**Journal of Civil Law Studies**

Volume 5
Issue 1 *200 Years of Statehood, 300 Years of Civil Law: New Perspectives on Louisiana's Multilingual Legal Experience*
*October 2012*

Article 5

10-1-2012

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# CLASHES AND CONTINUITIES: BRIEF REFLECTIONS ON THE "NEW LOUISIANA LEGAL HISTORY"

Seán Patrick Donlan*

## I. INTRODUCTION

I'm a Louisiana native, but I've been away from the state for over a decade. In that time, I completed a Ph.D. (on Edmund Burke's Legal Thought) at Trinity College Dublin and remained to teach law in Ireland. Most of my research has focused on comparative law, history, and legal history.[1] Given my Louisiana legal background and these interests, *comparative* legal history is especially important to my work. Indeed, I've long wanted to return to Louisiana history, in particular to the unusual legal and social history of my own "Florida Parishes". That research, on the laws and norms of Spanish West Florida in the early nineteenth century is underway, though it's proceeding slowly.[2] It has, however, drawn me back into the complex, sometimes convoluted, debates on Louisiana legal history. The bicentennial of Louisiana

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1. Most recently, for example, I co-edited, with Michael Brown of the University of Aberdeen, THE LAWS AND OTHER LEGALITIES OF IRELAND, 1689-1850 (Ashgate, London, 2011). My contribution to the collection was an article on Arthur Browne, an eighteenth-century, American-born civilian (a specialist in continental law) who taught civil law at Trinity College, practiced in both the admiralty and ecclesiastical courts and the courts of common law, and served in the Irish Parliament.

2. Seán P. Donlan, *Entangled up in Red, White, and Blue: Spanish West Florida and the American Territory of Orleans, c1803-1810* in ENTANGLEMENTS IN LEGAL HISTORY: CONCEPTUAL APPROACHES TO GLOBAL LEGAL HISTORY (Thomas Duve ed., forthcoming). The book grew out of a workshop held at the Max Planck Institute for European Legal History (Frankfurt, Germany) in August 2012.

statehood provides an opportunity to briefly comment on the state of our legal history and historiography. In particular, I want to discuss the so-called "New Louisiana legal history" as articulated over the last three decades by Professors Warren M. Billings and Mark F. Fernandez. Their scholarship, with their allies, has made important individual contributions to a more nuanced history of our laws. But the revisionism of Billings and Fernandez is most wanting precisely where they been most critical; that is, with respect to comparative legal history. Indeed, I suggest that a renewed engagement with the old legal historians and their heirs is in order.

Warren Billings and Mark Fernandez are both excellent historians with distinguished records in Louisiana history. A long-time resident of the state, Billings is Professor Emeritus in the History Department of the University of New Orleans (UNO).[3] He was the official historian of the Louisiana Supreme Court and was responsible for making their records available in the UNO archives. Fernandez, a native of Louisiana and once a student of Billings, is Professor of History at Loyola University New Orleans. Like Billings, he is also a past President of the Louisiana Historical Association.[4] Both are elected fellows of the Louisiana Historical Association. The published roots of the "New Louisiana Legal

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3. Warren M. Billings' relevant works include: *Louisiana Legal History and its Sources: Needs, Opportunities and Approaches* in LOUISIANA'S LEGAL HERITAGE (Edward F. Haas ed., 1983); Book Review, 30 LA. HIST. 324 (reviewing RICHARD H. KILBOURNE, HISTORY OF THE LOUISIANA CIVIL CODE: THE FORMATIVE YEARS, 1803-1839 (1987)); *Preface* and *Introduction*, AN UNCOMMON EXPERIENCE: LAW AND JUDICIAL INSTITUTIONS IN LOUISIANA 1803-2003 (Judith K. Schafer & Warren M. Billings eds., Center for Louisiana Studies, University of Southwest Louisiana, Lafayette, La., 1997; published as VOL. 13, LOUISIANA PURCHASE BICENTENNIAL SERIES IN LOUISIANA STUDIES) [hereinafter AN UNCOMMON EXPERIENCE]; *Mixed Jurisdictions and Convergence: The Louisiana Example*, 29 INTL. J. LEG. INFO. 272 (2001).

