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## The Civil Codes of Louisiana<sup>†</sup>

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### ABSTRACT

This article details the historical evolution of the Louisiana Civil Code, with a focus on the pre-1908 revisions. The first part of this article introduces the historical, legal, and political background of the codification. The second part explores the 1808 Digest of Laws, and the third part discusses the Civil Code of 1825. The article concludes with a summary of the Civil Code of 1870 and mentions its subsequent revisions.

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- I. HISTORICAL, POLITICAL, AND LEGAL BACKGROUND OF THE CODIFICATION ..... 1
  - A. French Colony ..... 1
  - B. Spanish Rule..... 2
  - C. Retrocession and the Louisiana Purchase ..... 5
  - D. The Territory of Orleans ..... 6
- II. THE DIGEST OF THE LAWS IN FORCE (1808) ..... 7
  - A. Enactment of the 1808 Digest of Laws..... 7
  - B. Sources of Law ..... 8
  - C. Repeal of Prior Laws ..... 10
- III. THE CIVIL CODE OF 1825 ..... 11
  - A. The Need for and the Process of Recodification..... 11
  - B. Sources of Law ..... 12
  - C. Repeal of Prior Laws ..... 12
  - D. Controlling Text ..... 13
- IV. THE CIVIL CODE OF 1870 ..... 14
  - A. Scope of Revision ..... 14
  - B. Controlling Text ..... 14
  - C. Fading of the French Language and Legal Culture..... 15
  - D. The Structure, Style, and Substance of the Louisiana Civil Code of 1870..... 16
  - E. The Cultural Influence of the Louisiana Civil Code..... 17
  - F. Revision of the Louisiana Civil Code of 1870..... 18



**I. HISTORICAL, POLITICAL, AND LEGAL BACKGROUND OF THE CODIFICATION<sup>1</sup>**

*A. French Colony*

¶1 The discovery of Louisiana belongs to the romance of American history. It has been suggested that the mouth of the Mississippi River was discovered by Alonso Álvarez de Piñeda in 1519 or by the expedition of Panfilo de Narvaéz, but neither suggestion rests on conclusive evidence. It seems that Hernando de Soto

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<sup>1</sup> See, in general, RICHARD H. KILBOURNE, JR., A HISTORY OF THE LOUISIANA CIVIL CODE; THE FORMATIVE YEARS, 1803-1839 (1987); Brown, *Law and Government in the “Louisiana Purchase”*: 1803-1804, 2 Wayne L. Rev. 169 (1956); *id.*, *Legal Systems in Conflict: Orleans Territory 1804-1812*, 1 Am. J. Legal Hist. 35 (1957); Dart, *Courts and Law in Colonial Louisiana*, 22 Rep. La. B.A. 17 (1921); Groner, *Louisiana Law: Its Development in the First Quarter-Century of American Rule*, 8 La. L. Rev. 350 (1948); Hood, *A Crossroad in Louisiana History*, 22 La. L. Rev. 709, 710-720 (1962); Schmidt, *Ordinances and Instructions of Don Alexander O’Reilly*, 1 La. L.J. 1 (1841); *id.*, *Edward Livingston and the Louisiana Codes*, 2 Colum. L. Rev. 24 (1902); Stone, *The Reception of Law in Louisiana*, in LEGAL THOUGHT IN THE UNITED STATES OF AMERICA (Hazard and Wagner eds. 1970).

entered the borders of the present state of Louisiana and was buried near the point where Red River empties into the Mississippi, but again there is lack of conclusive proof. Survivors of the de Soto expedition, however, did descend to the mouth of the Mississippi in 1543.

¶2 Spain set up no claim to the region by right of discovery. Thus, Robert Cavelier, Sieur de la Salle, who came down the river in 1682 from the French possessions to the north, was able to take possession of the territory in the name of France. The new possession was given the name of Louisiana, in honor of King Louis XIV. La Salle sought to establish a colony in 1684, but missed the mouth of the Mississippi and landed in Texas, where he was murdered a few years later by some of his followers. A second attempt to establish a colony was undertaken by D'Iberville, who reached the Gulf Coast in 1699 and established a fort about 40 miles above the mouth of the Mississippi. This was the earliest settlement within the boundaries of the present state of Louisiana.

¶3 The legal history of Louisiana began in 1712 when Louis XIV granted a Charter to Antoine Crozat for the development, administration, and exploitation of the possession. This Charter provided that the territory was to be governed by Edicts, Ordinances, and the Custom of Paris, namely a collection of customary rules prevailing in the city of Paris and its surrounding areas that had been reduced to writing in the sixteenth century. Louisiana proved a great burden on the purse of Crozat. In 1717, Crozat surrendered his Charter, and a new one was issued to John Law's Company of the West, which provided for application of the same French laws. The Company of the West accomplished much for Louisiana. DeBienville, a brother of D'Iberville, was sent out as a governor, and established New Orleans in 1717. However, the company failed to realize profits, and eventually came to an end fatal to its creditors. It surrendered its Charter in 1731, and Louisiana became a crown colony, still governed by Edicts, Ordinances, and the Custom of Paris.

#### *B. Spanish Rule*

¶4 France ceded the Louisiana Territory to Spain in 1762 by the Treaty of Fountainbleau. However, French laws continued to apply until November 25, 1769, when a newly appointed Spanish Governor, Don Alexander O'Reilly, in his determination to wipe out remaining vestiges of French law, issued an Ordinance that was designed to organize an efficient government and administration of justice in accordance with the Spanish laws.<sup>2</sup> Governor O'Reilly was a young Irishman who had risen to distinction in the Spanish Army. In the preamble, he stated the reasons for his legislation [*sic*]:

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<sup>2</sup> See Schmidt, *Ordinances and Instructions of Don Alexander O'Reilly*, 1 LA. L. J. 1-60 (1841) (English translation by Schmidt). The Spanish original of the Ordinances is reprinted in B. TORRES RAMIREZ, *ALEXANDRO O'REILLY EN LAS INDIAS* 187-225 (1969).

. . . to establish . . . that form of political government and administration of justice prescribed by our wise laws, by which all the states of His Majesty in America have been maintained in the most perfect tranquility, content and subordination . . . And as the want of advocates in this country, and the little knowledge which his new subjects possess of the Spanish laws might render a strict observance of them difficult, and as every abuse is contrary to the intentions of His Majesty, we have thought it useful, and even necessary to form an abstract or regulation drawn from the said laws, which may serve for instruction and elementary formulary in the administration of justice and in the economical government of this city, until a more general knowledge of the Spanish language may enable every one, by the perusal of the aforesaid laws, to extend his information to every point thereof.<sup>3</sup>

¶5 The text of the Ordinance contains provisions of public law dealing with the *Cabildo* (City Council), the Ordinary *Alcaldes*, the *Alcalde Mayor Provincial*, the *Alguazil Mayor*, the Depositary General, the Receiver of Fines, the *Mayordomo de Proprios*, the *Escribano* of the *Cabildo*, and the jailer and the prisons.

¶6 On the same day, November 25, 1769, Governor O'Reilly promulgated a second Ordinance containing:

Instructions as to the manner of instituting suits, civil and criminal, and of pronouncing judgments in general, in conformity with the laws of the *Nueva Recopilación de Castilla* and the *Recopilación de las Indias*, for the government of the judges and parties pleading, until a more general knowledge of the Spanish language, and more extensive information upon those laws may be acquired.<sup>4</sup>

This Ordinance, also known as *O'Reilly's Code*, was a brief code of practice that substantially influenced the development of the Louisiana procedural system. The text of the Ordinance contains provisions of public and private law dealing with civil judgment in general, executory proceedings, and judgments in criminal cases, appeals, punishments and testaments. The substance of these provisions was taken, as O'Reilly indicated, from the *Nueva Recopilación de Castilla* and the *Recopilación de las Indias*.<sup>5</sup> These statutes, promulgated in 1567 and 1661 respectively, contained a provision that, if no later enactment furnished the rule, reference should be made to the *Siete Partidas*.

