

# The Quest to Implant the Civilian Method in Louisiana: Tracing the Origins of Judicial Methodology

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## The Quest to Implant the Civilian Method in Louisiana: Tracing the Origins of Judicial Methodology

Vernon Valentine Palmer\*

It is my great honor to deliver The Tucker Lecture tonight, and I am humbled by recalling the illustrious figures who have stood at this lectern in the past.<sup>1</sup> None, of course, can be considered more illustrious than Colonel John Tucker, Jr., himself, whose memory is so fittingly honored each year by his alma mater. The year 2012 marks the 300th anniversary of the arrival of the *Coutume de Paris* in Louisiana, and it also marks the 200th anniversary of our statehood constitution, as well as the founding of our supreme court. I thought it would be fitting to choose a subject related to and worthy of the civil law that John Tucker loved. He was (and I use this word circumspectly) a *jurisconsult* in the true sense of the word, a scholar in action, who founded the Louisiana Law Institute, was virtually its only president for many years, and then served as its “animateur” until his death. After choosing what I thought was a fitting topic, I happened to discover that Colonel Tucker actually taught a course at Tulane for many years entitled “Civil Law Method and Technique.” I am therefore slightly intimidated to think what the real master of the subject might have done with the theme of this Lecture. I want to thank LSU for honoring him and for allowing me to deliver this Lecture.

In 1832 when Alexis de Tocqueville came to New Orleans during his famous journey across the United States, he was still gathering notes for his classic work, *La Démocratie en Amérique*. He tells us that he had a conversation with a “very well-known New Orleans lawyer whose name I have forgotten.”<sup>2</sup> The lawyer that he met is believed to have been Etienne Mazureau, a greatly admired intellect who spoke four languages fluently and who had total command of the Spanish–Roman–French laws comprising the Louisiana legal system. According to de Tocqueville’s notes, Mazureau spoke about a fateful act of the legislature that was passed only a few years before:

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1. This Article reproduces the text of The 36th Annual Tucker Lecture, which I delivered on November 17, 2011, at the Paul M. Hebert Law Center, Louisiana State University.

2. ALEXIS DE TOCQUEVILLE, JOURNEY TO AMERICA 106 (J. P. Mayer ed., George Lawrence trans., Yale Univ. Press 1960).

Late in 1828, at the end of a session, a bill was passed unnoticed repealing these laws [the Spanish laws] in a body without putting anything else in their place. Waking up the next day the bar and the judges discovered with horror what had been done the day before. But the thing was done.<sup>3</sup>

What was “the thing” that was done and why should the judges and the bar have reacted with “horror”? What was the historical significance of that moment in 1828? Some of Mazureau’s contemporaries apparently feared that this wholesale repeal of Spanish law was a wholesale disaster, but perhaps they were too close to the events to grasp its meaning. And what is its relevance to us today? Many present-day lawyers and students have not grasped its significance either because its place in history has been largely forgotten. Tonight, I want to place that act and a series of other events leading up to it in perspective. I will picture them as part of a broad quest—indeed, perhaps an unfinished quest—to implant a truly civilian methodology in Louisiana. My subject may be historical, but it is not antiquarian; it is ultimately modern and relevant to understanding the legal system that we have today.

Before proceeding further, I want to explain what I mean by implanting civilian method. There are many aspects to legal method and legal reasoning. There are the methods of the legislator, the methods of the scholar, and the methods of the judge—perhaps enough to furnish material for ten Tucker lectures. But tonight, I wish to consider a fundamental objective that I believe is the *sine qua non* of all other methodological considerations. It is to ensure that the Civil Code occupies the center of the system, that it is the epicenter of civil law reasoning, so that all jurisprudential development starts with and comes through the Code. This aspiration is summarized by a famous epigram of Géný’s, as reshaped by Saleilles: “*Au delà du code, mais par le code civil.*” (That is, “Beyond the code, but through the civil code.”)<sup>4</sup> The Civil Code of Quebec claims this central position for itself in a very forceful first article:

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3. Thomas W. Tucker, *Interpretations of the Louisiana Civil Codes, 1808–1840: The Failure of the Preliminary Title*, 19 TUL. EUR. & CIV. L.F. 57, 169 (2004) (quoting DE TOCQUEVILLE, *supra* note 2, at 106).

4. The phrase may be ascribed to Saleilles, who slightly modified Géný’s approach by turning it around. Saleilles inverted Géný’s expression “par le Code civil, mais au delà du Code civil” and thus emphasized interpretation taking the law beyond the Code. See R. Saleilles, *Préface* to FRANÇOIS GÉNY, MÉTHODE D’INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF, at xviii (1899).

The Civil Code comprises a body of rules which, in all matters within the letter, spirit or object of its provisions, lays down the *jus commune*, expressly or by implication. In these matters, the Code is the foundation of all other laws, although other laws may complement the Code or make exceptions to it.<sup>5</sup>

My address concerns this very aspiration and the earliest attempts in our history to achieve it.

In consequence, I am not going to speak about certain issues that are often connected to discussions of legal method. I will not be principally focused upon the accidentals of method, such as the style or length of decisions, whether the jurisprudence is used openly or covertly, the syllogistic or nonsyllogistic form of the judgment, the use of deductive versus inductive reasoning, whether decisions are anonymous, and so forth. These are factors of great interest that the civilian tradition and each national history has shaped individually and differently, but the incidental must not obscure what, to my mind, is the most basic issue. When I speak of the quest to establish civilian method in the formative years, I will be discussing attempts to establish the centrality of the code within the legal order.

This is never an easy accomplishment, and there is a part of me that says that, even today, it has never been completely achieved in our state. From the very beginning of our modern system, which I would say took place roughly in the years 1803–1808, there was an “inner tension,” or perhaps it could be called an intellectual collision, between civil law and common law. Our judicial methodology was almost immediately caught in the conflict between the ideology brought with the codes from Europe and the American-style common law legal institutions that were immediately put into place. Adding to the conflict was the immediate large-scale reception of American and English common law in distinct legal sectors surrounding the codes, namely in the areas of commercial law, civil procedure, criminal law, and criminal procedure. I will attempt in a moment to show you the common law encirclement of the Civil Code more graphically, but first let me describe the ideological conflict.

Louisiana’s first codifications were, by any definition, European-style codifications of high quality, and yet, they were expected to prosper in the midst of an alien institutional and procedural environment. The ideology brought with the codes presupposed a modest role for the judge and a strict separation of powers, which took away the previous lawmaking powers of the

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5. Civil Code of Québec, S.Q. 1991, c. 64, preliminary provision (Can.).

judges of the *ancien régime*. In a word, the codes placed the judge under the code. To any common law judge accustomed to the normality of case-to-case legal development and greater discretion, a civil code of that kind is something of a subjection, an undignified and tight fitting garment.<sup>6</sup> At the time of the French Revolution (which was not long before Louisiana's modern system was founded), French thought did not concede that the judge was a lawmaker at all, and it sometimes did not concede that the judge was a law interpreter. As Clermont-Tonnere said in ringing terms: "The judicial power, or that which one improperly calls the *judicial power*, is the application of the law (*loi*) or general will to a particular fact, thus in the final analysis it is nothing but the execution of the law."<sup>7</sup> France's 1789 Draft Constitution on Judicial Power declared, "No judge will be permitted in whatever manner, to interpret the law (*la loi*)."<sup>8</sup> Then, of course, there was Robespierre's violent dictum: "This word jurisprudence ought to be erased from our language. In a State that has a constitution, a legislation, the jurisprudence of the courts is nothing but law (*loi*)."<sup>9</sup> These declarations of course sound bizarre and extreme to American ears, both then and now. The American judges appointed by President Jefferson and Governor Claiborne in the period 1804–1808 were certainly not cut in this mold.<sup>10</sup> They knew nothing of the French reformatory. They had not been guilty of any of the abuses associated with the French *parlements*. They inhabited a different universe. These were judges in the common law mold, who possessed the power of judicial review to test the validity of legislation and who exercised certain undefined, inherent powers established over the course of history, e.g., the

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6. Historically, the tension in the relationship is captured in Edward Livingston's plan to deny Louisiana judges the power to create precedents when the code was silent and in requiring them to make an annual "circumstantial account" of decisions of this kind to the general assembly. For details of the plan and the reasons for its rejection, see Vernon Valentine Palmer, *The Many Guises of Equity in a Mixed Jurisdiction: A Functional View of Equity in Louisiana*, in *ÆQUITAS AND EQUITY: EQUITY IN CIVIL LAW AND MIXED JURISDICTIONS* 402–06 (A. M. Rabello ed., 1997).

