



The Louisiana Code of Practice (1825): A Civilian Essai Among Anglo-American Sources

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I. INTRODUCTION: SEVERAL CODES IN A SINGLE LEGISLATIVE PROJECT

During the early years after the Louisiana Purchase (1803), Louisiana may have seemed an unruly ingrate, at least to Thomas Jefferson, who had negotiated Louisiana's redemption from Napoleon Bonaparte. Though a professed Francophile, Jefferson feared that the Louisianians' upbringing in the papist and monarchist cultures of France and Spain had equipped them poorly for self-government.¹ To teach the local inhabitants civic virtue by example, Jefferson tried unsuccessfully to appoint a majority of Americans to the first territorial legislature in 1804.² He also devised several strategies for replacing the civil law of Louisiana with the common law. In 1806, the first legislature of the territory of Orleans, reacting to Jefferson's highhanded tactics, resolved to give the civil law a durable foundation that could withstand mounting pressures from the common law. To counteract the effect of this legislative resolution, Jefferson's handpicked governor, W.C.C. Claiborne, presumably instructed by Jefferson, vetoed the legislative act. Both Jefferson and the Louisiana lawyers remained unyielding in their positions. As Jefferson moved to handpick new territorial judges entirely trained in the common law, the Louisiana lawyers sought to insulate their law from Jefferson's influence by codifying their civilian heritage. In 1808, their early efforts yielded Louisiana's first civil code (popularly known as the Digest of 1808).

Recognizing serious gaps in the Digest's coverage,³ the legislature in 1825 appointed three commissioners to consolidate previous legislative achievements. Composed of Edward Livingston, Louis Moreau-Lislet, and Pierre Derbigny, the trio of commissioners made for a study in comparative legal cultures. Each was an accomplished jurist, and Livingston, in particular, had enjoyed a celebrated career as both a public official and a private practitioner.⁴

The commissioners' aim was to reinforce and broaden the civilian foundation provided by the Digest of 1808. Their ambitious legislative project, like its earlier French counterpart of 1804, included a civil code, a commercial code, a penal code, and codes of civil and criminal procedure. Though a number of discrete topics commanded the drafters' attention, they seem to have brought to their legislative project a singular vision. For example, when the drafters addressed codification of substantive private law, they had in view a code of civil procedure as well:

[W]e have thought it our first duty to comprise in the several Codes we were directed to prepare all the rules we deem necessary for stating and defining the rights of individuals in their personal relations to each other . . . preserving and transferring property and rights, [i.e., a civil code] and *for seeking civil redress for any injury offered to either*. These rules . . . will form the Civil and Commercial codes, and *the System of Judicial Procedure* which we are directed to furnish for your consideration.⁵

¹ Warren M. Billings, *From This Seed: The Constitution of 1812*, in *IN SEARCH OF FUNDAMENTAL LAW, LOUISIANA'S CONSTITUTIONS 1812-1874*, at 6-7 (Warren M. Billings & Edward F. Haas eds., 1993).

² VERNON V. PALMER, *THE LOUISIANA CIVILIAN EXPERIENCE: CRITIQUES OF CODIFICATION IN A MIXED JURISDICTION* 8 (2005) (reviewed by the author in *Under My Wings Everything Prospers*, 80 TUL. L REV. 1491 (2006) [hereinafter *Under My Wings*]).

³ "But it (the Digest) was necessarily imperfect: not purporting to be a legislation on the whole body of the Law; a reference that which existed before became inevitable, in all those cases (and they were many) which it did not embrace." EDWARD LIVINGSTON ET AL., *PRELIMINARY REPORT OF THE CODE COMMISSIONERS* (Feb. 13, 1823), reprinted in 1 LOUISIANA LEGAL ARCHIVES lxxxvii-viii (1937).

⁴ For background on Livingston's career, see *Under my Wings*, *supra* note 2, at 1510-15.

⁵ LIVINGSTON ET AL., *supra* note 3, at lxxxix (emphasis added).

Richard Kilbourne has ably explored both the content and the significance of the proposed commercial code.⁶ Like the French commercial code, the Louisiana counterpart would have reinforced the civil code regulation of contractual matters, but unfortunately the Louisiana commercial draft was not adopted. Nor was the penal code. The failure of this last code prompted the drafters to improvise: they incorporated regulation of the writ of habeas corpus into their Code of Practice although its scope was otherwise limited to civil litigation.

Since the virtually concurrent adoption in 1825 of the Civil Code and the Code of Practice, the former has boasted marquee billing, and the latter has received the credit of a supporting player. The legal community's disproportionate esteem for the codes is understandable: as the most distinctive feature of an emerging legal system, the Civil Code highlighted the uniqueness of the state's private law. Furthermore, in the Romanist tradition, substantive law took precedence over procedure. On the primacy of substantive law, French jurists followed the Roman tradition. Like the Code Napoleon, the Louisiana Civil Code signaled a civilian preference for substantive law over adjective law. Despite these reasons for the civil code's prominence on the legislative marquee, however, the Code of Practice seems to have figured more importantly in the drafters' project than the historical record suggests. In 1824, the Louisiana legislature declared that the Code of Practice took precedence over the Civil Code: "In case the . . . Code of Practice should contain any provisions contrary or repugnant to those of the Civil Code, the latter shall be considered as virtually repealed or thereby amended in that respect."⁷

On first impression, a civilian might consider this priority rule contrary to his tradition, and it is difficult to speak confidently of the commissioners' purpose for the rule without a close comparison of the two codes. Given the fact that the Code of Practice was to provide a bridge to American law by embracing a considerable number of constitutional norms (e.g., habeas corpus, trial by jury; prerogative writs; adversarial proceedings), the priority rule may have reflected the lawmakers' goal of assuring the supremacy of those norms over state law in case of conflict between them.

In view of the drafters' stress upon the kinship of the Civil Code and the Code of Practice, the latter deserves close attention, for it displayed traits of the emerging mixed system. Institutions characteristic of common law and civil law appeared side by side in the provisions of the Code of Practice. Its provisions were interlaced with comments that reflected the drafters' thinking about textual sources and influences upon the Code of Practice. In it may be found notable accommodations between national laws and the state's civilian norms, revealing a pragmatic tendency among the Louisiana lawmakers.

More than seventy-five years ago, Colonel John Tucker sought to encourage scholarly interest in the Code of Practice:

A critical, analytical study of our code of practice with respect to its sources should be made. The fusion of common law and civil law rules of procedure should be of great interest to the student of comparative law and to the legal historian; and a study of their origin is of practical as well as academic interest. Of all Louisiana legal institutions, the Code of Practice is probably the most individual, wrought as it is from these different systems. . . . [O]ur pleading has been thus epitomized by the supreme court: . . . One of the most valuable features of our system of jurisprudence is the simplicity with which parties are permitted to bring their rights before the tribunals of justice.⁸

⁶ R.H. KILBOURNE, JR., *LOUISIANA COMMERCIAL LAWS: THE ANTEBELLUM PERIOD* (1980) (reviewed by the author, 56 TUL. L. REV. 804 (1982)).

⁷ John Tucker, *Source Books of Louisiana Law*, 6 TUL. L. REV. 280 (1932), reprinted in LOUISIANA ARCHIVES, at xliv (1937) (citing La. Acts 1824 (Apr. 12, 1824) § 10, at 172).

⁸ *Id.* at xli.

The Civil War brought dramatic social and economic changes to Louisiana. Both the Civil Code and the Code of Practice were extensively revised to eliminate regulation of slavery. During the twentieth century, a proliferation of specialized acts hastened the need for a thorough renovation of the state's procedural laws; and in 1960 the legislature passed a new Code of Civil Procedure.⁹ Now almost a half-century old, this Code brought Louisiana's procedural norms in line with prevailing norms of federal procedure and the Constitution.

Despite the passage of time, however, the terminology of the original Code of Practice (1825) remains familiar to us. In their original conception, many rules of the Code of Practice have scarcely changed since their promulgation, though their ancient origins may now be forgotten. Following Colonel Tucker's suggestion, we have undertaken a study of the code. We believe that his high esteem for the legislation has been vindicated. In the Code of Practice we have found otherwise neglected aspects of the drafters' blueprint for the mixed jurisdiction. In it may be found intellectual moorings for the mixed jurisdiction in a burgeoning republic animated by common law ideals. Interpreting the codes in *pari materiae* reveals the drafters' project for harmonizing Louisiana law with the legal norms of the republic. This harmonization reinforced the position of civil law in Louisiana and adapted to American ideals of fair play a judicial procedure that Louisiana lawyers could master and their counterparts in other states would respect.

II. LOUISIANA CIVIL LAW CONFRONTS A NATIONAL COMMON LAW

Continental Europeans in origin and temperament, the early Louisiana settlers seem to have considered themselves accidental Americans. Many likely wished for Louisiana's return to French control.¹⁰ Their wish might have been fulfilled in 1802 if L'Ouverture's revolt in St Dominique had not led Napoleon to renege on his commitment to Spain not to transfer Louisiana to another nation.¹¹ To the Louisiana settlers, the Louisiana Purchase constituted a dramatic move by actors on a world stage remote from their daily concerns.¹² The local citizens had not voted for the Louisiana Purchase, and most of them would not have welcomed the political and legal changes the transaction entailed. Whether the lawyers considered their civilian heritage French or Spanish, they probably considered the common law tradition an alien afterthought imported into the state by "Johnny come latelys." Although French and Spanish branches of the civilian tradition might have intrafamilial differences, their common ancestry in Roman experience made them broadly compatible "subtraditions." Partisans of both the French and Spanish traditions could be expected to close ranks in the face of the "other," or the stranger, that is, the common law.¹³

Both Louisiana's uniqueness within the Union and a national drive to uniformity would influence the state's legal evolution. Viewed from afar by Jefferson and his ministers, Louisiana's civilian heritage had a local character because it was unique to a single state; however, this civilian heritage, expressed in French and Spanish, paradoxically gave the state's law a nearly universal

⁹ For background on this procedural code, see Louisiana Civil Law Treatise § 1.1, Westlaw database, 1 LACIVL § 1.1 (last visited Apr. 20, 2008).

