

A CONSTANT GIVE AND TAKE: TRACING LEGAL BORROWINGS IN THE LOUISIANA CIVIL LAW EXPERIENCE

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I. INTRODUCTION

One of the objectives of comparative law is to expand the perspective and the study of legal provisions and hence, by comparison, to improve local provisions already existing or those that will be created in the future.¹ While analyzing foreign legal provisions, the intent to

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¹ Agustín Parise, *Las bibliotecas jurídicas como herramientas fundamentales del*

borrow the provisions may be triggered. Drafters of local legal provisions may look at foreign legal provisions and find in the latter a source for their drafts. If the provisions seem to be suitable, the drafters may adopt them to their legal framework. That borrowing may develop into what Alan Watson calls “legal transplantation,” that is to say, “the moving of a rule or a system of law from one country to another, or from one people to another.”²

The adoption of a foreign legal provision will make the recipient its new owner, and in turn, the recipient will make the borrowed provision new; when the original provision “interacts with the *ethos* of the recipient society, the interaction” results in a body of its own.³ In addition, the borrowing of legal provisions may be experienced both in an active and a passive way. Active borrowing takes place when one seeks a foreign legal provision and introduces it to a local legal framework. Passive borrowing takes place when a local legal provision is sought after and is introduced into a foreign legal framework.

The borrowing of legal provisions is not new and has been around for thousands of years. More than 2000 years ago, Plato explained that in order to make a new colony successful, the borrowing of legal provisions could be implemented.⁴ Legal history also reflects that the borrowing of legal provisions, both passively and actively, occurred

Derecho Comparado: El caso de Schmidt en la Luisiana del siglo XIX, 15 REVISTA DE DERECHO COMPARADO 195, 197 (2009) (Arg.) [hereinafter Parise, *Las bibliotecas jurídicas*]; Agustín Parise, *Legal Transplants and Codification: Exploring the North American Sources of the Civil Code of Argentina (1871)*, 2 JINDAL GLOBAL L. REV. 40, 40-41 (2010) (India) [hereinafter Parise, *Legal Transplants and Codification*].

² ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 21 (2d ed. 1993).

³ Parise, *Legal Transplants and Codification*, *supra* note 1, at 40.

⁴ PLATO, *The Laws: Book III*, in 5 GEORGE BURGESS, *THE WORKS OF PLATO* 78, 119-20 (London, Henry G. Bohn 1859) (emphasis added) [hereinafter *THE WORKS OF PLATO*]. The Greek philosopher wrote within the conversation of Athen, Clin, and Megil:

Clin . . . For the greatest part of Crete is attempting at present to establish a certain colony, and orders the Cnossians to take the care of the matter; but the city of the Cnossians (imposes it) upon me and nine others; and at the same time **orders us to lay down laws (taken) from this place, if any are pleasing to us, and, if there are any, from elsewhere, making no account of their foreign character, should they appear to be better.** Let us then grant this favour to myself and you. After making a selection out of what has been said, let us in our discourse form a state, and colonize it, as if from its commencement; and there will be to us at the same time an inquiry into what we are in search of, and at the same time I may perhaps make use of this formation for the city that is to be.

Id. See also Parise, *Legal Transplants and Codification*, *supra* note 1, at 41.

with no geographical or temporal limitation. The State of Louisiana (hereinafter “Louisiana”) was no exception to that borrowing. In the early nineteenth century, the legal culture of Louisiana was an isolated “Civil Law island” partially surrounded by a “sea of Common Law;” a status that had to be safeguarded to survive.⁵

The history of the civil code of Louisiana has been explored with different degrees of intensity, with the analysis written by Athanassios N. Yiannopoulos being perhaps the most circulated, clear, and didactic.⁶ This Article will revisit the history of civil-law codification in Louisiana and break it down into seven time periods while focusing on the borrowing experience. This Article will show that in order to preserve its civil-law heritage, Louisiana borrowed legal provisions from other jurisdictions. Mainly through the testimony provided by the transcription of primary sources, the Article will help readers to better understand the flow of active legal borrowing in Louisiana with its different degrees of intensity. The fact that this Article will highlight active legal borrowings does not mean in any way that Louisiana did not develop original legislation or act as a passive borrower. Following these lines, the Article will also briefly show that Louisiana occupied a significant role as a passive borrower when its legal provisions served as a source for other jurisdictions.

II. GRAVITATION OF FOREIGN LEGAL PROVISIONS IN LOUISIANA

The protection of the civil-law system in Louisiana may be traced to the first years of the territorial period. On December 10, 1804, the Legislative Council of the Territory of Orleans appointed a committee to draft a civil code for the territory; the committee was formed by Benjamin Morgan, George Pollock, and John Watkins.⁷ Later, on February 4, 1805, it was resolved that the committee was “authorized to employ two counselors at law, to assist them in drafting the said [civil

⁵ Agustín Parise, Non-Pecuniary Damages in the Louisiana Civil Code Article 1928: Originality in the Early Nineteenth Century and Its Projected Use in Further Codification Endeavors 14 (May 18, 2006) (unpublished LL.M. thesis, Louisiana State University, Paul M. Hébert Law Center) (on file with the Louisiana State University Law Library).

⁶ See A.N. Yiannopoulos, *The Civil Codes of Louisiana*, in 1 WEST’S LOUISIANA CIVIL CODE LIII (A.N. Yiannopoulos ed. 2010). This study by Yiannopoulos, in its recently expanded version, has been of constant reference by the author of this paper.

⁷ KATE WALLACH, RESEARCH IN LOUISIANA LAW 46 (1958); *Orleans Legislative Council: Monday, December 10*, LOUISIANA GAZETTE, Dec. 21, 1804, at 3.

and criminal] codes.”⁸ These two brief and seemingly insignificant events would shape the future of Louisiana. They would lead Louisiana towards its current civil-law system, a system that has been identified with the state for more than 200 years, and that will certainly be identified with it in the future.

A. Project of 1806

A new step towards the codification of the civil law was taken by the Legislature of the Territory of Orleans in May of 1806. At that time, the Legislature adopted a bill,⁹ also referred to as the Project of 1806, by which the pre-existing Spanish and Roman laws would govern the Territory of Orleans.¹⁰ The Project of 1806 read in part:

An Act declaring the laws which continue to be in force in the Territory of Orleans, and authors which may be recurred to as authorities within the same.

....

Sect. 1st . . . the laws which remain in force, and those which can be recurred to as authorities in the tribunals of this Territory . . . are the laws and authorities following, to wit: 1. The roman Civil code, as being the foundation of the [S]panish law, by which this country was governed before its cession to France and to the United States, which is composed of the institutes, digest and code of the emperor Justinian, aided by the authority of the commentators of the civil law, and particularly of Domat in his treaty of the Civils laws; the whole so far as it has not been derogated from by the [S]panish law; 2. The Spanish law, consisting of the books of the *recopilacion de Castilla* and *autos acordados* being nine books in the whole; the seven parts or *partidas* of the king Don Alphonse the learned, and the eight books of the royal statute (*fuero real*) of Castilla; the *recopilacion de indias*, save what is therein relative to the enfranchisement of Slaves, the laws of *Toro*, and finally the ordinances and royal orders and

⁸ 1805 La. Acts 458-60.

⁹ See also Mitchell Franklin, *Introduction* to 1 THE LAWS OF LAS SIETE PARTIDAS WHICH ARE STILL IN FORCE IN THE STATE OF LOUISIANA 1, 8-11 (L. Moreau Lislet & Henry Carleton, trans., 1978) (1820); Mitchell Franklin, *Some Considerations on the Existential Force of Roman Law in the Early History of the United States*, 22 BUFF. L. REV. 69, 69-70 (1972); Mitchell Franklin, *The Eighteenth Brumaire in Louisiana: Talleyrand and the Spanish Medieval Legal System of 1806*, 16 TUL. L. REV. 514, 516 (1942); Mitchell Franklin, *The Place of Thomas Jefferson in the Expulsion of Spanish Medieval Law from Louisiana*, 16 TUL. L. REV. 319, 323-26 (1942) [hereinafter Franklin, *The Place of Thomas Jefferson*].

¹⁰ Yiannopoulos, *supra* note 6, at LVI.

decrees, which have been formally applied to the colony of Louisiana, but not otherwise; the whole aided by the authority of the reputable commentators admitted in the courts of Justice.¹¹

Governor Claiborne did not approve this initiative, which would have been an early legal borrowing in the newly created territory. He sent a letter on May 26, 1806, to the Legislature of the Territory of Orleans notifying them of his veto of the bill and therefore, the Project of 1806.¹² His decision had already been relayed to the U.S. Secretary of State, James Madison.¹³

The legislative body immediately claimed that Claiborne had rejected its best laws, and consequently, it proposed the dissolution of the local legislature.¹⁴ In addition, the New Orleans newspaper *Le Telegraphe*¹⁵ published a manifesto dated May 28 and signed by ten members of the House of Representatives in which the members proposed the dissolution of the Legislature after the veto of Claiborne and explained the reasons why they preferred the civil-law system.¹⁶ The repercussions of the manifesto helped to ignite the feelings of the Legislature and the citizens against the adoption of a common-law system.¹⁷ The manifesto welcomed active legal borrowing and read in part:

We certainly do not attempt to draw any parallel between the civil law and the common law; but, in short, the wisdom of the civil law is recognized by all Europe; and this law is the one which nineteen-twentieths of the population of Louisiana know and are accustomed

¹¹ Franklin, *The Place of Thomas Jefferson*, *supra* note 9, at 323-26.

¹² Letter from W. C. C. Claiborne to the Legislative Council and the House of Representatives (May 26, 1806), in 3 OFFICIAL LETTER BOOKS OF W. C. C. CLAIBORNE, 1801-1816, at 313 (Dunbar Rowland ed., 1917) [hereinafter OFFICIAL LETTER BOOKS]. The letter reads, "[H]e has considered with respectful attention, the Bill . . . and that he does not approve said Bill." *Id.*

¹³ Letter from W. C. C. Claiborne to James Madison (May 22, 1806), in 3 OFFICIAL LETTER BOOKS, *supra* note 12, at 305; Letter from W. C. C. Claiborne to James Madison (May 26, 1806), in 3 OFFICIAL LETTER BOOKS, *supra* note 12, at 309.

¹⁴ Yiannopoulos, *supra* note 6, at LVI; 4 CHARLES GAYARRÉ, HISTORY OF LOUISIANA: THE AMERICAN DOMINATION 142 (1903).

¹⁵ Letter from W. C. C. Claiborne to the Secretary of State (June 3, 1806), in 9 THE TERRITORIAL PAPERS OF THE UNITED STATES: THE TERRITORY OF ORLEANS, 1803-1812, at 642-57 (Clarence Edwin Carter ed., 1940) [hereinafter THE TERRITORIAL PAPERS] (containing the complete text of the letter). See also Elizabeth Gaspar Brown, *Legal Systems in Conflict: Orleans Territory 1804-1812*, 1 AM. J. LEGAL HIST. 35, 49-53 (1957).

¹⁶ 9 THE TERRITORIAL PAPERS, *supra* note 15, at 650.

