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## A Tribute to Thanassi: The Influence of Justinian on American Common Law Property

*Sally Brown Richardson\**

“The civil law is beautiful” was a favorite saying of my colleague, mentor, and friend A.N. “Thanassi” Yiannopoulos.<sup>1</sup> When any perceived “ugliness” of the common law reared its head in Louisiana, Thanassi was quick to point it out.<sup>2</sup> He tirelessly worked with the Louisiana State Law Institute to update Louisiana laws while maintaining a strong devotion to the state’s civilian heritage.<sup>3</sup>

When Louisiana law students today hear “the civil law is beautiful,” it is usually in the context of the civil law being used as a shield from the encroaching common law. It is worth remembering, though, that Thanassi’s favorite phrase is also a sword. The civil law has long influenced the common law, providing much of the foundation for common law doctrines. One area in which this influence is particularly evident is the subject to which Thanassi devoted much of his academic life: property law.

The civil law’s impact on American property law may not at first be apparent. Civil law property and common law property are structured very differently.<sup>4</sup> How things are classified—be they, for example, movable or

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1. See A.N. Yiannopoulos, *On the Bicentenary of the Louisiana Supreme Court: Chronicle of the Creation of a Unique and Beautiful Legal Tradition*, 74 LA. L. REV. 649, 651 (2014).

2. E.g., A.N. YIANNOPOULOS, PROPERTY § 13:16, in 2 LOUISIANA CIVIL LAW TREATISE (5th ed. 2015) [hereinafter YIANNOPOULOS, PROPERTY]; A.N. YIANNOPOULOS, PREDIAL SERVITUDES §§ 3:14, 3:33, in 3 LOUISIANA CIVIL LAW TREATISE (4th ed. 2013).

3. See Tyler G. Storms, *Interview with Professor A.N. Yiannopoulos: Louisiana’s Most Influential Jurist in Our Time*, 64 LA. B.J. 24, 25–26 (2016); Jeanne Louise Carriere, *From Status to Person in Book I, Title 1 of the Civil Code*, 73 TUL. L. REV. 1263, 1264–66 (1999).

4. YIANNOPOULOS, PROPERTY, *supra* note 2, § 11:6; Yun-chien Chang & Henry E. Smith, *An Economic Analysis of Civil Versus Common Law Property*, 88 NOTRE DAME L. REV. 1, 1 (2012).

immovable, corporeal or incorporeal—is of great import in the civil law;<sup>5</sup> the common law focuses far less on the classification of things.<sup>6</sup> The civil law has a firm, if not restrictive, concept of what constitutes a property right, whereas in the common law, property rights are much more fluid.<sup>7</sup> The civil law has a finite set of rights that are included in ownership, namely the rights of *usus*, *fructus*, and *abusus*.<sup>8</sup> The bundle of sticks that may make up an individual's interest in property in the common law is, it seems, ever-morphing.<sup>9</sup> The very notion that an individual can own property is theoretically foreign to the common law, whereas ownership is a bedrock of civil law property.<sup>10</sup>

Civil law property and common law property are unquestionably very different, and yet, they are also very similar. Doctrinally, much of common law property stems directly from the civil law and, specifically, from the father of the civil law himself, Justinian.<sup>11</sup> The *Corpus Juris Civilis* provides the foundation for many doctrines recognized in American property law today. By way of example, the rule of capture, as provided

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5. J. INST. 2.1, 2.2; YIANNPOULOS, PROPERTY, *supra* note 2, § 2:7; W.W. BUCKLAND, A TEXTBOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN 185–86 (Cambridge Univ. Press 1963).

6. This is not to say the common law does *not* classify things; the common law has obvious classifications, most notably real property versus personal property. See YIANNPOULOS, PROPERTY, *supra* note 2, § 7:6. The civil law's codified effort at describing how to classify things, however, is unknown in the common law.

7. JAMES GORDLEY, FOUNDATIONS OF PRIVATE LAW: PROPERTY, TORT, CONTRACT, UNJUST ENRICHMENT 49 (Oxford Univ. Press 2006); Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L. J. 1, 3–6 (2000).

8. LA. CIV. CODE ANN. art. 477 cmt. c (2018) (detailing how different civil law jurisdictions codify ownership rights as rights of *usus*, *fructus*, and *abusus*).