¹⁰ On the locals' hope for return to French control, see *Under My Wings*, *supra* note 2, at 1525-26.

¹¹ Among the far flung regions to which French troops were posted was the Caribbean island of St Dominique, where in April 1802 a local slave uprising led by Toussaint l'Ouverture combined with yellow fever to cripple Napoleon's military forces. By sapping the French treasury, the military debacle in St Dominique would indirectly foil Napoleon's plan to check the westward expansion of the United States. *Id.* at 1525-27.

¹² On Napoleon's extensive military and diplomatic activities, see generally ROBERT ASPREY, *THE RISE AND FALL OF NAPOLEON BONAPARTE* (2000).

¹³ On the struggle between partisans of French and Spanish law, and the affinities among them generated by the challenge of American law, see *Under My Wings*, *supra* note 2, at 1519-24, 1555. On the clash of cultures in the young state, see GEORGE DARGO, *JEFFERSON'S LOUISIANA: POLITICS AND THE CLASH OF LEGAL TRADITIONS* (1975).

character. Upon this civilian foundation would be engrafted American constitutional and procedural norms that were largely shaped by English law.

Flowing from a central government, these norms, on one hand, would require considerable conformity among all the states, including Louisiana. On the other hand, the United States Constitution would safeguard many unique features of Louisiana law.¹⁴ Because the federal structure tolerated considerable idiosyncrasy among the various states' substantive private laws, Louisiana lawmakers could elaborate the state's substantive law without deviating significantly from a conception of civil law derived from French and Spanish sources. But trial practice and civil procedure differed from substantive law in American legal minds that were attuned to practices of an English tradition.

To minimize procedural idiosyncrasies among the states, irrespective of their legal heritages, an overarching constitutional norm of due process would impose upon all states of the Union a rigorous procedural regime. Even before Louisiana's procedural regulation had been set out in the Code of Practice, it had departed notably from French and Spanish norms in order to conform with features of American adversarial process such as trial by jury, as well as specialized writs that had originated in English law and were rapidly becoming entrenched in American procedure.

Drafted properly, the Code of Practice would give Louisiana judicial norms a face recognizable among the other states and the central government. Once Louisiana acquired statehood in 1812, Louisiana lawyers would continue to formulate issues of property, contracts, and successions in terms of venerable civil law rubrics. But to conform with the Code of Practice, the lawyers would have to press their clients' substantive claims in a procedural framework that could withstand constitutional challenge. An exploration of the Code of Practice should help clarify the ways in which this mixed jurisdiction preserved its civilian heritage while it adjusted to the requirements of statehood in a federal union whose laws bore an English imprint.

III. THE DRAFTERS' CHALLENGES AFTER THE LOUISIANA PURCHASE

In 1933, Colonel Tucker described the lively political climate in which the Louisiana legislators undertook their codification work. He detailed the reasons why a procedural Act of 1805, prepared by Livingston, proved short-lived:

[In 1804], Congress passed an act erecting Louisiana into two territories and providing the temporary government thereof. This act provided for the exercise of the judicial power by a superior court, and inferior courts to be created by the legislative council. *The necessity for rules of practice adapted to this change in governmental structure* was rendered acute by the sharp increase in the "American" element of the bar, untrained in the civil law of Louisiana, and the efforts of its members to establish the common law. To supply this need, the newly created legislature, on April 10, 1805, adopted an act regulating the practice of the superior court in civil cases. This primitive simplicity was not destined to long survive the complicated practice of the rapidly expanding commerce of New Orleans. In actual practice it became inadequate as the interests of Louisiana became diversified. Confusion arose from the use of common law terms in the acts regulating procedure adding fuel to the flames of the conflict between that system and the civil law. *The chaos in the substantive law of the state, intensified by revival of the Spanish law by the supreme court in Cottin v. Cottin, was naturally reflected in its adjective law. When . . . Louisiana took up the task of revising the civil code, it was only natural that revision and codification of the rules of practice should have received serious*

¹⁴ For details of these safeguarded features, see Shael Herman, *E Pluribus Unum: The Paradox that Safeguards Louisiana's Mixed Legal System*, 78 TUL. L. REV. 457 (2003).

*consideration particularly since France had codified its rules of civil procedure by the adoption of the Code de Procedure Civile.*¹⁵

IV. A FRESH START: REPEAL, SIMPLIFICATION, AND SELF-DOUBT

Like the Civil Code of 1825, the companion Code of Practice invited Louisiana lawyers to reflect upon both their intellectual kinship with their European counterparts and their differences from lawyers elsewhere in the fledgling American union. Describing their vision for the new legislation, the drafters identified their goal as a fresh start for Louisiana law. They hoped that their work would guide courts and lawyers through a confusing thicket of pre-Revolutionary French laws, Spanish laws, and rules of Roman origin that had survived unaltered for generations. To achieve this fresh start, the Civil Code of 1825 repealed all earlier regulation of subjects governed by the new code. In 1828, a great repealing statute reinforced the repeal of 1825 by expressly abrogating “all the civil laws which were in force before the promulgation of the civil code” (of 1825).¹⁶ Contemporary French experience supplied a valuable precedent for these Louisiana repealing statutes. In a repealing statute of Ventose thirty, Year XII (i.e., 1804) the French lawmakers responsible for the Code Napoleon declared: “[F]rom the time the French Civil Code goes into operation, the Roman laws, the ordinances, the general or local customs, the statutes and regulations shall cease to have any force in the matters which form the object of the Code.”¹⁷

Taking their cue from contemporary French lawmaking experience, the Louisiana drafters detailed their reasons for an express repeal of all former laws and usages defining civil rights (i.e., private law rights of citizens, not constitutional rights). Searching for guidance across the Atlantic, the Louisiana commissioners detected in French jurisprudence a vexing habit of distilling “supplementary rules of decision from the *rubbish* of ancient ordinances, local customs and forgotten edicts.”¹⁸ To reduce prospects for a similar habit among Louisiana lawyers, the Louisiana commissioners declared with a utopian flourish that a thoughtfully drafted new civil code “would relieve (Louisiana) courts in every instance from the necessity of examining into Spanish statutes, ordinances and usages, the works of French and Italian jurists, and the heavy tomes of Dutch and Flemish annotations before they could decide the law.”¹⁹

In this remark, some readers may find a quaint Philistinism characteristic of early American polemicists, who opposed American ties with “foreign” laws, whatever their provenance.²⁰ Hindsight also suggests that the commissioners were making a virtue of necessity: historical reality virtually compelled the early Louisiana lawyers to discount many of these ancient European treatises because

¹⁵ Tucker, *supra* note 7, at xxxvii-viii (emphasis added).

¹⁶ PALMER, *supra* note 2, at 58.

¹⁷ LIVINGSTON ET AL., *supra* note 3, at lxxxix.

¹⁸ *Id.* at xcii (emphasis added).

¹⁹ *Id.*

²⁰ During the 1800s, polemics abounded in rhetorical attacks on proposals to adopt the civil law. In 1850, for example, the California legislature reacted to a proposal to enact the civil law with language calculated to inflame the passions of local inhabitants:

Substitute the civil for the common law, and it will be with great delay and expense, and in strange tongues that books can be procured which will be found absolutely necessary for the lawyer and the judge in the intelligent administration of the system . . . (original works) will have to be ferreted out among the dusty volumes of some antiquarian bookseller, and they can be purchased only at an exorbitant price . . . till become necessary to refer To works existing only in a foreign language, to names strange to the American ear, to Escriche and Febrero, to the Nueva and Novissima Recopilaciones, to the Partidas, to the Fuero Real of Alonzo (sic) the Wise, and perhaps even to the Fuero Juzgo of his Gothic predecessors.

CALIFORNIA APPENDIX 588, 603 (1851).

they were largely unavailable in the state. Even if some of the treatises could be found, few lawyers could read them.

A code accessible to all had to remove the . . . absurdity of being governed by laws . . . written in languages which few, even of the advocates or judges understand, and so voluminous, so obscure, so contradictory, that human intellect however enlarged . . . would be insufficient to understand or even to peruse them.²¹

In stressing the challenges of sorting out the legal principles applicable to Louisiana society, the law commissioners echoed a complaint of their French counterparts who confronted a confusing tangle of customary laws that had grown up during the centuries preceding the Revolution. Voltaire highlighted the need for simplification of French laws in a rhetorical question:

Is it not an absurd and terrible thing that what is true in one village is false in another? What kind of barbarism is it that citizens must live under different laws? . . . When you travel in this kingdom you change legal systems as often as you change horses.²²

To advance their vision of a modern law appropriate to a unified nation, the French revolutionary lawmakers had promoted twin goals of certainty and legislative simplification. These goals appealed to Louisiana jurists as well as French and Spanish populations that were swelling with new American settlers. Despite their avowed goal of simplification by means of broad repeal and fresh legislation, the Louisiana drafters seem to have doubted whether their new codes could fully displace the earlier laws already deposited in Louisiana's legal reservoir. It was true that the experience of the French revolutionary drafters had prompted them to propose express repealing statutes. Yet, the French jurists' conservative tendency in the face of such repealing statutes seems also to have sowed doubts in the minds of the Louisiana lawmakers about the local community's receptiveness to their work.