¹⁷ John T. Hood, Jr., *Louisiana and the Civil Law, A Crossroad in Louisiana History*, 22 LA. L. REV. 709, 719 (1962).

to from childhood, of which law they would not see themselves deprived without falling into despair . . . Those are the real reasons which attach us to our old legislation and not any other and political reasons which may falsely be attributed to the good inhabitants of Louisiana.¹⁸

From an early stage, the legal community of Louisiana regarded legal borrowing as a way of preserving its civil-law heritage. The Project of 1806 would have been equal to the borrowing of a complete system of civil law, a pure paradigm of active legal borrowing.¹⁹

B. Digest of 1808

Reluctance towards the common-law system kept moving the Legislature of the Territory of Orleans towards the codification of its civil law.²⁰ Another step was made towards codification on June 7, 1806, when the Legislature appointed James Brown and Louis Casimir Elisabeth Moreau-Lislet to draft a project of a civil code.²¹ According to the resolution, the “two jurisconsults shall make the civil law by which this territory is now governed, the ground work of said code.”²² Claiborne did not veto the resolution.²³ It seems as if the Governor had accepted the idea or that he preferred to pacify the feelings of the citizens. It is clear that the manifesto in *Le Telegraphe* had started to fulfill its purpose.

The drafters took two years to prepare their project, probably feeling that a longer period would have threatened the survival of the

¹⁸ 9 THE TERRITORIAL PAPERS, *supra* note 15, at 652-53.

¹⁹ Readers may claim that the adoption of Roman and Spanish laws may not be seen like an example of active legal borrowing in Louisiana, mainly because at the time of the Louisiana Purchase, those laws had been and were being applied in the region. This observation was made to the author by Robert A. Pascal on June 13, 2010, and is also applicable to what is said *infra* about the Digest of 1808. The author of this paper understands that with the change of jurisdiction in 1803 (with Louisiana becoming part of the United States), there came a need to decide on the legal system that would prevail in the state. The local legislature could have decided to adopt the common-law system, to adopt the laws of other civil-law jurisdictions, or to preserve the laws they had prior to the Purchase. With the change of jurisdiction, Louisiana experienced an active legal borrowing mainly by keeping the laws that were being applied before the Purchase.

²⁰ Alejandro Guzmán Brito, *La influencia del Código Civil francés en las codificaciones americanas*, in 9 EL CÓDIGO CIVIL FRANCÉS DE 1804 Y EL CÓDIGO CIVIL CHILENO DE 1855, at 17, 29 (Hernán Corral Talciani & Ian Henríquez Herrera eds., 2004).

²¹ 1806 La. Acts 214-19.

²² *Id.* at 214.

²³ Hood, *supra* note 17, at 719.

civil-law system in the territory. In February 1808, the different books were presented by the committee before the Legislature for debate.²⁴ On March 31, 1808, the Legislature promulgated the *Digest of the Civil Laws now in force in the territory of Orleans*, which is referred to as the Digest of 1808.²⁵ The act of the Legislature stated in its preamble that:

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 after the abrogation of those which were contrary to the constitution of the United States, or irreconcilable with its principles, and to collect them in a single work [*i.e.*, the Digest of 1808], 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.²⁶

Claiborne did not veto the Digest of 1808²⁷ and ordered the distribution of 600 copies²⁸ of the Digest of 1808 to judges across Louisiana.²⁹ However, in at least two letters,³⁰ he continued to express interest in the common law.³¹ Within a two-year period, Claiborne had

²⁴ This news was covered in the bi-weekly *Louisiana Gazette* of February 1808 in New Orleans under the direction of John Mowry. See GEORGE DARGO, LEGAL CODIFICATION AND THE POLITICS OF TERRITORIAL GOVERNMENT IN JEFFERSON'S LOUISIANA, 1803-1808, at 321 (1970).

²⁵ The complete French title is *Digeste des lois civiles actuellement en force dans le territoire d'Orléans, avec des changemens et améliorations adaptés à son présent système de gouvernement*. 1808 La. Acts 122-23. See generally 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 (Bradford & Anderson 1808) [hereinafter A DIGEST OF THE CIVIL LAWS].

²⁶ 1808 La. Acts 120.

²⁷ Claiborne informed the Legislature that he approved the Digest of 1808 by a letter dated March 31, 1808. Letter from W. C. C. Claiborne to the Legislature (Mar. 31, 1808), in 9 THE TERRITORIAL PAPERS, *supra* note 15, at 642-57. He informed James Madison by a letter dated April 3, 1808. Letter from W. C. C. Claiborne to James Madison (Apr. 3, 1808), in 4 OFFICIAL LETTER BOOKS, *supra* note 12, at 168. See also Vernon Valentine Palmer, *Two Worlds in One: The Genesis of Louisiana's Mixed Legal System, 1803-1812*, in LOUISIANA: MICROCOSM OF A MIXED JURISDICTION 23, 34 (Vernon Valentine Palmer ed., 1999).

²⁸ This is according to an act of the Legislature dated May 22, 1806. 1806 La. Acts 58.

²⁹ Letter from W. C. C. Claiborne to Parish Judges (Oct. 22, 1808), in 4 OFFICIAL LETTER BOOKS, *supra* note 12, at 230-31.

³⁰ Ferdinand Stone, *The Civil Code of 1808 for the Territory of Orleans*, 33 TUL. L. REV. 1, 4 (1958).

³¹ In one letter to James Madison, he said, "I see much to admire in the Civil Law, but there are some principles, which ought to yield to the common Law Doctrine." Letter from

partially shifted his position towards the insertion of the common law in Louisiana. The shift could be due to the Digest of 1808 being a friendly statement of the existing laws and easily accessible to all inhabitants, and due to finding the inhabitants in a more mature state to decide their own government.³²

The Digest of 1808 did not repeal the laws that had been applied in the region prior to its promulgation.³³ The act of the Legislature of March 31 refers to a digest,³⁴ and Claiborne³⁵ and the local courts³⁶ also referred to it as a digest. Finally, in that same respect, Judge Martin, in his *History of Louisiana*, said that the drafters' "labor would have been much more beneficial to the people . . . if the legislature . . . had given it their sanction as a system, intended to stand by itself, and be construed by its own context,"³⁷ as were most nineteenth-century civil codes.³⁸

The Digest of 1808 did not include an *exposé des motifs* or notes to

W. C. C. Claiborne to James Madison (Apr. 5, 1808), in 4 OFFICIAL LETTER BOOKS, *supra* note 12, at 169.

In a letter to Judge J. White, he said:

I am free to declare the pleasure it would give me to see the Laws of Orleans assimilated to those of the states generally, not only from a conviction . . . in a Country, where a unity of Government and Interests exists, it is highly desirable to introduce thro'out the same Laws and Customs.

Letter from W. C. C. Claiborne to Judge J. White (Oct. 11, 1808), in 4 OFFICIAL LETTER BOOKS, *supra* note 12, at 225.

³² Yiannopoulos, *supra* note 6, at LVII. Another explanation for the shift is found by George Dargo in the Burr conspiracy, which made the governor an advocate of the local interests. See GEORGE DARGO, JEFFERSON'S LOUISIANA: POLITICS AND THE CLASH OF LEGAL TRADITIONS 51-73 (1975).

³³ Yiannopoulos, *supra* note 6, at LIX.

³⁴ 1808 La. Acts 126.

³⁵ In a letter to James Madison, he said: "The 'Civil Code' alluded to in my last letter, is nothing more, than a 'Digest of the Civil Laws now in force in the Territory.'" Letter from W. C. C. Claiborne to James Madison (Apr. 5, 1808), in 4 OFFICIAL LETTER BOOKS, *supra* note 12, at 168.

³⁶ Yiannopoulos, *supra* note 6, at LIX; DARGO, *supra* note 32, at 158; RICHARD HOLCOMBE KILBOURNE, A HISTORY OF THE LOUISIANA CIVIL CODE: THE FORMATIVE YEARS, 1803-1839, at 62-77 (1987).

³⁷ FRANCOIS-XAVIER MARTIN, THE HISTORY OF LOUISIANA FROM THE EARLIEST PERIOD 344 (Firebird Press 2000) (1827).

³⁸ See VÍCTOR TAU ANZOÁTEGUI, LA CODIFICACIÓN EN LA ARGENTINA (1810-1870): MENTALIDAD SOCIAL E IDEAS JURÍDICAS 19-31 (1977) (Arg.); JACQUES VANDERLINDEN, LE CONCEPT DE CODE EN EUROPE OCCIDENTALE DU XIII AU XIX SIÈCLE, ESSAIS DE DÉFINITION (1967) (Belg.) (covering the codification that took place before the nineteenth century). See generally Jean Louis Bergel, *Principal Features and Methods of Codification*, 48 LA. L. REV. 1073 (1988) (analyzing the formation of civil codes); Alain Levasseur, *On the Structure of a Civil Code*, 44 TUL. L. REV. 693 (1970) (discussing the civil code's structure).

each article explaining its sources.³⁹ Therefore, it is not known precisely which sources were used by Brown and Moreau-Lislet when drafting.⁴⁰ Nevertheless, there are an uncertain number of copies of the *editio princeps* of the Digest of 1808 that contain interleaves between the French and English texts. Even though there are some copies with interleaves that have no annotations,⁴¹ other copies of the Digest of 1808 contain manuscript notes that seem to have been dictated by Moreau-Lislet, or in some cases, even written by him.⁴²

One of these manuscripts, the de la Vergne copy,⁴³ has triggered one of the most important debates in the legal history of the Western hemisphere. In 1941, Mitchell Franklin made public the existence of a particular *editio princeps* copy of the Digest of 1808 with interleaves containing manuscript notes in French.⁴⁴ Facing the English text are references to Roman and Spanish materials intended to be paired to each title of the Digest of 1808, and facing the French text are references to Roman and Spanish materials intended to be paired to each article.⁴⁵ The manuscript also includes references to French texts of Roman grounding, such as the works of Pothier and Domat. In addition, 645 articles of the 2160 of the Digest of 1808 do not have corresponding notes or comments;⁴⁶ blanks are found facing those articles.⁴⁷ The manuscript is dated 1814,⁴⁸ bound in leather, and in gold,

³⁹ See Joseph Dainow, *Moreau Lislet's Notes On Sources of Louisiana Civil Code of 1808*, 19 LA. L. REV. 43, 43 (1958).

⁴⁰ Some studies have been made. See Alejandro Guzmán Brito, *Las fuentes de las normas sobre interpretación de las leyes del digeste des lois civiles (Code civil) de la Luisiana (1808/1825)*, 31 REVISTA DE ESTUDIOS HISTÓRICO-JURÍDICOS 171 (2009) (Chile), available at http://www.scielo.cl/scielo.php?script=sci_arttext&pid=S0716-54552009000100007&lng=es&nrm=iso&tlng=es.

⁴¹ The LSU Law Library holds such a copy.

⁴² John W. Cairns, *The de la Vergne Volume and the Digest of 1808*, 24 TUL. EUR. & CIV. L.F. 31, 74 (2009).

⁴³ The most recent and perhaps most exhaustive study was elaborated by John W. Cairns. *Id.*

⁴⁴ Mitchell Franklin, *Libraries of Edward Livingston and of Moreau Lislet*, 15 TUL. L. REV. 401, 403-04 n.10 (1941).

⁴⁵ See Foreword to A DIGEST OF THE CIVIL LAWS, *supra* note 25; Cairns, *supra* note 42, at 77; Mitchell Franklin, *An Important Document in the History of American Roman and Civil Law: The de la Vergne Manuscript*, 33 TUL. L. REV. 35, 39-42 (1958).

⁴⁶ Vernon Valentine Palmer, *The Recent Discovery of Moreau Lislet's System of Omissions and Its Importance to the Debate Over the Sources of the Digest of 1808*, 49 LOY. L. REV. 301, 311 (2003).