4. Fernandez's relevant works include: *Louisiana Legal History: Past, Present, and Future* in A LAW UNTO ITSELF? ESSAYS IN THE NEW LOUISIANA LEGAL HISTORY (Billings & Fernandez eds., LSU Press, Baton Rouge, La., 2001) [hereinafter A LAW UNTO ITSELF?]; FROM CHAOS TO CONTINUITY: THE EVOLUTION OF LOUISIANA'S JUDICIAL SYSTEM, 1712-1862 (LSU Press, Baton Rouge, La., 2001) [hereinafter FROM CHAOS TO CONTINUITY].

History" lay in Billings' *Louisiana Legal History and its Sources: Needs, Opportunities and Approaches*, published in *Louisiana's Legal Heritage* (1983). There Billings launched a critique of the "lawyer-annalists" writing on Louisiana legal history and began to suggest that American legal history, like that of Virginia (on which he'd long specialized), was a better context than comparisons with continental legal traditions.[5] The "New Louisiana Legal History" tag was developed in Billings' review of Richard Kilbourne's *History of the Louisiana Civil Code* (1989). There Billings both criticised and claimed Kilbourne, who must have been surprised to find that he'd been pressed into the ranks of the new historians.[6] Billings continued his critique and call-to-arms, now assisted by Fernandez, across the 1990s. Their agenda became still clearer over time: our legal history and historiography must, they argued, generally be set in a wider social context and especially within the broad contours of American legal history. The efforts of Billings and Fernandez culminated in the jointly-edited *A Law unto Itself? Essays in the New Louisiana Legal History* (2001) and, in the same year, Fernandez's *From Chaos to Continuity: The Evolution of Louisiana's Judicial System, 1712-1862* (2001).

## II. CODES AND CONTEXTS

The first plank of Billings' and Fernandez's critique is the insistence that we set our legal history and historiography in its broader social context. This call to place law in wider contexts—without denying some level of autonomy for law—is to be welcomed. As Fernandez wrote a decade ago, in his introduction to *A Law unto Itself?*, it's important not "to view law in a vacuum" and to employ instead "interpretive schemes that mingle social,

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5. Billings, *Introduction* in AN UNCOMMON EXPERIENCE, *supra* note 3, at 12.

6. Billings claimed that Kilbourne's book was "among [the] first fruits" of the movement. Warren M. Billings, Book Review, 30 LA. HIST. 324 (reviewing RICHARD H. KILBOURNE, HISTORY OF THE LOUISIANA CIVIL CODE: THE FORMATIVE YEARS, 1803-1839 (1987)).

political, and intellectual history into modes of analysis that treat things legal as one strand in a complex cultural matrix."[7] Professional historians rather than lawyers by training, Billings and Fernandez are certainly right to insist that trained historians have an important role to play in our legal history. It is a subject too important to be left to legal historians alone. If the "old legal historians" are never clearly identified, Louisiana legal historians have traditionally focused—with their counterparts throughout the West—on *internal* or doctrinal legal history.[8] Given the dominance of *external* legal history in the United States over the last half-century—which attempts, like the "New Louisiana Legal History," to place law in its wider economic, political, and social contexts—it is peculiar that it has taken so long for what Billings called a "sociocultural approach" to appear in the Bayou State.[9]

The laudable aim of a more meaningful social history of law has already produced some results. Billings and Fernandez are responsible, at least in part, for encouraging or publishing work in which scholars they include as fellow travelers in their "New Louisiana Legal History"—e.g., Florence M. Jumonville and Judith Kelleher Schafer—have taken their studies beyond codes and courtrooms. Indeed, *A Law unto Itself?* included not only a section on *Judges and Courts*, but essays on *Books and the Law* and *Law in Society* as well. With these last two sections in mind, Fernandez noted the importance of contributors who "mov[ed] past mere analyses of digests and codes to identify the books on which

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7. Fernandez, *Louisiana Legal History* in A LAW UNTO ITSELF?, *supra* note 4, at 21.