7. Michel Troper, *La Notion de Pouvoir Judiciaire au Début de la Révolution Française, in 1791: LA PREMIÈRE CONSTITUTION FRANÇAISE* 358 (1993) (quote freely translated); Philippe Raynaud, *La Loi et la Jurisprudence, des Lumières à la Révolution Française, in 30 ARCHIVES DE PHILOSOPHIE DU DROIT* 60–61 (1985).

8. 1789 DRAFT CONST. ON JUDICIAL POWER, art. 9 (Fr.). This text became the substance of article 12 of the law of 16–24 August, 1790.

9. GÉNY, *supra* note 4, § 45.

10. See generally Robert B. Fisher, Jr., *The Louisiana Supreme Court, 1812–1846: Strangers in a Strange Land*, 1 TUL. CIV. L.F., no. 4, 1973, at 1.

contempt power. They were acknowledged law creators, policymakers, and prestigious figures in the community. When they immigrated to Louisiana, they brought with them certain intellectual possessions and artifacts, such as the English form of judgment, an inclination for case-by-case reasoning, a discursive and argumentative style, the individually authored opinion and the *permissible* dissenting opinion, and a high regard for the authority of Blackstone and the brilliance of Mansfield. We should not be surprised that Governor Claiborne—himself a common lawyer—would call the first court that he created in the Territory of Orleans the “Court of Common Pleas,” nor regard as a coincidence that Judge Martin modeled his first law reports on the precise format of Douglas’s Reports of King’s Bench Cases.

Our first judges had no prior experience with codes or codal interpretation. They were not acquainted with the civilian world of Justinian, Febrero, Domat, and Pothier, and their initial encounter with codification would be, in my view, an unpredictable element in our history.

Let me remind you briefly of their backgrounds, particularly the four justices who dominated our supreme court in the first crucial decades. F.X. Martin of North Carolina (but born in Marseilles) was a printer and translator and had served in the North Carolina Legislature. He had prior judicial experience as a judge in the adjoining Mississippi Territory before receiving his appointment to the Orleans Territorial Superior Court. He was appointed to the supreme court in 1815 and served on that court for the next 31 years, mostly as presiding judge.<sup>11</sup> George Mathews of Georgia learned law in the law offices of his brother in Augusta, Georgia. He was a judge in the Mississippi Territory for two years before his appointment to the Orleans Superior Court in 1806. He sat on the Louisiana Supreme Court from 1813–1836. Pierre-Charles Derbigny was born into a noble French family in northern France. His studies in Paris were interrupted by the French Revolution, and he immigrated (or perhaps fled) to Louisiana, taking a circuitous itinerary through St. Domingue, Pittsburgh, Florida, and Cuba, finally reaching New Orleans in 1797 when Louisiana was still under Spanish occupation.<sup>12</sup> Derbigny served on the court from

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11. He has been described as a man of great erudition and strong will, whose views were “as fixed as the North Star.” Symeon C. Symeonides, *The Louisiana Judge: Judge, Statesman, Politician*, in *LOUISIANA: MICROCOSM OF A MIXED JURISDICTION* 89, 97 (Vernon Valentine Palmer ed., 1999) (citation omitted) (internal quotation marks omitted).

12. Derbigny studied law at St. Genevieve in Paris; however, it is unclear how far he progressed in his studies, given that he left France in 1790 at the age of 21. For biographical details, see Judith F. Gentry, *Pierre Auguste Bourguignon*

1813–1820, when he resigned to run for Governor. Finally, Alexander Porter, an Irish immigrant who settled in Tennessee and practiced law in that state before coming to Louisiana, took his place and sat on the supreme court from 1820–1833.

These legal pioneers were “strangers in a strange land” as Robert Fisher has called them.<sup>13</sup> They were beginning a cultural journey. My point is surely not to stress their deficiencies, for some of these men were outstanding jurists by any measure in any time (Martin and Porter, I believe, were shining examples) and in the fullness of time became expert exponents of the civil law. My interest lies in the challenge that they faced in their conflicted bijural legal culture and in what I believe emerged as an instinctual resistance to all efforts to restrict their discretion and subject themselves to a true code system.

Let me make my point in different terms: Here was a strange mixed marriage of European codes and American judges, and, whatever its merits (Justice Tate said it represented the “best of both worlds”),<sup>14</sup> I believe that it was destined to be a life of turbulent monogamy. It would take considerable effort to subject these common law minds to a European code. The tension, if not contradiction between the nature of the codes and the culture of the justice, would make it difficult for a method worthy of a code to take root.

But let me not forget a second, an equally formidable, obstacle in any quest to establish a civil code at the center of the legal system—the Territory of Orleans was already, even before the first civil code arrived on the scene, a highly compartmentalized legal system, heavily mixed with common law.

#### I. A SYSTEM PRE-MIXED FROM THE OUTSET

We must not think for a moment that the Territory of Orleans or Louisiana was ever intended or designed to be a pure civil law

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*Derbigny, Arnaud Julie Beauvais, Jacques Dupré, Governors, 1828–1831, in THE LOUISIANA GOVERNORS: FROM IBERVILLE TO EDWARDS 103, 103–05 (Joseph G. Dawson III ed., 1990); CARL J. EKBERG, A FRENCH ARISTOCRAT IN THE AMERICAN WEST: THE SHATTERED DREAMS OF DE LASSUS DE LUZIÈRES 29–38 (2010).*

13. See Fisher, Jr., *supra* note 10.

14. Albert Tate, Jr., *The Role of the Judge in Mixed Jurisdictions: The Louisiana Experience*, 20 LOY. L. REV. 231, 231 (1974) (“[T]he judge of a mixed jurisdiction such as Louisiana has the best of both worlds available to him for the performance of his judicial function. He may take advantage of the techniques and perspectives of both legal systems.”).

island unto itself. The enactment of its first civil codes, in 1808 and 1825, did indeed mark the culmination of a successful struggle on the part of the French Creoles to keep their old laws—their civil laws. That was a great cultural victory but not one to be exaggerated. They kept the civil law in the area of civil law alone, and they quickly accepted, perhaps too eagerly, the laws of England and the United States in most other areas of life and law. English common law and American law immediately commanded the heights on four broad fronts encircling the civil law. This encirclement made it unlikely that the civil law would be the epicenter of the overall system or even the master of its own individual sphere.<sup>15</sup> It is striking that, from the very beginning, legal method depended entirely on the changing subject matter. The method had to shift in accordance with the different legal sources appropriate to each subject matter. A brief overview of these subjects and sources makes this clear.

## II. OVERVIEW OF JUDICIAL SOURCES IN 1808

It was a system in which the judge in commercial matters had to apply the uncodified law that merchants built upon American and English caselaw.<sup>16</sup> If a criminal case were presented, the judge turned to the English and American law of crimes and its caselaw. If the case concerned private civil law, however, say a question of family law, he would turn to the Digest of 1808; the related Roman, Spanish, and French laws; and a host of French and Spanish commentators. Nevertheless, if some point of civil procedure should arise in the midst of deciding a civil code question, the same judge was forced to return to the cases and authorities of the common law.<sup>17</sup> And, yes, there were some cases where all of these sources and traditions were mixed together in four languages (if I count Latin) spanning both legal traditions, in a bewildering display of competing authorities. One is tempted to say there was no “system” here; rather, there were mismatched parts taken from different systems and made to function together. How could it be maintained that the civil code was actually the “epicenter” of such a system? It was a system with different traditions and sources in defined compartments but with no defined center. In such a system, the

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15. For a chart diagramming this encirclement, see *infra* Appendix A.

