perhaps could no longer) provide. With regard solely to the coordinating rules, thus removing issues of rentseeking or government preference, it has already been argued that the lack of strong reputational bonds between the payor and payee made these rules more susceptible to self-seeking behavior and more difficult to police. The merchants and jurists of the time believed that such self-interested actions derived from the disintegration of the "good faith" ideal among merchants. They felt that when "good faith" no longer guided merchant practice, as seventeenth- and eighteenth-century jurists believed it had in the good old days, uncodified practices tended to permit abuses.[59] While we might dispute their terminology, the economic environment of the late sixteenth and seventeenth centuries does lend some credence to their idea in the sense that the rapid expansion of commerce and the opening of new trading paths challenged old trading networks.[60] To the extent that agreed-upon merchant customs had existed in the Middle Ages, they likely did so within particular commercial networks. The group of English and Flemish merchants involved in the English wool trade, for instance, may all have known and accepted a certain set of practices, and they may have been unaware that other networks had different practices.[61] By the early modern period, these networks

[58] *Id.* at 15-17.

[59] In addition to the comments in the preface to the 1673 Code mentioned above, see, e.g., Bornier, ORDONNANCE at 23, "il est très important que cette Ordonnance soit religieusement observée, sur-tout en ce siècle, où il semble que la bonne foi & la probité des siècles passes ont fort dégénéré."

[60] Van der Wee, *Monetary, Credit and Banking Systems* at 325.

[61] Emily Kadens, *Order within Law, Variety within Custom*, 5 CHI. J. INT'L L. 39, 59-60 (2004).

had either broken down or expanded to include other, formerly separate, networks. When each network, unbeknownst to the others, had different rules about such basic matters as the time a payee had to protest a letter of exchange, the interconnection of networks would lead to confusion and a sense that these new trading partners were acting in bad faith.[62]

At base, however, the difficulty with custom was that it tended to vary over time and under differing circumstances. Custom depended upon memory and repetition. If a given practice occurred too infrequently, the chances that it would be correctly remembered diminished. Even if a practice occurred frequently, each party involved in determining the custom in the event of a dispute, including the supposedly neutral experts, might have a reason to want to skew the interpretation of the custom in one direction or another, whether for their own self-serving ends or because of some sense of fairness, compassion, or righteous indignation caused by the facts of the case before them. A modern example from a mid-twentieth century African tribal court demonstrates this problem:[63]

> [Ngoni tribal] courts have continually to deal with new situations and to make decisions which are unprecedented. This is done under the guise of drawing attention to some good Ngoni custom which has been neglected. Thus for example a man came to court saying that he was always quarreling with his wife and that he wished to divorce her. The bench granted the divorce and awarded the woman 30*s.* damages. The litigant protested. The junior member of the bench, a man aged about 25 years, said, "Don't you know, it has always been the custom in this court to award 30*s.* damages against men who divorce their wives." Yet this was a comparatively recent practice and the litigant's protest seemed, to me, to be quite justified. The young man had been on the bench only about eighteen months. [D]eliberate acts of legislation are not unknown among the Ngoni, but they require considerable discussion and probably a tribal meeting. It is easier, particularly for a court member as junior as the man in question, to appeal to the unwritten corpus of tribal custom when introducing a new rule. . . . Ngoni do not quote specific precedents in court; and in this undocumented environment new decisions, if they are not soon challenged, become part of what has always been the custom since time immemorial.

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[62] Lisa Bernstein found exactly this same pattern in her study of late 19th- and early 20th-century industry attempts to codify trading practices. Bernstein, 66 U. CHI. L. REV. at 719, 721, 724, 725-26, 727.

[63] J.A. Barnes, *History in a Changing Society*, 11 RHODES-LIVINGSTONE J. 1, 5-6 (1951). See also the lament at the end of Philippe de Beaumanoir's thirteenth-century collection of the customs of the French county of Beauvais: "[S]ince the truth is that customs come to an end because of young jurors who do not know the old customs, so that in the future the opposite of what we have put into this book will be observed to happen, we pray to all to excuse us, for when we wrote the book, we wrote as far as we could what was enforced or should have been done ordinarily in Beauvais. . . ." . PHILIPPE DE BEAUMANOIR, THE COUTUMES DE BEAUVASIS OF PHILIPPE DE BEAUMANOIR ¶ 1982 (F.R.P. Akehurst trans., 1992).

The fundamental problem with using custom to regulate commercial practice was its failure to establish clear and known rules. Of all things, the merchants disliked uncertainty. Without certainty, disputes arose, and litigation then as now was costly in both time and money. Yet, notwithstanding the assumption of the modern law merchant advocates, custom is an especially poor breeder of certainty. As the law merchant advocates acknowledge, custom's strength lay in its ability to evolve, but that very tendency toward evolution worked against definitiveness.

This suggests that the law merchant story's simplistic dichotomy between good custom and bad regulation is wrong in several respects. First, merchant custom would not have been uniform and universal, at least not outside of small trading networks made up of repeat players dealing in the same trade. Second, legislation was not harmful to commerce. Sovereign bodies stepped in to regulate at the behest of merchants because the merchants could not self-regulate. Thus legislation helped European commerce move into the next stage of its development when wider trading activity meant that merchants no longer dealt exclusively within their restricted networks.