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<sup>3</sup> Schmidt, *Ordinances and Instructions of Don Alexander O'Reilly*, 1 LA. L. J. 1-3 (1841).

<sup>4</sup> See Instructions of Nov. 25, 1769, Preamble, reprinted in English translation in Schmidt, *Ordinances and Instructions of Don Alexander O'Reilly*, 1 LA. L. J. 1, 27 (1841).

<sup>5</sup> The *Nueva Recopilación* of the Kingdom of Castile was enacted in 1567. The *Recopilación de Leyes de los Reinos de las Indias* is a selective and systematic rearrangement of major legal texts up to 1680. See Baade, *The Formalities of Private Real Estate Transactions in Spanish North America*, 38 LA. L. REV. 656, 667 (1978). If no later enactment furnished the rule of decision, reference was made to the laws of the *Siete Partidas*. This is a compilation of laws made in 1263 and formally enacted in 1348. See MOREAU LISLET AND CARLETON, *THE LAWS OF LAS SIETE PARTIDAS, WHICH ARE STILL IN FORCE IN THE STATE OF LOUISIANA* iii-xxv (1820).

¶7 The O'Reilly enactments of November 25, 1769 transformed Louisiana into a Spanish ultramarine province, governed by the same laws as the other Spanish possessions in America and subject to the same system of judicial administration.<sup>6</sup> However, despite fairly clear indications that French law was replaced in 1769 by the complicated system of Spanish private and public law,<sup>7</sup> there has been much disagreement in Louisiana as to whether this actually happened.

¶8 It has been suggested that O'Reilly did not have the authority to alter the laws of the colony and that the Ordinance and Instructions of November 25, 1769 therefore could not, and did not, repeal the pre-existing French law, with the possible exception of certain provisions of the law of successions.<sup>8</sup> However, contemporary research has shown that, undoubtedly:

“the law of Castile and of the Indies, including the private law of Castile, was introduced into *Louisiana* soon after Spain formally took possession in August 1769. O'Reilly was authorized to introduce this system of law, subject to subsequent approval; he did in fact introduce Spanish-Castilian law, and received approval by royal cedula.”<sup>9</sup>

¶9 Nevertheless, there are contrary indications demonstrating an unusual attachment by the French population to their own laws and customs. Rather than resorting to the official Spanish judicial system, the French population frequently settled affairs among themselves extrajudicially on the basis of French laws, customs, and usages.

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<sup>6</sup> See Baade, *Marriage Contracts in French and Spanish Louisiana: A Study in “Notarial” Jurisprudence*, 53 TUL. L. REV. 3, 40 (1978).

<sup>7</sup> Consider: texts at notes 2 and 3 *supra*; An act declaring the laws which continue to be in Force in the Territory of Orleans, and authors which may be referred to as authorities within the same, vetoed by Governor Claiborne. The proposed legislation in manuscript is printed in the TERRITORIAL PAPERS, ORLEANS SERIES, NATIONAL ARCHIVES. It has been reprinted in BROWN, *Legal Systems in Conflict; Orleans Territory, 1804-1812*, AM. J. LEGAL HISTORY 35, 46-48 (1857), and Franklin, *The Place of Thomas Jefferson in the Expulsion of Spanish Medieval Law from Louisiana*, 16 TUL. L. REV. 319, 323-26 (1942). See also Beard v. Poydras, 4 Mart.(O.S.) 348 (La. 1816); MOREAU-LISLET AND CARLETON, THE LAWS OF LAS SIETE PARTIDAS, Translators' Preface iii, xviii (1820): “O'Reilly issued a proclamation, changing the form of the government of Louisiana, abolishing the authority of the French laws, and substituting those of Spain in their stead. . . . From the time of its proclamation until now, the French laws ceased to have any authority in this country, and all controversies were tried and decided conformably to the Spanish laws.”

<sup>8</sup> See Schmidt, *Were the Laws of France, which Governed Louisiana, Prior to the Cession of the Country to Spain, Abolished by the Ordinances of O'Reilly?*, 1 LA.L.J. 24, 25, 37 (1841); Tucker, *Effect on the Civil Law of Louisiana Brought About by the Change in Sovereignty*, 2-42 (SC'Y OF BARTOLUS, JURIDICAL STUDIES, No. 1, 1975); Foreword.

<sup>9</sup> Baade, *Marriage Contracts in French and Spanish Louisiana: A Study in “Notarial” Jurisprudence*, 53 TUL. L. REV. 3, 74 (1978); see also Baade, *The Formalities of Private Real Estate Transactions in Spanish North America*, 38 LA.L.REV. 656, 682 (1978), citing recommendation for royal approval by the Council of the Indies on February 27, 1772, and formal approval by royal cédula dated August 17, 1772.

### C. *Retrocession and the Louisiana Purchase*

¶10 Louisiana was retroceded to France on October 1, 1800, by the Treaty of San Idelfonso, but France assumed sovereignty only on November 30, 1803 for a period of twenty days. During the brief period of French control, Laussat, as Colonial Prefect representing Napoleon, abolished the Spanish authorities and created a municipal government for Louisiana. He organized a militia composed of Americans and Creoles, and, bearing a grudge from his treatment by the Spaniards, made himself as obnoxious to them as he could.

¶11 However, Laussat did not have the time to organize a judiciary, and his only change to the laws governing Louisiana was the abrogation of Spanish slave legislation and the reintroduction of the French *Code Noir*. Thus, the bulk of the pre-existing laws remained in force until the United States took possession of the territory on December 20, 1803 by virtue of the Louisiana Purchase.

¶12 The 1803 Act of Congress that authorized the President to take possession of the territories ceded by France provided a method of interim government and the basis for the protection of the inhabitants. In accordance with this Act, President Jefferson appointed W. C. C. Claiborne to exercise all the powers and authorities heretofore exercised by the Colonial Governor and Intendant. The first official act of Claiborne was to affirm the application of laws then in force.

¶13 Claiborne's affirmation of the pre-existing laws in Louisiana was intended to be a temporary measure. Claiborne was a native of Virginia and a lawyer trained in the common law system. He was convinced that the common law should be introduced in the territory, and he shared this conviction with President Jefferson and with most of the American lawyers newly arrived in New Orleans. Both Jefferson and Claiborne anticipated difficulties in establishing the authority of the United States, as they had been advised by Spanish officials that the people of Louisiana “are only kept in order by the Hand of Power” and that “there will be the greatest necessity of being prepared for any event whatever.” They thought, however, that once order was firmly established, it would be an easy matter to introduce the common law system. In reality, the transfer of authority was effected without incident, but there was much reaction against the introduction of the common law system.

¶14 The introduction of the common law system was opposed by the native population, though the leader of the opposition was Edward Livingston, a New York lawyer who immigrated to Louisiana in 1803. Livingston, the statesman and jurist, was a convert to the cause of the civil law. He studied Roman and Spanish law after his arrival in New Orleans and became convinced that the civil law system was by far superior to the common law that prevailed in all other sister states. He devoted his time and energy, therefore, to the preservation of the civil

law system in his new home state. In this he was successful; moreover, he contributed greatly to the formation of the Louisiana tradition of codified laws.

*D. The Territory of Orleans*

¶15 By an 1804 Act of Congress, the areas ceded to the United States were divided into distinct territories, one of which, the Territory of Orleans, substantially comprised the present state of Louisiana. The Act provided that this territory was to be governed by the Governor and a Legislative Council consisting of thirteen members appointed by the President. Edward Livingston, having reason to fear that the appointees of the President, nominated by Claiborne, would favor adoption of the common law system, undertook to prevent the appointment of the Council. He prepared a memorial urging Congress to grant statehood to the territory at once, so that it could be governed by a body of elected rather than appointed representatives.

¶16 Before Congress had an opportunity to act on Livingston's memorial, key positions in the Legislative Council were filled. The Council convened promptly and, in its first session, adopted "An Act Regulating the Practice of the Superior Court in Civil Causes." This Act formed the basis of Louisiana civil procedure until the enactment of the Code of Practice in 1825. It preserved some of the best elements of the civil law, but at the same time introduced jury trials in civil matters and vested the judiciary with many of the prerogatives of judges in common law jurisdictions. The Council also passed legislation dealing with criminal law and procedure. For the rest, Livingston was successful in blocking any definitive action regarding the governing system of laws until his memorial was considered by Congress.