⁴⁷ Examples can be found in Articles 10 to 24, Chapter II, Title III, Book I of the Digest of 1808. A DIGEST OF THE CIVIL LAWS, *supra* note 25, at 17-21.

reads, “L. Moreau Lislet.” The manuscript also includes an *avant-propos*, a table of abbreviations, and a thematic index, all in French. The table of abbreviations includes, among others, references to the *Partidas*, the *Fuero Real*, the *Recopilación de Castilla*, the *Autos Acordados*, the *Leyes de Toro*, the *Curia Filípica*, the Spanish translation by Rodríguez de Fonseca of the *Digest* of Justinian,⁴⁹ and the works of Domat, Febrero, and Pothier.⁵⁰

Rodolfo Batiza tested the content of the de la Vergne copy in 1971 when he published his study on the textual sources of the Digest of 1808.⁵¹ He presented the results of his study in an article which compared the text of the Digest of 1808 with other laws and scholarly writings, most of which were of French origin. Nevertheless, that work of Batiza does not make available the results of a detailed study of each and every manuscript note included in the de la Vergne copy.⁵² Through four appendices, especially Appendix C,⁵³ he identified the similarities between the texts of the articles of the Digest of 1808 and those of the other texts which were subjects of the study. If the comparison showed that two provisions were textually identical, Batiza identified them as “verbatim,” and from there, he continued the analysis in a decreasing order with the categories “almost verbatim,” “substantially influenced,” and “partially influenced.”⁵⁴

Batiza identified the formal origins of 2081 of the 2160 articles of the Digest of 1808.⁵⁵ According to Batiza, his study traced the number

⁴⁸ The title of the manuscript reads in French: “Loix de l’Etat de la Louisiane avec des notes qui referent aux Loix civiles et Espagnoles qui y ont rapport. 1814.” Palmer, *supra* note 46, at 305. One annotation to an article of the Digest of 1808 seems to indicate that it was not completed until at least 1817, which can be seen in Article 27, Chapter III, Title VI, Book I. A DIGEST OF THE CIVIL LAWS, *supra* note 25, at 43. According to Cairns, the year 1817 is a clerical error of the copyist. Compare Cairns, *supra* note 42, at 41, with Palmer, *supra* note 46, at 305.

⁴⁹ See generally BARTOLOMÉ AGUSTÍN RODRÍGUEZ DE FONSECA, DIGESTO TEÓRICO PRÁCTICO O RECOMPILACIÓN DE LOS DERECHOS COMÚN, REAL Y CANÓNICO, POR LOS LIBROS Y TÍTULOS DEL DIGESTO (1775) (Spain).

⁵⁰ See *Explanation of the Abbreviations Designating the Various Codes of Laws and Authors Cited in Marginal Notes to the Laws of this State*, in A DIGEST OF THE CIVIL LAWS, *supra* note 25.

⁵¹ Rodolfo Batiza, *The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance*, 46 TUL. L. REV. 4, 4 (1971).

⁵² *Id.* at 9-10 nn.35-36.

⁵³ *Id.* at 45-134.

⁵⁴ *Id.*

⁵⁵ *Id.* at 11.

of articles that were linked to each of the following sources: (i) 807 to the *Projet* of 1800; (ii) 709 to the *Code Napoléon*; (iii) 67 to the *Partidas*; (iv) 52 to the *Febrero Adicionado*; (v) 27 to the *Institutes* of Justinian; (vi) 25 to Blackstone; (vii) 16 to the *Digest* of Justinian; (viii) 16 to the *Curia Filípica*; (ix) 16 to an act of the Legislature of the Territory of Orleans on marriage dated April 6, 1807; and (x) 14 from the *Recopilación de Castilla*.⁵⁶ The remaining articles of the Digest of 1808 were linked to other sources that were also of Roman, French, and Spanish origin, and others from local acts of the Legislature.⁵⁷ Batiza concluded that approximately 85% of the text of the articles of the Digest of 1808 had been extracted from French texts.⁵⁸

Reactions to the work and conclusions of Batiza did not take long to arise. In 1972, Robert A. Pascal published a reply providing his reasons why he understood the Digest of 1808 to be comprised in its substance of Spanish, not French, law.⁵⁹ Pascal claimed that the work of Batiza was a “work of concordances rather than an index of sources.”⁶⁰ Pascal asserted that Spanish law, including Roman law and *derecho común*, were the law of Louisiana in 1806 and were not codified or easily accessible to those who intended to draft a digest.⁶¹ In addition, Brown and Moreau-Lislet had been instructed to draft the Digest of 1808 in English and French.⁶² According to Pascal, French law, composed of elements from Roman, Romanized Frankish, Burgundian, and Visigothic origin, habitually resembled the Spanish law that derived from Roman or Roman-Visigothic origins.⁶³ He understood that the *Code Napoléon* was a valuable model, which reflected a remarkable organization, and more importantly, provided a mine of texts written in French.⁶⁴ Furthermore, the *Projet* of 1800 afforded greater attention to the Roman and Roman-Visigothic institutions that had been in force in the South of France.⁶⁵ Thus, the drafters of the Digest of 1808, without

⁵⁶ *Id.* at 11-12.

⁵⁷ Batiza, *supra* note 51, at 11.

⁵⁸ *Id.* at 12.

⁵⁹ Robert A. Pascal, *Sources of the Digest of 1808: A Reply to Professor Batiza*, 46 TUL. L. REV. 603, 605 (1972).

⁶⁰ *Id.* at 623.

⁶¹ *Id.* at 605.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Pascal, *supra* note 59, at 606.

violating the instruction of the Legislature of the Territory of Orleans, used French texts (*i.e.* *Code Napoléon*, *Projet* of 1800, French commentators) that contained, or could be modified to contain in substance, the Spanish-Roman law then in force in Louisiana.⁶⁶ When there were no French texts that fit perfectly with the law of Louisiana, the drafters projected new ones or adapted the existing language. As a corollary, the Digest of 1808, although largely written with words from French texts, tried and largely⁶⁷ succeeded in reflecting the substance of the Spanish law in Louisiana.

Pascal was not alone in his quest. Legal history shows that similar claims had taken place in other parts of Latin America. For example, in Uruguay in 1851, the drafter of one of the projects of a civil code for that country had stated that:

Having used for our work the writings of French authors, especially Domat, Pothier, Toullier, Merlin and Troplong, it will be questioned why we have not cited them [in our project], especially since on occasions we borrowed their words. However, that was necessary because we had imposed ourselves to provide a national character to all the work, removing all foreign scent that would be reproached. Furthermore, many times an article that had been triggered by reading Toullier found support on an opinion by Sala or Acevedo, which, although identical in substance, lacked the fundamentals that made it more acceptable. Moreover, no one can justly accuse us of plagiarism, since nothing we claim as ours, we present ourselves as mere reporters, and frankly confess how much we owe to the authors mentioned, which we had in our hands at all times during the course of our work.⁶⁸

Rodolfo Batiza presented his reply to the arguments of Robert A. Pascal.⁶⁹ This reaction was not followed by a new reply from Pascal, because Pascal thought that the rejoinder of Batiza did not change his original position, and therefore, there was nothing else he should add.⁷⁰

⁶⁶ *Id.*

⁶⁷ *Id.* at 604.

⁶⁸ EDUARDO ACEVEDO & ALBERTO PALOMEQUE, EDUARDO ACEVEDO AÑOS 1815-1863, SU OBRA COMO CODIFICADOR, MINISTRO, LEGISLADOR Y PUBLICISTA 342 (1908) (Uru.). See also ALEJANDRO GUZMÁN BRITO, LA CODIFICACIÓN CIVIL EN IBEROAMÉRICA: SIGLOS XIX Y XX 461-62 (2000) (Chile); Olivier Moréteau & Agustín Parise, *Recodification in Louisiana and Latin America*, 83 TUL. L. REV. 1103, 1146 (2009).

⁶⁹ Rodolfo Batiza, *Sources of the Civil Code of 1808, Facts and Speculations: A Rejoinder*, 46 TUL. L. REV. 628, 628 (1972).

⁷⁰ Robert A Pascal, *A Treatise on the Reprint of Moreau Lislet's Copy of a Digest of the*

In 1974, Rodolfo Batiza enlarged his study by publishing two volumes that provided a collage of copies of the actual sources that he had used to complete his study of 1971.⁷¹ These were the last stands for the Tournament of Scholars⁷² even though many other scholars continued writing and debating on the topic.⁷³

John Cairns recently undertook a clarifying and detailed study of the de la Vergne copy and other manuscripts, *i.e.*, LSU, Denis, Bermudez, St.Paul, and Mouton.⁷⁴ Following this recent study, a new approach should be taken with respect to the sources of the Digest of 1808. The study by Rodolfo Batiza has identified the formal, literal, or direct sources of most articles of the Digest of 1808. Notwithstanding, on many occasions, formal sources “dress” with modern language a foreign or previous idea.⁷⁵ Therefore, to avoid misconceptions, a look into the material, ideological, or indirect sources of the Digest of 1808 should be undertaken. This look could be initiated with a detailed analysis of the manuscript notes of the de la Vergne copy. The Roman and Spanish references that are paired with the different articles should be analyzed in light of the corresponding texts of the articles of the Digest of 1808.⁷⁶ The results of the analysis could be a first step towards determining whether the material sources of the Digest of 1808 are to be found in Roman, French, or Spanish law or in a combination of the three.⁷⁷

Civil Laws, in 2.1 PUBLICATIONS OF THE LOUISIANA HISTORICAL SOCIETY 43, 47 (1974).

⁷¹ See RODOLFO BATIZA, SOURCES WHICH HAD A SUBSTANTIAL OR PARTIAL INFLUENCE ON PROVISIONS OF THE LOUISIANA CIVIL CODE OF 1808: THE ORIGINAL TEXTS (1973) (consisting of one volume); RODOLFO BATIZA, THE VERBATIM AND ALMOST VERBATIM SOURCES OF THE LOUISIANA CIVIL CODES OF 1808, 1825 AND 1870: THE ORIGINAL TEXTS (1973) (consisting of the other volume).

⁷² This term was adopted after a publication by the then Dean of Tulane Law School. Joseph Modeste Sweeney, *Louisiana Civil Code of 1808: Tournament of Scholars Over the Sources of the Civil Code of 1808*, 46 TUL. L. REV. 585, 585 (1972).

⁷³ The Tournament has been analyzed in several works. See, e.g., JOHN W. CAIRNS, THE 1808 DIGEST OF ORLEANS AND 1866 CIVIL CODE OF LOWER CANADA: AN HISTORICAL STUDY OF LEGAL CHANGE 623-34 (1980); Cairns, *supra* note 42, at 35-38. See generally Alain Levasseur, *Grandeur or Mockery?*, 42 LOY. L. REV. 647 (1997) (analyzing the Tournament).

⁷⁴ Cairns, *supra* note 42, at 65-72.

⁷⁵ ABELARDO LEVAGGI, DALMACIO VÉLEZ SARSFIELD, JURISCONSULTO 181 (2005) (Arg.). Yiannopoulos also provides a noteworthy view of sources. A.N. Yiannopoulos, *The Early Sources of Louisiana Law: Critical Appraisal of a Controversy*, in LOUISIANA'S LEGAL HERITAGE 87, 102 (Edward F. Haas ed. 1983).

⁷⁶ A somewhat similar study was invited by Rodolfo Batiza in his reply to Robert A. Pascal. See Batiza, *supra* note 69, at 652.