16. See, e.g., *Nugent v. Delhomme*, 2 Mart. (o.s.) 307 (La. 1812).

17. See, e.g., *Bermudez v. Bermudez*, 2 Mart. (o.s.) 180 (La. 1812); *Hunt v. Norris*, 4 Mart. (o.s.) 517 (La. 1816) (discussing the meaning of the word *debt* at common law).

judges could not be full-time civilians or full-time common lawyers. They were destined to be full-time hybrids.

So, it is interesting to try to place ourselves, as I tried to place myself in this research, at the beginning of a new state with its entire future before it. How did these untrained, fledgling civilian judges react to a civil code from another continent set in a mixed and compartmentalized legal landscape? Let me say parenthetically that, in preparation, I read consecutively the first three volumes of Martin's Old Series reports, cover to cover, 1809–1815, as well as the statute books of the founding period, to try to gain perspective and data. I cannot pretend to have the kaleidoscopic or wide-angle lens necessary to do justice to this theme. No one, I believe, can pretend to speak *ex cathedra* at a removal of 200 years from the events that he is describing. Nevertheless, I will try to describe one central episode of this history—it concerns the failure of the Digest of 1808 to become the fulcrum of civil law in the Louisiana legal system.

### III. A DIGEST MARGINALIZED BY A *IUS COMMUNE*

Here we come upon the greatest methodological crossroads at the founding—it was whether to treat Louisiana's first code, called the 1808 Digest, as a true civil code, that is, as a self-contained and self-sufficient statement of the law, or whether to regard it, as its own name indicates, as an incomplete and partial statement of a far larger legal system beyond.

You will recall, and hopefully not dispute, that at the time of the Louisiana Purchase and into the statehood period, Spanish law continued in force in southern Louisiana. It was decided by the Territorial Legislature in 1806, while Claiborne was governor, to codify the law then in force in the Territory of Orleans. Two jurisconsults, Louis Moreau Lislet and James Brown, were commissioned to write the draft. And this draft was accomplished in less than two years and was promulgated on March 31, 1808, as "A Digest of the Civil Laws Now in Force in the Territory of Orleans."

Now, the purpose of this codification was not only to preserve and entrench the civil law against the then much-demonized common law, but also it was to reduce the cognitive demands on lawyers, judges, and citizens by consolidating in one book and in the two languages generally spoken in Louisiana the extraordinarily complex and diffuse Spanish law that governed Spain's overseas possessions. That system consisted of more than 20,000 individual laws that were dispersed in six different compilations. The situation was astonishingly complex and chaotic. The Preamble to the enactment succinctly stated simplification as a vital goal:

Whereas, in the confused state in which the civil laws of this territory were plunged by the effect of the changes which happened in its government, it had become indispensable to make known the laws which have been preserved . . . and to collect them in a single work, which might serve as a guide for the decision of the courts and juries, without recurring to a multiplicity of books, which, being for the most part written in foreign languages, offer in their interpretation inexhaustible sources of litigation.<sup>18</sup>

Now, these were the evils to be overcome, but the Louisiana Legislature simultaneously took two steps that prevented the 1808 enactment from ever coming close to achieving this goal. First of all, the Legislature made a decision, on the very eve of promulgation, to christen the codification a *digest*—a type of codification thought to be inferior and quite different than a true civil code.<sup>19</sup> Secondly, it decided, again apparently at the last moment, not to make a full and express repeal of the background Spanish–Roman law. It inserted in the enabling act a weak abrogation clause that abolished very little and left the Spanish–Roman colossus still standing. This text read:

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18. 1808 La. Acts 120.

19. Among civilians, this word *digest* generally connotes a less scientific type of codification that preceded the modern European codes that came on the scene beginning in the 1750s and on. A digest may contain disparate kinds of materials consolidated in one enactment, arranged in some convenient way, and with little internal coherence. Even an alphabetical arrangement may suffice as the internal organization of a digest. See Vernon V. Palmer, *The Death of a Code—The Birth of a Digest*, 63 TUL. L. REV. 221 (1988). In that sense, it might be compared to a far more important Digest of the 6th century, in which the Emperor Justinian condensed millions of lines of classical Roman law texts into 50 books. It can be objected, I realize, that I am perhaps superimposing a modern distinction between a code and a digest that would be unhistorical to attribute to the Louisiana codifiers of 1808. Put another way, it may be objected that I am making too much of a distinction, which, considering the state of contemporary understandings and the codification movement, had not yet crystallized. The answer is, however, that history says otherwise. The age of codification actually began in Europe more than 50 years before the French Civil Code and the Digest of Orleans appeared. Europe had already received the Bavarian Civil Code (1756), the Codex Theresianus (1753–1766), the Josephinian Code (1787), the West Galician Code (1797), Malta's Code de Rohan (1797), as well as the meticulously prepared Allgemeines Landrecht, or Prussian Civil Code (1792), which, incidentally, was translated into French to assist preparation of the Code Napoléon. Because it is unquestioned that the Code Napoléon served as the formal code model followed by the Louisiana codifiers, there is ample basis to believe that the difference between a code and a digest was appreciated both in Europe and in Louisiana at that time. Indeed, why else would the Louisiana Supreme Court have *explicitly* relied upon that very distinction in the *Cottin* case (1817) as the cornerstone for the “digest methodology” that it recognized? See *infra* note 23 and accompanying text.

“That whatever in the ancient civil laws of this territory . . . is contrary to the dispositions contained in the said digest or irreconcilable [sic] with them is hereby abrogated.”<sup>20</sup>

If, instead of that weak repealing clause the Legislature had expressly repealed all the former laws, that could have put the Digest on a prominent pedestal alone on the Louisiana stage, and it might have forced the judges to reason first and foremost through the code, at least before going *au delà du code*. Instead, as we shall see, that weak repealer encouraged the courts to slight, disregard, and even undermine these codified provisions by routine and frequent excursions into obscure Spanish sources.

The combined effect of the Legislature’s timidity in naming the code a *digest* and its failure to repeal the bulk of Spanish laws in force was more than enough for the supreme court to adopt a methodology suitable to that of a digest, and I shall hereafter call it the *digest method*.

The conception was that the Spanish–Roman law found in the Partidas, the Recopilación of Castille, and the Recopilación of the Indies was the default legal system. This *droit commun* or “common law” would be applicable wherever it was not expressly or impliedly repealed by Louisiana enactments. Let me be clear about what this meant—this extensive body of law was not relevant as merely persuasive authority or comparative authority (although sometimes that purpose cannot be ruled out altogether). These laws were cited, set forth, and applied because they contained controlling texts that bound the court as fully as a statute or code enacted by the Louisiana Legislature.

To envision for a moment how this system operated, we might think of a rock placed in a pail of water.<sup>21</sup> The rock represents the 1808 Digest. The water in which it is submerged represents the surrounding Spanish–Roman law. Now, in theory, the Digest was controlling to the extent that a rock is watertight and displaces the water (to the extent that it is “contrary” to the water, if you will), but to the extent that it is not watertight, the water enters into the cracks, crevices, or porousness in the rock, filling it with Spanish–Roman laws.

Any displaced water represents the repealed Spanish law that was deemed contrary or irreconcilable with the statute. The fit between the two should be seamless. It is interesting to mention that this same metaphor of the rock and the water is also used by

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20. 1808 La. Acts 126.