¶17 Statehood was not granted immediately. But, after consideration of Livingston's memorial, Congress abolished the Legislative Council early in 1805 and established a Legislature composed of an elected House of Representatives and an appointed Legislative Council. The Legislature convened in 1806 and declared that the Territory of Orleans should be governed by Roman and Spanish civil law and by the ordinances and decrees that previously applied in Louisiana. Governor Claiborne vetoed this Act, pointing out that it was the prerogative of Congress to determine whether the civil law should or should not apply in the territory.

¶18 Claiborne's veto was also justifiable in light of pragmatic considerations. It was not an easy matter to determine which Spanish laws were actually in force in Louisiana. There were at least six different compilations of Spanish laws and more than 20,000 individual laws, some of which were never intended to apply in the colonies. Conflicts among legislative provisions were not uncommon, and Spanish writers often disagreed as to which laws should take precedence. Copies of Spanish laws were extremely rare, and, indicatively, Claiborne was unable to

secure a copy of O'Reilly's Code. A great number of Spanish laws were obsolete, and some were clearly repugnant to the citizens of the United States. For example, the unsuccessful defendant in a civil suit might suffer serious penalties, and a lawyer who intentionally miscited the law could be sent to exile, and his property could be confiscated. Torture was a lawful means for the extraction of testimony from persons accused of crimes or from uncooperative witnesses, and numerous offenses were punishable by death. Burning, hanging, and decapitation by the sword were acceptable methods for the carrying out of capital punishment.

## II. THE DIGEST OF THE LAWS IN FORCE (1808)<sup>10</sup>

### A. *Enactment of the 1808 Digest of Laws*

¶19 Following Claiborne's veto of the 1806 Act of the Territorial Legislature, the Legislature adjourned in protest, claiming that their best acts were rejected by the Governor. Within a few days, a manifesto signed by a number of representatives was published in New Orleans newspapers, which purported to be a resolution for the dissolution of the legislature on account of the Governor's veto. Nevertheless, the legislature convened on June 7, 1806 and adopted a resolution for the preparation of a civil code for the territory. James Brown and Moreau-Lislet were charged with this task, and were specifically directed to base codification on the civil law by which the territory was governed. Governor Claiborne acceded to this resolution.

¶20 In accordance with the legislative mandate, Brown and Moreau-Lislet prepared a code and submitted it to the legislature. On March 31, 1808, the legislature adopted their work under the title of "A Digest of the Civil Laws now in Force in the Territory of Orleans, with Alterations and Amendments Adapted to its Present Form of Government." The Digest, known as the Louisiana Civil Code of 1808, gained Claiborne's approval. It was published in both French and English, but the English version was merely a translation from the French original. The 1808 Code was revised in 1825, and again in 1870. As revised and amended by special legislation, it is still the fountainhead of our private law.

¶21 It may be wondered why the 1808 Code secured the approval of Governor Claiborne whereas the 1806 Act, two years earlier, had been vetoed. The answer lies in the qualities of the new Code and in Claiborne's changed attitude toward

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<sup>10</sup> See, in general, DARGO, JEFFERSON'S LOUISIANA: POLITICS AND THE CLASH OF LEGAL TRADITIONS 105-174 (1975). On the sources of Louisiana Civil Code of 1808, see also RICHARD H. KILBOURNE, JR., A HISTORY OF THE LOUISIANA CIVIL CODE; THE FORMATIVE YEARS, 1803-1839 pp.1-43 (1987); Batiza, *Justinian's Institute and the Louisiana Civil Code of 1808*, 69 Tul. L. Rev. 1639 (1995); *id.*, *Roman Law in the French and Louisiana Civil Codes: A Comparative Textual Survey*, 69 Tul. L. Rev. 1601 (1995); Snyder, *Ancient Law and Modern Eyes*, 69 Tul. L. Rev. 1631 (1995); *id.*, *Possession: A Brief for Louisiana's Right of Succession to the Legacy of Roman Law*, 66 Tul. L. Rev. 1853 (1992).



Louisianians. The 1806 Act purported to affirm the application of medieval Spanish laws, whereas the 1808 Code was largely inspired by the ideas of the French Revolution. Moreover, whereas the 1806 Act tended to perpetuate chaotic situations and controversies as to which were the laws in force, the 1808 Code was a concise statement of principles and rules easily ascertainable and readily available to all. These were far-reaching differences. Apart from the merits of the Code, Claiborne's initial attitude toward Louisianians had undergone a change as he had come to have increased respect for their ability to participate in their own government.

*B. Sources of Law*

¶22 The redactors of the Louisiana Civil Code of 1808 based codification on a variety of sources. They followed, as a model, preparatory works of the French Civil Code, as well as the finished text of that code. The 1808 Digest contained 2,160 articles; 1,516 of these articles, about seventy per cent of the whole, corresponded with, and were based upon, provisions of the French *projet du gouvernement* of 1800 or of the Napoleonic Code. Three hundred and twenty-one articles, about fifteen per cent of the whole, were based upon other French statutes or upon French doctrinal works. Most of the remaining articles were based directly on Spanish materials.<sup>11</sup>

¶23 The questions of whether the legislative mandate to the redactors called for codification of Spanish law, and of whether the redactors violated that mandate by the adoption of French substantive law have been hotly debated.<sup>12</sup> Since the redactors were directed by the legislature to “compile and prepare jointly a Civil Code” and “to make the civil law by which the territory is now governed the ground work of said code,”<sup>13</sup> the answer to these questions depends on whether Spanish law or French law was in force in Louisiana in 1806.

¶24 Professor Pascal of the L.S.U. law faculty maintains that Spanish law was in force in 1808, that the redactors were directed to codify Spanish law, and that they did so. According to Professor Pascal, the redactors of the 1808 Digest acted as intelligent and practical men. Without in any way violating their mandate, they used readily available texts in the French language which expressed existing rules of Spanish law or which were modified to accomplish this end. Thus, “the Digest of 1808, though written largely in words copied from, adapted from, or suggested

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<sup>11</sup> See Tate, *The Splendid Mystery of the Civil Code of Louisiana*, 3 LOUISIANA REVIEW 1, 8 (1974).

<sup>12</sup> See Batiza, *The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance*, 46 TUL. L. REV. 4 (1971); Pascal, *Sources of the Digest of 1808: A Reply to Professor Batiza*, 46 TUL. L. REV. 603 (1972); Sweeney, *Tournament of Scholars over the Sources of the Civil Code of 1808*, 46 TUL. L. REV. 585 (1972); Batiza, *Sources of the Civil Code of 1808, Facts and Speculation: A Rejoinder*, 46 TUL. L. REV. 628 (1972).

<sup>13</sup> Res. Of June 7, 1806, TERRITORY OF ORLEANS ACTS 215 (1806).

by French language texts, was intended to, and does for the most part, reflect the substance of the Spanish law in force in Louisiana in 1808.”<sup>14</sup> Indeed, one may add that when there was an obvious difference between Spanish and French law, the redactors were careful to adopt Spanish solutions, and that in this way a great number of distinctively Spanish rules and institutions were codified in the 1808 Digest.