⁷⁷ Vernon V. Palmer mentioned that a study comparing Castilian law and the provisions

The legal community has benefited from the Tournament of Scholars. The Tournament reflected that whether French, Spanish, or Roman, the laws were taken from the civil-law heritage, and that the Digest of 1808 was not a mere copy of the *Code Napoléon* or of a single text.⁷⁸ Above all, the Tournament showed that the inhabitants of Louisiana were, in 1808, able to protect their civil-law heritage from the incursions of the common law. Whatever may be the result of the Tournament of Scholars, what is clear is that an intense and active legal borrowing took place in Louisiana as early as 1808.⁷⁹

C. Project of 1823

Several factors contributed to a tendency in the legal community of Louisiana to de-emphasize the Digest of 1808.⁸⁰ Having fulfilled the initial need of adopting a legal body that would comprise the civil law, the legal community gradually started to feel the need for a newer and more developed text.⁸¹

In 1817, Pierre Auguste Bourguignon Derbigny decided in the case of *Cottin v. Cottin*⁸² that the laws that were not contrary to the Digest of 1808 were not repealed with its enactment.⁸³ Therefore, the Digest of 1808 had not completely repealed the civil laws that had existed in Louisiana.⁸⁴ Consequently, a state of uncertainty was generated concerning the laws that should be applied by the courts. In addition, there were some concerns with regard to which interpretation should be given to the dispositions of the Digest of 1808. The interpretation of the

of the Digest of 1808 could try to settle the Tournament, while admitting that it would be an enormous amount of work of purely historical interest. Vernon Valentine Palmer, *The Recent Discovery of Moreau Lislet's System of Omissions and Its Importance to the Debate Over the Sources of the Digest of 1808*, 49 LOY. L. REV. 301, 308 (2003).

Palmer undertook a study of approximately 30% of the articles of the Digest of 1808 (*i.e.* articles that had blank references in de la Vergne copy), and he identified no Spanish counterparts. *Id.*

⁷⁸ SHAEL HERMAN, *THE LOUISIANA CIVIL CODE: A EUROPEAN LEGACY FOR THE UNITED STATES* 32 (1993).

⁷⁹ Alan Watson defines the Louisiana experience of 1808 as a "massive borrowing." WATSON, *supra* note 2, at 104.

⁸⁰ KILBOURNE, *supra* note 36, at 62; Agustín Parise, *The Place of the Louisiana Civil Code in the Hispanic Civil Codifications: The Comments to the Spanish Civil Code Project of 1851*, 68 LA. L. REV. 823, 833 (2008).

⁸¹ DARGO, *supra* note 24, at 359.

⁸² *Cottin v. Cottin*, 5 Mart. (o.s.) 93, 101-02 (La. 1819).

⁸³ *Id.*

⁸⁴ KILBOURNE, *supra* note 36, at 62.

courts showed that there was uncertainty about the preservation of the Spanish, French, and Roman laws.⁸⁵

The applicability of the Digest of 1808 was also affected by other factors. The drafters did not include the previous laws that ruled on insolvency proceedings.⁸⁶ In addition, the Digest of 1808 was not supported by a strong central authority for the application of positive laws.⁸⁷ Besides, the common law in practice before the local courts generated a propensity to explore for answers “behind” the Digest of 1808.⁸⁸ Contemporaneously, Louisiana was experiencing a comprehensive and noteworthy codification movement. Edward Livingston was at the forefront of this movement. Those who supported codification defended the need for the drafting of a civil code, a code of practice, a commercial code, and a criminal code for the newly created state.⁸⁹

The depicted scenario encouraged the Legislature of Louisiana to react by working towards a revision. Therefore, on March 14, 1822, the legislative body resolved that “three jurisconsults be appointed. . .to revise the [Digest of 1808] 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.”⁹⁰ That same day, the attending members of the Legislature appointed attorneys Pierre Auguste Bourguignon Derbigny, Edward Livingston, and Louis Casimir Elisabeth Moreau-Lislet to draft what would be known as the Project of 1823.⁹¹ Less than one year later, on February 13, 1823, the three attorneys presented their Preliminary Report before the Senate and House of Representatives.⁹² In the Preliminary Report, the drafters presented their plan of work, which very much welcomed active legal borrowing from other jurisdictions:

⁸⁵ SHAEL HERMAN ET AL., *THE LOUISIANA CIVIL CODE: A HUMANISTIC APPRAISAL* 26 (1981).

⁸⁶ KILBOURNE, *supra* note 36, at 63; Parise, *supra* note 80, at 833.

⁸⁷ See KILBOURNE, *supra* note 36, at 63; Parise, *supra* note 80, at 833. .

⁸⁸ Parise, *supra* note 80, at 833.

⁸⁹ Joseph Dainow, *The Louisiana Civil Law*, in *CIVIL CODE OF LOUISIANA REVISION OF 1870 WITH AMENDMENTS TO 1947*, xi, xxi (Joseph Dainow ed., 1947).

⁹⁰ 1822 La. Acts 108.

⁹¹ H.R. JOURNAL, 5th Leg., 2d Sess., at 73 (La. 1822); Ira Flory, *Edward Livingston's Place in Louisiana Law*, 19 LA. HIST. Q. 328, 346 (1936).

⁹² The text of the Preliminary Report has been appended to an Article by Thomas W. Tucker. Thomas W. Tucker, *Interpretations of the Louisiana Civil Codes, 1808-1840: The Failure of the Preliminary Title*, 19 TUL. EUR. & CIV. L.F. 57 app. (2004).

In the execution of the work we shall keep a reverent eye on those principles, which have received the sanction of time, and on the labors of the great Legislators, who have preceded us. The Laws of the Partidas, and other Statutes of Spain, the existing digest [of 1808] of our own Laws, the abundant stores of the English Jurisprudence, the comprehensive Codes of France, are so many rich mines from which we can draw treasures of Legislation; and where they differ, and we doubt we shall apply to that oracle to which an eloquent writer asserts "All nations yet appeal, and from which all receive the answers of eternal truth;" to those inspirations of prophetic Legislation, which enabled the Roman Jurists to foresee almost every subject of civil contention, and to establish principles for the decision of Cases, which could only arise in a state of Society different from their own, and maxims applicable to all nations, at all times and under every form of Government.⁹³

The Legislature of Louisiana approved the work plan of the three attorneys by a resolution on March 22, 1823,⁹⁴ and ordered the distribution of the Preliminary Report to all members of the Legislature by a resolution on March 25, 1823.⁹⁵ A day later, the Legislature of Louisiana ordered that the Project of 1823 be printed as soon as it was ready to be sent to the printer.⁹⁶

The Project of 1823 included comments accompanying the text proposed for many of its articles.⁹⁷ These comments often cite the sources of the changes and are important tools for the interpretation of the proposed rules.⁹⁸ The comments of the drafters of the Project of 1823 cover 25% of the proposed articles.⁹⁹ The Project of 1823 proposed 423 amendments, 1746 additions, and 276 suppressions to the text of the Digest of 1808,¹⁰⁰ while 1100 articles were not accompanied by comments.¹⁰¹ The comments include approximately 340 references to

⁹³ *Id.*

⁹⁴ 1823 La. Acts 88-89.

⁹⁵ 1823 La. Acts 90-91.

⁹⁶ 1823 La. Acts 68-71.

⁹⁷ *See generally* ADDITIONS AND AMENDMENTS TO THE CIVIL CODE OF THE STATE OF LOUISIANA, PROPOSED IN OBEDIENCE TO THE RESOLUTION OF THE LEGISLATURE OF THE 14TH, MARCH, 1822, BY THE JURIST COMMISSIONED FOR THAT PURPOSE (1823) [hereinafter ADDITIONS AND AMENDMENTS].

⁹⁸ KATE WALLACH, RESEARCH IN LOUISIANA LAW 48 (1958).

⁹⁹ Rodolfo Batiza, *The Actual Sources of the Louisiana Project of 1823: A General Analytical Survey*, 47 TUL. L. REV. 1, 3 (1972).

¹⁰⁰ *Id.* at 3-4.

¹⁰¹ *Id.* at 3.

diverse codes, laws, and works of legal doctrine. These references are spread very unevenly throughout the draft.¹⁰² Most comments are found in Book I and in titles I and II of Book II. In contrast, titles III to XXIII of Book III contain very few references.¹⁰³

The sources of the Project of 1823 also aroused the interest of Rodolfo Batiza.¹⁰⁴ The results of a new study by Batiza indicated that the drafters of the Project of 1823 used, among others, the following texts: the *Corpus Iuris*, the *Partidas*, the *Projet* of 1800, the *Code Napoléon*, the Digest of 1808, and various acts of the Legislature of Louisiana. The study also indicated that the drafters of the Project of 1823 consulted, among others, works by Blackstone, Domat, Febrero, Maleville, Merlin, Toullier, and Pothier.¹⁰⁵

The pace of legal borrowing in Louisiana did not slow during the period of 1808 to 1823. The Project of 1823 also provides a clear example of active legal borrowing. On this occasion, the drafters in Louisiana looked to legal works from diverse origins: English, French, Roman, and Spanish. Notwithstanding, the drafters also looked at their local acts and the Digest of 1808 when making the proposals for change.

D. Civil Code of 1825

The Civil Code of 1825 is a valuable example of active and passive legal borrowing. This code not only borrowed provisions from other jurisdictions, it has also exerted the biggest influence around the world,¹⁰⁶ especially during the nineteenth-century, on the codification endeavors of Spain and Latin America.¹⁰⁷

The Project of 1823 was subject to discussion by the Legislature of Louisiana,¹⁰⁸ and on April 12, 1824, the Legislature ordered the printing

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Batiza, *supra* note 99, at 28-30.

¹⁰⁶ See *infra* Part III.

¹⁰⁷ See generally Parise, *supra* note 80 (discussing Latin American countries' codification efforts).

¹⁰⁸ Bank of Louisiana v. Farrar, 1 La. Ann. 49, 60 (1847). "The charter of the bank was passed, in April, 1824. At that time the *projet*, in which this article figures, was before the Legislature, and had received a most elaborate discussion." *Id.* at 55.

See also John H. Tucker, *Source Books of Louisiana Law I*, 6 TUL. L. REV. 280, 287 (1931).

and promulgation of the text with the proposed changes.¹⁰⁹ The act of the Legislature of Louisiana reads:

Sec.1 . . . That the amendments made to the civil code [i.e. Digest of 1808] of the state shall be in force from the day of their promulgation, as hereinafter provided:

. . . .

Sec.7 . . . That when the said civil code shall be printed and received the promulgation of it shall be made by the secretary of state, by sending a copy thereof to each of the courts of and within this state, of which transmission the date shall be recorded in the office of the secretary of state; and one month after said transmission, the said code shall be deemed promulgated, and shall henceforward be in full force throughout the state.¹¹⁰

The printing of the Civil Code of 1825 was delayed, as shown by an act of February 16, 1825, granting six additional months to Joseph Charles de St. Romes to complete the printing.¹¹¹ Pierre Auguste Bourguignon Derbigny, at that time Secretary of State of Louisiana,¹¹² issued a certificate of promulgation for the code on May 20, 1825, indicating that the new text would take effect one month later, on June 20, 1825.¹¹³ The note by Derbigny reads: "It is made known that the transmission of the Civil Code [of 1825] of the State of Louisiana, to each of the courts of and within the state, . . . was this day completed, and that in one month from this date, the same Code shall be deemed promulgated."¹¹⁴

Louisiana kept welcoming legal borrowing with the Civil Code of 1825, and the proposals of the Project of 1823 were followed.¹¹⁵ Even when borrowings were invited, the legal community in Louisiana felt the need to create a system of provisions of their own. The Spanish laws

¹⁰⁹ 1824 La. Acts 172-78. *See also* WALLACH, *supra* note 98, at 48.