21. For a visual representation of this image, see *infra* Appendix B; see also Beaker 2 Image, [http://w3.shorecrest.org/~Lisa\\_Peck/Physics/All\\_Projects/photo\\_journal/blair/beaker2.jpg](http://w3.shorecrest.org/~Lisa_Peck/Physics/All_Projects/photo_journal/blair/beaker2.jpg) (last visited Mar. 4, 2013).

common law authors to describe the relationship between a statute of Parliament and the surrounding common law.<sup>22</sup>

Now, according to conventional historical accounts of this period, this symbiotic relationship between the Digest and the surrounding laws was not apparent at first for some reason, and it took about nine years before it was discovered that the evils described in the Preamble had not actually been overcome. The rude awakening or reckoning, it is said, arrived with the ruling in *Cottin v. Cottin* in 1817.<sup>23</sup>

The facts of *Cottin* are worth a brief examination. There was a child who was born alive, but it lived only eight hours and then died. The question in the case was: Did this child inherit from his father (who died just before the child's birth), or did that share of inheritance go instead to other heirs because this was an abortive child who, legally speaking, never existed? By the rules found in the Digest of 1808 and by the rules of the Roman law, the child born alive should inherit in such a situation. In contrast, an abortive child, or, as the Digest defined it, one "either born dead or incapable of living,"<sup>24</sup> should not inherit. This child, however, was ostensibly capable of living and thus qualified as an heir.<sup>25</sup> In Spain, however, the laws had a particular disposition that, to be considered naturally born, and not abortive, the child must live at least 24 hours. The Louisiana Supreme Court held that the 24-hour requirement of Spanish law must apply here. Since it was not contrary to the Digest, it was not repealed. It only added an extra requisite to the definition there stated. Judge Derbigny then stated his rationale:

It must not be lost sight of, that our civil code is a digest of the civil laws, which were in force in this country, when it was adopted; that those laws must be considered as untouched, wherever the alterations and amendments, introduced in the digest, do not reach them; and that such parts of those laws only are repealed, as are either contrary to, or incompatible with the provisions of the code.<sup>26</sup>

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22. See WILLIAM BURNHAM, INTRODUCTION TO THE LAW AND LEGAL SYSTEM OF THE UNITED STATES 51 (1995).

23. 5 Mart. (o.s.) 93 (La. 1817).

24. A DIGEST OF THE CIVIL LAWS NOW IN FORCE IN THE TERRITORY OF ORLEANS, WITH ALTERATIONS AND AMENDMENTS ADAPTED TO ITS PRESENT SYSTEM OF GOVERNMENT, bk. 1, tit. 1, art. 6 (1808) [hereinafter DIGEST OF 1808].

25. See *id.* bk. 3, tit. 1, art. 65.

26. *Cottin*, 5 Mart. (o.s.) at 94.

It may be of interest to note how Judge Derbigny himself, while emphasizing that it is a digest, twice calls it a code, all in one and the same sentence.

Now Shakespeare asked a famous question in *Romeo and Juliet*: “What’s in a name? That which we call a rose [b]y any other name would smell as sweet.”<sup>27</sup>

Could it be that that which we call a digest might, by any other name, produce all the effects and have the same properties as a civil code? No, I am afraid that is not what the supreme court wished to say. The *Cottin* court’s position was that a digest is really *a different object* than a code, a different kind codification. Even if you called it a code, it would remain a digest true to its own nature. Their logic was impeccable—the legislative intent was to create a distinct object, and that object brought with it the method of a digest.

And yet, allow me to state that there is something amiss in this logic as well as something mysterious in this history, and it begs for further research. There is, in my view, considerable counterpoint in the record, which deepens the mystery of the digest. Let me mention five points.

#### A. Point 1

First of all, the Legislature’s decision to use the word *digest* came as an utter surprise to the outside world. In every preceding act and resolution leading up to promulgation, the Legislature always referred to the gestating enactment as the “Civil Code.” Unless there is a hidden counter letter somewhere of which I am unaware, the Legislature therefore specifically commissioned Louis Moreau Lislet and James Brown to write a civil code, not a digest. In a second legislative act, it fixed the compensation that the juriconsults and translators of the “Civil Code” would be paid.<sup>28</sup> (By the way, in a small triumph in the course of this research, I have uncovered the names of our sometimes maligned translators and their relations to the principal jurists.)<sup>29</sup> In yet a third legislative act (and here we are only two months before promulgation when the *projet* was apparently complete), the Legislature appointed a committee of four of its own members to examine the “Civil Code” and to report back to the full “House.”<sup>30</sup> It is a provocative fact that

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27. WILLIAM SHAKESPEARE, *ROMEO AND JULIET*, act 2, sc. 2.

28. 1807 La. Acts 190 (approved April 14, 1807).

29. My research identifying the translators and their role in Louisiana legal history will be presented in a later article.

30. See *LE MONITEUR DE LA LOUISIANE*, Jan. 27, 1808 (referencing the Resolution of the Legislature of June 7, 1806 and reporting the resolutions of the Chamber of Representatives made Thursday, January 21, 1808).

the “Digest” was not born until the eleventh hour on the eve of promulgation. How could this be important? Well, it raises the fairly strong possibility that the Legislature simply superimposed that name on a work actually conceived, commissioned, and drafted as a true code. Perhaps we are not talking about two different objects but rather the use of two interchangeable names for the same object. In that event the code–digest might have been as susceptible to code-like interpretation as any other code might have been. It was up to the interpreters to decide what it was as much as the Legislature. My conjecture, as I will now expand upon further, is that the drafters, who I assume worked in accordance with the mandate written in the acts, actually constructed a civil code, but the Legislature designated it a digest.<sup>31</sup>

### *B. Point 2*

There is some corroboration for this code thesis from a different angle. In one of the acts announcing the forthcoming “Civil Code,” the Legislature made a provision for the two jurisconsults to exercise continuing oversight over its application in the courts for five years after its promulgation. For this supervision, each was to receive \$800 per year to attend and observe proceedings in the inferior and superior courts as much as possible and to monitor the problems that might arise in the Code’s implementation. They would submit their observations and recommendations to the Legislature each year in order “to make this new Code as perfect as possible.”<sup>32</sup> In other words, a process of post-enactment refinement and improvement was to be carried out, and the overall compensation for perfecting the code was actually twice the size of their stipend for drafting it in the first place. Now, to my mind, the priority placed on refining and perfecting the code makes sense if

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31. The clause of implied repeal was apparently a last-minute decision as well because it is not found in the body of the work itself but only in the promulgating act written by the Legislature. Actually, the best evidence of the redactor’s intentions regarding the designation *code* or *digest* should be gathered from the document itself. Professor Batiza has argued that, but for its title, it has the completeness, coherence, and structural arrangement equivalent to that of a true code. See Rodolfo Batiza, *The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance*, 46 TUL. L. REV. 4 (1971). The debate between Professor Batiza and Professor Pascal over this nomenclature and how it relates to the controversy over the sources of the Digest of Orleans is thoughtfully discussed by John Cairns. See John W. Cairns, *The 1808 Digest of Orleans and 1866 Civil Code of Lower Canada: An Historical Study of Legal Change* (1980) (unpublished Ph.D. dissertation, University of Edinburgh).

32. See 1806 La. Acts 218 (Résolution Relative à la Formation d’un Code Civil, June 7, 1806).

the enactment was meant to be a scientific code equal in dignity to the Code Napoléon. On the other hand, why would there be any pressing need to “perfect” a digest that merely restated and summarized the civil law and left so much untouched? These provisions for continuing oversight are more consistent with an original intention to enact a true code because it is arguably less important to perfect a digest. And this was probably soon realized, [because] once the code was enacted as a digest, the program of oversight was dropped, and we have no record that the jurists received further payments or carried out this charge.

### C. Point 3

The Legislature’s decision and the judiciary’s decision to interpret it as a digest of laws created a serious internal difficulty. There has been no comment on this by historians, but the digest methodology suggested by its name does not fit with the directory provisions set forth and enacted in the Preliminary Title of the Digest. The Preliminary Title sets forth in one provision a methodology for the judge to follow in exceptional situations in which the positive law is silent.<sup>33</sup> This is famed article 21, which found its way into all subsequent Louisiana civil codes, including our present Code. That provision is of course the counterpart of similar directory provisions found in the civil codes of Switzerland, Austria, and others.