9. See Yun-chien Chang & Henry E. Smith, *The Numerus Clausus Principle, Property Customs, and the Emergence of New Property Forms*, 100 IOWA L. REV. 2275, 2277–79 (2015).

10. GORDLEY, *supra* note 7, at 50–51; SJEFF VAN ERP & BRAM AKKERMANS, CASES, MATERIALS AND TEXT ON PROPERTY LAW 206 (Hart Pub. 2012).

11. For a discussion on Justinian's impact on the civil law, see PETER STEIN, ROMAN LAW IN EUROPEAN HISTORY 32–52 (Cambridge Univ. Press 1999); GEORGE MOUSOURAKIS, A LEGAL HISTORY OF ROME 190–95 (Routledge 2007).

in the infamous case *Pierson v. Post*,<sup>12</sup> sprang directly from Roman law,<sup>13</sup> with the majority in *Pierson* expressly relying on the works of Justinian and later civilian scholars, such as Grotius, Barbeyrac, and Puffendorf, to determine whether the capturer becomes the owner of the property in question.<sup>14</sup>

Similarly, American jurisprudence on the right of a riparian owner to alluvion on his land can be traced to Roman law.<sup>15</sup> Take, for example, *Middleton v. Pritchard*.<sup>16</sup> In *Middleton*, the plaintiff leased land from the riparian owner for the purpose of felling the trees on the land.<sup>17</sup> The defendants cut down trees from the alluvial part of the plaintiff's leased property.<sup>18</sup> The defendants alleged they had a right to remove trees on the alluvion because, they argued, there can be no private ownership of alluvion.<sup>19</sup> The *Middleton* court, siding with the plaintiff, found that "[a]ll alluvions belong to the riparian proprietor, both by the common and civil law," citing Justinian for support.<sup>20</sup> Similarly, in *St. Clair County v. Lovington*,<sup>21</sup> the United States Supreme Court had to determine whether the riparian owner or the county owned the alluvion that had formed along the Mississippi River.

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12. *Pierson v. Post*, 3 Cai. R. 175 (N.Y. 1805). The facts of *Pierson* are well known: Post was hunting a fox and hot on the fox's trail when Pierson sprang into action and fatally shot the fox. *Id.* at 175. The court was faced with the question of who acquired the fox, the pursuer or the capturer. Just as Justinian would have answered, the New York court in *Pierson* found that the capturer, Pierson, won the fox and sent the pursuer, Post, home empty-handed. *Id.* at 179–80.

13. Roman law provided that one who captured water owned that water, even when the capturing was done to the detriment of the capturer's neighbor. DIG. 39.2.24.12 (Ulpian, Edict 81); 39.3.1.12 (Ulpian, Edict 53). Roman law took the same position on wild animals: he who captures, owns. *See* J. INST. 2.1.13.

14. *See Pierson*, 3 Cai. R. at 177–79. That the majority adopted Roman law is not lost on the dissent. *See id.* at 180 (Livingston, J., dissenting). The dissent even poked fun at the majority for relying on ancient scholars, stating "*tempora mutantur; and if men themselves change with the times, why should not laws also undergo an alteration?*" *Id.* at 181. Interestingly, the rule of capture as understood in English common law similarly finds its roots in Roman law. *See, e.g., Acton v. Blundell*, 152 Eng. Rep. 1223 (1843).

15. In his *Institutes*, Justinian stated that "[t]he law of all peoples makes yours any alluvial accretion which a river adds to your land. An alluvial accretion is one which goes on so gradually that you cannot tell at any one moment what is being added." J. INST. 2.1.20.

16. *Middleton v. Pritchard*, 3 Scam. 510, 522 n.4 (Ill. 1842).

17. *Id.* at 510.

18. *Id.* at 510–11.

19. *Id.* at 512.

20. *Id.* at 522 n.4. The plaintiff similarly relied on Justinian. *See id.* at 517.

21. *St. Clair Cty. v. Lovington*, 90 U.S. 46 (1874).