¹¹⁰ 1824 La. Acts 172-76.

¹¹¹ 1825 La. Acts 128.

¹¹² 1 A DICTIONARY OF LOUISIANA BIOGRAPHY 239 (Glenn R. Conrad ed., 1988).

¹¹³ Tucker, *supra* note 108, at 288.

¹¹⁴ Tucker, *supra* note 108, at 288. *See also* CIVIL CODE OF THE STATE OF LOUISIANA; WITH ANNOTATIONS BY WHELOCK S. UPTON, LL.B., AND NEEDLER R. JENNINGS 9 (1838).

Nevertheless, the Louisiana Supreme Court stated that the code had been promulgated on different dates in different parts of the state; New Orleans on May 20 and West Feliciana Parish on June 15. Tucker, *supra* note 108, at 288-89. *See also* Yiannopoulos, *supra* note 6, at LX; WALLACH, *supra* note 98, at 48.

¹¹⁵ Rodolfo Batiza included in his study of 1972 a chart indicating which articles of the Project of 1823 were incorporated into the Civil Code of 1825 and which were later retained in the Revision of 1870. Batiza, *supra* note 99, at 30-115.

that had been applied in the state before the adoption of the Digest of 1808 kept generating a feeling of uncertainty about their application. The Code tried to terminate the debate on the application of Spanish laws and to give a sense of originality and a new starting point. Therefore, the Code included article 3521, which read:

From and after the promulgation of this Code [of 1825], 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 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 pretence that their provisions are not contrary or repugnant to those of this Code.¹¹⁶

This article was inserted once the Project of 1823 was submitted to the Legislature of Louisiana.¹¹⁷ Article 3521 could be read as not repealing all previous laws but only those “for which it has been especially provided in this Code.”¹¹⁸ That language opened the door to different interpretations; it allowed some lawyers and members of the judiciary to interpret this as an open door in cases of lacunae, and hence, limit the express repeal. Therefore, when faced with silence in the Code, it would have been admissible to look for solutions in the previous laws.¹¹⁹ The Louisiana Supreme Court applied this interpretation in the case of *Cole’s Widow v. His Executors*.¹²⁰ In addition, the same court

¹¹⁶ CIVIL CODE OF THE STATE OF LOUISIANA 1112 (1825).

¹¹⁷ Page 197 of the Project of 1823 is silent. ADDITIONS AND AMENDMENTS, *supra* note 97, at 176, 197.

See also Vernon Valentine Palmer, *The French Connection and The Spanish Perception: Historical Debates and Contemporary Evaluation of French Influence on Louisiana Civil Law*, 63 LA. L. REV. 1067, 1077 (2003).

¹¹⁸ CIVIL CODE OF THE STATE OF LOUISIANA, *supra* note 116, at 1112.

¹¹⁹ Vernon Valentine Palmer, *The Death of a Code – The Birth of a Digest*, 63 TUL. L. REV. 221, 246 (1988).

¹²⁰ *Cole’s Widow v. His Executors*, 7 Mart. (n.s.) 41, 46 (La. 1828). The court said in that case:

It is provided by the 3521 article of the Louisiana code, that the former laws of the country are repealed in every case for which it has been specially provided in this code; and they shall not be invoked as laws, even under the pretense that their provisions are not contrary or repugnant to those of this code. Now the case of one of the married couple moving into this state, is not specially provided for: the former law therefore, in relation to it, is not repealed by this general provision. Whether, on the general rules of construction, the article already cited can be considered as abrogating a former law which, although

resolved, in 1827, that Spanish law that was not contrary to the Civil Code of 1825 continued in effect, and that the articles of the Digest of 1808 that had been omitted in the Civil Code of 1825 were still in force in Louisiana.¹²¹ To end these interpretations, the Legislature of Louisiana enacted two acts¹²² that were intended to achieve a great repeal.¹²³ There is still debate on the effects of both acts, especially since the Louisiana Supreme Court claimed that the acts only repealed the previous positive law and not the principles that derived from them, which had been acquired by the practice of the courts.¹²⁴ It may, in conclusion, be stated that well into the twentieth century, courts in Louisiana still looked at

different, is not contrary, little need be now said.

Id.

¹²¹ *Flower v. Griffith*, 6 Mart. (n.s.) 89, 92-93 (La. 1827). The court said in that case: The whole of the twenty-first title of the third book of the old code [Digest of 1808] has been omitted in the new, and yet it was not proposed to be suppressed by the jurists, nor does it appear to have been repealed by any act of the legislature of which we can get cognizance. We have examined the original of the amendments, to the code, in the office of the secretary of state, the only place where they are to be found distinct and separate, and not a word is there said of repealing this title. We of course are bound to come to the conclusion, that it is still in force.

Id.

¹²² Act 40, March 12, 1828 read in its relevant part: That all the articles contained in the old civil code of this state . . . and all the provisions of the same which are not reprinted in the new civil code of Louisiana, published under the authority of this state on the [12 April, 1824], . . . are, hereby, repealed; except so much of title tenth as is embraced in its third chapter, which treats, "*of the dispolution of communities or corporations.*"

1828 La. Acts 66 (emphasis added).

Act 83, March 25, 1828 read in its relevant part:

be and are hereby abrogated; and that all the civil laws which were in force before the promulgation of the civil code lately promulgated, be and are hereby abrogated, except so much of title tenth of the old civil code as is embraced in its third chapter, which treats of the dissolution of communities or corporations.

1828 La. Acts 160.

¹²³ Palmer, *supra* note 117, at 1077.

¹²⁴ *Reynolds v. Swain*, 13 La. 193, 198 (1839). The court said in that case: 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 only such as were introductory of a new rule, and not those which were merely declaratory—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.

Id. See also John T. Hood, *The History and Development of the Louisiana Civil Code*, 33 TUL. L. REV. 7, 18 (1958).

court decisions and scholarly writings of France and Spain.¹²⁵

E. Revision of 1870

The Civil Code of 1825 survived without significant alterations for approximately half a century.¹²⁶ Nevertheless, at that time, the new social context (*v.gr.* abolition of slavery) and the needs of the legal community created a need for changes in the statutes that had been enacted during the first years of statehood. Faced with this scenario, the Legislature of Louisiana ordered on August 17, 1868, that a revision of the laws should be undertaken.¹²⁷ In addition, on October 21 of that same year, the Legislature resolved by a joint resolution that “the committee appointed to revise the statutes of the state . . . select one or more commissioners to revise the Civil Code and the Code of Practice.”¹²⁸

John Ray was appointed to undertake the needed work, which would become the Revision of 1870. He presented the results of his work on December 27, 1869. Several months later on March 14, the Legislature of Louisiana adopted Ray’s revision,¹²⁹ apparently with few changes to the proposals.¹³⁰ The act of adoption reads in part “that the Civil Code of the State of Louisiana be amended and re-enacted so as to read as follows. . .”¹³¹ The wording seems to indicate that the Legislature did not intend to clearly repeal the Civil Code of 1825, and that on the contrary, they intended to reflect continuity.¹³² In addition, the Revision of 1870 did not include a repealing clause.¹³³ Finally, this interpretation was also favored by the Louisiana Supreme Court, which was rendering

¹²⁵ WALLACH, *supra* note 98, at 49. John T. Hood makes the statement applicable to Spanish Laws. Hood, *supra* note 124, at 18. *See also* Yiannopoulos, *supra* note 6, at LXI.

¹²⁶ Moréteau & Parise, *supra* note 68, at 1116.

¹²⁷ 1868 La. Acts 39.

¹²⁸ 1868 La. Acts 237.

¹²⁹ The complete title in English reads, “An Act [t]o amend and re-enact the Civil Code of the State of Louisiana, including, besides all other matters embraced in said Code, the several objects set forth in the Table of Contents here annexed and made part of this title.” THE REVISED CIVIL CODE OF THE STATE OF LOUISIANA iii (1870).

¹³⁰ Even when the different journals of the Legislature seem to be silent in this respect, there is evidence that the Revision of 1870 differed from the text that Ray presented on December 27, 1869. A.N. Yiannopoulos, *Two Critical Years in the Life of the Louisiana Civil Code: 1870 and 1913*, 53 LA. L. REV. 5, 9 (1992).

¹³¹ JOHN RAY, THE CIVIL CODE OF THE STATE OF LOUISIANA, REVISED, ARRANGED AND AMENDED xxi (1869) [hereinafter REVISED, ARRANGED AND AMENDED].

¹³² Palmer, *supra* note 119, at 248.

¹³³ REVISED, ARRANGED AND AMENDED, *supra* note 131, at 532-33; Palmer, *supra* note 119, at 248-49.

decisions in accordance with this interpretation in 1964.¹³⁴

Ray claimed in his report that the Revision of 1870 had “required much labor and a thorough acquaintance with the Civil Code [of 1825], the Statutes of the State, and the Decisions of the Supreme Court”;¹³⁵ the report makes no reference to foreign sources.¹³⁶ All of this indicates that active legal borrowing was slowing down in Louisiana at that time. This introspection is perhaps the main difference between the codification process in 1870 and the one that took place in the same region at the beginning of the nineteenth century. This reflects that Louisiana started to look more at its own legislation and court decisions, and less at the legislation and court decisions of other civil-law jurisdictions. As this Article will develop below, this slowing of legal borrowing was only temporary in Louisiana.

F. Project of 1908

The dawn of the twentieth century brought light to the need for a revision of the civil code of Louisiana.¹³⁷ Conditions had been altered, and the conceptual framework implemented in 1870 had proved to be analytically deficient on occasion.¹³⁸ Therefore, on July 2, 1908, the Legislature of Louisiana stated that “it shall be the duty of the Governor of the State on or before October 1st, 1908, to appoint a commission composed of three . . . lawyers of the State, whose duty it shall be to prepare drafts for a revision of the Civil Code of the State of Louisiana [*i.e.*, Revision de 1870].”¹³⁹

The new revision lasted two years. Then, R. E. Milling, W. O.

¹³⁴ *Mary H. Shelp v. Nat'l Surety Corp.*, 333 F.2d 431, 439 (5th Cir. 1964); Palmer, *supra* note 119, at 249.

In *Shelp*, the court said:

Article 2716 of the Code of 1870 must yield to the French text of Article 2686 of the Code of 1825. The controlling fact is the derivation of the article from a civilian source, here the Code Napoleon by way of the Code of 1808. Reading Article 2716 with its antecedents in light of the historical background of the Louisiana Codes, the result we reach represents the Louisiana legislature's will.

Shelp, 333 F.2d at 439.

¹³⁵ Letter from John Ray to Joint Committee on the Revision of the Statutes and Codes (Dec. 27, 1869), *in* REVISED, ARRANGED AND AMENDED, *supra* note 131, at vii.

¹³⁶ *Id.*

¹³⁷ Moréteau & Parise, *supra* note 68, at 1116.

¹³⁸ A.N. YIANNPOULOS, CIVIL LAW SYSTEM: LOUISIANA AND COMPARATIVE LAW 76 (2d ed. 1999); Moréteau & Parise, *supra* note 68, at 1116-17.

¹³⁹ 1908 La. Acts 216.