In the event of the Code’s silence, it calls for a return to equity, to natural law, and to reason. The Louisiana provision was taken bodily from the *projet du gouvernement*, which Portalis drafted for the French Code Civil.<sup>34</sup> In the case of the French Code, that provision could have filled a functional need because the Code was built as a closed system, and there must have been some way to deal with the unprovided-for case since any *deni de justice* was forbidden. All prerevolutionary sources of law had been repealed, and the code rested on its own bottom. In the case of Louisiana, too, it could have fulfilled the same role but logically only if we

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33. DIGEST OF 1808, *supra* note 24, bk. 1, prelim. tit., art. 21 (“In civil matters, where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is to be made to natural law and reason, or received usages, where positive law is silent.”).

34. The *Livre Préliminaire*, which was rejected by the code commission and not included in the final Code Civil, was the work of Portalis who chose Domat as his model. As Maleville noted, “Ce fut aussi sans contradiction que passa la suppression presque entière du livre préliminaire que M. Portalis avait rédigé à l’instar du Livre des Lois de Domat, et dans lequel il avait bien surpassé son modèle . . . .” Tucker, *supra* note 3, at 80 n.42.

assume the redactors thought they were constructing a true code that would be severed from the past laws. Such a provision, however, is superfluous and contradictory under a digest, for a digest does not involve occasional gaps; it has many gaps. It is porous by design and surrounded by its own *ius commune*. The gaps in a digest are foreseen and expected, and they are regarded as less consequential because they will be filled not by the judge's concept of equity or conception of natural law but by routine recourse to the default system in the background.<sup>35</sup> The digest methodology exemplified in *Cottin* is thus at war with an article 21 methodology, which presupposes an internal, analogical mode of growth and development. Both cannot operate at the same time, and I think the drafters must have known that and probably intended otherwise. But, the last minute name change caught them off guard. What is very interesting is that the historical record demonstrates that article 21 *did* turn out to be functionally superfluous throughout the life of the 1808 Digest, as anyone could have predicted. I hope that I have not missed anything in the historical record of the years 1808–1825, but after diligent search there was not one instance in which the Louisiana judges actually invoked or used article 21. It is true that lawyers arguing before the court adverted to article 21 a few times,<sup>36</sup> but there was no instance in which the judges adopted that argument or confessed to any gap in the Digest. Of course, they handled hundreds of cases in which they made routine recourse to Spanish and Roman law, but that was never considered to be article 21 gap-filling. Actually, I was surprised to learn that it was not until 1851 that the court used article 21 for the first time, and this of course was long after the

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35. Thomas Tucker conceived that Spanish law was considered “natural law” by the Louisiana jurists, and it was brought into play in the Louisiana system under the Digest of 1808 by passing through article 21. Tucker, *supra* note 3, at 126. I believe this theory is unhistorical. As opposed to being idealized natural law that passed into the system where positive law was silent, Spanish law was conceived in this period as a body of statutory law directly applicable, so long as it had not been repealed by positive provisions found in the Digest. The silence of the Digest was never the test of its relevance—rather nonrepeal was. For instance, the 24-hour test applied in *Cottin* for determining whether a child was considered abortive did not involve a rule of universal natural law. Indeed the Spanish rule was idiosyncratic and not followed in any other European system. It applied as positive law in Louisiana without any mention of article 21.

36. See *Hunt v. Norris*, 4 Mart. (o.s.) 517 (La. 1816); *Griffin's Ex'r v. Lopez*, 5 Mart. (o.s.) 145 (La. 1817); *Brashears v. Barrabino*, 8 Mart. (o.s.) 641 (La. 1820); *Poultney's Heirs v. Barrett*, 8 La. 441 (La. 1835); *Fisk v. Fisk*, 2 La. Ann. 71 (La. 1847).

Digest had been repealed.<sup>37</sup> Thus, the presence of article 21 in the 1808 enactment is, to my mind, clear evidence that the drafters thought that they were constructing a true code, that is until they were told otherwise by the Legislature.

*D. Point 4*

There is, furthermore, a better form of evidence to show that they wrote a code before it became a digest. There is the Code [of 1808] itself, ready to be examined. There is no *exposé des motifs* accompanying the document, so we really do not know the inner thinking of Moreau and Brown. The best evidence of their intentions, however, is the document itself. If we disregard its title and look at its substance, it has the completeness, coherence, and structural arrangement equivalent to that of a true code, or so at least a number of distinguished scholars have thought.<sup>38</sup> When we look closely at the provisions, it is clear that they did not slavishly copy or merely rephrase or restate the civil laws of their time. Choices were made and original rules were sometimes confected. Frequently enough, they attempted to create clearer or better rules by splicing elements from more than one tradition. For example, in drafting the articles on redhibition applicable to the sales of slaves, they chose to borrow French rules about the seller's state of mind (this offered stronger buyer protection than the Spanish rules) but attached them to some detailed Spanish rules about the types of defects that were actionable (this produced the division between vices of character and defects of the body). The final combination represented a splice of the two laws.<sup>39</sup> In my view, a redactor would have had very little motivation to craft new rules of this type if he or she realized that the rule would go into a digest that would in turn be subject once again to the very rules from which he or she had originally chosen. The reasonable redactor would realize that a digest methodology threatens to undermine every attempt at

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37. See *Thompson v. Mylne*, 6 La. Ann. 80 (La. 1851); cf. *Simonton's Case*, 2 Mart. (o.s.) 102 (La. 1811) (stating that the case presented a *casus omissus* in the legislation, but without adverting to article 21, it was not within the power of the court to provide a remedy).

38. John T. Hood, Jr., *The History and Development of the Louisiana Civil Code*, 19 LA. L. REV. 18 (1958). Thomas Tucker, however, argues that it was not meant to be a true code on the basis of the name of the work, the weak repealing clause, the historical purpose behind it, and a sampling of the opinions of contemporary historians and jurists. See Tucker, *supra* note 3, at 130–35.

39. See VERNON VALENTINE PALMER, *THROUGH THE CODES DARKLY: SLAVE LAW AND CIVIL LAW IN LOUISIANA* ch. 4 (2012). The Spanish source of the provision was Partida 5,5,64, while the French source was Code Civile articles 1641–1646.

originality. New rules are fated to be supplemented by the very elements in the old sources that the drafters chose to discard.

*E. Point 5*

There is an additional historical fact that I will mention only because it seems so odd. In reading over, as I said, three volumes of Martin's reports covering 1809–1815, Louisiana's 1808 law is constantly referred to as the "Civil Code" by the court and by all of the lawyers, even though, as we know, that was not its real name. In scouring the reports, I have found but two occasions out of hundreds or thousands of references in published briefs and opinions in which it is ever referred to as the Digest. The *Cottin* decision was of course one of those two occasions.<sup>40</sup> If the proper title was so consequential to the legal mind, what can explain this almost complete disregard of it in everyday practice? What's in a name?

These counterpoints will not change the history books of this period, but they may create certain inferences, add to our questions, and deepen the mystery. Actually, we know little about this vital period. We have no *exposé des motifs*, no journal, and no explanatory letters. We have no record of the discussions between the jurisconsults and the legislative committee, nor whether the judges were first consulted on the naming of the enactment. And we unfortunately have no reported cases for the critical years 1804–1809, which might shed light on the previous interpretations given to the relationship between local laws and the greater *ius commune*.