In France, noted the Louisiana drafters, the courts and commentators had retained their pre-Revolutionary habits of mind after the revolution, despite legislative urgings to forego them. According to the Louisiana drafters, the French jurists were

unwilling to render their knowledge of previous laws useless and unavailing; clung to the shreds and patches of the ancient system, and consider them [the ancient laws] as their guide in all cases which do not come within the express provisions of the Code. . . . [F]or these reasons . . . the Spanish digests have done very little and the French code not so much as might have been expected in correcting the evil of continual references to the preexisting laws.²³

Although the Louisiana commissioners decried the French conservatism toward the ancient laws, they were not free of this conservative impulse themselves. Indeed the Louisiana commissioners sometimes seemed unconvinced that reliance upon preexisting laws was truly an "evil practice" that needed to be rooted out. Perhaps they were contending with the truth that new legislation had inevitably to draw inspiration from earlier authorities. Unsure of the direction in which Louisiana's law would go after the Purchase, perhaps the drafters thought that appealing to the ancient laws would insulate Louisiana law from an instantaneous reception of the common law, as Jefferson seems to have desired. Whatever their thoughts about the ancient laws, it is clear that the drafters qualified their enthusiastic commitment to a fresh start for Louisiana law by acknowledging admiration for a familiar Romanist practice of scouring early legal sources for inspiration.

²¹ *Id.*

²² VOLTAIRE, 7 OEUUVRES DE VOLTAIRE (DIALOGUES) 5 (1838) (author's translation).

²³ LIVINGSTON ET AL., *supra* note 3, at lxxxix.

V. POLITICAL PRACTICALITIES

The Louisiana commissioners' avowed respect for tradition perhaps represented no more than astute political maneuvering. In explaining their legislative project to the lawmakers who had appointed them, they were caught between the competing demands of newly arriving American lawyers unschooled in civil law, on one hand, and local lawyers whose affection for the civil law may have exceeded their knowledge of it, on the other. In preferring the timeworn over the new and unfamiliar, the drafters seemed animated by Hamlet's line: for they had consciously chosen "rather to bear those ills we know, than to fly to those we know not of."²⁴ Though conscience animated Hamlet's choice, pragmatism seems to have informed the Louisiana commissioners' conviction that wholesale adoption of American norms originating from the common law was unsuited for Louisiana's unusual circumstances.

The drafters sought to highlight the virtues of Louisiana's ancient heritage, even if their knowledge of that heritage was shallower than they had wished. Although they could not vouch for the quality or purity of their eventual legislative products, they nonetheless assured their audience of the authenticity of their work by searching for guidance in venerable sources. They reported that they were exploring the civilian legal patrimony, with

a reverent eye on those principles which have received the sanction of time . . . including the Laws of the Partidas, the other Statutes of Spain, the existing digest of our own laws, the abundant stores of the English Jurisprudence, . . . so many rich mines from which we can draw treasures of Legislation.²⁵

Convinced of the universal utility of the Roman law heritage, the drafters argued that the Roman jurists could "foresee almost every subject of civil contention and . . . establish principles for the decision of cases which could . . . arise in a state of society different" from their own (i.e., nineteenth-century Louisiana).²⁶ The drafters reported that they were hewing to a traditional path; they did not intend to "innovate in any case where a change [was] not called for by some great inconvenience in the existing law, either felt or foreseen, or some inconsistency in the present system with the provisions of that which [they] mean to offer."²⁷

The drafters also fixed their attention upon the newly emerging legal and political ideas of the American experiment, for they had to keep in constant view interactions between state laws and national laws and to assure that the former did not offend the latter. Though eager to account for an emerging separation-of-powers doctrine, they sometimes misconceived the opportunities and challenges the doctrine posed. For example, the drafters concluded [mistakenly, in the event] that the separation-of-powers doctrine embodied in the state constitution excluded legislation based upon already decided cases.²⁸ Operating in coequal spheres, the United States Supreme Court and the Congress in time would develop a complex set of interactions to inform both judicial decisions and legislation. The interactions would make it difficult to draw sharp boundaries between policies announced in decisions and those expressed in statutes.

²⁴ WILLIAM SHAKESPEARE, *HAMLET* 3.1 at 89-90.

²⁵ LIVINGSTON ET AL., *supra* note 3, at lxxxix-xc.

²⁶ *Id.* at xc. For background on the universality of Roman law, see generally *Under My Wings*, *supra* note 2, at 1518-20.

²⁷ LIVINGSTON ET AL., *supra* note 3, at xc.

²⁸ "Independent of the manifest injustice of making the Law with reference to an existing case, the positive clause in our [Louisiana] Constitution which forbids the Union of legislative and judicial powers is abar to any proposition for a similar reference in the plan we shall propose." LIVINGSTON ET AL., *supra* note 3, at lxxxviii. The commissioners' misconception likely stemmed from their devotion to French law. For background on the idea in French law that legislation could not be formulated with reference to an existing case, see *Under My Wings*, *supra* note 2, at 1504-10.

Although the drafters claimed to have minimized innovation as much as possible, they understood that integrating a hybrid legal system into the fabric of the new republic would require dexterous adaptation of local institutions. In a young pioneering society, rapid social change would pose for the drafters' legislative skills other challenges in addition to integration of a mixed legal system: "The continual change . . . in society; the new wants, new relations, new discoveries which continually succeed each other, and which cannot be foreseen; would alone render it impossible to provide laws for the . . . government."²⁹

VI. THE LAW COMMISSIONERS' PRAGMATIC COURSE

The Civil Code of 1825 was an alloy of French, Spanish, Roman, and occasionally even English sources, although it is difficult to gauge the proportions contributed by each tradition to the final product. The drafters' preface also made it difficult to gauge the depth of their conservatism, on one hand, and their utopian zeal, on the other. A lawmaker's revolutionary or utopian rhetoric may disguise the conservative choices his training predisposes him to make.

French revolutionary jurists were unexcelled in rhetorical masquerades. Tensions between conservative impulses and revolutionary rhetoric surely figured in the French lawmakers' debates. Although the French Revolution provided the necessary conditions for preparation of the Code Napoleon, historians generally agree that the code represented a retrenchment from revolutionary excesses and a consolidation of gains for the bourgeoisie in the aftermath of the bloodiest years of the Revolution.³⁰

As for the political outlook of the Louisiana commissioners, they boasted a French inspiration, but the spirit of their project was distinguishable from that of their French counterparts. Despite the drafters' avowed reverence for their European forebears, the preferences and needs of the local Louisiana community differed from those of the French revolutionaries. As a new Eden to which Europeans might flee to escape the "exterminating havoc"³¹ of the French Revolution that Jefferson had evoked in his first inaugural address, America promised a political and social trajectory scarcely imaginable to Europeans whose collective experience had been characterized by feudal bonds, monarchy, and ecclesiastical authority.³² Adaptation to new American circumstances required the drafters to steer a pragmatic course between their civilian heritage and the incoming tide of the common law. A *via media* required of the drafters a conciliatory rhetoric, and constant attention to the interaction between local and national laws.

²⁹ LIVINGSTON ET AL., *supra* note 3, at lxxxviii.

³⁰ The Code Napoleon defies easy characterization as either revolutionary or conservative. It was not uniformly one or the other. See *Under My Wings*, *supra* note 2, at 1548-49; J.L. HALPERIN, L'IMPOSSIBLE CODE CIVIL 103-04 (1992). Based largely on a union of wills, the concept of contract embodied in the Code Napoleon seemed to spring from a utilitarian strain in French thought. By contrast, French divorce regulation seemed animated alternately by conservative religious impulses on one hand, and by liberal antireligious impulses on the other. Based heavily upon church dogma, prerevolutionary laws prohibited divorce. Revolutionary legislation authorized a modern form of divorce without fault. But by mid-nineteenth century, changes in the Code Napoleon had narrowed the grounds for divorce authorized at the time of the Revolution. For links between prevailing theological tenets and evolution of French civil law regulating property, contract, and divorce, see Shael Herman, *From Philosophers to Legislators and Legislators to Gods: The French Civil Code as Secular Scripture*, 1984 ILL. L. REV. 597.

³¹ According to Jefferson, the United States had been spared the "exterminating havoc wrought by the revolution across one quarter of the globe." Thomas Jefferson, First Inaugural Address (Mar. 1, 1801), *reprinted in* 3 THE WRITINGS OF THOMAS JEFFERSON 317, 320 (Andrew A. Lipscomb & Albert E. Bergh eds., 1903).

³² While the United States has always been a republic with a tripartite form of government, post-revolutionary France veered away from republican ideals and toward restoration of the monarchy. See *infra* note 44 and accompanying text.

VII. DOCUMENTS STUDIED

To demonstrate the *mixité* of Louisiana's legal system in its formative years, this inquiry examines common law institutions incorporated into the Code of Practice in Civil Cases for the State of Louisiana, enacted in 1825 [sometimes cited hereafter as CP in referring to numbered articles of the Code] [French title: *Code de Procédure Civile de l'état de la Louisiane*].³³ Explanatory remarks and source references for the CP provisions appear at the feet of provisions in the projet. Our study sometimes refers to comments in the French version of the Code of Practice when they vary materially from those in the English version. Because the provisions in the projet of the Code of Practice were not numbered, we identify articles by their numbers in a version of the enacted Code of Practice, dated 1867.³⁴

VIII. ORGANIZATION OF THE STUDY

Beginning with a brief overview of the Code of Practice, our study poses essential questions about its debts respectively to civilian and common law sources. There follows an exploration of common law institutions incorporated into the Code of Practice: in particular, the study examines jury trials and prerogative writs, such as habeas corpus, quo warranto, prohibition, mandamus, and certiorari. For each writ, the study provides historical context that generally includes references to English experience as well as Louisiana and federal jurisprudence. For the regulation of the writ of habeas corpus, Edward Livingston, who seems to have been the main architect of the titles regulating the prerogative writs, acknowledged reliance upon English statutes. During Livingston's congressional service, he displayed an enthusiasm for English jurisprudence on the prerogative writs as well as other topics of English law.³⁵ Once past the regulation of habeas corpus, pinning down sources and discovering the drafters' thought processes for the other writs requires considerable speculation. A sequel to this article will discuss in detail the other prerogative writs. Blackstone's Commentaries, the most popular treatise in the colonies, immediately springs to mind as an influence, but our research suggests the drafters' reliance upon other sources as well.