8. Perhaps because of the acrimony of past debates, neither Billings nor Fernandez is usually very specific about their targets. Henry Plauché Dart gets the most attention, but he died in 1934. *See* Billings, *Introduction* in AN UNCOMMON EXPERIENCE, *supra* note 3, at 14-15 and *Mixed Jurisdictions and Convergence: The Louisiana Example*, 29 INTL. J. LEG. INFO. 272, 296-297 (2001). *See also* Billings, *Louisiana Legal History and its Sources* in LOUISIANA'S LEGAL HERITAGE, *supra* note 3, at 194-5.

9. Billings, *Preface* in AN UNCOMMON EXPERIENCE, *supra* note 3, at 6. For a recent comparison of British and American legal historians, *see*, e.g., Michael Lobban, *The Varieties of Legal History*, 5 CLIO@THÉMIS 1 (2012), available at http://www.cliothemis.com/The-Varieties-of-Legal-History.

lawyers and judges relied, to gauge their content, and to assess their impression on Louisiana law and its practice."[10] Even more important perhaps are those contributors who moved between legal and social history to investigate topics like slavery and the place of women in the nineteenth century.[11] Ironically, however, the collection contains little that is explicitly comparative even within the American context that the new historians have championed. As one reviewer put it, "its essays amplify the title's ambivalence by engaging only sporadically with the unifying theme of evaluating Louisiana legal history in larger context."[12]

Indeed, the critique of Billings and Fernandez is not without problems. First, it may be a little unfair to portray inattention to *social* history as a failure of the lawyers. It's hardly surprising, after all, that "[l]aw professors claimed legal history for their very own" or that histories written by lawyers would be, well, lawyerly.[13] Instead, the absence of the social history of law that Billings and Fernandez demand might suggest negligence on the part of historians rather than jurists. More importantly, the legal history produced by Billings and Fernandez is itself court-centered, largely focused on judges and jurisprudence. It looks, in fact, little different from traditional Anglophone legal scholarship, what we

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10. Fernandez, *Louisiana Legal History* in A LAW UNTO ITSELF?, *supra* note 4, at 17.

11. Others have gone further. *See*, e.g., DEREK N. KERR, PETTY FELONY, SLAVE DEFIANCE, AND FRONTIER VILLAINY: CRIME AND JUSTICE IN SPANISH LOUISIANA, 1770-1803 (Garland Publishing, New York, 1993); Sara Brooks Sundberg, Women and the Law of Property Under Louisiana Civil Law, 1782-1835 (Ph.D. Dissertation, Louisiana State University, 2001); SHANNON L. DAWDY, BUILDING THE DEVIL'S EMPIRE: FRENCH COLONIAL NEW ORLEANS (University of Chicago Press, Chicago, 2008); ANDREW MCMICHAEL, ATLANTIC LOYALTIES: AMERICANS IN SPANISH WEST FLORIDA 1785-1810 (University of Georgia Press, Athens, Ga., 2008). Beyond Louisiana, *see* BROWN & DONLAN, THE LAWS AND OTHER LEGALITIES OF IRELAND, 1689-1850, *supra* note 1.

12. Christopher L. Doyle, Book Review, 1 J. EARLY REPUBL. 708 (review of Billings & Fernandez, A LAW UNTO ITSELF? ESSAYS IN THE NEW LOUISIANA LEGAL HISTORY (2001)).

13. Billings, *Introduction* in AN UNCOMMON EXPERIENCE, *supra* note 3, at 15.

might call the "Old Anglo-American Legal History". More problematically, especially when arguing for a social history of law, are the conclusions drawn from case law. For example, rather than an exploration of "social, political, and intellectual history," Fernandez argued in *From Chaos to Continuity* that the "[e]xamination of … state courts … allows for a sweeping analysis of law, society, culture, politics, conflict, and consensus."[14] But surely this overstates the significance of the judiciary and case law. These are obviously an important part of the overall picture of our laws and of the "law in action". But the study of case law is hardly "sociocultural" analysis at its best. Both the old and new historians would do well to take more seriously the call to "modes of analysis that treat things legal as one strand in a complex cultural matrix."[15]

