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Nicholas Kasirer

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## POSTSCRIPT TO THE CONSTITUTION AS CODE BY PAUL R. BAIER

Others have written of the “code as constitution,”<sup>1</sup> but the metaphorical leap in the other direction is more rarely undertaken. It is not surprising that the jump to the “constitution as code” is made in Louisiana, where the Civil Code and the civil law play a special role in shaping the legal imagination, and by scholars such as Paul Baier and Mitchell Franklin whose research linking civilian ideas and constitutional principles have earned them a readership inside and outside the mixed jurisdiction.

The figures of François GénY and his scholarly friend Raymond Saleilles are key to understanding Professor Baier’s thesis.<sup>2</sup> The place of these two legendary—and occasionally subversive—scholars in legal letters may, oddly enough, be more secure in Louisiana than elsewhere where their work has been, at least for the study of positive law, largely eclipsed.<sup>3</sup> As Professor Baier remarked in this engaging paper first presented before a rapt audience at the Fourth Worldwide Congress of Mixed Jurisdictions in Montreal in 2015, “Only because I teach in Louisiana, did I receive the gift of GénY.”<sup>4</sup>

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1. The notion that in France the Civil Code establishes a “sociological constitution,” through its enunciation of the fundamental principles for organizing civil society, its timeless style, its enduring wisdom, and its self-consciously symbolic function, was made famous by Jean Carbonnier, *Le Code civil* in *LES LIEUX DE MÉMOIRE*, II, *LA NATION : LE TERRITOIRE, L’ÉTAT, LE PATRIMOINE* 293 (Pierre Nora ed., Gallimard 1986).

2. French legal historians have taken an increasing interest in the intellectual friendship between these two early 20th century scholars. For a rich source of insight into this collaboration through their recently published personal correspondence, see *LETTRES DE FRANÇOIS GÉNY À RAYMOND SALEILLES—UNE TRAJECTOIRE INTELLECTUELLE 1892-1912* (Christophe Jamin, Frédéric Audren & Sylvain Bloquet eds, L.G.D.J. 2015)

3. In a sense, GénY has been “found in translation” in Louisiana, where the rarity of translated works provides him with enduring influence among the sources of Louisiana civil law in English. See FRANÇOIS GÉNY, *MÉTHODE D’INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF* (1899, 2nd ed. 1919, Jaro Mayda trans., Louisiana Law Institute 1963).

4. During his lecture of the Congress on June 25, 2015, Professor Baier alerted the audience to the fact that the United States Supreme Court had just rendered judgment in *Obergefell v. Hodges*, 576 U.S. (2015), in which the majority decided that the right to marry is guaranteed to same-sex couples by the United

The famous interpretative ideal associated with Saleilles, Gén $\acute{y}$ 's préfacier, "through the Civil Code, but beyond the Civil Code" may indeed echo more loudly today in this corner of the United States<sup>5</sup> than in France.<sup>6</sup> The two authors may well not have agreed on all things, but they shared an intellectual curiosity and an interest in comparative law that makes them fellow travelers with Professor Baier.<sup>7</sup> All three are adepts of libre recherche scientifique, to be sure. And all three of them could wear Jean Carbonnier's description of the search for meaning in law on their sleeve: "[i]nterpretation is the intellectual form of disobedience."<sup>8</sup>

The questions raised in Professor Baier's paper concerning the evolving meaning to be attributed to legal texts find refreshing answers when considered in light of the principles associated with the interpretation of a Civil Code. And as Professor Baier suggests, the issues pointed to in this essay on the connections between the methods for reading each document are deserving of further study, in particular matters relating to the sources of the law of interpretation. And who better than legal experts working in a mixed jurisdiction—

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States Constitution. The majority view was, Professor Baier explained, a fortuitous but telling confirmation, coming on the day of his talk, that Gén $\acute{y}$ 's approach to constitutional interpretation was thriving in modern-day jurisprudence.

5. Professor Saleilles' aphorism is considered, for example, by a renowned Louisiana civilian in John H. Tucker, Jr., *Au-delà du Code civil, Mais par le Code civil*, 34 LA. L. REV. 957 (1974).

6. French scholars have recently lamented that both figures have fallen from view, prompting major studies endeavouring to revive interest in their work: see, e.g., *LA PENSÉE DE FRANÇOIS GÉNY* (Olivier Cachard, François-Xavier Licari & François Lormant eds, L.G.D.J. 2013) and, *RAYMOND SALEILLES ET AU-DELÀ* (Frédéric Audren, Charles Chêne, Nicolas Mathey & Armand Vergne eds., L.G.D.J. 2013).

7. For a conspectus of their common and divergent ideas on matters relating to this paper, as well as an interest the two shared in German law with Professor Baier, see Eugène Gaudemet, *L'œuvre de Saleilles et l'œuvre de Gén $\acute{y}$  en méthodologie juridique en en philosophie du droit* in *RECUEIL D'ÉTUDES SUR LES SOURCES DU DROIT EN L'HONNEUR DE FRANÇOIS GÉNY*, t. II., 5 (Sirey 1934).

8. JEAN CARBONNIER, *DROIT CIVIL. INTRODUCTION* para. 158 (P.U.F. 2004) (my translation).

be they scholars of public law,<sup>9</sup> private law,<sup>10</sup> comparative law<sup>11</sup> or legal history<sup>12</sup>—to link, as François Gény did over one hundred years ago, interpretative method and sources of law? In thanking Professor Baier for the invitation to write this short postscript to his stimulating paper given at McGill University, I allow myself to express the hope that scholars in Quebec and Louisiana will continue to find fresh opportunities to exchange on matters, like this one, of shared interest and insight.

*Nicholas Kasirer  
of the Board of Editors  
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9. This work has begun in earnest for Quebec by PIERRE-ANDRÉ CÔTÉ, *INTERPRÉTATION DES LOIS*, especially pp. 32 and following on the sources of the law of interpretation of statute law and of the Civil Code. (4th ed., with the collaboration of Stéphane Beaulac and Mathieu Devinat, Thémis 2009).

10. The leading work in Quebec private law remains FREDERICK P. WALTON, *THE SCOPE AND INTERPRETATION OF THE CIVIL CODE OF LOWER CANADA* (Montreal 1907), especially Part II.

11. For a fine example, see Shael Herman, *Quot Judices Tot Sententiae: A Study of the English Reaction to Continental Interpretative Techniques*, 1 *LEGAL STUDIES* 165 (1981).

12. In this *Journal*, for example: Derek Warden, *Secundum Civilis: The Constitution as an Enlightenment Code* 8 *J. CIV. L. STUD.* 585 (2015).