Hart, and William N. Potts, members of the commission, presented, together with what would be known as the Project of 1908,¹⁴⁰ a report in which they noted that they had carefully analyzed the Revision of 1870 in light of the acts of the Legislature and the court decisions emanating from the local higher court.¹⁴¹ The drafters also stated that, on a few occasions, they suggested changes to the articles of the Revision of 1870.¹⁴² The Louisiana Bar Association originally favored the revision process, but after a study by an internal committee, decided not to recommend the proposals included in the Project of 1908,¹⁴³ which were ultimately never adopted by the Legislature.¹⁴⁴

The Project of 1908 built on the Civil Code of 1825 and the Revision of 1870. Similar to what occurred with the Revision of 1870, the Project of 1908 encompassed many of the acts of Louisiana that had been enacted since the last promulgation.¹⁴⁵ In addition, the work of 1908 showed efforts to include rules emanating from the decisions of the courts of Louisiana¹⁴⁶ and the U.S. Supreme Court¹⁴⁷ that occurred during the same time period.¹⁴⁸

The Louisiana Bar Association welcomed legal borrowing and the use of comparative law during the early twentieth century. The main changes contained in the Project of 1908 were found in the sources the drafters had consulted while drafting it. It was sensed that there was a lack of attention to foreign and comparative law by the members of the

¹⁴⁰ See generally THE REVISED CIVIL CODE OF THE STATE OF LOUISIANA (1910) (providing the revision).

¹⁴¹ REPORT OF THE COMMISSION TO REVISE THE CIVIL CODE OF LOUISIANA TO JARED Y. SANDERS, GOVERNOR OF LOUISIANA 1 (1910) [hereinafter REPORT OF THE COMMISSION TO REVISE]; Moréteau & Parise, *supra* note 68, at 1117.

¹⁴² REPORT OF THE COMMISSION TO REVISE, *supra* note 141, at 1; Moréteau & Parise, *supra* note 68, at 1116.

¹⁴³ See Ernest T. Florence, *Report of Special Committee Revision Civil Code*, 14 REP. LA. B. ASS'N 345, 349 (1913); James J. Morrison, *The Need for a Revision of the Louisiana Civil Code*, 11 TUL. L. REV. 213, 221 (1937).

¹⁴⁴ Hood, *supra* note 124, at 19.

¹⁴⁵ The note to Title IV, Book I reads: "[T]hat Article 95 be changed so as to make it embrace the provisions of Act No. 120 of 1900." REPORT OF THE COMMISSION TO REVISE, *supra* note 141, at 11.

¹⁴⁶ The note to Book I reads, "[S]uggest an amendment to Art. 39 . . . as decided by our Supreme Court in *Wilcox v. Nixon* 115 La., 48." *Id.* at 10-11.

¹⁴⁷ The note to Book I also reads: "Art. 56 we advise, should be amended so as to state fully the law as settled by the United States Supreme Court in *Pennoyer v. Naff*, 95 U.S. 713." *Id.* at 11.

¹⁴⁸ *Id.* at 10-11.

commission when drafting their project. The draft was ultimately rejected, and a respected member of the Louisiana Bar Association said at that time:

It is generally understood that the Civil Codes of Germany, Holland, Italy, Belgium and other European States under the regime of the Civil Law represents the highest point of development of that system of law. There is no reason why the State of Louisiana in the revision of its Code should not receive the benefit of the learning and the experience of the great European juriconsults.¹⁴⁹

G. Revision by the Louisiana State Law Institute

i. Great Debate, 1930s

Louisiana and its civil-law system kept evolving in the new century. In 1935, the Louisiana State University (hereinafter “LSU”) Law School appointed Gordon Ireland to teach law.¹⁵⁰ After two years of teaching in Louisiana, Gordon Ireland claimed that it should be admitted that Louisiana had become a common-law state.¹⁵¹ Ireland understood that France and its legal texts had been left aside, that the Revision of 1870 was nothing other than a compilation that was applied whenever a local decision was not rendered in that area, and that the legal system of Louisiana resembled that of other states of the Union that at some point had been Spanish or French colonies.¹⁵² A reaction to this statement was quick to come. In 1937, the dean of LSU, Paul M. Hébert, together with three other law professors, Harriet Daggett, Joseph Dainow, and Henry McMahon, published a note challenging Ireland’s position,¹⁵³ and concluded that Louisiana continued to be a civil-law jurisdiction.¹⁵⁴

This scholarly discussion is known as the Great Debate,¹⁵⁵ and it is

¹⁴⁹ Florence, *supra* note 143, at 347-48. *See also* Yiannopoulos, *supra* note 130, at 27.

¹⁵⁰ Kenneth M. Murchison, *The Judicial Revival of Louisiana’s Civilian Tradition: A Surprising Triumph for the American Influence*, 49 LA. L. REV. 1, 3 (1988).

¹⁵¹ Gordon Ireland, *Louisiana’s Legal System Reappraised*, 11 TUL. L. REV. 585, 596 (1937). *See also* Murchison, *supra* note 150, at 4.

¹⁵² Ireland, *supra* note 151, at 595-97.

¹⁵³ Harriet Spiller Daggett et al., *A Reappraisal Appraised: A Brief for the Civil Law of Louisiana*, 12 TUL. L. REV. 12, 12 (1937).

¹⁵⁴ *Id.* at 41.

¹⁵⁵ *See generally* Paul Brosman, *A Controversy and a Challenge*, 12 TUL. L. REV. 239 (1938) (providing a recapitulation of the main statements and positions); Marta Figueroa-Torres, *Recodification of Civil Law in Puerto Rico: A Quixotic Pursuit of the Civil Code for*

considered to be very positive both for the civil law and for legal borrowing in Louisiana. It generated a movement towards the enhancement of the civil law; the creation of the Louisiana Law Review, which aimed to develop the civil and comparative law in Louisiana; the appointment of foreign civil-law professors, mainly at the Tulane Law School and at LSU; and the creation of the Louisiana State Law Institute, which was envisioned to be a tool for law reform in the state.¹⁵⁶

In that same year, 1937, the legal community was clamoring for a revision of the text that had been adopted in 1870.¹⁵⁷ The need for reform would quickly reach the doors of the Legislature of Louisiana.

ii. Implementation of Partial Revisions, 1970s

Already by 1932, James Barclay Smith had moved forward a plan of creating a research unit for Louisiana that would be inspired by the activities of the American Law Institute.¹⁵⁸ Later, and after several meetings with the presence of, among others, Henry P. Dart, John H. Tucker, Jr., Cecil C. Bird, Charles E. Dunbar, Jr., and Horace H. White, the plan of what would become the Louisiana State Law Institute (hereinafter “LSLI”) was set forth.¹⁵⁹ The creation of the LSLI was delayed due to the Great Depression, which affected the economy during the 1930s.¹⁶⁰

On April 7, 1938, the President of LSU, James Monroe Smith, announced the activation of plans to create the research unit.¹⁶¹ This motivated the Legislature of Louisiana to decide to create the LSLI according to the act on July 2, 1938.¹⁶² The act established that the LSLI should be the “official advisory law revision commission, law reform agency and legal research agency”¹⁶³ of Louisiana. The first meeting of

the New Millennium, 23 TUL. EUR. & CIV. L.F. 143, 155-56 (2008) (discussing the impact on Puerto Rico).

¹⁵⁶ Murchison, *supra* note 150, at 4.

¹⁵⁷ See Morrison, *supra* note 143, at 221.

¹⁵⁸ Paul M. Hébert, *The Louisiana State Law Institute*, in 17 WEST’S LOUISIANA STATUTES ANNOTATED 35, 36 (1951).

See also LA. STATE LAW INST., *The Louisiana State Law Institute: From Its Creation to 2006* 1 (Mar. 2006) (on file with the author).

¹⁵⁹ Hébert, *supra* note 158, at 36.

¹⁶⁰ *Id.*

¹⁶¹ John H. Tucker, *The Louisiana State Law Institute*, 1 LA. L. REV. 139, 141 (1938).

¹⁶² 1938 La. Acts 429-33.

¹⁶³ *Id.* at 430.

the LSLI took place on January 28, 1939, at LSU. On that occasion, the first officials were appointed with John H. Tucker, Jr. as President.¹⁶⁴

The preliminary steps towards the revision of the 1870 text were started shortly after the appointment of the first officials. In 1948, facing the need to update the civil law of the state, the Legislature of Louisiana instructed the LSLI to prepare a comprehensive revision of the text of 1870.¹⁶⁵ With that same purpose in 1960, the LSLI created its civil-law section attempting to accomplish a revision of the text of 1870 and an advancement of the civil law in Louisiana.¹⁶⁶ The LSLI considered three possible action plans to revise the text of 1870: (i) focus on linguistic changes, remove obsolete provisions, and refurnish the existing dispositions; (ii) partake in an integral revision that would be initiated by a meticulous analysis of each institution followed by a study of the jurisprudence, and then, provide new texts; and (iii) undertake segmented or partial revisions of the existing text.¹⁶⁷ The LSLI chose the last option revising it on a title-by-title basis.¹⁶⁸ The partial revisions started approximately 100 years after the text of 1870 was adopted,¹⁶⁹ and the process is ongoing.¹⁷⁰ By 2003, it was estimated that 72% of the text of the Revision of 1870 had been revised. That is to say, only 28% of the current code kept the original text of 1870.¹⁷¹

Reporters occupy a key role in revisions by the LSLI. When the LSLI encounters a need for reform, a reporter is appointed to lead a particular revision. The reporter works with a group of researchers and a committee of experts who provide advice on the areas of study. Then, once the reporter completes the project, it is sent to the council for discussion and revision.¹⁷² During almost four decades, dozens of

¹⁶⁴ Hébert, *supra* note 158, at 41.

¹⁶⁵ 1948 La. Acts 810.

¹⁶⁶ A.N. Yiannopoulos, *The Civil Law Program of the Louisiana State Law Institute*, 12 LA. B.J. 89, 90 (1964).

¹⁶⁷ Saúl Litvinoff, *Codificación en Louisiana*, in 2 LA CODIFICACIÓN: RAÍCES Y PROSPECTIVAS 127, 135 (2004) (Arg.); Moréteau & Parise, *supra* note 68, at 1117. See Yiannopoulos, *supra* note 6, at LXVI (discussing the approach to the options of revision).

¹⁶⁸ Litvinoff, *supra* note 1677, at 135.

¹⁶⁹ William E. Crawford & Cordell H. Haymon, *Louisiana State Law Institute Recognizes 70-Year Milestone: Origin, History and Accomplishments*, 56 LA. B.J. 85, 91 (2008).

¹⁷⁰ See Yiannopoulos, *supra* note 6, at LXVI-LXIX; Crawford & Haymon, *supra* note 169, at 91-92; Moréteau & Parise, *supra* note 68, at 1118-19.

¹⁷¹ Palmer, *supra* note 117, at 1112.

¹⁷² Ferdinand F. Stone, *The Louisiana State Law Institute*, 4 AM. J. COMP. L. 85, 87-88

reporters and hundreds of attorneys, judges, and law professors have participated in the revision efforts of the LSLI.¹⁷³

The sources of the revisions by the LSLI are diverse and welcome legal borrowing. This should not surprise readers; the sources are different and numerous because they resulted from partial revisions undertaken by different reporters and researchers. For example, in the *exposé des motifs* of the revision of the titles on obligations,¹⁷⁴ Saúl Litvinoff, acting as reporter, indicated that they studied and consulted the texts of the civil codes of several countries including Germany,¹⁷⁵ Argentina,¹⁷⁶ Ethiopia,¹⁷⁷ France,¹⁷⁸ and Italy,¹⁷⁹ and local¹⁸⁰ and foreign jurisprudence, including that of Argentina.¹⁸¹ A clear example of legal borrowings is found in the passage of the *exposé des motifs*, which reads:

The traditional definition of the term, “contract” has been retained. Article 1906 defines contract as “an agreement by two or more parties whereby obligations are created, modified, or extinguished.” Traditional French doctrine drew a distinction between *contrat* and *convention*, the former being a species of the latter. A *contrat* was made for the creation of an obligation, whereas a *convention* might be made to create, modify, or extinguish an obligation. That distinction has been abandoned in modern law. See Article 1675 of the Ethiopian Civil Code of 1960 and Article 1321 of the Italian Civil Code of 1942. Definitions similar to the one adopted in the revised [Louisiana] articles have been adopted in Article 50 of the Polish Code of Obligations of 1934 and in Article 1 of the Franco-Italian Projet of 1927.¹⁸²

Another example of active legal borrowing is provided by the *exposé des motifs* of the reform on property law. There, Athanassios N. Yiannopoulos, acting as reporter, made reference to, among others, the

(1955).