Allow me now to come back to the year 1817 because I think we have misread its significance. It is very difficult for me to agree after a close reading of the earliest cases that the digest method was first discovered and applied in *Cottin* in 1817 and that this holding "had the effect of reviving the Spanish law."<sup>41</sup> It is also difficult to agree with an eminent author's assertion that it was *Cottin* which "gave rise to almost limitless confusion and opened the floodgates of litigation. This decision meant that the 1808 Code could be used in practice only as an incomplete digest of existing laws that still retained their original force."<sup>42</sup> Actually, the same method was known and used from the outset, for it plainly appears in the first cases reported in Volume 1 of Martin's Reports for the

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40. See *Cottin v. Cottin*, 5 Mart. (o.s.) 93 (La. 1817).

41. See Hood, Jr., *supra* note 38, at 28.

42. A.N. Yiannopoulos, *The Civil Codes of Louisiana*, 1 CIV. L. COMMENTARIES 1, 11 (2008).

fall term of 1809.<sup>43</sup> For instance, in *Folk v. Solis* (1809), it had to be determined whether the plaintiff, who brought suit for defamation, had a right to demand bail or surety from the defendant as a guarantee against his departing the jurisdiction. Under a territorial statute, a demand for bail was authorized where the action involved wrongful injury to property or wrongful detention of property, but the statute said nothing about the availability of bail where the action was for defamation. Nevertheless, said the court, it remained to inquire if the Spanish authorities (and—or English authorities) permitted a plaintiff to demand bail from the defendant upon a defamation claim. The court concluded that Spanish law would allow a type of surety (the *judicio sisti*) in a libel action provided certain conditions were met, but it held that, under the facts of the case, those conditions were not met. Thus, the defendant's bail was discharged.<sup>44</sup> Had the conditions been met, however, the court was prepared to apply the Spanish *judicio sisti* because it was part of Louisiana law. I have found a number of other pre-*Cottin* cases where Spanish law was applied directly beyond the limits of the Digest.<sup>45</sup> Thus, it seems correct to say that as early as 1809, if not

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43. See *Folk v. Solis*, 1 Mart. (o.s.) 64 (La. 1809); *Beauregard v. Piernas*, 1 Mart. (o.s.) 281 (La. 1811); *Hayes v. Berwick*, 2 Mart. (o.s.) 138 (La. 1812); *Brogner v. Forstall*, 3 Mart. (o.s.) 577 (La. 1815); *Durnford v. Syndics of Brooks*, 3 Mart. (o.s.) 222 (La. 1814); *Rogers v. Beiller*, 3 Mart. (o.s.) 665 (La. 1815); cf. *Deweese v. Morgan*, 1 Mart. (o.s.) 1 (La. 1809).

44. *Folk*, 1 Mart. (o.s.) at 68 (“It seems, therefore, that the law of Spain alone may be invoked by the plaintiffs, and as they have not complied with what it requires, I am bound to say that they cannot have the benefit of it.”).

45. *Beauregard*, 1 Mart. (o.s.) 281, and *Brogner*, 3 Mart. (o.s.) 577, have similar facts and present pre-*Cottin* examples of the digest method in action. In the latter case, defendant, a married woman, bound herself jointly with her husband to pay a debt to plaintiff, and the couple mortgaged slaves to secure payment. The plaintiff exercised his mortgage rights and obtained an order of seizure. The defendant's wife resisted the seizure on grounds that under Spanish law, a wife cannot become security for her husband unless the debt has been converted to her benefit, even though she had formally renounced the law's protections. The Digest of 1808 was silent on the question of the capacity of a wife to secure her husband's debts. The court held that the defendant had formally renounced the protections, and therefore she was bound under Spanish law (the law of *Toro*) to make payment. A sample of such a renunciation by the wife is found in an authentic act of July 9, 1810 executed in West Florida while under Spanish rule:

And I, the said Victorina Marie de Armas, renounce all laws of Emperor Justinian and Beleyano, senatu consultus, laws of the forum, of Madrid, and the Partidas, all the new and old Constitutions, and any other laws for the benefit of women, all concerning which I have been advised, and with full knowledge of them I renounce all of them, swearing that I have not been compelled or coerced by my said husband or any other person to sign this act, but I have signed it of my own free will . . . .

sooner, the courts were already directly applying Spanish law as they also did in *Cottin*, and, interestingly, no attention or objection is drawn to this in the cases. It is done in an atmosphere of normal operating procedure.

The question becomes, therefore, not whether *Cottin* marked the first use of the digest methodology—certainly it was not—but rather to ask, What made the *Cottin* decision so noteworthy to contemporaries and What made it so consequential for the later history of this subject? It is from that date forward that the translation of the *Partidas* into English was decided upon, and it probably clinched the decision to enter upon a second round of codification.

In my judgment, there *was* something special and deeply unsettling about the decision, but it was not the novelty of the digest method. This decision showed more graphically than any prior decision that *even the most precise rules* set forth in the Digest—whether they be those establishing the age of majority, or the length of a prescriptive period, or, as here, the definition of an abortive child—might all be subject to some modification or supplementation after consultation with the background law.

The legislative technique displayed in a civil code, C.J. Morrow once noted, establishes norms along a spectrum that ranges from very precise rules, to more flexible and supple rules, and on to general principles. It is, notably, those very precise rules that are most conducive to deductive reasoning and that will produce the most predictable and certain outcomes. Yet, when the court reconfigured the definition of an abortive child to coincide with Spanish law, the court demonstrated that not even the most detailed provisions in the Digest could be regarded as incontestable or safe from revision.<sup>46</sup> Even a definition could be redefined under the digest methodology. Here was a staggering blow to legal certainty and to the reliance that the citizenry could place in the published laws that they were expected to know—for if the clearest, most detailed laws prove uncertain, what can be expected to happen to its more numerous general provisions? The rock submerged in the pail of water would seem to have turned into a

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*See* Archives of the Spanish Government of West Florida, West Florida Papers, no. 110, 288–89 (in translation) (on file with the Louisiana Collection, Howard Tilton Library, Tulane University).

46. Perhaps the case also attracted attention because it affected conservative values about inheritance and family, and the Spanish rule was idiosyncratic and had no equivalent in European family law.

sponge.<sup>47</sup> The sponge would seem adrift and not the center of anything.

From the beginning, this method had continually marginalized the Digest, and it often led the judges to go straight to Spanish, French, or Roman authority with only a passing glance, if any, at the Digest itself. A representative case is one in which the question was whether a purchaser of land could suspend payment of the purchase price on grounds that he was in danger of eviction.<sup>48</sup> The particular danger alleged by the plaintiff was *the existence* of an unsatisfied mortgage on the land, which the seller had not paid and for which he was not in default. Under the Digest, a danger of eviction meant some disturbance of the purchaser's possession by an "action" taken or filed against him, and nothing of that sort had occurred. But the court never cited, quoted, or discussed the Digest. It held for the purchaser by relying upon Domat and Justinian's Digest for the proposition that the mere existence of the mortgage created a danger of eviction.<sup>49</sup> Another case illustrating the marginalization of the Digest involved whether a will was valid if a witness was absent when the testator dictated his intentions to the notary.<sup>50</sup> In reaching its decision, the court did not cite or quote the Digest provisions. It said merely that the Digest was in agreement with the Spanish law that the witnesses must be present at that moment. It quoted Febrero's statement that they must "all at one and the same time hear the words from the mouth of the testator."<sup>51</sup> Over and over, the cases give the impression that the Digest is secondary authority compared to the *ius commune* surrounding it.

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47. Or as François-Xavier Martin phrased it:

In practice, the work was used, as an incomplete digest of existing statutes, which still retained their empire; and their exceptions and modifications were held to affect several clauses by which former principles were absolutely stated. *Thus, the people found a decoy, in what was held out as a beacon.*

2 FRANÇOIS-XAVIER MARTIN, *THE HISTORY OF LOUISIANA, FROM THE EARLIEST PERIOD 291–92* (1829) (emphasis added).

48. See *Duplantier v. Pigman*, 3 Mart. (o.s.) 236 (La. 1814).

49. *Id.* at 244.