The Court, like in *Middleton*, relied on Roman law for its answer, stating that “[t]he law in cases of alluvion is well settled. In the Institutes of Justinian it is said: ‘Moreover, the alluvial soil added by a river to your land becomes yours by the law of nations.’”<sup>22</sup>

Even issues concerning life estates—a property interest unknown to the civil law—find their origins in Roman law. For example, the doctrine of waste, as applied to life estates and understood in American property law, comes from the English common law that was derived from the Roman law of usufruct.<sup>23</sup>

Broad swaths of American property law find their roots in Roman law. Servitudes, for example, “have been known since ancient times.”<sup>24</sup> Roman law has long been attributed as a major source for American property law concerning servitudes.<sup>25</sup> Similarly, adverse possession stems from Roman

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22. *Id.* at 66 (citing J. INST. 2.1.20). The *Lovington* Court went on to cite French and Spanish law, which also were derived from Roman law. *Id.* at 66–67; see also *Humble Oil & Ref. Co. v. Sun Oil Co.*, 130 F.2d 191, 194–95 (5th Cir. 1951) (relying on Roman law to determine alluvion ownership). There are even instances in which state statutes concerning riparian ownership rights are expressly drawn from Roman law. *E.g.*, *J.P. Furlong Entes., Inc. v. Sun Expl. & Prod. Co.*, 423 N.W.2d 130, 135–36 (N.D. 1988) (discussing the Roman heritage for a North Dakota statute that assigns ownership rights to the riparian owner when a river leaves its bed and forms a new channel).

23. See Sally Brown Richardson, *Reframing Ameliorative Waste*, 65 AM. J. COMP. L. 335, 351–54 (2017) (demonstrating how Henry de Bracton relied on Roman usufruct law to develop English waste law); see also *First Nat’l Bank of Mobile v. Wefel*, 40 So. 2d 434, 437 (Ala. 1949) (relying in part on *Dashwood v. Magniac*, [1891] 3 Ch 306, to determine whether felling trees was an act of waste); *Lee & Bradshaw v. Rogers*, 108 S.E. 371, 374 (Ga. 1921) (same). The *Dashwood* case used by some American courts is an English case that relied expressly and exclusively on Roman law to determine that a life tenant may periodically fell trees without committing waste. For a further discussion of *Dashwood*, see Richardson, *supra*, at 354–55.

24. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES Introduction (AM. LAW INST. 2000); see also Susan F. French, *Servitudes Reform and the New Restatement of Property: Creation of Doctrines and Structural Simplification*, 73 CORNELL L. REV. 928, 929 n.8 (1988).

25. *E.g.*, *Hills v. Miller*, 3 Paige Ch. 254, 256–57 (Chancery Court N.Y. 1832) (using Roman predial servitude law to determine an issue concerning a servitude of light); *Duncan v. Cent. Pass. Ry. Co.*, 4 S.W. 228, 229 (App. Ct. Ky. 1887) (analogizing to Roman predial servitudes to decide an issue pertaining to negative easements); Uriel Reichman, *Toward a Unified Concept of Servitudes*, 55 S. CAL. L. REV. 1177, 1185 n.36 (1982); Sally Brown Richardson, *Nonuse and Easements: Creating a Pliability Regime of Private Eminent Domain*, 78 TENN. L. REV. 1, 22 n.142; Harry Upson Sims, *Notes on Codifying Real Property Law in the United*

law.<sup>26</sup> Scholars have credited Roman law with providing the underpinnings for the modern system of copyright law.<sup>27</sup> How the common law identifies property as real versus personal also is attributed to Roman law.<sup>28</sup>

That Roman law is a source for American property law is not a novel statement,<sup>29</sup> but it is an important one, particularly as we remember a great Louisiana property law scholar. As Thanassi always said, “the civil law is beautiful,” and that beauty is something that has long been recognized, even by the common law.

As Louisiana continues to revise the Louisiana Civil Code and other state laws, those involved in the revision, including judges, legislators, and academics, must remember the beauty of the civil law and protect that beauty. Louisiana’s legal system operates at its best when the Louisiana Civil Code and the Revised Statutes work hand in hand, providing coherent,

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*States*, 36 HARV. L. REV. 987, 998 (1923); Kenneth G.C. Reid, *The Idea of Mixed Legal Systems*, 78 TUL. L. REV. 5, 27 (2003) (“[E]asements were in turn derived from the Roman law of predial servitudes.”).

26. See *United States v. Chavez*, 175 U.S. 509, 523 (1899) (crediting Roman law with supplying the concept of adverse possession that existed in Mexican law); Sally Brown Richardson, *Abandonment and Adverse Possession*, 52 HOUS. L. REV. 1385, 1393 (2015); Carol Necole Brown & Serena M. Williams, *Rethinking Adverse Possession: An Essay on Ownership and Possession*, 60 SYRACUSE L. REV. 583, 584 (2010).