If our treatment of the prerogative writs seems unnecessarily detailed, this is because we wish to show that the writs were not merely ornaments imported from English law for the pleasure of the state's new owners. To the contrary, the writs, as part of the law in action in the fledgling state, figured crucially in controversies touching political life in both the young republic and in particular Louisiana. Imbued with the spirits of both the common law and civil law, the Louisiana drafters approached their task with greater sensitivity to local cultural preferences than Thomas Jefferson had counseled. Aware of the historical circumstances that gave rise to the writs, the drafters codified them at a time when standard learning on the writs was scattered in treatises and jurisprudence.

IX. OVERVIEW OF THE CODE OF PRACTICE

The Code of Practice (1825) contained 1161 provisions. Like the companion Civil Code, it was published on opposing leaves in French and English. So it is tempting to conclude that most of its sources were French. This conclusion seems to find support in the fact that the Code of Practice and the Civil Code were companion laws and all three drafters were learned in French law. On

³³ The Projet of the Code of Practice appeared in a bilingual version with English and French texts on facing pages and was republished in 1937 as *A Republication of the Projet of the Code of Practice of Louisiana of 1825*, in 2 LOUISIANA LEGAL ARCHIVES 1-182 (1937). As enacted the Code of Practice of 1825 did not deviate materially from the Projet.

³⁴ CODE OF PRACTICE IN CIVIL CASES FOR THE STATE OF LOUISIANA WITH THE STATUTORY AMENDMENTS FROM 1825 TO 1866 INCLUSIVE (J.O. Fuqua ed., 1867) [hereinafter FUQUA EDITION].

³⁵ GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME 32 (2004).

examination, however, the Code of Practice turns out to be an eclectic synthesis of civilian and common law influences. By formulating the provisions in French on facing leaves, perhaps the drafters hoped to mask the common law origins of many titles of the Code. But even before Louisiana joined the Union, American doctrines and practices had made enough inroads into state law to have foiled the drafters' efforts to mask common law sources.

X. UNEVEN CITATION OF SOURCES

The drafters' uneven acknowledgment of sources has complicated our inquiry into the balance between civilian and common law influences upon the Code of Practice. Though the drafters candidly identified French, Spanish, and Roman sources in the text, they provided no sources at all for most provisions originating in the common law. Facing this editorial silence, we must rely upon educated conjecture for both the drafters' motivations and the common law sources themselves. Omission of common law sources might have signaled that the drafters were too pressed to provide a bibliography for their work. Perhaps the omissions signaled the drafters' conviction that the common law-inspired provisions had already acquired legitimacy, so that even readers who were briefly exposed to American law could be expected to know the common law institutions without being reminded of their provenance.³⁶ This assumption seems consistent with a calculated guess about the probable evolution of the state bench and bar. Assessing the likelihood of the lawyers' access to sources, and realizing that Jefferson's earliest judicial appointees had all been trained in the common law, the drafters may have concluded that the English language, the United States Constitution, and pressure from other states would conspire to draw Louisiana lawyers into the mainstream of American procedural developments. It was true that exceptionally well endowed libraries such as those of Jefferson and Livingston were rich in civilian sources. But as time passed and Louisiana became integrated into the republic, busy lawyers would have been unlikely to make a habit of collecting works written in foreign languages about foreign laws. This last point would explain the drafters' aim of filling anticipated gaps with abundant citations of civilian sources in the Code of Practice. Without specific guidance about the civilian texts that informed the drafters' work, gaps could be expected to open in the civilian learning that the lawyers required to advise their clients.

XI. CIVILIAN INFLUENCES IN BRIEF

The articles of the Code of Practice are distributed between a short Part I entitled "Of Civil Actions" (consisting of 123 provisions) and a considerably longer Part II entitled "Of the Rules To Be Observed in the Prosecution of Civil Actions." From CP article 1 through article 462, the language of the Code of Practice is distinctively civilian. Editorial comments suggest somewhat more reliance upon Spanish sources, such as *Las Siete Partidas*, than upon French ones (e.g., Pothier, Domat). Yet we must be alert to the drafters' goals and careful not to confound substance with form. Romanist nomenclature—e.g., peremptory exceptions, dilatory exceptions, *litis contestatio*, reconventional demands—ought not mask the drafters' aim of formulating rules of civil procedure that would pass constitutional muster in the new republic.

³⁶ Louisiana's early judges would have welcomed the common law institutions, for "the institutional roots of the Louisiana magistrature (were) almost entirely common law." V. PALMER, *LOUISIANA: MICROCOSM OF A MIXED JURISDICTION* 232-33 n.26 (1999). Jefferson consciously recruited judges from other states for early Louisiana courts as a way of promoting adherence to the common law and reducing prospects for the civil law. These recruits included Duponceau (Pennsylvania), Kirby (Connecticut), and Prevost (New York). Prevost organized the Superior Court of Orleans after Duponceau declined the appointment and Kirby died. *Id.* The two vacancies were filled by Sprigg (Ohio) and Mathews (Georgia). *Id.* When Sprigg and Prevost retired, Lewis (Kentucky) and Martin (North Carolina) replaced them. *Id.*

A considerable volume of citations is not a litmus for measuring the depth of influences. As we have already suggested, the drafters, under mounting pressure from an incoming common law, incorporated many common law institutions into the Code of Practice without indicating their sources. According to extant catalogs, the libraries of Livingston and Moreau Lislet³⁷ were rich in civilian and common law authorities. Along with the works of Pothier and Domat, treatises such as Bacon's Abridgement, Comyn's Digest, Coke's Abridgement, Story's Pleadings, and Blackstone's Commentaries in English and French translation surrounded the drafters as they worked.

XII. AMERICAN INFLUENCES

Despite its reliance upon a civilian lexicon, Part I of the Code of Practice contains scattered references to American law, betraying the drafters' intention to conform their legislation with congressional enactments and the United States Constitution.³⁸ For example, CP article 82 provided: "There are judges with concurrent jurisdiction, that is to say having cognizance in matters of the same nature, though they hold their courts in the same place or district."³⁹

To illuminate this provision, the drafters noted an allocation of substantive matters among different courts "such as the courts of the United States as relates to those of the state, in cases where either a foreigner or a citizen of another state is defendant, and the court of the parish and the city of New Orleans, as relates to the court of the first district."⁴⁰ Highlighting an important feature of the federal system, this comment seems to have been inspired by the constitutionally authorized diversity jurisdiction of federal courts.

Planted among provisions animated by civilian sources, an isolated reference to federal diversity jurisdiction under United States law may make a feeble impression upon us today. Our experience and training have accustomed us to an omnipresent federal law and policy that few Louisiana lawyers would have anticipated in 1825. Understood as a prelude to Book II, the reference signals the drafters' understanding that their task was to prepare a code faithful to the civilian tradition, yet consistent with a newly applicable American law.

³⁷ Mitchell Franklin, *The Libraries of Edward Livingston and Louis Moreau Lislet*, 15 TUL. L. REV. 401 (1940-41). There were other notable law libraries in early Louisiana. See R.F. Karachuk, *A Workman's Tools: The Law Library of Henry Adams Bullard*, 42 AM. J. LEGAL HIST. 160 (1998).

³⁸ Local Louisiana lawyers recorded their understanding of the superiority of the United States Constitution over local laws as well as their complementarity: "[W]e have the power to keep our laws insofar as they do not conflict with the Constitution of the United States and the special acts passed for our provisional government." 9 THE TERRITORIAL PAPERS OF THE UNITED STATES 643-47 (C.E. Carter ed., 1940). The locals' understanding of the compatibility of the United States Constitution with Spanish laws appeared in the translators' preface to the *Siete Partidas*: "The translators have thought proper to give the translation of all those laws which have not been expressly repealed by the legislature, or which are not repugnant to the Constitution of the United States, or that of this state." LAS SIETE PARTIDAS xxiv.

³⁹ C.P. art. 82, at 14; *id.* statute 11, ch. xl.

⁴⁰ Federal diversity jurisdiction originated in U.S. Constitution Article III, Section 2: "The judicial power shall extend to all Cases in Law and Equity arising under this Constitution . . . between Citizens of different States and between a State, or citizens thereof, and foreign states, Citizens, or Subjects." Under current law, federal jurisdiction based upon diversity of citizenship applies only to civil suits and is unrelated to the presence of a federal law question. To qualify under federal diversity jurisdiction, a case must involve parties from different states and the amount in controversy must exceed \$75,000.

According to the drafters, the regulation in CP article 752 of the validity of certified copies of judgments and their recognition in other states derived from an Act of Congress of 1790.⁴¹ To implement the United States Constitution's full faith and credit clause,⁴² this congressional act required each state to recognize judgments and enactments of a sister state. Regulation of certified judgments, like the earlier reference to the federal judiciary's parallel relationship with that of the state, may seem a technical adjustment that requires little space in the Code of Practice. Yet, in the minds of lawyers newly initiated into the mysteries of American law, the rule underscored the drafters' goal of integrating Louisiana law into the legal fabric of the new union.