The general thrust of modern socio-legal scholarship is that law, including but not limited to the courts, may reflect society, but it also has meaningful autonomy as well. The relationship is extraordinarily complex. But Billings wrote, in 1997, not only that "[c]ulture, society, and law are inextricably intertwined," but that:[16]

> *Ultimately law defines culture* because it invests societies with their collective identities, which sets each off from another. Thus to examine even the most mundane facet of any legal order is to illuminate changes in society and its values through the passage of years.[17]

Perhaps Billings misstated his view here or I've misunderstood, but the idea that "law defines culture" seems simplistic, if not naïve. Such an opinion has, of course, been held by older schools of legal historians who placed their legal traditions at the center of their cultures, not least long-standing views of Anglo-American legal exceptionalism. A continental European variant, reflecting

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14. FERNANDEZ, FROM CHAOS TO CONTINUITY, *supra* note 4, at xii.
15. Fernandez, *Louisiana Legal History* in A LAW UNTO ITSELF?, *supra* note 4, at 16.
16. Billings, *Preface* in AN UNCOMMON EXPERIENCE, *supra* note 3, at 7.
17. *Id*. at 7 (emphasis added).

the nationalism of the nineteenth century, was the mystical *Volksgeist* of the influential German "Historical School". But such views have little connection to an extensive, comparative scholarship on the frequency of legal transplantation.[18] It contradicts, too, the historical complexity and plurality of both laws and cultures throughout Western legal history.[19]

## III. COMPARISONS AND CONTEXTS

The second aim of Billings and Fernandez is, as the latter put it, to "explore new methods and areas of research with the aim of tying the state's legal history more closely to that of the South and to the nation as a whole" is a perfectly reasonable endeavor.[20] Billings had earlier written that the new historians:

> share a commitment to novel methods, a revisionist bent, rigorous manuscript research, and an astute incorporation of Louisiana's legal history into the larger contexts of national legal history, Southern history, and American history in general.[21]

This emphasis on the American context is rooted in the belief, shared by Billings and Fernandez, that scholarship on Louisiana legal history is not merely internal, but has tended to unnecessarily and problematically accentuate its uniqueness or "exceptionalism", especially its relationship to continental legal sources. There is some truth to this. Writing on our links to continental legal

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18. The obvious touchstone is ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (2d ed., University of Georgia Press, Athens, Ga., 1993). The debate is, however, quite extensive and complex. For additional titles, *see* Seán P. Donlan, *The Mediterranean Hybridity Project: At the Boundaries of Law and Culture*, 4 J. CIV. L. STUD. 355, 370-373 (2011).

19. *See* Seán P. Donlan, *Remembering: Legal Hybridity and Legal History*, 2 COMP. L. REV. 1 (2011) and *All This Together Make Up Our* Common Law*": Legal Hybridity in England and Ireland, 1704-1804* in MIXED LEGAL SYSTEMS AT NEW FRONTIERS (Esin Örücü ed., Windy, Simmonds, and Hill Publishing, London, 2010).

20. Fernandez, *Louisiana Legal History* in A LAW UNTO ITSELF?, *supra* note 4, at 1.

21. Billings, *Introduction* in AN UNCOMMON EXPERIENCE, *supra* note 3, at 17.

traditions, our legal historians have too often failed to attend to American parallels.[22] Indeed, in this respect, much of Fernandez's introduction to *A Law unto Itself?* is solid advice for the development of a richer legal history. But similarities, like differences, can be exaggerated. One partial perspective, or partiality, may simply replace another. I want to suggest that Billings and Fernandez appear confused about what the old legal historians—whoever they are—were doing, oscillate in their own appraisal of Louisiana law, and reveal important limitations in their understanding of the comparative analysis they reject.