27. Russ VerSteeg, *The Roman Law Roots of Copyright*, 59 MD. L. REV. 522 (2000) (discussing how Roman law concepts of intangible property, the nature of the public domain, and ownership rights provide the foundation for modern copyright law); Craig W. Dallan, *The Problem with Congress and Copyright Law: Forgetting the Past and Ignoring the Public Interest*, 44 SANTA CLARA L. REV. 365, 369–70 (2004).

28. WILLIAM L. BURDICK, *THE PRINCIPLES OF ROMAN LAW AND THEIR RELATION TO MODERN LAW* 301–02 (Lawyers Co-operative Pub. Co. 1988).

29. E.g., Andrea B. Carroll, *Examining A Comparative Law Myth: Two Hundred Years of Riparian Misconception*, 80 TUL. L. REV. 901 (2006) (discussing the civil law roots for the rules regarding riparian surface access to non-navigable lakes); Harbert Davenport & J.T. Canales, *The Texas Law of Flowing Waters with Special Reference to Irrigation from the Lower Rio Grande – Part One*, 8 BAYLOR L. REV. 138, 157 (1956) (discussing Roman influence in American water law). See generally Thomas J. McSweeney, *Property Before Property: Romanizing the English Law of Land*, 60 BUFF. L. REV. 1139 (2012) (discussing how English scholars, particularly Bracton, used Roman law as the basis for understanding English property law); Richard A. Epstein, *The Modern Uses of Ancient Law*, 48 S.C. L. REV. (1997) (discussing how Roman law highlighted and answered numerous legal questions that persist in modern society).

interconnecting, *ex ante* rules to guide parties,<sup>30</sup> just as Justinian did for Roman law.<sup>31</sup> Louisiana law is weakest when the Civil Code contradicts itself<sup>32</sup> or when the state's legislation and jurisprudence act as adversaries rather than partners.<sup>33</sup> These weak points in Louisiana law can be prevented, so long as those involved in revising and interpreting the law remember the beauty that Thanassi always found in Louisiana's civil law.<sup>34</sup>

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30. Louisiana's community property regime, for example, generally functions as a coherent set of interconnected rules that guide spouses as to their property rights vis-à-vis one another and with respect to third parties. See HARRIET S. DAGGETT, POLICY QUESTIONS ON MARITAL PROPERTY LAW IN LOUISIANA, in *COMPARATIVE STUDIES IN COMMUNITY PROPERTY LAW* 50, 52 (Jan P. Charmatz & Harriet S. Daggett eds., 1977) (noting how Louisiana's community property regime is "the fairest, most thoughtfully designed plan for marital property law yet devised"). Louisiana's Civil Code articles on possession similarly create a coherent, organized structure for parties to know, *ex ante*, their rights to property. See Martin E. Golden, Note, *Working with the New Civil Code Property Scheme: The 1982 Book III Revision*, 43 LA. L. REV. 1079, 1079 (1983) (noting that the 1982 revision to the articles on possession were a "great step forward" in terms of "language, organization, and legislative technique").