¶25 Colonel John H. Tucker, Jr., maintained vigorously that O'Reilly never repealed the French law that prevailed in Louisiana.<sup>15</sup> It follows that French law was still in force at the time of the Purchase, that the redactors were directed to codify French law, that they did, and thus that the question of violation of the legislative mandate does not arise. Professor Batiza of the Tulane law faculty, though admitting that the redactors were mandated to codify Spanish law, this being the law then in force, disputes the statement that the 1808 Code reflects the substance of the Spanish law in force in Louisiana in 1808. He maintains the redactors adopted instead the structure, or organization, of the French Civil Code and *projet* as the framework of the Louisiana code. “Nearly 1,700 provisions taken literally and almost literally by Moreau-Lislet from French codal and doctrinal texts pervade the Louisiana code, adopted no doubt on the theory that the Roman law tradition shared by the French and Spanish legal systems made them essentially similar.”<sup>16</sup> When, however, French laws were in conflict with Spanish rules and institutions, as in the fields of illegitimacy, curatorship, succession law and community of gains, the redactors deviated from the French models because “to have ignored Spanish laws in those areas would have been in open disregard of the instructions received, but even here French texts are found throughout the code.”<sup>17</sup>

¶26 There has been speculation as to why the redactors of the Louisiana Civil Code of 1808 did not acknowledge their debt to French and Spanish sources in the form of a published *projet*. Justice Tate of the Louisiana Supreme Court has suggested a plausible explanation. The deliberate intent of the redactors was to create a comprehensive body of principles and rules of law that either would be directly applicable to a matter in dispute or would be susceptible of application by expansive interpretation and analogy. In the absence of positive law, there would be judicial resolution of disputes by application of equitable principles rather than by resort to ancient treatises or former laws. In the event of ambiguity or uncertainty of a code provision, reasons for judicial interpretation of it should be

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<sup>14</sup> Pascal, *Sources of the Digest of 1808: A Reply to Professor Batiza*, 46 TUL. L. REV. 603, 604 (1972) (emphasis deleted).

<sup>15</sup> See JOHN H. TUCKER, JR., Foreword, LOUISIANA CIVIL CODE (Yiannopoulos ed. 1999).

<sup>16</sup> BATIZA, THE VERBATIM AND ALMOST VERBATIM SOURCES OF THE LOUISIANA CIVIL CODES OF 1808, 1825, AND 1870: THE ORIGINAL TEXTS, Preface to Volume 3 (1973).

<sup>17</sup> *Id.*

based on Louisiana-grounded equities and usages rather than upon the prior Spanish or French law or doctrinal writing. “By cloaking the origins of the Louisiana Code provisions in mystery, the juriconsults tended to free them from meanings or applications restricted to those inherited from their known ancestors. Having no meaning fixed by an ancient day, the general principles of the Louisiana Code could be applied to the new conditions arising decade after decade.”<sup>18</sup>

### *C. Repeal of Prior Laws*

¶27 The Civil Code of 1808 did not repeal all prior laws. The enabling statute provided that “whatever in the ancient laws of this territory, or in the territorial statute, is contrary to the dispositions contained in said digest, or irreconcilable with them, is hereby abrogated.” This provision was compatible with the notion of a digest or compilation rather than a true civil code. Civil codes are conceived as comprehensive enactments, designed to be complete within their area of application, and intended to break with the past.

¶28 It is neither proper nor necessary to go outside a civil code and look at previous legislation for the purpose of ascertaining the law. The provision in the enabling statute has been criticized, therefore, as an inadvertence in draftsmanship and as an entirely useless precaution. Indeed, if the 1808 Code was actually conceived as a digest of existing laws, the provision accomplished nothing that would not have been equally well accomplished by its omission, because, according to the principle of tacit abrogation, the latest expression of legislative will would have been given precedence over ancient laws.

¶29 Moreover, if the intention of the legislature was to retain some of the ancient laws in force, it would have been a preferable legislative technique to reaffirm the application of these laws by specific declaration in the enabling statute. In the absence of such a declaration, the Louisiana Supreme Court rightly held in 1812 that the Code was “but a digest of the civil law, which regulated the country under the French and Spanish monarchs.”<sup>19</sup> And, in 1817, the same court declared further that the ancient laws “must be considered as untouched, wherever the alterations and amendments, introduced in the digest, do not reach them.”<sup>20</sup>

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<sup>18</sup> Tate, *The Splendid Mystery of the Civil Code of Louisiana*, 3 *Louisiana Review* 1, 11 (1974).

<sup>19</sup> *Hayes v. Berwick*; 2 Mart. (O.S.) 138, 140 (La. 1812)

<sup>20</sup> *Cottin v. Cottin*, 5 Mart. (O.S.) 93, 94 (La. 1817).

### III. THE CIVIL CODE OF 1825<sup>21</sup>

#### A. *The Need for and the Process of Recodification*

¶30 The Louisiana Supreme Court decision in *Cottin v. Cottin*<sup>22</sup> 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. The various Spanish compilations and Spanish jurisprudence in general, the Custom of Paris, the United States and Louisiana Constitutions, Acts of Congress, territorial legislation, and the 1808 Code thus became “inextricably mixed and entangled in a baffling melange of legal perplexity and uncertainty. It was impossible to know which codes, or what parts of them, had the force of law.”<sup>23</sup>

¶31 Since copies of Spanish compilations were rare in Louisiana, and the use of the Spanish language was largely on the retreat, the Louisiana legislature authorized Moreau-Lislet and Carleton to proceed with the translation of “such parts of the laws of the *Partidas* as are considered to have the force of law in this State.”<sup>24</sup> The same Act provided for the appointment of a committee, consisting of Derbigny, Mazureau, and Livingston, to examine and certify the proposed translation. The translators, however, found the task of accurate selection beyond their capabilities and made a translation of “all those laws which have not been expressly repealed by the Legislature, or which are not repugnant to the Constitution of the United States, or to that of the state, leaving it to the proper tribunals to determine whether they are in force or not.”<sup>25</sup>

¶32 The work never received legislative sanction, but its distribution was officially authorized on February 28, 1822. A few days later, on March 24, 1822, Derbigny, Moreau-Lislet, and Livingston were commissioned by the Legislature “to revise the civil code by amending the same in such a manner as they will deem it advisable, and by adding under each book, title, and chapter of said work, such of the laws as are still in force and not included therein.”<sup>26</sup> The three jurisconsults were also charged with the duty to prepare a complete system of the

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<sup>21</sup> See, in general, RICHARD H. KILBOURNE, JR., A HISTORY OF THE LOUISIANA CIVIL CODE; THE FORMATIVE YEARS, 1803-1839 pp. 96-30 (1987); DARGO, JEFFERSON'S LOUISIANA: POLITICS AND THE CLASH OF LEGAL TRADITIONS 105-174 (1975); Batiza, *The Actual Sources of the Louisiana Projet of 1823: A General Analytical Survey*, 47 Tul. L. Rev. 1 (1972).

<sup>22</sup> 5 Mart. (O.S.) 93 (La. 1817).

<sup>23</sup> Groner, *Louisiana Law: Its Development in the First Quarter-Century of American Rule*, 8 LA. L. REV. 350, 375 (1948).

<sup>24</sup> La. Acts p. 44 (1819).

<sup>25</sup> MOREAU-LISLET AND CARLETON, THE LAWS OF LAS SIETE PARTIDAS, Preface xxiv (1820).

<sup>26</sup> La. Acts p. 108 (1822).

commercial laws in force and a system of the practice to be observed before the courts.

¶33 The committee completed its work speedily, and on March 22, 1823, presented to the legislature drafts of a Civil Code, a Code of Practice, and a Code of Commerce. After elaborate consideration and discussion, the Civil Code and the Code of Practice were adopted by the legislature on April 12, 1824. The Commercial Code was rejected, apparently on the theory that commercial law ought to be uniform for the entire United States.

#### B. *Sources of Law*

¶34 The redactors of the 1825 Code followed the French Civil Code closely and relied heavily on French doctrine and jurisprudence. In their *projet*, which was reprinted by the legislature in 1937 and is readily available, the redactors took care to identify the sources of most proposed amendments, deletions, and additions, and commented on the reasons that prompted them to act.<sup>27</sup> They drew freely from the treatises of Domat, Pothier, and Toullier, but, at the same time, paid attention to the Digest of Justinian, the Siete Partidas, Febrero, and other Spanish materials. Even so, the Code of 1825 contains for the most part provisions that have an exact equivalent in the French Civil Code.<sup>28</sup>

¶35 Deviations from the French model occurred frequently with respect to definitions and didactic materials in general, which were kept to a minimum in France. While, according to the better view, these materials have no place in a legal text, their inclusion in the Louisiana Civil Code of 1825 was, perhaps, a practical necessity due to the scarcity of coherent doctrinal works.