Billings is especially critical of "exceptionalism …", the belief in the *sui generis* nature of Louisiana's laws, "as the organizing principle of Louisiana legal history."[23] Elsewhere, he refers to "[t]he myth" that "French civil law [was] the marrow, the bone, and the spirit of Louisiana jurisprudence."[24] Perhaps there remain some lawyers and laypeople who believe this, but to conclude that it reflects the *communis opinio* of any generation of Louisiana's legal historians is mistaken. In fact, it seems to conflate an argument largely about the uniqueness of Louisiana's *private law* for more sweeping conclusions about the tradition *as a whole*. The "civilian renaissance" to which Billings refers was part of a wider

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22. A number of recurring, admittedly important, questions still distract from more productive analyses. Ongoing debates in Louisiana legal history include, at least for the early nineteenth century: the status—mere digest or modern code—of the 1808 redaction; the character—whether French or Spanish—of the A DIGEST OF THE CIVIL LAWS NOW IN FORCE IN THE TERRITORY OF ORLEANS (1808) [hereinafter DIGEST] and the role of the 1808 redactors; the significance of the "De La Vergne volume" of the 1808 DIGEST; the character—whether continental or Anglo-American—of the jurisprudence; the general character—whether naturalist or positivist—of Louisiana law. For a similar list of debates, *cf.* Billings, *Louisiana Legal History and its Sources* in LOUISIANA'S LEGAL HERITAGE, *supra* note 3, at 195.

23. Billings, *Preface* in AN UNCOMMON EXPERIENCE, *supra* note 3, at 6.

24. Billings, *Mixed Jurisdictions and Convergence*, *supra* note 3, at 299. Indeed, Billings seems to want it both ways. He suggests that the Louisiana claim to uniqueness "speaks more to myth than to reality" while acknowledging, in the same paragraph, that Louisiana would become "a jurisdiction apart." *Id.* at 272, 273. Note, too, Billings' odd contrast between the FRENCH CIVIL CODE OF 1804 and the CODE NAPOLEON, *id*. at 280.

debate against those who argued, anticipating in many respects the new historians, that Louisiana was virtually indistinguishable from its fellow American jurisdictions.[25] Indeed, the most heated debate of the past four decades was precisely over whether the Digest of 1808 was best seen as redacting French or Spanish private law.[26] But neither camp denied Anglo-American transplants then or the progressive influence of Anglo-American law since. Of course, in Louisiana, as in other jurisdictions, legal history can be whiggish and shallow among the public, practitioners, and professors alike.[27] But if Billings contrasts "exceptionalism" with the idea that Louisiana is "an amalgamation of civil and common law precepts that commenced in 1803 and continued into the present," I know of no scholar—certainly no living Louisiana legal historian—who maintains the former view.[28]

This suggests a fundamental misunderstanding of the old legal historians—whoever they are—by at least some of the new historians. Similar to Billings, Fernandez makes an odd contrast between those who emphasized a "clash" of Anglo-American and continental legal traditions in the early nineteenth century and others who "walked a different route. [The latter] drew notice to a blend between civil and common law that made Louisiana a 'mixed jurisdiction.'"[29] The point of the clash thesis in its various forms was, especially for the early nineteenth century, precisely to explain the generation of Louisiana's mixed legal system, of which

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25. Fernandez called the revival an "intellectual cul-de-sac," *Louisiana Legal History*, *supra* note 4, at 9.

26. See especially Rodolfo Batiza, *The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance*, 46 TUL. L. REV. 4 (1971) and Robert Pascal, *Sources of the Digest of the Civil Laws of 1808: A Reply to Professor Batiza*, 46 TUL. L. REV. 604 (1972). Forty years ago, this was described as a "tournament of scholars" in Joseph M. Sweeney, *Tournament of Scholars Over the Sources of the Civil Code of 1808*, 46 TUL. L. REV. 586 (1972).

27. The widespread belief that English common law was or is rooted in actual social custom is a well-known example. *Cf.* FERNANDEZ, FROM CHAOS TO CONTINUITY, *supra* note 4, at 112.