XIII. BOOK II: ADAPTATION OF COMMON LAW INSTITUTIONS

Starting with CP article 463, the incidence of civilian and Roman references in the Code of Practice declines rapidly. Thereafter many editorial comments refer to Louisiana enactments that predated the Code of Practice. From the regulation of "trial by jury" onward, long stretches of Part II of the Code of Practice are almost devoid of source references, suggesting that the drafters considered these sources familiar enough to lawyers to permit them to dispense with specific citation.

Upon reaching the regulation of jury trials (CP articles 493-532), one has the impression that he has been viewing the first act of an opera on a revolving stage set. If the Code of Practice were a libretto, a spectator might think that the first act occurred in New Orleans after the great fires destroyed many original buildings, and the Vieux Carré was rebuilt as a blend of French and Spanish colonial architecture. By contrast, the second act may leave a spectator with a sense that the players have been transported to an American *mise-en-scène* bedecked in familiar colonial furniture. Part II signals this new setting by locating the judicial power in the state constitution. Part II, article I (article 874) reproduces the first article from the Louisiana constitution itself. By expressly anchoring the judicial power in the state constitution, the drafters seem to have taken guidance from the United States Constitution.⁴³ It is true that a title of the first French constitution (1789) established the judicial power. However, unlike the United States Constitution, in which governmental institutions grew out of a social contract among citizens, the French constitution lodged the judicial authority in the monarchy.⁴⁴

⁴¹ C.P. art. 752 cmt. The editors cited Statute II, May 26, 1790, ch. xl (Act To Prescribe the Mode in which the Public Acts, Records and Judicial Proceedings in Each State Shall Be Authenticated So As To Take Effect in Every Other State). The act was supplemented by Statute I, March 27, 1804, ch. lvi ("[A]n act supplementary to the preceding act, C.P. at 298). For a C.P. provision similar in its aim to article 752 in the sense that it implemented the full faith and credit clause of the United States Constitution with respect to mortgages, see C.P. arts. 746-747. A judgment creditor's right to enforce by executory process a judgment obtained in another state, or in a foreign country, was repealed June 1, 1846.

⁴² U.S. CONST. art. IV, § 1: "Full faith and Credit shall be given by each State to the Public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general laws prescribe the manner in which such Acts, Records, and Proceedings shall be proved and the Effect thereof."

⁴³ "We have thought proper to insert this article of the constitution for the purpose of rendering more clear the provisions which follow." C.P. 137.

⁴⁴ French constitutions adopted nearest in date to the Code of Practice and the Louisiana constitution did not expressly anchor the French judiciary in a republican framework. A politically retrogressive document, the French constitution of 1804 [an xii] designated Napoleon emperor, established an imperial succession, and reconstituted the nobility. The Charter of June 4, 1814, preserved many of the judicial structures established during the revolutionary period. Only now its article 57 declared that "all justice emanate[d] from the King."

XIV. JUDICIARY ACT OF 1789 CONFIRMS RIGHT TO JURY TRIAL AND AUTHORIZES PREROGATIVE WRITS

Article I, Section 9, of the United States Constitution authorized the writ of habeas corpus. The Seventh Amendment of the Constitution authorized jury trials in a wide variety of common law disputes.⁴⁵ The Judiciary Act of 1789, Section 9, confirmed the right to a jury trial; Section 14 of the Act confirmed the privilege of habeas corpus, and provided for writs of “*scire facias* . . . and other writs not specially provided for by the statute necessary for exercise of their . . . Jurisdictions.” Section 13 of the Act authorized courts to issue writs of prohibition to “district courts when proceeding as courts of admiralty and maritime jurisdiction, and writs of mandamus to any courts appointed or persons holding office under authority of the United States.” Section 11 of the Act confirmed the judicial power to issue writs of *quo warranto*.

In 1792, the attorney-general of the United States provided a fillip to the role of the prerogative writs in American judicial practice by moving the Supreme Court “to be informed of the system of justice by which the attorneys and counselors of this Court shall regulate themselves.”⁴⁶ In reply to the attorney general’s motion, Chief Justice John Jay suggested “that [the] Court consider the practice of the courts of Kings Bench and Chancery in England as affording outlines for the practice of this court.”⁴⁷ Magistrates in the King’s Bench and the Chancery had long administered the prerogative writs.⁴⁸

In incorporating the prerogative writs into the Code of Practice, the Louisiana drafters were likely guided by the federal Judiciary Act of 1789, Justice Jay’s pronouncements, and the Louisiana Practice Act of 1805, Livingston’s first effort to codify judicial practice for Louisiana courts. Section 22 of this last act consolidated judicial writ-granting authority into a single provision: “The . . . Courts shall have the power to issue the writs of *Quo Warranto*, *procedendo*, *mandamus*, and *prohibition*, which said writs shall pursue the forms and be conducted according to the rules and regulations prescribed by the common law.”⁴⁹

During the early decades of the Republic, suitors often relied on prerogative writs for relief in the United States Supreme Court and inferior federal courts. Louisiana litigants followed their lead. The Louisiana judiciary’s reception of the writs was predictable; Louisiana judges, like their counterparts in other states, increasingly modeled their opinions and demeanor upon those of Blackstone’s “oracles of the law.”⁵⁰ American judges, including those in Louisiana, were fully endowed with creative lawmaking powers necessary to function as a coordinate branch of the government.

⁴⁵ U.S. CONST. amend. VII (adopted 1791):

In suits at common law where the value in controversy shall exceed twenty dollars the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rule of the common law.

For background on the continuity of the English form of jury in American practice, see *Capital Traction v. Hof*, 174 U.S. 1 (1899) (U.S. LEXIS 1480 (Apr. 11, 1899)).

⁴⁶ 1 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 202-03 (M. Marcus et al. eds., 1985-2003).

⁴⁷ *Id.*

⁴⁸ See *infra* text accompanying notes 53-62.

⁴⁹ Louisiana Practice Act of 1805, *quoted in* Tucker, *supra* note 7, at xl.

⁵⁰ Blackstone is credited with having coined the quoted phrase.

How are these customs or maxims to be known, and by whom is their validity to be determined? The answer is by the judges of the several courts of justice. They are the depositaries of the laws; the living oracles who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land.

1 WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND *53 (Lewis ed., 1900).

Properly deployed, prerogative writs such as quo warranto, mandamus, and prohibition illuminated interactions among public officials and made the judges referees of their disputes. For example, habeas corpus, the most celebrated of the writs, was an ancient plea by which imprisoned citizens obtained relief when the usual routes to redress were blocked or exhausted. We may never know if the Louisiana drafters and local lawyers viewed ambivalently the incorporation into the code of prerogative writs unknown to their civilian tradition. By the time they faced the task of preparing a code of practice, the drafters likely realized that the United States Constitution, key national statutes, and Louisiana acts had foreclosed the issue of incorporation. In the emerging mixed jurisdiction, a pragmatic goal of political integration trumped legal purity.

In judicial pleadings, Louisiana lawyers sometimes suggested that invocation of “common law” principles, whether expressed in English originals or their American counterparts, was weighty enough to justify issuance of a prerogative writ. For example, in *Breedlove v. Fletcher*,⁵¹ an attorney was reported to have remarked in support of his application for a writ of quo warranto:

I fancy no lawyer would consider that section [Section 22 of Louisiana Judiciary Act, 1805] as having any other intent than to say courts should have power to issue certain writs known to the common law such as quo warranto, procedendo, mandamus and prohibition, and to declare that when issued the writs shall be according to the common law.⁵²

In his arguments to the court, this nineteenth-century pleader seemed at ease in asking for a writ deriving from English law, even though Louisiana judges had long been guardians of a civilian legal system. Incorporating by implication the Federal Judiciary Act of 1789, the Louisiana Purchase afforded newly appointed territorial judges these writ granting powers five years before enactment of the first civil code (1808), and nine years before Louisiana’s statehood.

XV. PREROGATIVE WRITS EMBLEMATIC OF COMMON LAW INFLUENCE UPON LOUISIANA LAW

Hallmarks of English judicial practice, the prerogative writs originated in the monarch’s exclusive and discretionary powers.⁵³ Unlike ordinary writs [*de cursu*] that the chancery sold to willing purchasers, the prerogative or magisterial writs were jealously guarded by the court of King’s Bench.⁵⁴ Never guaranteed, their issuance constituted a gesture of royal grace.⁵⁵ Because issuance of the writs depended upon judicial discretion and equitable considerations, they seemed to interfere unpredictably with the ordinary judicial machinery. Unlike typical common law proceedings that began with issuance of an original writ as a matter of course, proceedings for a prerogative writ began

⁵¹ 8 Mart o.s. 69 (1820).

⁵² *Id.*

⁵³ For background on the prerogative writs in English law, see generally J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 144-56 (4th ed. 2002); Edward Jenks, *The Prerogative Writs in English Law*, 32 YALE L.J. 523 (1923); S.A. DE SMITH, THE PREROGATIVE WRITS: HISTORICAL ORIGINS IN JUDICIAL REVIEW OF ADMINISTRATIVE ACTION 584 (4th ed. 1980). For studies contemporaneous with the work of the Louisiana drafters, see RICHARD GUDE, THE PRACTICE OF THE CROWN SIDE OF THE COURT OF KING’S BENCH 545-46 (1828); THOMAS TAPPING, THE LAW AND PRACTICE OF THE HIGH PREROGATIVE WRIT OF MANDAMUS 421-22 (1848); JOSEPH A CHITTY, JR., A TREATISE ON THE LAW OF THE PREROGATIVE WRITS OF THE CROWN (1820). For the role of prerogative writs in American jurisprudence, see L. Jaffe & E. Henderson, *Judicial Review and the Rule of Law: Historical Origins*, 72 L.Q.R. 345-64 (1956).