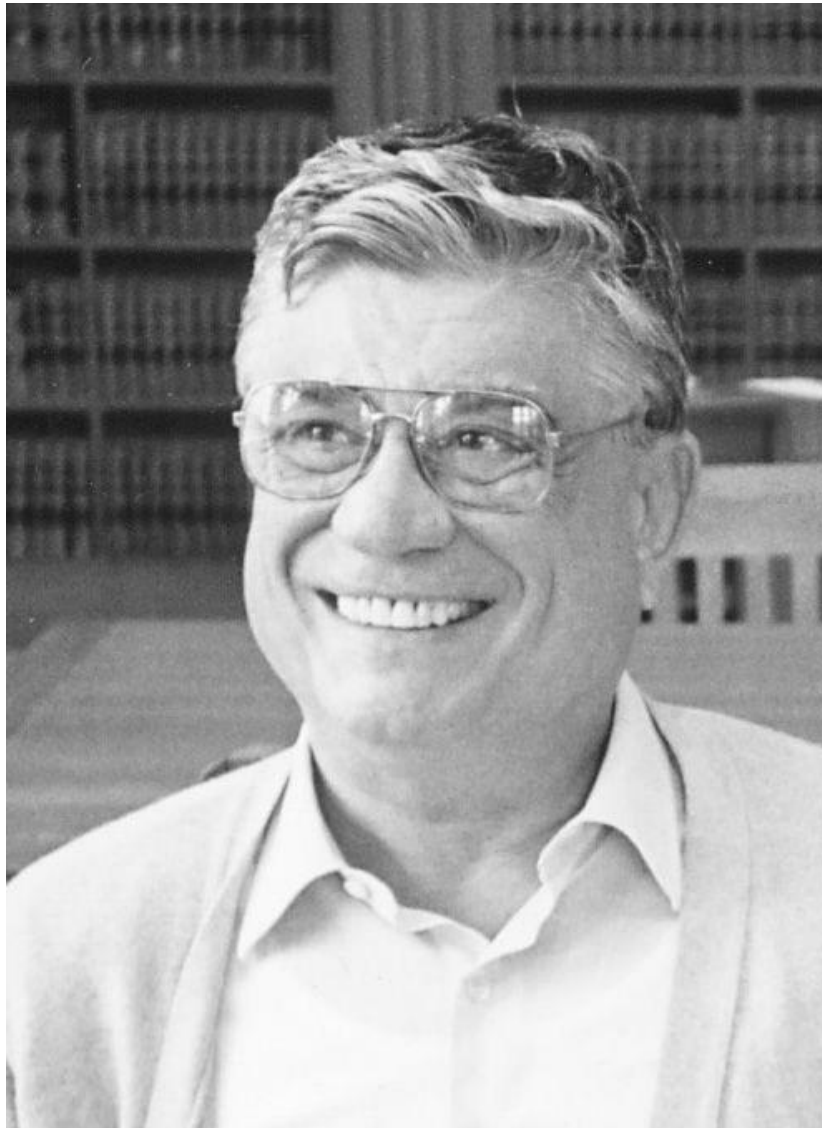
31. STEIN, *supra* note 11, at 33 (noting the orderly nature of the *Corpus Juris Civilis*); see also BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW 42–44 (Clarendon Press 1962) (discussing Justinian's success with the *Corpus Juris Civilis* but noting that a number of contradictions exist within the work).

32. See, e.g., LA. CIV. CODE ANN. art. 568.2, editor's note (2018) (critiquing the right of a usufructuary to lease property beyond the term of the usufruct as it conflicts with other provisions in the Civil Code and Mineral Code); *id.* art. 573, editor's note 1 (critiquing that the reference in Article 573(A)(1) to a legal usufruct in Article 223 was not repealed when the legal usufruct in Article 223 was legislatively removed). The lack of codification can also create havoc for Louisiana law. E.g., Spencer C. Sinclair, *The Louisiana Good Faith Purchaser Doctrine: Codified Confusion*, 89 TUL. L. REV. 517 (2014) (discussing the confusion caused in the good faith purchaser doctrine with the repeal of Civil Code article 520).

33. The decades-long back-and-forth between courts and scholars regarding Civil Code article 466 is perhaps the best example of how conflicting jurisprudence and legislation can be problematic in Louisiana law. See YIANNOPOULOS, PROPERTY, *supra* note 2, § 7:40 (providing a history of the debate on how Article 466 should be interpreted); Amy Allums, *Prytania Park Hotel, Ltd. v. Gen. Star Indem. Co.: How a Small Hotel Made a Big Difference in the Component Part Concept*, 74 TUL. L. REV. 1543, 1555 (noting the need to redraft Article 466 if the court's holding in *Prytania Park* was to be applied in the future without leading to unjust results).

34. See Kathryn Venturatos Lorio, *The Louisiana Civil Law Tradition: Archaic or Prophetic in the Twenty-First Century?*, 63 LA. L. REV. 1, 24–25 (2002) (noting that the challenge facing Louisiana is how to modernize the Civil Code to deal with contemporary technology without "discarding the classic ideology and methodology which is characteristic of our proud civil law heritage").

In honoring that beauty, however, we cannot fear the common law. Much of the common law is derived directly from the civil law. Although the civil law and common law systems may have notable differences, they also have striking similarities. As Louisiana law continues to modernize, we civilians would be remiss if we ignore the common law simply because it is the common law. We must instead remember that many of the common law's roots are intertwined with our own in Roman legal history.



Professor A.N. Yiannopoulos