¹⁷³ Crawford & Haymon, *supra* note 169, at 91.

¹⁷⁴ LA. STATE LAW INST., *Exposé de motifs*, in REVISION OF BOOK III, TITLES III AND IV OF THE LOUISIANA CIVIL CODE 1, 1-86 (1983).

¹⁷⁵ *Id.* at 57.

¹⁷⁶ *Id.* at 11.

¹⁷⁷ *Id.* at 37.

¹⁷⁸ *Id.* at 7.

¹⁷⁹ *Id.* at 18.

¹⁸⁰ LA. STATE LAW INST., *supra* note 174, at 21.

¹⁸¹ *Id.* at 41.

¹⁸² *Id.* at 37.

influence that the civil codes of Germany, France, and Greece had on his draft.¹⁸³

The revisions by the LSLI are great examples of active legal borrowing in Louisiana. The foreign reporters looked to the law that was familiar to them, both that of Louisiana and countries abroad, including their home jurisdictions, which is why French, Spanish, and Greek sources are cited by the two above-mentioned reporters. Language proved again to be a tool for legal borrowing. This had already occurred in Louisiana with the Digest of 1808, which provides an early example of language occupying an important role in legal borrowing. The Digest of 1808 was originally drafted in French and then translated into English.¹⁸⁴ It is known that the text was drafted in French, not only due to an act of the Legislature of the Territory of Orleans,¹⁸⁵ but also due to a statement of one of the drafters¹⁸⁶ and a letter by Clairborne.¹⁸⁷ The accessibility of French texts expedited the active borrowing in Louisiana because legal ideas could easily be incorporated into the local legislation.

It should not be ignored that the revision by the LSLI was also built strongly upon the local jurisprudence, local acts, and local scholarly writings. At the same time, it must be noted that active legal borrowing returned to the main stage in Louisiana.

¹⁸³ CIVIL LAW PROPERTY: REVISION OF BOOK II OF THE LOUISIANA CIVIL CODE WITH THE DRAFTER'S COMMENTS 3 (1980).

¹⁸⁴ E.B. Dubuisson, *The Codes of Louisiana (Originals Written in French; Errors of Translation)*, 25 REP. LA. B. ASS'N 143, 143-57 (1924); Olivier Moréteau & Didier Lamèthe, *L'interprétation des textes juridiques rédigés dans plus d'une langue*, 58 REVUE INTERNATIONALE DE DROIT COMPARÉ [R.I.D.C.] 327, 340-41 (2006)(Fr.); John M. Shuey, *Civil Codes-Control of the French Text of the Code of 1825*, 3 LA. L. REV. 452, 452 (1941).

¹⁸⁵ An Act of April 14, 1807, ordered "[t]hat a sum of seven hundred and fifty dollars, to be paid out of the treasury of the territory, be allowed to each of the two translators appointed to translate the said civil code." 1807 La. Acts 192.

¹⁸⁶ Before the Louisiana Supreme Court, Moreau-Lislet said: "We have nothing to do with the imperfections of the translation of the *Code*—the French text, in which it is known that work was drawn up, leaves no doubt." *Dufour v. Camfrancq*, 11 Mart. (o.s.) 675, 701 (La. 1822).

¹⁸⁷ Finally, Claiborne said in a letter of October 7, 1808, addressed to the Secretary of State of the U.S. that "you will find the English [t]ext extremely incorrect; - This is attributable to the circumstance of the Work having been written in French." Letter from G. C. C. Claiborne to the Secretary of State (Oct. 7, 1808), in 9 THE TERRITORIAL PAPERS, *supra* note 15, at 802.

iii. The Uniform Commercial Code in Louisiana

Active legal borrowing also found sources in common-law jurisdictions. Louisiana had never enacted a commercial code¹⁸⁸ even though the remaining states of the Union had largely adopted provisions of the Uniform Commercial Code (UCC).¹⁸⁹ Therefore, Louisiana was surrounded by the text of the UCC,¹⁹⁰ and the pressure for its adoption from the commonlaw trained lawyers was somehow felt. That pressure resulted in the gradual adoption of the Uniform Commercial Code in Louisiana, with the exception of articles 2 (sales) and 6 (bulk sales).¹⁹¹

Even though Articles 2 and 6 of the UCC are not applied directly in Louisiana, some of their dispositions have entered into the legal framework of the state. For example, the revision of Title VII, Book III on Sale includes a new Chapter 13, which incorporates some of the ideas that exist in the UCC, such as the battle of the forms, and the buyer's rights of inspection and of rejection of nonconforming goods.¹⁹² Commentaries on the revision by the LSLI indicate that those provisions are new and are in accordance with the provisions and spirit of the Revision of 1870; therefore, the civil-law background of Louisiana prevails when the articles on sale are analyzed or applied.¹⁹³

Active legal borrowing from common-law jurisdictions may generate a mixed or hybrid legal system in Louisiana. Scholars look at Louisiana as a traditional mixed jurisdiction where the predominant legal system is no longer pure, and the influence of the common law is sensed.¹⁹⁴ Examples of mixture are found around the world in other jurisdictions, such as South Africa, Scotland, Israel, Quebec, the

¹⁸⁸ See generally RICHARD HOLCOMBE KILBOURNE, JR., *LOUISIANA COMMERCIAL LAW: THE ANTEBELLUM PERIOD* (1980).

¹⁸⁹ See *Uniform Commercial Code Locator*, LEGAL INFO. INST., <http://www.law.cornell.edu/uniform/ucc.html> (last visited Nov. 25, 2010). The text of the Uniform Commercial Code can be accessed online. *Uniform Commercial Code*, LEGAL INFO. INST., <http://www.law.cornell.edu/ucc/ucc.table.html> (last visited Nov. 25, 2010) (providing the standard provisions of the Uniform Commercial Code).

¹⁹⁰ Litvinoff, *supra* note 1677, at 137.

¹⁹¹ The adoption of the text of the UCC has been gradual in Louisiana during the past 30 years. Currently, Title X on commercial law may be referred to as the "Uniform Commercial Code." LA. REV. STAT. ANN. § 10:1-101 (Supp. 2009).

¹⁹² David Gruning, *Bayou State Bijuralism: Common Law and Civil Law in Louisiana*, 81 U. DET. MERCY L. REV. 437, 458 (2004).

¹⁹³ *Id.* at 458-59.

¹⁹⁴ See, e.g., *LOUISIANA: MICROCOSM OF A MIXED JURISDICTION* 4 (Vernon V. Palmer ed., 1999).

Philippines, and Puerto Rico.¹⁹⁵

III. LOUISIANA AS A SOURCE FOR FOREIGN LEGAL PROVISIONS

It is clear that Louisiana was an active borrower of legal provisions. Interestingly, Louisiana has been also used by other jurisdictions when drafting texts for their civil codes. The influence of Louisiana has not been limited to civil-law jurisdictions, however. During a 200 year period, it spread to different systems of law and to different regions of the globe.¹⁹⁶

The text of the civil code of Louisiana has been subject to passive legal borrowing and has been influential in other states of the Union. David Dudley Field drafted a civil code project, and four other projects, during the period between 1847 and 1865 for the State of New York.¹⁹⁷ His civil code project was presented, together with Alex W. Bradford, before the Legislature of New York on February 13, 1865.¹⁹⁸ Field's draft had 2034 sections¹⁹⁹ with notes that indicated references to, among others, related jurisprudence,²⁰⁰ revised statutes,²⁰¹ and the *Code Napoléon*.²⁰² The Louisiana Civil Code of 1825 was an important source for the text of New York,²⁰³ and examples of references to Louisiana are found in the text. One of those examples highlights the civil-law rule as superior to the one provided by the common law, by stating:

¹⁹⁵ See Vernon V. Palmer, *Introduction to the Mixed Jurisdictions*, in MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY 3, 3-6 (Vernon V. Palmer ed., 2001). Information is also provided by the World Society of Mixed Jurisdiction Jurists. WORLD SOCIETY OF MIXED JURISDICTION JURISTS, <http://www.mixedjurisdiction.org/> (last visited Nov. 24, 2010).

¹⁹⁶ Yiannopoulos, *supra* note 6, at LXIV-LXV.

¹⁹⁷ Shael Herman, *The Fate and the Future of Codification in America*, 40 AM. J. LEGAL HIST. 407, 422 (1996).

¹⁹⁸ THE CIVIL CODE OF THE STATE OF NEW YORK 9 (1865).

¹⁹⁹ *Id.* at 647. Sections are similar to what, in a civil law jurisdiction, would be called articles.

²⁰⁰ Article 443 of the project reads: "Halsey v. Mc. Cormick, 18 N.Y., 147." *Id.* at 135.

²⁰¹ Article 523 of the project reads: "R.S., 758, § 12." *Id.* at 156.

²⁰² Article 444 of the project reads: "This and the four sections following are similar to those of the *Code Napoleon*, Art. 559-563." *Id.* at 135.

²⁰³ Rodolfo Batiza, *Sources of the Field Civil Code: The Civil Law Influences on a Common Law Code*, 60 TUL. L. REV. 799, 806-10 (1986). For example, the note to Chapter 2, Title 3, Part 4, Division 2 of the project reads: "The provisions of this chapter, except § 455, are similar to those of the Code Napoleon and the Code of Louisiana." THE CIVIL CODE OF THE STATE OF NEW YORK, *supra* note 198, at 136.

The provisions of this section [*i.e.*, 721, on extinction of pecuniary obligations] have long been the law, in substance, of Louisiana and France. It seems to the commissioners to be all that creditors can reasonably ask. The common law compels a debtor to keep money which he owes, at this own risk. This is often an inconvenience, and sometimes a positive loss to him.²⁰⁴

Field's project was never the law of New York because it was constantly vetoed by the governor.²⁰⁵ However, the eight drafts and eighteen partial corrections of the project were very influential across the Union,²⁰⁶ and some of the provisions regarding the law of contracts were adopted by California, North Dakota, South Dakota, Georgia, Idaho, and Montana.²⁰⁷

Provisions of the civil law of Louisiana were also subject to passive legal borrowing in other parts of the Americas. The Civil Code of 1825 had a significant "presence in the worldwide nineteenth century codification movements,"²⁰⁸ extending to French-²⁰⁹ and Spanish-speaking²¹⁰ jurisdictions. Louisiana's text occupied a paramount position in those codification projects through the inclusion of references to it in two works of concordances; the French work by Fortuné Anthoine de Saint-Joseph: *Concordance entre les Codes civils étrangers et le Code Napoléon* of 1840,²¹¹ and the Spanish scholarly publication by Florencio García Goyena: *Concordancias, Motivos y Comentarios del Código Civil Español* of 1852.²¹² Both works of concordances were among the most efficient ways to provide drafters with complete and

²⁰⁴ *Id.* at 214.