#### C. *Repeal of Prior Laws*

¶36 The Civil Code of 1825 was printed in both French and English and acquired the force of law on June 20 of that year (June 15 in West Feliciana Parish). The new Civil Code was not merely an amendment of the 1808 Digest. It was an all-inclusive piece of legislation, intended to break definitively with the past. It provided in Article 3521 that “the Spanish, Roman and French laws, which were in force in this State, when Louisiana was ceded to the United States, and the acts of the Legislative Council, of the legislature of the Territory of

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<sup>27</sup> The Louisiana Civil Code of 1825 was much more comprehensive than the 1808 Digest. It contained 3,522 articles, about one and one-half times more than the 1808 Digest. There were more than 423 amendments to the 1808 Digest, 1746 additions to it, and 276 deletions from it. About sixty percent of the amendments and of the new provisions were taken from French treatises and an additional fifteen percent from the French Civil Code.

<sup>28</sup> Professor Pascal maintains that the adoption of the 1825 Civil Code did not work any wholesale abandonment of Spanish institutions and rules. Many were changed in particulars, but there is convincing evidence for “the basic assumption that the character and thrust of the Spanish-Roman laws were being retained unless better rules could be found or devised.” Pascal, *Sources of the Digest of 1808: A Reply to Professor Batiza*, 46 TUL. L. REV. 603, 627 (1972).

Orleans, and of the Legislature of the State of Louisiana, be and 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.”

¶37 Despite this sweeping repeal, the Louisiana Supreme Court held that the provisions of the old code continued to be in force, unless expressly modified, suppressed, or superseded by new provisions.<sup>29</sup> Following this decision, the Legislature passed the Great Repealing Act of 1828, which, with the exception of the tenth title of the old code, abrogated “all the civil laws which were in force before the promulgation of the civil code lately promulgated.”<sup>30</sup>

¶38 On the basis of that provision, the Supreme Court declared that “the whole body of Spanish law, which had remained in force after the promulgation of the Code of 1808” had been effectively repealed.<sup>31</sup> Nevertheless, the same court declared in 1839 that the legislature could repeal only provisions that it had enacted itself, that is, “the positive, written, or statute laws,” but that the court did not intend to abrogate “those principles of law which had been established or settled by the decisions of courts of justice” on the basis of the prior law.<sup>32</sup> And, even today some ancient principle of Spanish law is likely to lift its head in our litigation, especially in cases involving French and Spanish land grants.

#### *D. Controlling Text*

¶39 The 1808 and 1825 Louisiana Civil Codes were drawn up in French and translated into English. They were subsequently published in French and English, both versions being official. Since, however, the translation into English was made hastily, and a number of errors crept in, question arose as to which of the two versions should prevail in case of conflict.

¶40 The enabling statute of the 1808 Code had provided that in the event of “obscurity or ambiguity, fault, or omission, both the English and French texts shall be consulted, and shall mutually serve to the interpretation of one and the other.”<sup>33</sup> The enabling statute of the 1825 Code, however, merely instructed printing in French and English on facing pages; it made no provision for the resolution of conflicts between the two texts.

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<sup>29</sup> Flower v. Griffith, 6 Mart. (N.S.) 89 (La. 1827).

<sup>30</sup> La. Acts 1828, No. 83 ' 25.; RICHARD H. KILBOURNE, JR., A HISTORY OF THE LOUISIANA CIVIL CODE; THE FORMATIVE YEARS, 1803-1839 pp. 158-164 (1987).

<sup>31</sup> Handy v. Parkinson, 10 La. 92, 99 (1836).

<sup>32</sup> Reynolds v. Swaim, 13 La. 193, 198 (1839).

<sup>33</sup> La. Acts 1808, No. 29.

Under the circumstances, courts taking cognizance of the fact that the French text was the original version, and being aware of the poor quality of the translation, developed the view that the French text was controlling. This almost dictated that the Louisiana legal profession be familiar with French legislation, jurisprudence, and doctrine. As a result, the French legal culture enriched the Louisiana civilian tradition, especially in the half century after the 1825 revision.

#### IV. THE CIVIL CODE OF 1870<sup>34</sup>

##### A. *Scope of Revision*

¶41 Changes brought about by the Civil War, the adoption of a new constitution, and the accumulation of civil law legislation that remained outside the 1825 Code, made revision imperative. Sensitive to this demand, the Louisiana legislature appointed in 1868 a committee to revise the general statutes of the state and the Code of Practice. In the same year, the legislature authorized this committee to select one or more commissioners to revise the Civil Code of 1825. The committee charged John Ray of the Monroe Bar with this task. Ray employed three attorneys to assist him, and within a year, submitted his report to the legislature along with a proposed text. This work was adopted by the legislature in 1870 under the title of “The Revised Civil Code of the State of Louisiana.”

¶42 The Civil Code of 1870 is substantially the Code of 1825. The changes made relate merely to the elimination of provisions concerning slavery, the incorporation of amendments made since 1825, and the integration of acts passed since 1825, which dealt with matters regulated in the Code without officially amending it. These changes necessitated renumbering the articles of the Code, but they did not affect its structure, underlying theory, or the substance of most of its provisions.

##### B. *Controlling Text*

¶43 Unlike the 1808 and 1825 Codes that had been published in both French and English, the 1870 Code was published in English only. Argument could thus be made that the old question concerning the resolution of conflicts between the French and English versions has become moot. Indeed, if the 1870 Code were to

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<sup>34</sup> From the rich bibliography on the origin, development, and general character of Louisiana's legal system, see, Barham, *Methodology of the Civil Law in Louisiana*, 50 Tul. L. Rev. 474 (1976); Beutel, *The Place of Louisiana Jurisprudence in the Legal Science of America*, 4 Tul. L. Rev. 70 (1929); Cross, *The Eclecticism in the Law of Louisiana: A Charcoal Sketch of the Legal System of that State*, 55 Am. L. Rev. 405 (1921); Dart, *The Legal Institutions of Louisiana*, 3 So. L. Q. 247 (1918); Fabre-Surveyer, *The Civil Law in Quebec and in Louisiana*, 1 La. L. Rev. 649 (1939); Jolowicz, *The Civil Law in Louisiana*, 29 Tul. L. Rev. 491 (1955); Tucker, *The Code and the Common Law in Louisiana*, 29 Tul. L. Rev. 739 (1955). On the use of the French language, see, Herold, *The French Language and the Louisiana Lawyer*, 5 Tul. L. Rev. 169 (1931); Note, 3 La. L. Rev. 452 (1941).

be regarded as a piece of legislation complete unto itself, and without any relation to the prior French version, the English text alone should be regarded as controlling. But this argument, attributing to the legislature the intent to break definitely with the past, despite the verbatim re-enactment of most of the provisions of the 1825 Code, cannot be accepted. It is unrealistic and likely to lead to unintended consequences.

¶44 The prevailing view in Louisiana doctrine and jurisprudence is that the 1870 Code is merely a re-enactment of the 1825 Code with relatively few amendments based on John Ray's report of 1869. According to this view, the law, contained in untouched articles, remains the same, and in case of conflict between the English version and the earlier French version, the latter should control.<sup>35</sup>

¶45 This view rests on the conclusion that the legislature never intended to insulate the 1870 Code from its antecedents. The 1868 Act that created the committee for the revision of the general statutes of the state provided for a limited revision, namely, simplification of language, correction of incongruities, additions to take care of insufficiencies, and orderly management of the subject matter. The Act instructing the committee to select commissioners for the revision of the Civil Code, passed in the same legislative session, must be interpreted as contemplating revision along the lines of the earlier act. Nowhere did the legislature manifest an intent to introduce the sweeping changes that would have certainly resulted from the view that the French text had been definitively abrogated.