⁵⁴ BAKER, *supra* note 53, at 143.

⁵⁵ *Id.* at 144. Although at inception the writs had purely routine functions, the judges of King’s Bench adapted them for supervisory purposes. The writs soon ceased to be obtainable as a matter of course, and the king’s justices had great latitude to grant or deny them. *Id.*

by motion or petition with supporting affidavits to show cause for issuing the writ.⁵⁶ The grant of a prerogative writ was not appealable; each writ was enforceable through a contempt sanction.⁵⁷

According to Holdsworth, prerogative writs constituted the central government's most effective means for exercising control over local governments that had long enjoyed considerable autonomy.⁵⁸ For an English monarch who sought to increase control of the realm, the prerogative writs had a praetorian character in the sense that they constituted a royal arsenal for redressing official wrongs wherever they might occur. A prerogative writ might issue to discipline a wayward or recalcitrant official who was unresponsive to an ordinary writ.⁵⁹ The writ of mandamus, for example, enabled the judges of the king's bench to direct inferior courts and administrative officials to take non-discretionary action that the law clearly required of them.⁶⁰ A writ of habeas corpus instructed a jailer to bring the body of a detainee into court so that the reasons for his detention might be reviewed.⁶¹ A writ of prohibition directed an inferior court [and in particular an ecclesiastical court] to refrain from exercising authority over a matter beyond its jurisdiction.⁶² A writ of quo warranto tested the entitlement of an individual to a royal office and supplied the means of ousting a usurper of the office.⁶³

XVI. ENGLISH PREROGATIVE WRITS CONTRASTED WITH AMERICAN COUNTERPARTS

Adopted by the Congress promptly after the founding of the republic, American versions of the prerogative writs differed from their English ancestors principally because the American versions did not derive their legitimacy from a monarch. American practice required transforming an English prerogative writ issued on behalf of the crown into a writ issued by the state or "in the name of the state."⁶⁴ Unlike their English ancestors, the American writs depended for effectiveness upon continuous interpretation of a written constitution. Furthermore, issuance of American versions of the writs occurred in a tripartite government where political power was allocated to a federal system and a growing number of state systems that enjoyed a degree of autonomy unknown in the nineteenth-century English polity. This Article and its sequel highlight other differences between the American writs and their English ancestors, as well as differences between the American versions of the writs, on one hand, and their Louisiana counterparts, on the other.

XVII. LINGUISTIC UNIQUENESS OF THE REGULATION OF PREROGATIVE WRITS

A linguistic factor has also invited our focus on the prerogative writs as an index of common law influence upon the Code of Practice. Unlike certain procedural institutions with similar functions in both French and American law (e.g., actions, *res judicata*), the prerogative writs lacked analogues in French and Spanish law, and Louisiana civilians attuned to French and Spanish procedure surely recognized in these writs distinctive emblems of the "other law." In the Code of Practice, the French

⁵⁶ Jenks, *supra* note 53, at 523; DE SMITH, *supra* note 53, at 584.

⁵⁷ James Pfander, *Sovereign Immunity and the Right To Petition: Toward a First Amendment Right To Pursue Judicial Claims Against the Government*, 91 Nw. U. L. Rev 899, 920 (1997).

⁵⁸ For the King's Bench, Lord Coke claimed a wide jurisdiction to "correct errors and misdemeanors extrajudicial tending to the breach of the peace, or oppression of . . . subjects . . . or any other manner of misgovernment." BAKER, *supra* note 53, at 144 (citing Co. Inst. IV, 71).

⁵⁹ *Id.*

⁶⁰ Pfander, *supra* note 57, at 917.

⁶¹ 3 BLACKSTONE, *supra* note 50, at *79.

⁶² Pfander, *supra* note 57, at 918-26; 3 BLACKSTONE, *supra* note 50, at *79.

⁶³ Pfander, *supra* note 57, at 918; 3 BLACKSTONE, *supra* note 50, at *112; DE SMITH, *supra* note 53, at 590-91.

⁶⁴ See, e.g., C.P. articles defining the individual prerogative writs (habeas corpus, CP article 791; mandamus, CP article 829; prohibition, CP article 845; quo warranto, CP article 867; certiorari, CP article 855).

chapters regulating the prerogative writs are practically opaque, despite the drafters' efforts to provide good translations for them. One may wonder, for example, if a French lawyer could have understood without English historical context the drafters' definition of the writ of quo warranto: "*un mandat a l'effet d'empêcher une usurpation.*"⁶⁵ The talismanic term "usurpation" might have triggered for the lawyer a recollection of the regulation of patronage by the monarchy and the church. In Blackstone's account of the writ of prohibition the lawyer might find echoes of a medieval judicial instrument of the same name that vexed churchmen because it permitted royal judges to oust church courts of their jurisdiction over matters the churchmen had claimed as rightfully in their competence. But it is equally probable that the lawyer's patience would have been exhausted before he made these connections.

Deprived of historical context, French definitions of the other prerogative writs could be equally elusive. For the context in the French language, however, the lawyer need not have searched long; for in French translation, Blackstone provided accounts of several of the writs and an elaborate narrative of the writ of habeas corpus.⁶⁶ Transposed to administration of the fledgling American republic, the themes of patronage and usurpation of offices narrated by Blackstone had already begun to resonate in early federal enactments, as well as the jurisprudence of the United States Supreme Court and the newly established Louisiana tribunals.⁶⁷ In codifying the prerogative writs for the Code of Practice, the law commissioners seem to have avoided invention from whole cloth. Instead they followed Hamlet's advice "rather to bear those ills we know than fly to others 'that we know not of.'"⁶⁸ But, unlike Hamlet's choices, those made by the law commissioners seemed motivated less by conscience than by a pragmatic need to give Louisiana lawyers new uses for a terminology that they already knew.

XVIII HABEAS CORPUS

Code of Practice article 791: "The habeas corpus is an order in writing, issued in the name of the state, by a judge of competent jurisdiction, and directed to a person who has another in his custody, or detains him in confinement, commanding him to bring before the judge the person thus detained, at the time and place appointed, and to state the reasons for which he thus keeps him imprisoned and deprived of liberty."

A. *The Drafters' Reasons for Including Habeas Corpus in the Code of (Civil) Practice*

Article One, Section 9, of the United States Constitution made the fact of Louisiana's eventual adoption of habeas corpus a foregone conclusion. But the time and conditions for the writ's adoption in Louisiana were uncertain. The drafters of the Code of Practice included habeas corpus in their code to compensate for a failure of legislative planning. According to Livingston's report on the penal code, regulation of habeas corpus was to have been "the first act of legislation in our state on this subject; important enough to have sooner engaged our attention."⁶⁹ The Penal Code's failure of

⁶⁵ PROJET OF CODE OF PRACTICE art. 131.

⁶⁶ E.g., BLACKSTONE, COMMENTAIRES SUR LES LOIS ANGLAISES (N.M. Chompré trans. & ed., 1822-23).

⁶⁷ According to Blackstone, the writ of quo warranto was a royal remedy against usurpers of offices. 3 BLACKSTONE, *supra* note 50, at 263. For links between the *ius presentandi* and canonical procedures regulating patronage, see generally J.W. Gray, *The Ius Presentandi in England from the Constitutions of Clarendon to Bracton*, 67 ENG. HIST. REV. 481 (1952). For history of administration of patronage rights, see generally F. Cheyette, *Kings, Courts, Cures, and Sinecures: The Statute of Provisors and the Common Law*, in 19 TRADITIO 295-349 (1963), http://www.amherst.edu/~flcheyette/Publications/biblio_lcme.html.

⁶⁸ SHAKESPEARE, *supra* note 24.

⁶⁹ E. LIVINGSTON, PROJECT OF A NEW PENAL CODE FOR THE STATE OF LOUISIANA 75 (1824).

adoption left habeas corpus unregulated. The Code of Practice provided a fresh opportunity for enactment of habeas corpus regulation. The drafters accomplished their goal by pruning sixty articles in the unenacted penal code down to thirty-seven provisions in the Code of Practice.

Recognizing the anomaly of locating the writ of habeas corpus in a code of *civil* procedure, the drafters explained:

Every thing concerning the habeas corpus seems rather to belong to the code of criminal procedure, than to the present code. However as the project of a penal code which is now preparing by [sic] by a jurist appointed for that purpose, is not yet ready to be offered to the legislature and as some time may elapse before it is adopted we have thought proper to insert here some general provisions on this important subject, borrowing them from the said code.⁷⁰

Although the Code of Practice offered practically no sources for habeas corpus, Livingston had commented upon the privilege in both congressional debates and his draft penal code. During his congressional tenure, Livingston argued that the writ of habeas corpus constituted a bulwark against arbitrary governmental action.⁷¹ In England, “arbitrary governmental action” might refer to acts of disobedience by officials who sought to elude royal scrutiny. The writ was a powerful tool for disciplining them. As Blackstone reported, “Habeas corpus [ran] into all parts of the king’s dominions, for the king [was] at all times entitled to have an account why the liberty of any of his subjects [was] restrained.”⁷²

According to Livingston’s draft penal code, the original Atlantic states, unlike Louisiana, “needed only a brief constitutional provision based upon English habeas corpus acts to consecrate the protection against tyranny.”⁷³ First authorized during Henry II’s reign by the Ordinance of Clarendon, the writ recurred in statutes of 1640 and 1679.⁷⁴ Referring to the English habeas corpus statutes, Livingston observed:

In all the Atlantic states, this statute was a part of the law by which they were governed at the time they became independent; and it was either expressly or impliedly adopted with the whole body of their municipal laws. In those states, therefore, nothing more was necessary than to guard against its suspension by a constitutional clause. But here [i.e., in Louisiana], the common law of England was not in force, still less were its statutes. Neither could form part of our law, unless specially reenacted. Yet the framers of our [Louisiana] constitution, not attending to this difference, contented themselves with transcribing from the constitution of other states the provision [in the United States Constitution]. “The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public

⁷⁰ PROJET OF CODE OF PRACTICE cmt. (habeas corpus) art. 791, at 125.