²⁰⁵ HENRY M. FIELD, *THE LIFE OF DAVID DUDLEY FIELD* 88 (1898).

²⁰⁶ EXTRACTS FROM NOTICES OF DAVID DUDLEY FIELD 39 (1894).

²⁰⁷ Herman, *supra* note 197, at 425.

²⁰⁸ Parise, *supra* note 80, at 824.

²⁰⁹ See generally John P. Richert & E. Suzanne Richert, *The Impact of the Civil Code of Louisiana upon the Civil Code of Quebec of 1866*, 8 *REVUE JURIDIQUE THÉMIS* 501 (1973) (Que.) (providing an example of the influence of the Louisiana Civil Code in the drafting of the Civil Code of Quebec of 1866).

²¹⁰ See generally Rolf Knutel, *Influences of the Louisiana Civil Code in Latin America*, 70 *TUL. L. REV.* 1445 (1996) (providing an analysis of the Louisiana Civil Code's influence on Latin American countries); Parise, *supra* note 80 (describing the Louisiana Civil Code's impact on the Spanish Civil Code).

²¹¹ See generally FORTUNÉ ANTHOINE DE SAINT-JOSEPH, *CONCORDANCE ENTRE LES CODES CIVILS ÉTRANGERS ET LE CODE NAPOLEON* (1840) (Fr.) (referencing the Civil Code of 1825 throughout the concordance).

²¹² See generally 4 FLORENCIO GARCÍA GOYENA, *CONCORDANCIAS, MOTIVOS Y COMENTARIOS DEL CÓDIGO CIVIL ESPAÑOL* (Sociedad Tipográfico-Editorial, eds., 2d ed. 1852) (Spain) (referencing the Louisiana Civil Code).

contemporaneous surveys of pertinent codification developments.²¹³ In its first edition, the French work of concordances provided a chart that included and helped to compare the texts of the *Code Napoléon* with other contemporary civil codes (*v.gr.* Civil Code of 1825). That same edition included diverse extracts from other contemporary civil codes (*v.gr.* Civil Code of Haiti) and a second chart with the relevant articles on mortgages of other codes (*v.gr.* Civil Code of Wurttemberg).²¹⁴ The Spanish work of concordances was built around a project to develop a Civil Code for Spain in 1851.²¹⁵ The leading drafter made comments that explained the history, provided a comparative study, and gave the motives for each article of the project of the civil code.²¹⁶ This work mentions approximately one-third of the articles of the Civil Code of 1825 in its comments.²¹⁷ For example, the comment to Article 702 of the Spanish text reads: “[This article] is article 1628 of the Code of Louisiana, which seems very much in accordance to reason and law.”²¹⁸

These works of concordances helped spread the text of Louisiana to Spain and Latin America.²¹⁹ In the latter region, drafters had access to the Louisiana text, and to different extents, incorporated provisions from it in the civil codes of Argentina, Chile, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay, and Venezuela and in a project for Brazil by Teixeira de Freitas.²²⁰ The Civil Code of 1825 was also subject to passive legal borrowing in the Caribbean Island of Saint Lucia. The Civil Code of Saint Lucia of 1879 took many provisions from both the Civil Code of Quebec of 1866 and the Civil Code of 1825.²²¹ In Puerto Rico, the borrowing was not only achieved due to the nineteenth-

²¹³ Parise, *supra* note 80, at 825.

²¹⁴ *Id.* at 825 n.5.

²¹⁵ *Id.* at 824-25.

²¹⁶ 4 GARCÍA GOYENA, *supra* note 212, at 5; Parise, *supra* note 80, at 840.

²¹⁷ Parise, *supra* note 80, at 847.

²¹⁸ *Id.* at 845 (author’s translation). See 4 GARCÍA GOYENA, *supra* note 212, at 141. Shael Herman provides a complete translation of Article 702 in his 1982 study. See Shael Herman, *Louisiana’s Contribution to the 1852 Projet of the Spanish Civil Code*, 42 LA. L. REV. 1509, 1523 (1982).

²¹⁹ Parise, *supra* note 80, at 851. See generally Regina Gaya Sicilia, *La influencia del código civil de Luisiana en la codificación civil española* (Nov. 2008) (Spain) (unpublished manuscript) (on file with the author).

²²⁰ Many of those countries replicated the texts of the Civil Code of Chile. Parise, *supra* note 80, at 848-51.

²²¹ N.J.O. LIVERPOOL, *Preface* to THE HISTORY AND DEVELOPMENT OF THE ST. LUCIA CIVIL CODE 2, 2 (1977); Moréteau & Parise, *supra* note 68, at 1124.

century works of concordances, but also because Puerto Rico was incorporated into the jurisdiction of the U.S. in 1898. This incorporation led to a later revision of its statutes in 1902, and the Civil Code of Puerto Rico was included in the revised statutes. At that stage, Louisiana's provisions were also borrowed and incorporated in the civil code of the island.²²²

The passive legal borrowing of Louisiana provisions was not limited to the Americas. The text of the Civil Code of Louisiana reached Europe again when Estonia started to reform its civil law in the early 1990s.²²³ Estonia began to work on a replacement for the 1965 Civil Code of Soviet Estonia through partial reforms.²²⁴ The first reform came with the Property Law Act of 1993.²²⁵ The drafters of the Act looked to the German BGB, the Swiss Civil Code, and provisions from Quebec and Louisiana.²²⁶ Athanassios N. Yiannopoulos visited Estonia in 1993 and worked with the members of the Estonian drafting committee;²²⁷ he occupied an important role in the drafting of the Property Law Act contributing to the elaboration of several provisions.²²⁸

The Civil Code of Louisiana also reached Asia where at least two examples of legal borrowing of Louisiana provisions can be found. The Philippines adopted the Civil Code of Spain of 1889, which had been influenced by the second work of concordances, and therefore, by Louisiana.²²⁹ Also, China reinitiated its approach to civil-law codification in the late 1990s.²³⁰ Several drafts of civil codes were elaborated by China, and in one of those drafts, the *Green Civil Code Project*, it followed several provisions of Book II of the Civil Code of Louisiana.²³¹

²²² Moréteau & Parise, *supra* note 68, at 1142.

²²³ Martin Kaërdi, *Estonia and the New Civil Law*, in REGIONAL PRIVATE LAWS AND CODIFICATION IN EUROPE 250, 251 (Hector L. Mac Queen et al. eds., 2003).

²²⁴ *Id.*

²²⁵ *Id.* at 253.

²²⁶ *Id.*

²²⁷ Paul Varul & Heiki Pisuke, *Louisiana's Contribution to the Estonian Civil Code*, 73 TUL. L. REV. 1027, 1029 (1999).

²²⁸ *Id.*

²²⁹ Parise, *supra* note 80, at 851.

²³⁰ Guodong Xu, *Structures of Three Major Civil Code Projects in Today's China*, 19 TUL. EUR. & CIV. L.F. 37, 38 (2004).

²³¹ *Id.* at 53. The *Green Civil Code Project* cites the following articles from the Louisiana Civil Code: 488, 489, 499, 501, 513, 515, 520, 523, 528, 624, 625, 656, 666, 674, 675, 676, 681, 683, 684, 688, 689, 690, 691, 694, 696, and 749. *Id.*

IV. CLOSING REMARKS

Codification of the civil law since the nineteenth century provides a unique scenario for active and passive legal borrowing. The drafters of civil codes around the world tend to look at other models that serve their drafting purposes and language skills assist drafters in their borrowing activities. In the early stage, the French language, mainly through the *Code Napoléon*, led the way for legal borrowings.²³² Gradually, sources in other languages started to proliferate, and nations borrowed mainly from English and Spanish sources. In that same early stage, legal borrowing was limited due to the scarcity of complete comparative-law libraries. The appearance of works of concordances helped in solving the problem of scarcity of complete libraries, and the borrowing of legal ideas soon met no geographical boundaries. Currently, comparative-law collections have grown in libraries around the world, and at the same time, the Internet and other communication-friendly devices have eliminated even more boundaries.²³³

The flow of active legal borrowing demonstrates an interesting oscillation in Louisiana. In the first-half of the nineteenth century, legal borrowing was massive,²³⁴ and therefore, very intense. The drafters in Louisiana had few *Creole* statutes, and when establishing the groundwork for their civil-law system, did not hesitate to look at existing models and previous legislation. Later, in the second-half of the nineteenth century and the early part of the twentieth century, legal borrowing slowed down in Louisiana. Drafters looked more into the acts of their own legislature and their court decisions. An example of a more introspective attitude is reflected by the removal of the articles related to slavery, making the civil code stay in accordance with the state Constitution. The Project of 1908 reflected that active legal borrowing had slowed even more in Louisiana. The rejection of that project showed that the members of the Louisiana Bar Association felt a

²³² The borrowing was not limited to French texts. See generally Rolf Knütel, *Influenza dell'allgemeines landrecht prussiano del 1794 sul código civil argentino del 1869*, in DALMACIO VÉLEZ SARSFIELD E IL DIRITTO LATINOAMERICANO 79 (Sandro Schipani ed., 1991) (It.) (Argentina's civil code drafter looked at the Civil Code of Prussia of 1794); PEDRO LEÓN, *EL CÓDIGO DE PRUSIA COMO FUENTE DEL CÓDIGO CIVIL ARGENTINO* (1946) (discussing the Civil Code of Prussia's impact on Argentina); NÉSTOR A. PIZARRO, *EL CÓDIGO DE PRUSIA Y SAVIGNY: SU INFLUENCIA EN LA DOCTRINA Y LA LEGISLACIÓN* (1944) (emphasizing Prussia's influence).

²³³ Parise, *Las bibliotecas jurídicas*, *supra* note 1, at 198-99.

²³⁴ WATSON, *supra* note 2, at 104.

need to return to active borrowing, expecting that better solutions or ideas could be adopted for Louisiana. Mainly throughout the twentieth century, but also in the twenty-first, the Louisiana State Law Institute faced a new challenge when drafting. Reporters, some of them educated in foreign jurisdictions, welcomed the legal borrowing of ideas. At the same time, local legislation and court decisions provided a significant amount of materials from which the reporters could also borrow rules. In this last stage, legal borrowing was reactivated, but with a mature look into the local sources. Throughout its history, Louisiana drafters have been keen to look towards active legal borrowing when drafting or revising the texts of civil codes. Further studies will be needed in order to determine if the intention of the drafters to borrow legal provisions was effectively reflected in the legislation they proposed for Louisiana.

Louisiana drafters were not the only ones who undertook legal borrowing. Throughout the world, especially in Latin America, drafters of civil codes also looked at other models when drafting for their countries. Other countries looked at the Louisiana model; the text of Louisiana spread around the globe and was subject to passive legal borrowing.

Passive legal borrowing might not be over yet for Louisiana. Currently, the European Union is exploring the adoption of a civil code. Louisiana, considered by many to be a mixed jurisdiction, combines aspects of common- and civil-law. In addition, the *lingua franca* now is English, displacing the French language. Contrary to what had been said in the early twentieth century²³⁵ and inverting the roles, it can now be said that there is no reason why the European Union in the revision of the civil codes of its member states (or in the drafting of a uniform civil code) should not receive the benefit of the learning and the experience of the great Louisiana jurisconsults.

Legal borrowing should not be a blind activity. Drafters, when (and if) they borrow, should take into consideration their local legal culture, which is shaped by, among others, existing positive law, customs, and the decision of their courts. Borrowing, of course, should be a complement to the local needs of a determinate society.

²³⁵ See *supra* note 143 and accompanying text.