28. Billings, *Preface* in AN UNCOMMON EXPERIENCE, *supra* note 3, at 7.

29. Fernandez, *Louisiana Legal History*, *supra* note 4, at 12.

no one is in doubt.[30] Again, writing about the attempt by some Louisianans to protect their continental private law, Fernandez states that "[t]he petitioners hoped to control efforts to admit Louisiana into the Union, and to undermine Claiborne's efforts to create a mixed jurisdiction by securing civilian traditions."[31] Assuming that this was Claiborne's aim, it fails to appreciate the fact that whoever won (what certainly looks like a clash of some sort), the result would have been a mixed system. It's only by securing the civilian traditions, in some manner at least, that a mixed jurisdiction could be created. It's the nature of our mixture, not whether one was established, that has been the central question for Louisiana's legal historians.

The concept of a "clash of legal traditions" and cultures in the Territory of Orleans, by being defined in different ways by different writers with different perspectives and agendas, has admittedly created enduring problems for Louisiana legal history.[32] In 1983, Billings himself maintained that "[t]he rivalry between Louisiana law and American law after 1803 was no mere intellectual exercise for the edification and material benefit of lawyers; it is a conflict of culture in which Franco-Spanish Louisianans sought to preserve their identity."[33] He added that accommodation was found and "the story of that accommodation requires telling."[34] Both of these statements are in the mainstream of writing on Louisiana legal history. Since then, Billings and

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30. This was quite explicitly the intention of GEORGE DARGO'S JEFFERSON'S LOUISIANA: POLITICS AND THE CLASH OF LEGAL TRADITIONS (Rev. ed., The Lawbook Exchange, Ltd., Clark, NJ, 2009), the most eloquent exponent of the clash thesis. *Cf.*, however, his more moderate presentation in Dargo, *The Digest of 1808: Historical Perspectives*, 24 TUL. EUR. & CIV. L. FORUM 1 (2009).

31. FERNANDEZ, FROM CHAOS TO CONTINUITY, *supra* note 4, at 24.

32. Contrary to Billings' claim that "Samuel B. Groner introduced the 'clash of legal traditions' thesis", the idea extends back into the nineteenth century. *See* Billings, *Introduction* in AN UNCOMMON EXPERIENCE, *supra* note 3, at 16. *See* also Groner, *Louisiana Law: Its Development in the First Quarter-Century of American Rule*, 8 LA. L. REV. 350 (1947-8).

33. Billings, *Louisiana Legal History and its Sources*, *supra* note 3, at 199.

34. *Id.*

Fernandez have not so much presented a study of the confluence of legal cultures, but to claim that Anglo-American law was victorious early in the century, largely by virtue of the numbers of Anglo-Americans in the Bar and on the Bench.[35] This is less accommodation than annexation.[36] It can also rather easily be presented as a clash. More importantly, however, conflict and consensus, like clashes and continuities, aren't mutually exclusive. Louisiana legal historians have never denied that an accommodation was made. The question was, to repeat myself, about the character of that accommodation. The suggestion of Billings and Fernandez seems to be that Louisianans developed not a mixed system, but "a Louisiana version of [Anglo-American] common law."[37]

Indeed, it appears that Billings and Fernandez don't merely want us to attend to American—or Anglo-American—contexts, but dismiss other comparisons as irrelevant.[38] But their conclusion is,

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35. See Billings, *Preface* and *Introduction* in AN UNCOMMON EXPERIENCE, *supra* note 3, at 6, 16-17, and Fernandez, *Louisiana Legal History*, *supra* note 4, at 9-12. Kilbourne's rejection of the clash thesis, at least in its most crude form, seems to have been an especially important influence on the new historians. His primary point was to deny that President Thomas Jefferson or William CC Clairborne, the Territorial Governor of Orleans, intended to suppress the local laws and replace them with Anglo-American law. *See* chapter one of RICHARD H. KILBOURNE, HISTORY OF THE LOUISIANA CIVIL CODE: THE FORMATIVE YEARS, 1803-1839 (Hebert Law Center, Louisiana State University, Baton Rouge, La., 1987). There are, of course, more modest possibilities. I suggest that if the true motivations of the advocates of the common laws of Orleans and England cannot easily be divined, some amount of low-grade competition and anxiety clearly existed, at least with regard to private law (regulating land, matrimonial regimes, successions, etc.). This needn't deny that Creoles and their allies probably had mixed motives: the stability of property and politics, the possibility of expediting statehood, as well as a genuine concern about the substance of the law and the culture to which it was attached. In any event, we must be cautious not to confuse rhetoric for reality.