50. *Knight v. Smith*, 3 Mart. (o.s.) 156 (La. 1813). For a further example of marginalization, see *Jacob v. Ursuline Nuns*, 2 Mart. (o.s.) 269 (La. 1812) (A plantation overseer, a free person of color, worked for a number of years without wages. The nuns attempted to reward him by donating two arpents of land, but this was held to be beyond their authority and right. Further, he was not entitled to recover the reasonable amount of his services in "quantum meruit," but the court did not examine the Digest provisions on natural obligations or quasi-contracts. It relied on an English case denying quantum meruit under similar circumstances.).

51. *Id.* at 167.

Furthermore, the judges could often control outcomes under the digest method at their discretion. The linchpin of the method was actually judicial control over the issue of repeal. And much depended upon the principles of repeal that they entertained. Certainly, no teleological construction of “contrariness” based on what end the code was meant to accomplish was ever raised. The courts were wedded to a most literal and conservative theory of repeal, drawn word-for-word from British decisions and authors who were emphatic that implied repeals of prior statutes were disfavored. Application of this British view favored the maximum retention of old Spanish law because it read the implied repeal clause as narrowly as possible. For example, Judge Mathews in *De Armas’ Case* (1821) said that, to decide whether an 1813 contempt statute abrogated the Spanish laws on attorney discipline, it was necessary to resort to “known and established rules of abrogation and repeal.”<sup>52</sup> He set forth three known and established rules, but interestingly, he did not disclose where these principles came from. Research shows that they were in fact rules for the repeal of common law statutes drawn from common law books. The favorite sources were William Blackstone, Matthew Bacon’s *Abridgement*, and English precedents.<sup>53</sup> It is also important to note how unpredictable the question of repeal could be. Litigants could never be really sure when the court would say that Spanish law had been repealed and when it remained in force. As stated previously, the test of “contrariness,” or repugnancy, was generally construed as strictly as possible to maintain the exterior Spanish law in force, but sometimes it was applied loosely and purposively to strike down certain disliked or inconvenient Spanish rules. The factors behind the differing outcomes were not articulated.<sup>54</sup> Clearly, this interpretational discretion enhanced judicial power.

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52. See *De Armas’ Case*, 10 Mart. (o.s.) 158, 172 (La. 1821).

53. Thus, in *Rogers v. Beiller*, 3 Mart. (o.s.) 665 (La. 1815), Judge Martin referred to Matthew Bacon’s *A New Abridgment of the Law* and Lord Mansfield’s decision in *The Earl of Ailesbury v. Pattison* (1778). See *id.* at 672.

54. For example, the “decisory oath,” which existed in Louisiana during the Spanish occupation, was peremptorily declared “virtually” repealed by procedural rules under the Practice Act simply because the Practice Act allowed interrogatories to be directed to the opposite party in the case. Actually, however, there is no necessary incompatibility between sending written interrogatories to the party and deferring a decisory oath to that same party. Answering the decisory oath may have conclusive effects on the outcome of the case, but there is no reason why both the decisory oath and written interrogatories could not be used at different stages of the same proceedings. They represent different ways of obtaining party evidence and of assigning weight to it. In the event, however, the superior court summarily declared that the decisory oath was repealed without explaining why. *Porche’s Heirs v. Poydras*, 1 Mart. (o.s.) 198 (La. 1811). *Cottin v.*

## IV. A CODA ON THE DIGEST

The inner connection between maintaining Spanish law through the digest method and maintaining the court's own power became more obvious over time. Matters came to a head in the second round of codification from 1823–1828 when the Legislature attempted mightily to sever the Spanish umbilical cord. The three juriconsults expressed forcefully in their preliminary report that it was necessary to repeal “all former laws and usages defining civil rights.”<sup>55</sup> A Code article drafted by the senate itself contained a comprehensive and definitive repeal of all prior laws:

From and after the promulgation of this code, the Spanish, Roman and French laws, which were in force in this State, when Louisiana was ceded to the United States . . . are hereby repealed in every case, for which it has been especially provided in this code, and that they shall not be invoked as laws, even under the pretense that their provisions are not contrary or repugnant to those of this code.<sup>56</sup>

Despite the comprehensiveness of this repeal and the advance warning against judicial “pretense,” the judges of the supreme court obstinately refused to give full effect to it. In a series of decisions in 1827, the court ruled that Spanish custom was still controlling, in another that the *Partidas* was still controlling, and in a third it ruled that the new Civil Code of 1825 had not succeeded

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*Cottin* also illustrates the discretionary element in the repeal question. 5 Mart. (o.s.) 93 (La. 1817). Counsel pointed out that under Spanish law, the baptism of a child, even one that did not survive 24 hours, prevented it from being considered as abortive. He also pointed out that Spanish law's use of this religious rite as an element in its rule made it expressly contrary to the Digest's definition, which made no reference to baptism. The court, however, brushed aside this disparity and did not think that the Spanish rule was sufficiently contrary to be regarded as repealed. *Id.* See also *Rogers v. Beiller*, 3 Mart. (o.s.) 665 (La. 1815).

55. See Tucker, *supra* note 3, at 179 (Preliminary Report of the Code Commissioners, dated February 13, 1823).

56. LA. CIV. CODE art. 3521 (1825). This amendment passed overwhelmingly in the House of Representatives by a vote of 26–2, with the majority comprised equally (judging by their surnames) between Creole and American representatives. LA. H.R. JOURNAL, 2d Sess., at 10 (Mar. 13, 1824). A further amendment, weakening the first, was proposed and defeated by a vote of 18 to 6. This amendment would have permitted the Spanish, French, Roman, and common law to be used for illustrating the principles of the code. The “no” vote was again evenly comprised of Creole and American names. *Cf.* RICHARD KILBOURNE, A HISTORY OF THE LOUISIANA CIVIL CODE: THE FORMATIVE YEARS, 1803–1839 (1987).

even in repealing certain provisions of the Digest and therefore the Digest provisions were concurrently in force.<sup>57</sup> The Legislature now felt called upon to respond and to reassert the repeal in more forceful and particularized terms. It passed a first act specifically repealing all articles contained in the Digest of 1808<sup>58</sup> and then passed a second act declaring “that all of the civil laws which were in force before the promulgation of the civil code lately promulgated, be and are hereby abrogated.”<sup>59</sup> Once again, the judges remained intransigent and resorted to disingenuous arguments to block the repeal. They now insisted that their own precedents and legal decisions, if based upon “general principles” of the civil law rather than statutes, were immune from the effects of the omnibus repeal issued by the Legislature. Accordingly, they held that a doctrine founded on Roman principles, which the court had previously recognized in a case, was still controlling even after the repeal of 1828.<sup>60</sup> The court reasoned that legislative power

cannot extend beyond the laws which the legislature itself had enacted; for it is this alone which it may repeal; *eodem modo quiquit constituitur, eodem modo dissolvitur*. . . . We, therefore, conclude, that the Spanish, Roman, and French civil laws, which the legislature repealed, are the positive, written, or statute laws of those nations, and of this state [and] that the legislature did not intend to abrogate those principles of law which had been established or settled by the decisions of courts of justice.<sup>61</sup>

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57. See *Broussard v. Bernard*, 7 La. 211 (La. 1834) (decided in 1827 but not reported until 1834); *Erwin v. Fenwick*, 6 Mart. (n.s.) 229 (La. 1827); *Lacroix v. Coquet*, 5 Mart. (n.s.) 527 (La. 1827); *Flower v. Griffith*, 6 Mart. (n.s.) 89 (La. 1827).