### *C. Fading of the French Language and Legal Culture*

¶46 After the end of the War between the States, the use of the English language had become almost universal in Louisiana political, legal, and governmental circles; and the judicial reliance on legal materials deriving from French or Spanish sources was diminished. The development of Louisiana law took a new turn, common law influence was expanded, and by the turn of the century, the Louisiana Civil Code came to be regarded as just another statute suitable for literal application only.<sup>36</sup>

¶47 In his Preface to the 1909 edition of the Louisiana Civil Code, E.D. Saunders wrote,

The Supreme Court of Louisiana has constantly disregarded the French and Roman sources of Louisiana law, although referring to them in terms of unmeaning praise. . . . The course of legal development in this State has been such that its connection with the law of France has been constantly diminishing, and is today, almost non-existent, and will cease

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<sup>35</sup> See, e.g., *Phelps v. Reinach*, 38 La. Ann. 547 (1886); *Straus v. City of New Orleans*, 166 La. 1035, 118 So. 125 (1928); *Sample v. Whitaker*, 172 La. 722, 135 So. 38 (1931).

<sup>36</sup> See E.D. SAUNDERS, *The Law of Louisiana*, in LA. CIV. CODE xxxv-xxxvi (1909).



completely in a few years unless a higher standard of legal education is required by the Legislature, or by the Supreme Court. . . . The citations of even French authorities today are extremely rare, and are made with uncertainty, which indicates plainly enough the little importance which the Supreme Court attaches to the legal literature of France. This is much to be regretted. There is probably no legal literature in the world so rich and instructive as that of modern France.<sup>37</sup>

¶48 By that time, an otherwise unknown Professor Shands at Tulane Law School had expressed the same sentiments that the much-maligned Professor Gordon Ireland of Louisiana State University Law School voiced thirty years later,<sup>38</sup> namely, he gave “public expression to the wish that the Roman civil law, which is the foundation of the jurisprudence of Louisiana, should be abandoned and the common law substituted in its place.”<sup>39</sup>

¶49 Such voices became the vanishing point of view of very few partisans. Despite the fading of the French language and cultural influence, the Louisiana Civil Code continued to be the fountainhead of the private law of Louisiana and is “Alive and Well.”<sup>40</sup>

*D. The Structure, Style, and Substance of the Louisiana Civil Code of 1870*

¶50 After the 1868-1869 revision, the Louisiana Civil Code emerged as the primary depository of private law in the state and as a charter for justice, equality, and liberty in the private relations of all persons.

¶51 The Louisiana Civil Code was greatly influenced by, and was modeled after, the Code Napoleon. However, lay beliefs and expressions that the Napoleonic Code has been in force in Louisiana are totally unfounded. The Louisiana Civil Code of 1870 resembled the Code Napoleon in its structure, style, and substance, but had its own unique identity as a product of Louisiana legal and cultural history. The Louisiana Civil Code of 1870 contained 1,275 more articles than the Code Napoleon. The provisions that had no equivalent in the Napoleonic Code had been drawn from the Justinian legislation, Spanish sources, French doctrinal works, and the Louisiana statutes enacted since 1808. Some of these statutes had introduced ingenious solutions into the fabric of the civil law,, such as the usufruct of the surviving spouse in community. Quite apart from these textual variations, however, the Louisiana Civil Code differed from the Napoleonic Code

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<sup>37</sup> *Id.* at xxv, xxxvii.

<sup>38</sup> Gordon Ireland, *Louisiana's Legal System Reappraised*, 11 TUL. L. REV. 585, 598 (1973). For the ensuing storm in the legal literature of the state, see A.N. Yiannopoulos, *Louisiana Civil Law: A Lost Cause?*, 54 TUL. L. REV. 830 (1980).

<sup>39</sup> Hon. Carleton Hunt, Rep. of the La. B. Ass'n 5 (1908).

<sup>40</sup> Cueto-Rua, *The Civil Code of Louisiana is Alive and Well*, 64 TUL. L. REV. 147 (1989); Stein, *Judge and Jurist in the Civil Law: A Historical Interpretation*, 46 LA. LA. REV. 241, 257 (1985). [See also § 70 *infra*.]

in its approach to the fundamental matter of sources of law. The extreme legal positivism of the Code Napoleon that has elevated legislation to the status of the single source of law may be contrasted with the genius of the Louisiana Civil Code that has always recognized custom as an authoritative source of law<sup>41</sup> and equity as a source for the resolution of disputes in the absence of a positive law or custom.<sup>42</sup>

*E. The Cultural Influence of the Louisiana Civil Code*

¶52 The Louisiana Civil Code has exerted a profound cultural influence in the United States and abroad. Being, perhaps, the most Romanist civil code ever enacted anywhere,<sup>43</sup> it was a natural model for the drafting, style, and substance of civil codes in Latin America, including the Argentine Civil Code which itself became a model for other civil codes.<sup>44</sup> More than one hundred articles of the Louisiana Civil Code of 1870 became part of the Puerto Rico Civil Code.<sup>45</sup> In the Caribbean Basin, the Civil Code of St. Lucia was influenced by the Louisiana Civil Code<sup>46</sup> and the influence of the Preliminary Title of the Louisiana Civil Code on the corresponding title of the Civil Code of Spain is apparent.<sup>47</sup>

¶53 The cultural influence of the Louisiana Civil Code on the common law of sister states and on federal law has not been systematically studied; but scattered information suggests that the influence is real and significant. Mitchell Franklin wrote in 1932,

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<sup>41</sup> See LA. CIV. CODE art. 3 (1870); *cf.* LA. CIV. CODE art. 3, as revised by 1987 La. Acts No. 124.

<sup>42</sup> See LA. CIV. CODE art. 21 (1987); *cf.* LA. CIV. CODE art. 4, as revised by 1987 La. Acts No. 124.

<sup>43</sup> See, e.g., LA. CIV. CODE arts. 448 to 461 (1870) (distinctions of things); LA. CIVIL CODE arts. 2279 to 2793 (emphyteusis); *id.* arts. 3176 to 3181 (antichresis); *id.* arts. 3412 to 3425 (occupancy); *id.* arts. 3426 to 3456 (possession). See also Peter Stein, *Judge and Jurist in the Civil Law: A Historical Essay*, 46 LA. L. REV. 241, 255 (1985), quoting Maine's description of the Louisiana Civil Code of 1825 as "of all republications of Roman law, the one which appears to us as the clearest, the fullest, the most philosophical and the best adapted the exigencies of modern society."

<sup>44</sup> By a twist of fate, the Argentine Civil Code in turn deeply influenced the revision of the Civil Code in the field of Conventional Obligations. See LA. CIV. CODE arts. 1756 to 2057, as revised by 1984 La. Acts No. 331.

<sup>45</sup> See M. Rodriguez Ramos, *Interactions of Civil Law and Anglo-American law in the Legal Method in Puerto Rico*, 23 TUL. L. REV. 1, 20 (1948), quoting from the unpublished notes of Dr. Luis Munoz Morales on the history of Puerto Rican Law: "Many changes were introduced in the text of the Spanish Code, especially in the First Book, and the greater part of those changes was aimed at incorporating in our civil law many provisions of the Civil Code of Louisiana, which incidentally, were taken from the revised edition of 1870, older than the Spanish Code."

<sup>46</sup> See N.J.O. LIVERPOOL, *The History and Development of the Saint Lucia Civil Code*, in ESSAYS ON THE CIVIL CODES OF QUEBEC AND ST. LUCIA 303 (Raymond A. Landry & Ernest Caparros eds., 1984). For the influence of Louisiana law on the law of Quebec, see generally E. Fabre-Surveyer, *The Civil Law in Quebec and Louisiana*, 1 LA. L. REV. 649 (1939).

<sup>47</sup> *Cf.* SPANISH CIVIL CODE arts. 1 through 7, as revised in 1973, and LOUISIANA CIVIL CODE arts. 1 through 23 (1870).