36. Billings' earlier article was more nuanced, noting both that Louisiana laws "set [them] off from their antecedents and the rest of the nation as well" and suggesting how "[t]he courts quickly became the forum in which the competing legal systems were harmonized." Billings, *Louisiana Legal History and its Sources*, *supra* note 3, at 199.

37. FERNANDEZ, FROM CHAOS TO CONTINUITY, *supra* note 4, at 76.

38. Billings bemoaned the "preoccupation with comparative analysis" in Billings, *Louisiana Legal History and its Sources*, *supra* note 3, at 195. He

in part, rooted in inattention to and unfamiliarity with comparative legal history. Fernandez's *From Chaos to Continuity* is especially problematic in this respect. The work contains careful, useful, and important research on Louisiana's courts. But the wider legal context it presents, both Anglo-American and continental, relies on stereotypes and anachronisms.[39] In discussing judicial practice in the aftermath of the *Digest* of 1808, for example, Fernandez states that Louisiana judges "deviated from traditional civilian practice in which the jurist's main occupation consisted of applying appropriate code citations."[40] This idea, with that of "[a]n inflexible code", is not merely unsubstantiated in *modern* continental legal practice, it wasn't even an aspiration for the *ius commune* traditions of which French and Spanish Louisiana, the subsequent Orleans Territory, was a part.[41] The *Code Civil* (1804) was only four years old and the formalism of the French "exegetical" approach, insofar as it actually applied even in France at the time, was a *deviation* from the complex balancing of legal texts, reason, and equity (i.e., *équité*) in continental adjudication. The employment of such shibboleths results in attributing existing commonalities between Anglo-American and continental law to evidence of borrowing from the former, missing the more significant fact that there were numerous parallel developments in

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suggested that being an "outsider" gave him a critical distance Louisianans didn't have in understanding their laws. *Id.*

39. See Dargo, Book Review, H-LAW: H-NET REVIEWS, August 2002 (reviewing MARK F. FERNANDEZ, FROM CHAOS TO CONTINUITY: THE EVOLUTION OF LOUISIANA'S JUDICIAL SYSTEM, 1712-1862), available at www.h-net.org/reviews/showrev.php?id=6645.

40. FERNANDEZ, FROM CHAOS TO CONTINUITY, *supra* note 4, at 33-34.

41. *Id.* at 61. Fernandez writes that such a code "embodying logic and efficiency, simply could not provide for the plethora of challenging questions that often arose before the bench." Even assuming that the exegetical approach of a later generation in France accurately expressed the practice of the French courts, it's odd to hear that such a codal regime, applied across France for over two centuries, couldn't provide for the legal challenges of Louisiana.

both.[42] That is, rather than seeing Louisiana as part of a wider American movement to codify, the American movement must itself be, and has often been, set within wider codification movements across the West.

## IV. CONCLUSION

Billings, Fernandez, and their allies have made important contributions to the study of Louisiana law and history. Collectively, they've edged us in the direction of a more meaningful social history of law. They've counseled us to pay closer attention to the American context of Louisiana's laws, legal actors, and legal institutions. Following their suggestions will result in a much more nuanced image of our laws and better define the precise contours of our mixed tradition. But the revisionism of Billings and Fernandez is most wanting precisely where they been most critical, that is, with respect to comparative law and legal history. For all our faults, comparatists and legal historians can capture contexts that others—including talented historians—don't. Billings and Fernandez might accomplish still more than they have with greater modesty, a closer reading of the scholarship of the old historians and their heirs, and a wider appreciation of comparative law, past and present. Perhaps in the wake of our bicentennial, we can find more constructive ways in which the old and the new historians can work together—in dialogue, collaborative projects, joint publications, etc—to the benefit of the subject we all hold dear.

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42. See Fernandez's comments on common law and custom, the *ius commune* and exegetical jurisprudence, *stare decisis* and *jurisprudence constante* in *Civil Law and Common Law*, an appendix to FROM CHAOS TO CONTINUITY, *supra* note 4.