⁷¹ STONE, *supra* note 35, at 563 n.62.

⁷² BAKER, *supra* note 53, at 146-47 (“The writ of habeas corpus has become a principal safeguard of personal liberty. It is . . . ironic that its original purpose was not to release people from prison but to secure their presence in custody.”).

⁷³ LIVINGSTON, *supra* note 69, at 74-76.

⁷⁴ According to Jenks, clause four of the Ordinance of Clarendon dealt

with the case of accused persons captured and held for trial at a time when the Justices of the King [did] not happen to be in the county and there [was] no immediate prospect of their arrival. He directs that word shall be sent by the sheriff to the nearest Justice, and that the latter shall inform the sheriff in reply of the place where he wishes the accused to be brought before him. In other words, the sheriff is commanded to “have the bodies of the accused before the Justice . . . the accused in the meanwhile is to be kept in one of the new gaols ordered by the Assise to be built for the purpose in every county. . . . This message under the Ordinance crystallized into the later habeas corpus ad respondendum

Jenks, *supra* note 53, at 524-25. For background on the evolution of habeas corpus in English law, see generally *id.*

safety may require it.” But no law had before, or has been since passed, defining what the writ of habeas corpus was, or directing the manner in which it was to be obtained, how it was to be executed what was to be its effect, or what the penalty of disobeying it. If the writ alone be introduced without the provisions for enforcing it, it could be of as little use here as it was in England before the statute of Charles II. . . . Whatever construction we put on this clause, in our constitution it must be confessed, that without some statute to define and enforce the great privilege, the provision itself can be of little use.⁷⁵

B. Early Political Leaders’ Grudging Recognition of Privilege of Habeas Corpus

Livingston’s spirited defense of habeas corpus seems to have been prompted partly by the fact that early political leaders sometimes suspended the privilege for unsound reasons. Two of these political miscues coincidentally concerned Louisiana and likely would have been familiar to the drafters of the Code of Practice.

1. The Burr Conspiracy⁷⁶

In his first inaugural address on March 4, 1801, Thomas Jefferson identified the writ of habeas corpus as a bedrock constitutional principle. But in 1806, he seems to have ignored his own praise for habeas corpus; for he tried unsuccessfully through his military governor at New Orleans to withdraw the privilege running to former vice president Aaron Burr and a number of accomplices who were alleged to have committed treason by conspiring to overthrow the American government. Though the exact details of this conspiracy remain unclear, many salient facts may be narrated.

In July 1804, shortly after his vice-presidential term had ended, Burr killed Alexander Hamilton in a duel, and his public image began to wither. In about 1804, Burr seems to have dreamed of reviving his political fortunes by establishing an independent empire in the territory of Louisiana. Newly acquired from France, Louisiana was largely unsettled; Spain disputed the territory’s borders; many Louisiana residents of Spanish and French ancestry openly talked of secession. Burr believed that a relatively small military force would enable him to carve out territory from Louisiana and build his own empire. When Jefferson learned of Burr’s plan, he declared it an “illegal combination of private individuals against the peace and safety of the Union.”⁷⁷ Jefferson had chosen his words carefully: having ordered Burr jailed in Washington, he then opposed Burr’s application for habeas corpus on the constitutional ground that “the public safety required” suspension of the writ.

In October 1806, General James Wilkinson, though initially one of Burr’s co-conspirators, realized that Burr’s plan would collapse, turned against him, and wrote to Jefferson detailing the plan. At Bayou Pierre, thirty miles above New Orleans, Burr received a newspaper announcing a reward for his capture, and translating a coded letter in which Burr outlined his plans. Ultimately General Wilkinson, presumably instructed by Jefferson, arrested Burr and had him jailed in Washington pending his trial for treason. Opposing the release of the conspirators on bail, Jefferson’s

⁷⁵ PROJET OF LOUISIANA PENAL CODE, at 77 .

⁷⁶ For biographical details of Burr’s life and career, see *The Burr Conspiracy*, www.pbs.org/wgbh/amex/duel/sfeature/burrconspiracy.html (last visited Apr. 28, 2008).

⁷⁷ Jefferson’s Special Message to Congress (Jan. 22, 1807); *The Avalon Project of Yale Law School*, www.yale.edu/lawweb/avalon/jeffburr.htm, quoted in *Ex parte Bollman*, 8 U.S. 75 (1807). Affidavits of military officers whom Burr recruited to join his expedition suggested that Burr intended to overthrow the U.S. government and assassinate Jefferson. See, e.g., Summary of Affidavit of Lt. Eaton, *Ex parte Bollman*, 8 U.S. at 128-31.

administration contended unsuccessfully that their threat to public order met the constitutional criterion for suspension of habeas corpus.⁷⁸

In judicial skirmishes between the government and lawyers for Bollman and Swartout, two of Burr's alleged co-conspirators, the court was urged to grant a habeas corpus to effect release of Burr and his compatriots. A fascinating analysis of the English origins of habeas corpus, the Supreme Court opinion⁷⁹ dealing with the propriety of suspending the writ of habeas corpus for Burr's two compatriots was vague about Burr's designs. This vagueness was due partly to the fact that the trial court had not conducted an evidentiary hearing based upon extensive cross-examination of witnesses. The case report transcribed a number of lengthy affidavits executed by General Wilkinson and officers under his command; a message from Jefferson in which he expressed his own alarm upon learning of the plot; extensive colloquies among the judges and lawyers and the transcription of the hearing contained both speculation and inconsistencies of fact and law. Nevertheless, the following points may be gleaned from the court records. The charges against Burr and his compatriots included a claim that their treasonous conduct consisted in "revolutionizing by force the government of the United States."⁸⁰ More specifically, Wilkinson swore that the conspirators planned to launch a war against Mexico.⁸¹ This was a logical inference in view of tensions with Spain over the borders of Louisiana. He also suggested that the conspirators intended to set up an independent nation in Louisiana (then the Territory of Orleans).⁸² Although a vivid narrative of the alleged conspirators' plans emerged in Burr's letter to General Wilkinson, several attorneys questioned its accuracy and wondered whether the claims, even if proven, amounted to treason.

According to counsel for the prisoners, Wilkinson's affidavit was defective because he had not executed it under oath, and his testimony suggested "no assemblage of men nor that treason was a purpose of alleged assemblage."⁸³ Furthermore, revolutionizing the territory of Orleans was not equivalent to making war against the United States. Ultimately, Burr and his associates were released because their plan, even if proven, did not pose a sufficiently serious threat to public safety to satisfy the constitution's criterion for suspension of habeas corpus.

Earlier I characterized Jefferson's order as a political misstep. To some of the judges in the case, his actions seem to have verged upon abuse of power, for he had meddled in the ordinary procedures of arrest and detention. He ordered General Wilkinson directly to arrest Burr and his associates when Wilkinson's proper course of action would have been to swear out before a magistrate sufficient facts to constitute probable cause for Burr's arrest. This point was urged by Lee, an attorney for the prisoners:

The oath upon which a warrant of arrest or commitment is to be grounded must be made before the magistrate who is about to issue the warrant. He must be satisfied of the probable cause. The laws were open in New Orleans. General Wilkinson might have gone before a justice of peace and there made his oath and obtained a warrant to arrest the prisoners. There was no necessity to proceed in this illegal and unprecedented manner.⁸⁴

⁷⁸ U.S. CONST. art. I, § 9, cl. 2. For the constitutional language regulating suspension of habeas corpus, see *supra* text accompanying note 75. Marshall's ruling in *In re Bollman* seems to have irritated many officials including Jefferson, who had long considered the justice an enemy. For background on their mutual enmity, see J.A. Garraty, *The Case of the Missing Commissions*, in *QUARRELS THAT HAVE SHAPED THE CONSTITUTION* 13-19 (1988).

⁷⁹ *Ex parte Bollman*, 1807 U.S. LEXIS 369, 8 U.S. 75 (Feb. 20, 1807).

⁸⁰ *Id.* at 128.

⁸¹ *Id.* at 111.

⁸² Lt. Eaton's affidavit, quoted in *In re Bollman*, 1807 U.S. LEXIS at 23.

⁸³ 1807 U.S. LEXIS 242.

⁸⁴ *Id.* at 239-40.