The Civil Code of Louisiana is the most important contribution of Louisiana to an American culture. It possibly is the most important accomplishment in the history of American law in the sense of the relation it bears to the future direction of American law... It is a rather grim commentary on our historians that the significance of the Louisiana Civil Code has been completely overlooked . . . As a cultural document, the Civil Code has its own merit. It is beautifully written, so carries the best tradition of civilian aesthetics.<sup>48</sup>

¶54 It has been pointed out that the decision of the United States Supreme Court in *Bender v. Pfaff*,<sup>49</sup> grounded on Louisiana community property law, led the federal government to the adoption of the joint return as the mode for the income taxation of spouses.<sup>50</sup> As late as 1990, a spouse argued before the United States Tax Court that New Mexico had adopted as part of its law the Louisiana law of usufruct, and that, therefore, a surviving spouse is entitled to QTIP marital deduction.<sup>51</sup> The court denied the claim, but remedial state legislation may be forthcoming to secure the QTIP for citizens of New Mexico.

*F. Revision of the Louisiana Civil Code of 1870*

¶55 The question of the desirability of codification is by no means settled in comparative legal theory. In Louisiana, however, this question was answered in the affirmative more than a century and a half ago when the legislature adopted the Civil Code of 1808, and again in 1825 and 1870 on the occasion of the revision of the Civil Code. The tradition of codified laws is thus firmly established in the state, and what may be still controversial is the desirability of a new revision of the already twice revised Civil Code.

¶56 The arguments against revision are many and complex, most of them deserving attention and discussion. The motivating forces behind these arguments, however, have not as yet been fully articulated, although traditionalism and excessive reverence for the personalities of the men who shaped the Louisiana civil law system appear to be at the basis of most objections to revision. The redactors of the Civil Code have, indeed, produced a text that has proved both functional and durable. As a product of its era, the Louisiana Civil Code has been justly considered to be an achievement of juridical craftsmanship and has been hailed as

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<sup>48</sup> Mitchell Franklin, *Book Review*, 7 TUL. L. REV. 632, 633 (1933) (reviewing BENJAMIN W. DART, CIVIL CODE OF THE STATE OF LOUISIANA (1932)). See also Roscoe Pound, *The Influence of the Civil Law in America*, 1 LA. L. REV. 1, 16 (1938).

<sup>49</sup> 282 U.S. 127, 51 S. Ct. 64 (1930). The court held that marital income in Louisiana could not be taxed wholly to the husband but should be divided equally between the spouses and taxed accordingly.

<sup>50</sup> See John H. Tucker, Jr., *The Code and the Common Law in Louisiana*, 29 TUL. L. REV. 739, 762-63 (1955).

<sup>51</sup> See *Estate of Doherty v. Comm'r of Internal Revenue*, 95 T.C. 446, 464 (1990).

[t]he most precious heritage which we have received from our ancestors . . . The filtered residuum, strained and expressed from the accumulated wisdom and experience of large bodies of human race, stretching over vast tracts of time, amongst peoples of various stocks and living under differing conditions and environments, illuminated by the genius of Paul, Ulpian and Papinian, of Grotius, Bynkershoeck and Puffendorff, of Dumoulin, Domat and Pothier, purged from all impurities of caste, privilege and monopoly, and permeated and saturated throughout by the divine spirit of Justice, Liberty and Equality.<sup>52</sup>

¶57 Yet, the conditions of life have changed since 1825 and 1870. In the light of changed conditions, the conceptual framework of the Louisiana Civil Code of 1870 has proved analytically deficient in certain instances. Perhaps, due to the fact that several distinct masses of materials were used – Roman sources, Spanish laws, preparatory works of the French Civil Code as well as that Code itself – the concepts are sometimes blurred, and a number of contradictions are present. Moreover, a gloss of jurisprudence has grown around the provisions of the Code and legislation has been enacted, repealing or amending a substantial number of articles. Other statutes bearing on civil law matters have been left outside the Civil Code and have become part of Title 9 of the Louisiana Revised Statutes. In the light of these circumstances, the revision of the Civil Code is desirable not only for systematic purposes but also in order to establish a clear correspondence between the legal precepts in the Code and in actual practice. A persisting dichotomy between law in the books and living law in Louisiana may be a disservice both to society and to a venerable text.

¶58 In countries sharing our legal heritage – France, Quebec, Belgium, and Holland – there has been an awareness of the need for revision for quite a while, because civil codes in force in these places are no longer responsive to the needs of society. The Louisiana Civil Code of 1870 belongs to the same category; it speaks from the beginning of the nineteenth century. It has been said that “the entire foundation of the Code is swept beneath it, leaving the superstructure of its articles suspended *in vacuo*, and in contact but remotely and tenuously with the life, the *moeurs* and the demands of the civilization.”<sup>53</sup> While this statement may be an exaggeration, revision is desirable, and it is the solemn duty of the legal profession in Louisiana to assist in the creation of a Civil Code that does justice to the tradition and at the same time proudly meets the needs of a complex, industrialized society.

¶59 In 1908, the Louisiana legislature appointed a commission of three prominent attorneys and charged them with the task of preparing a revision of the Civil Code. A Code proposed by this commission, however, was rejected by the

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<sup>52</sup> Fenner, *The Civil Code of Louisiana as a Democratic Institution*, 1904 PROC. LA. B.A. 7.

<sup>53</sup> Morrison, *The Need for Revision of the Louisiana Civil Code*, 11 TUL. L. REV. 213, 218-219 (1937).

legislature at the insistence of the Bar Association.<sup>54</sup> In 1948, the Louisiana State Law Institute, an official law reform agency for the state, was specifically instructed by the legislature to prepare a *projet* for the revision of the Civil Code.<sup>55</sup> In due course, the Institute implemented the legislative mandate by the creation of a Civil Law Section and by the appointment of Reporters and Advisory Committees.

¶60 Faced with the responsibility of Code revision, the Louisiana State Law Institute considered two possible approaches. One possibility would be an effort at bringing the text of the Code up to date in light of judicial precedents and special legislation bearing on civil law matters. Modifications in language and style could be worked out, but no major changes in organization or policies could be effected. This would be a relatively easy task to accomplish, and was perhaps better than nothing. The alternative was a substantial revision of the Civil Code with regard to structure, determination of policies, and drafting of new provisions. Redrafting the Louisiana Civil Code as a whole, however, appeared to be a task of such magnitude that it might well await a new generation of Louisiana lawyers. Attention was thus focused on the possibility of partial revision, namely, revision of the law governing certain institutions that might qualify for independent consideration. Although a civil code is an integrated piece of legislation and, in principle, does not lend itself to piecemeal adoption or revision, there are examples in history which tend to confirm the effectiveness of partial revision. Moreover, concentration on specific areas of interest have often resulted in the drafting of comprehensive legislation designed to replace obsolete rules. In light of these considerations, the Louisiana State Law Institute decided to proceed to the revision of individual titles and chapters of the Civil Code.

¶61 The Preliminary Title of the Civil Code was revised in 1987.<sup>56</sup> This title consists of three Chapters: Chapter 1 – General Principles; Chapter 2 – Interpretation of Laws; and Chapter 3 – Conflict of Laws. The third chapter of the Preliminary Title was revised again in 1991.<sup>57</sup>

¶62 The revision of Book I of the Louisiana Civil Code has not been completed. Title I (Natural and Juridical Persons) was revised in 1987;<sup>58</sup> Title II (Absent

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<sup>54</sup> See Florance, *Report of Special Committee Revision Civil Code*, 14 REP. LA. B.A. 345 (1913).

<sup>55</sup> See La. Acts 1948, No. 335.

<sup>56</sup> See La. Acts 1987, No. 124, revising Preliminary Title of the Civil Code (Arts. 1 to 15).

<sup>57</sup> See La. Acts 1991, No. 923. This act revised Chapter 3 of the Civil Code to consist of Articles 14 through 49. The provisions of Articles 15 through 49 as contained in this Act have been redesignated by the authority of the Louisiana State Law Institute as a new Book IV of the Civil Code, containing Articles 3515 through 3549.

<sup>58</sup> See La. Acts 1987, No. 125, revising Title I of Book I, Natural and Juridical Persons (Arts. 24 to 29).