58. Act No. 40, 1828 La. Acts 66.

59. Act No. 83, 1828 La. Acts 160.

60. See *Reynolds v. Swain*, 13 La. 193 (La. 1839). The earlier case alluded to was *Christy v. Cazenave*, 2 Mart. (n.s.) 451 (La. 1824), which recognized on the basis of Roman principles the doctrine of abandonment in the law of lease. This claim of immunity from legislative power clearly surpassed the claim that decisions have precedential effect for judges and should not be lightly overruled. While the former may have been unusually radical, the latter view was advanced frequently enough. See *Dugas v. Estiletts*, 5 La. Ann. 559, 559–60 (La. 1850) (citation omitted) (“But the most distinguished of our predecessors have, in two cases, come to a different conclusion, and based their opinions upon those of our earliest commentators on the laws of redhibition. In the interpretation of a law, it is a wise rule, ‘*stare decisis*,’ and we are obliged to adopt it in this case.”).

61. *Reynolds*, 13 La. at 198. The court also deemed the Louisiana Legislature impotent to repeal the revealed law, the natural law, the law of nations and those laws “antecedent to any positive precept.” *Id.*

It could be said that this was a struggle over the lawmaking power and over the court's jurisprudence, but in my view it was about the centrality of the civil code in the legal order. There was a deep fear of a code on its own bottom, bereft of any safety net. This seems to have been the fear of Etienne Mazureau, who recounted the story of the repeal to Alexis de Tocqueville on his visit to New Orleans: "The bar and the judges discovered with horror what had been done the day before. But the thing was done."<sup>62</sup> What had really been done was of course not an evil or a horror but the final demise of the digest method. It marked a great turning point in the history of our Civil Code.

Ladies and gentlemen, perhaps I have gone far enough with this story to make my thesis clear that the honorable judges were resolute defenders of their methods, their powers, and their offices. They clung to the old law, particularly the parts now embodied in their own jurisprudence, as they might have clung to their own possessions. It was indeed a shocked Judge Mathews who expressed his true feelings about the propriety of the great repeal:

The clause of repeal is sweeping in its effects, *tremendously sweeping*, and an unwise or inconsiderate interpretation on the part of the courts of justice, would have left the community without any civil laws, except those contained in the Louisiana Code and Code of Practice; an evil so great as to be irreconcilable with the wisdom that must be conceded to our legislatures.<sup>63</sup>

And yet, this was surely the turning point in the quest to implant a true code in Louisiana. It is important to realize what the old order was actually defending. They preferred the freedom of the open spaces and fluid, plural sources of Spanish, French, and common law. If discretion means the power to choose, they were in a sense defending their own discretionary powers and resisting a legislative bridle. Possibly the Spanish–Roman–French *ius commune* seemed to them a more prestigious system of justice, nobler and better tested than anything they believed that the Louisiana Legislature might enact. But, in my opinion, in the final analysis, they were unconsciously defending what we all defend every day in our legal lives—our acquired legal culture. The judges and lawyers had acquired their expensive libraries and mastered these laws and, in the process, proudly identified with them. They had become, in fact,

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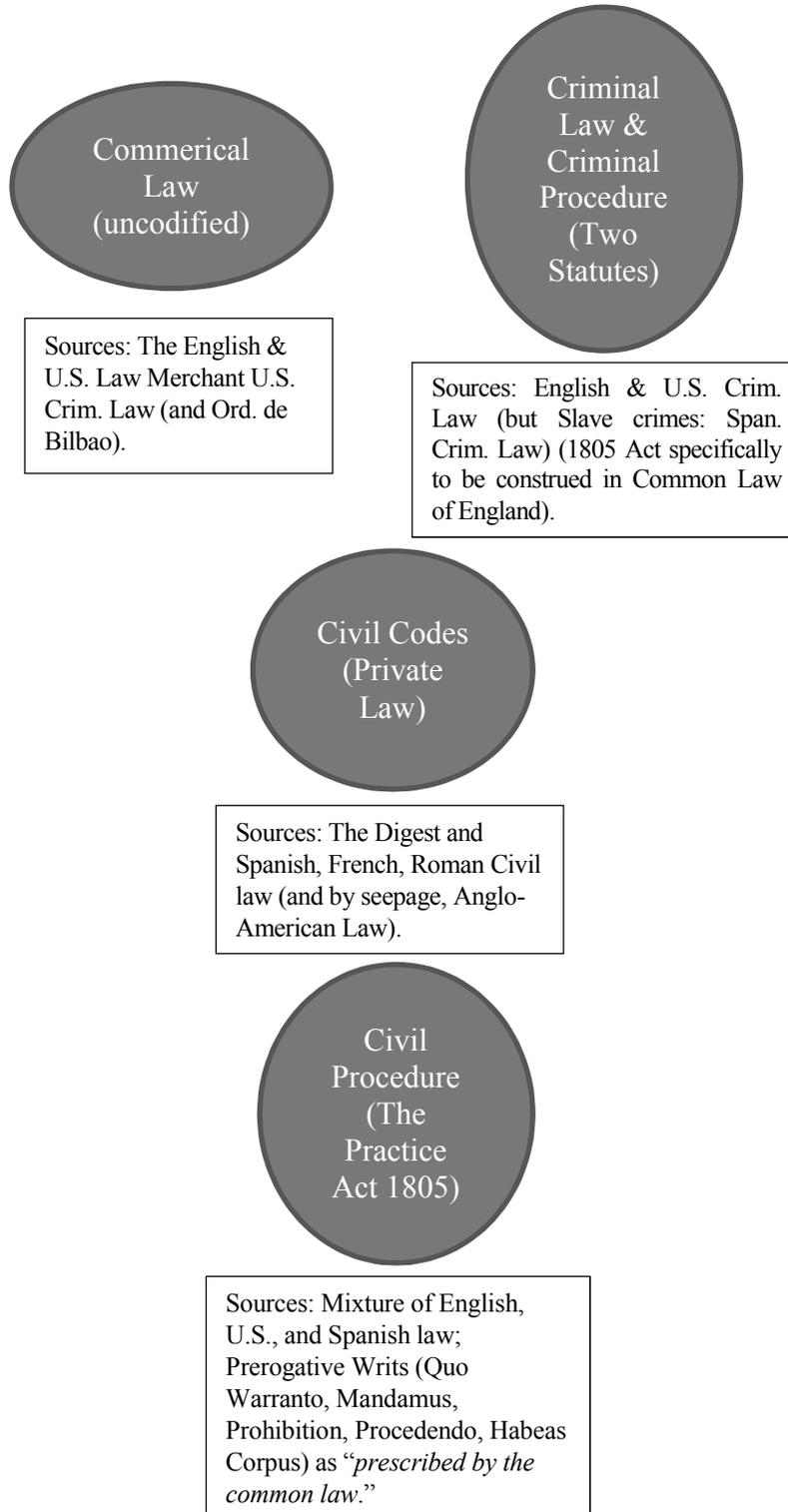
62. Tucker, *supra* note 3, at 169 (quoting DE TOCQUEVILLE, *supra* note 2, at 106).

63. Testamentary Ex'r of Lewis v. Casenave, 6 La. 437, 441 (La. 1834) (emphasis added).

expert comparatists who made an eclectic synthesis of the law to a degree seldom seen before or since. The judges felt threatened by the Legislature's omnibus repeal of the very sources upon which their whole jurisprudence of the past 20 years rested. From 1825 on, the Legislature apparently expected the judges to accept the Civil Code as the one and only source of civil law. For the coequal judicial branch of government, this seemed an uncomfortable and undignified straitjacket. Their creativity would be reduced to analogical paths within a single code rather than the freedom to apply the justice of laws which lay beyond it. Of what use would their learning be if it could only be deployed in the intellectual isolation of a true civil code? What would be left of their former liberty to seek and to find just rules from every part of the world?

Ladies and gentlemen, my time has indeed expired, and I have not reached other episodes in this history that I intended to present. They would have added to the evidence of the struggle to place our civil code in the center of our system, but that is for another day. Napoleon once said of the renowned Portalis that "Portalis would be the most eloquent of speakers if he only knew when to stop." I must reluctantly obey the Emperor and break off here.

## APPENDIX A: THE ENCIRCLEMENT OF THE CIVIL LAW



APPENDIX B: ROCK IN A PAIL OF WATER