Persons) was revised in 1990;<sup>59</sup> Title IV (Husband and Wife) was revised in 1987;<sup>60</sup> Title V (Divorce) was revised in 1990 and 1997;<sup>61</sup> and Title VII, Chapter 2 (Of Legitimate Children) was revised in 1976.<sup>62</sup>

¶63 The entire Book II of the Louisiana Civil Code was revised by a series of legislative acts from 1976 to 1979 to consist of six titles: Title I (Things),<sup>63</sup> Title II (Ownership),<sup>64</sup> Title III (Personal Servitudes),<sup>65</sup> Title IV (Predial Servitudes),<sup>66</sup> Title V (Building Restrictions),<sup>67</sup> and Title VI (Boundaries).<sup>68</sup> Title VII (Ownership in Indivision) was added to Book II of the Louisiana Civil Code in 1990.<sup>69</sup>

¶64 The revision of Book III of the Louisiana Civil Code has been selective. The Preliminary Title (General Dispositions) and Title I (Of Successions), Chapters 1, 2, and 3, of Book III were revised in 1981.<sup>70</sup> Title II, Chapter 2 (Of the Capacity Necessary for Disposing and Receiving by Donations *Inter Vivos* or *Mortis Causa*) was revised in 1991, and Chapter 3 (The Disposable Portion and Its Reduction in Case of Excess) was revised in 1996.<sup>71</sup> Title III (Obligations in General) and Title IV (Conventional Obligations or Contracts) were revised in 1984.<sup>72</sup> Title V (Obligations Arising Without Agreement), Chapter 1

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<sup>59</sup> See La. Acts 1990, No. 989, revising Title III of Book I, Absent Persons (Arts. 47 to 59).

<sup>60</sup> See La. Acts 1987, No. 886, revising Title IV of Book I, Husband and Wife (Arts. 1 to 10).

<sup>61</sup> See La. Acts 1990, No. 1009, revising Title V, Chapter 1, of Book I, Divorce (Arts. 102 to 105) and La. Acts 1997, No. 1078, revising Title V, Chapter 2, Section 1, of Book I, Spousal Support (Arts. 111 to 117). See also La. Acts 1990, No. 1008, adding Articles 117 to 120 (redesignated as Articles 121 to 124).

<sup>62</sup> See La. Acts 1976, No. 430, revising Title VII, Chapter 2, of Book I, Of Legitimate Children (Arts. 184 to 190).

<sup>63</sup> See La. Acts 1978, No. 728, revising Title I of Book II, Things (Arts. 448 to 476).

<sup>64</sup> See La. Acts 1979, No. 180, revising Title II of Book II, Ownership (Arts. 477 to 532).

<sup>65</sup> See La. Acts 1976, No. 103, revising Title III of Book II, Personal Servitudes (Arts. 533 to 645).

<sup>66</sup> See La. Acts 1977, No. 415, revising Title IV of Book II, Predial Servitudes (Arts. 646 to 774).

<sup>67</sup> See La. Acts 1977, No. 170, revising Title V of Book II, Building Restrictions (Arts. 775 to 783).

<sup>68</sup> See La. Acts 1977, No. 169, revising Title VI of Book II, Boundaries (Arts. 704 to 796).

<sup>69</sup> See La. Acts 1990, No. 990, adding Book II Title VII, Ownership in Indivision (Arts. 797 to 818).

<sup>70</sup> See La. Acts 1981, No. 919 revising the Preliminary Title and Title I of Book III, Of Successions, Chapters 1, 2, and 3 (Arts. 871 to 902).

<sup>71</sup> See La. Acts 1991, No. 363, revising Chapter 2 of Title II of Book III (Arts. 1470 to 1483); La. Acts 1996, No. 77 (1st Extraordinary Session), revising Chapter 3 of Title II of Book III (Arts. 1493 to 1514).

<sup>72</sup> See La. Acts 1984, No. 331, revising Title III of Book III, Obligations in General, and Title IV of the same Book, Conventional Obligations or Contracts (Arts. 1756 to 2057).

(Management of Affairs) and Chapter 2 (Enrichment Without Cause) were revised in 1995.<sup>73</sup> Title VI (Matrimonial Regimes) was revised in 1979.<sup>74</sup> Title VII (Sale) was revised in 1993, with an effective date of January 1, 1995.<sup>75</sup> Title XI (Partnership) was revised in 1980.<sup>76</sup> Title XV (Representation and Mandate) was revised in 1997.<sup>77</sup> Title XVI (Suretyship) was revised in 1987.<sup>78</sup> Title XXII (Mortgages) was revised in 1991<sup>79</sup> and 1992.<sup>80</sup> Title XXIII (Occupancy and Possession) was revised in 1982.<sup>81</sup> Title XXIV (Prescription) was revised partly in 1982 and partly in 1983.<sup>82</sup> Book IV (Conflict of Laws) was added to the Louisiana Civil Code in 1991.<sup>83</sup>

¶65 The selective revision of the Louisiana Civil Code has resulted in alterations of form and substance. Gone is the tripartite division of the subject matter of the civil law that derived from the Institutes of Gaius and reflected the model of the Code Napoleon. It may be hoped, however, that the new legislation will be the product of evolution resting on tested values and on the accumulated wisdom of the past. The new Civil Code of Louisiana may, indeed, be an authoritative statement of the civilian tradition of the state within the scheme of a modern, scientific, comprehensive, and comprehensible organization of the subject matter.

¶66 The tale continues to unfold. The Louisiana Civil Code reflects the contemporary realities of life in the United States and particularly in the state of Louisiana, with its antinomies and fascinating but competing legal traditions.

¶67 Colonel John H. Tucker Jr's foreword to the pamphlet edition of the Louisiana Civil Code underscores the function of the Civil Code as a social

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<sup>73</sup> See La. Acts 1995, No. 1041, revising Title V of Book III, Obligations Arising Without Agreement (Arts. 2292 to 2305).

<sup>74</sup> See La. Acts 1979, No. 709, revising Title VI of Book III, Matrimonial Regimes (Arts. 2235 to 2376). See also, La. Acts 1979, Nos. 710, 711.

<sup>75</sup> See La. Acts 1993, No. 841, revising Title VII of Book II, Sales (Arts. 2438 to 2659), effective January 1, 1995).

<sup>76</sup> See La. Acts 1980, No. 150, revising title XI of Book III, Partnership (Arts. 2801 to 2848).

<sup>77</sup> See La. Acts 1997, No. 261, revising Title XV of Book III, Representation and Mandate (Arts. 2985 to 3032).

<sup>78</sup> See La. Acts 1987, No. 409, revising Title XVI of Book III, Suretyship (Arts. 3035 to 3070).

<sup>79</sup> See La. Acts 1991, No. 652, revising Title XXII of Book III, Mortgages (Arts. 3278 to 3298).

<sup>80</sup> See La. Acts 1992, No. 1132, revising Title XXII of Book III, Mortgages (Arts. 3299 to 3337).

<sup>81</sup> See La. Acts 1982, No. 187, revising Title XXIII of Book III, Occupancy and Possession (Arts. 3412 to 3444).

<sup>82</sup> See La. Acts 1982, No. 187, revising Title XXIV of Book III, Prescription, Chapters 1, 2, and 3, (Arts. 3445 to 3491); La. Acts 1983, No. 173, revising Title XXIV of Book III, Prescription, Chapter 4 (Arts. 3492 to 3504).

<sup>83</sup> See La. Acts 1991, No. 923.

blueprint that regulates the life of citizens from birth to grave. Addressing the legal profession of Louisiana, he wrote,

The “Civil Code” . . . is your most important book because it ushers you into society as a member of your parents’ family and regulates your life until you reach maturity. It then prescribes the rules for the establishment of your own family by marriage and having children, and for the disposition of your estate when you die, either by law or by testament subject to law. It tells how you can acquire, own, use, and dispose of property . . . It provides the rules for most of the special contracts necessary for the conduct of nearly all of your relations with you fellowman . . . and finally, all of the rights and obligations governing your relations with your neighbor and fellowman generally.