Jefferson seems to have compounded the mistake noticed by Lee by ordering Wilkinson to bring Burr and his associates to Washington for detention although Louisiana, as the place of their alleged actions, should have been the place of their confinement and trial. In his message to Congress, Jefferson justified the order of removal: “[A]n impartial trial could not be expected during the present agitations of New Orleans, and the city was not as yet a safe place of confinement.”⁸⁵

Though Jefferson’s view perhaps had merit, his order nonetheless ignored proper procedures:

First the commitment papers of the prisoners designated no place of trial, and this lapse was a sufficient reason for admitting them to bail. They certainly cannot be tried here, for it is not contended that they have here committed any offence; and this is not the district in which they were first apprehended or brought. They were seized by orders of a military officer 2000 miles from this place, without any process of law or legal authority, and sent here to be disposed of by the Executive. They have been committed for trial, not before any court, or in any particular district, and their imprisonment will be perpetual, unless government can find out when and where the offence was committed and devise some means of transmitting them to the place of trial.⁸⁶

Jefferson’s actions toward Aaron Burr seem to have been more characteristic of a self-anointed monarch than an elected president constrained by established judicial procedures. The phrase “disposed of by the executive” speaks volumes; for, as first year law students know, the judiciary, not the executive, disposes of criminal cases. Political misstep though it was, Jefferson’s behavior was consistent with his attitude toward Louisiana. Though an important acquisition for the young nation, the territory was not yet a state. Jefferson had labored mightily but unsuccessfully to have Louisiana replace the civil law with the common law. To Americanize the territory rapidly, he proposed a generous land grant to about 30,000 American settlers who would then serve as a local militia. But Congress never approved this proposal.⁸⁷

Jefferson had long distrusted Aaron Burr, even though Burr had a few years earlier emerged from a close election as his vice president. Jefferson’s orders to Wilkinson suggest that his distrust persisted. To the extent possible, he wished to maintain control of the disposition of the case. And with good reason, at least from Jefferson’s perspective. For some scholars now judge the case a “real showdown” in a partisan power struggle between Marshall and Jefferson, and more important in American jurisprudence than *Marbury v. Madison*.⁸⁸

⁸⁵ Jefferson’s Special Message to Congress, *supra* note 77, at 6.

⁸⁶ 1807 U.S. LEXIS 239-40.

⁸⁷ For background on Jefferson’s personal involvement in Burr’s prosecution, his animus toward Burr, and his irritation with Justice Marshall for what he regarded as “twistifications” of the law, see Jefferson Administration Documents Concerning the Burr Conspiracy and Trial, <http://www.law.umkc.edu/faculty/projects/ftrials/burr/burrjeffproclamation.html> (last visited Apr. 28, 2008). Years after the Burr case had ended, signs of Jefferson’s irritation with Marshall’s ruling lingered in Louisiana jurisprudence. See *Laverty v. Duplessis*, 13 Mart. o.s. 42 (La. S. Ct. 1813), 1813 WL 757. Referring to the Burr case, the Louisiana court observed:

It was openly declared that the great and upright magistrate (Marshall’s) ruling who preside(d) with so much usefulness and dignity on the supreme bench of the United States, relaxed the law of treason to favor the escape of a powerful criminal (Burr). . . . Disappointed in the magistrate (Marshall’s) ruling, the president of the United States (Jefferson) caused a special message to be sent to Congress, enclosing the testimony in the case of Burr, and called their attention to defects of the law.

3 Mart o.s. 43 (1813). The term “twistifications” was coined by Jefferson. See Garraty, *supra* note 78, at 18.

⁸⁸ Garraty, *supra* note 78, at 19.

2. Martial Law Enforced in New Orleans During War of 1812

The suspension of the writ of habeas corpus also figured in Louisiana's experience during the War of 1812. In the aftermath of a decisive battle against the British at New Orleans in 1812, General Andrew Jackson, the American commander who would later become President, ordered continuation of martial law in New Orleans until news of the Treaty of Ghent ending the war had reached the city. When Louis Louailler, editor of a French language newspaper in New Orleans, protested Jackson's policy of continued martial law, Jackson had him arrested for inciting the troops to mutiny. The next day, a United States judge, Dominick Hall, issued a writ of habeas corpus for Louailler's release. In defiance of the order, Jackson summarily ordered Hall locked up along with Louailler. When news of the Treaty of Ghent finally reached New Orleans, General Jackson revoked his order of martial law. Upon that revocation, Louailler and Hall were freed, and Judge Hall, having returned to his official role, ordered Jackson to show cause why he should not be cited for contempt of court for having disobeyed Hall's earlier orders. Found in contempt, General Jackson was fined only \$1000 because of his valiant service to the country.⁸⁹

3. Habeas Corpus an Instrument for Combating Slave Trade

Louisiana's central role in the American slave trade may also have underscored the need to incorporate the writ of habeas corpus into the Code of Practice. According to Edward Livingston, habeas corpus, like the Roman interdict *de homine libero exhibendo*, was invoked to liberate slaves from their owners' property claims. To support his argument for inclusion of the regulation of habeas corpus, Livingston pointed to an eighteenth-century English decision known as Somerset's case. Declaring that "English air was too pure for slavery to exist in England,"⁹⁰ Lord Mansfield relied upon a writ of habeas corpus to free a slave who had been transported to England from Jamaica.

Given the extent of slave trading in early America, it was a matter of time before the writ would be urged on behalf of African blacks destined for American slave markets. In *The Antelope*,⁹¹ an early United States Supreme Court opinion, the justices investigated the utility of the Great Writ for advancing a national policy against the slave trade.

In June 1820, an American revenue cutter, the *Dallas*, arrested the *Antelope*, a foreign privateer built in Massachusetts and sailing from the port of Havana, as it transported a large number of Africans bound for markets in the United States. When United States authorities in Savannah took possession of the human cargo, the Spanish and French consuls protested the detention, asserting their nations' interests in the Africans on the ground that they had previously been cargo aboard Spanish and Portuguese vessels. Counsel for the United States opposed the Spanish and Portuguese claims, arguing that the law of nations defined the Africans as freedmen, not property, and that their importation violated United States policy against increasing the nation's slave population. Urging that the *Antelope's* human cargo be freed, William Wirt, Attorney General of the United States, reasoned that the slaves should be regarded "as if brought before it upon a *habeas corpus* . . . , asserting their freedom and claiming [the court's] protection."⁹² Although contemporary Spanish law might define

⁸⁹ W. REHNQUIST, *EVERY LAW BUT ONE* 69-70 (1998).

⁹⁰ For a summary of the background of Somerset's case, see BAKER, *supra* note 53, at 476 ("Lord Mansfield, while stating that slavery was 'odious,' did not decide that slavery was unlawful, nor even that Somerset was no longer a slave. . . confining himself to the narrow point that a slave could not be made to leave England against his will."). For further background on Somerset's case, see W.R. Cotter, "The Somerset" Case and the Abolition of Slavery in England, 79 HISTORY 31-56 (1994).

⁹¹ *The Antelope: The Vice Consuls of Spain and Portugal, Libellants*, 23 U.S. 66 (1825).

⁹² *Id.* at 108, quoted in JOHN NOONAN, JR., *THE ANTELOPE: THE ORDEAL OF THE RECAPTURED AFRICANS IN THE ADMINISTRATIONS OF JAMES MONROE AND JOHN QUINCY ADAMS* 103 (1977). Although himself a slave owner at the time

the blacks as property or merchandise, Spanish law inimical to federal policy had no place in a United States tribunal.

4. Uses of Habeas Corpus in Nineteenth-Century Slave Cases: The International Context

Without hindsight, one might today think it reasonable for the Supreme Court to have viewed the plight of a cargo of slaves in terms of habeas corpus; as students of English jurisprudence, Justice Marshall and his colleagues knew *Somerset's* case and considered it in their opinion.⁹³ At the time of Marshall's opinion, however, granting a writ of habeas corpus to the blacks might have puzzled an American audience. Appropriateness of the writ for this purpose was controversial. Although a large number of treaties, resolutions and statutes⁹⁴ cited in the case had outlawed slave trading since 1794, slavery figured in the social and legal fabric of many of the original colonies including New York and Rhode Island,⁹⁵ and the institution prevailed in the confederate states until the end of the Civil War. At least one justice, Bushrod Washington, the heir to George Washington was, like his ancestor, a slave owner. The former had sold a considerable number of slaves from Mount Vernon to purchasers from the Red River Louisiana.⁹⁶

Because Louisiana law deemed slaves property,⁹⁷ Justice Marshall's opinion in *The Antelope* would surely have surprised many contemporary Louisiana lawyers. But the decision may be regarded as a turning point in the evolution of an international law of human rights then in its infancy. During the early nineteenth century, the unusual status of personal rights necessitated exceptional national measures. At the time, an individual ordinarily lacked standing to complain of a violation of his human rights; this was surely true of slaves. Contrary to natural law, the positive laws of many European nations, including Spain and Portugal, denied slaves human rights. Some abolitionist nations, such as England, sought to overcome this procedural obstacle and to strike a blow against slavery by means of international compacts banning commerce in slaves. In 1815, England pressured Spain, Portugal, France, and the Netherlands to halt the Atlantic slave trade.⁹⁸ In 1817, England and Spain signed a treaty banning the slave trade north of the equator. In May 1820, the United States

of the arguments in *The Antelope*, Wirt suggested that there was "no excuse or palliation for perpetuating and extending the guilt and misery of the slave trade." *Id.* at 104.

⁹³ *The Antelope*, 23 U.S. at 112 n.20.

⁹⁴ *Id.* at 115. The case appendix cited acts banning slave trading dating to 1794.

⁹⁵ New Yorkers were recently shocked to learn of the extent of slavery in New York during almost three centuries from its founding until the middle of the nineteenth century, a few years before the outbreak of the Civil War. SLAVERY IN NEW YORK (I. Berlin & L.M. Harris eds., 2005). In *The Antelope*, the Supreme Court incorrectly assumed that slavery was almost exclusively to be found in the southern states.

In the southern states there is the highest degree of probability, from universal practice and well known law, that such persons are slaves. But in the northern states, the probability is just the contrary, and the presumption is reversed. . . . If there be a permitted slave trade, there is also a prohibited slave trade; and the prohibition is much more extensive than the permission.

The statement is especially ironic in view of Justice Washington's involvement in slave trading. 1825 U.S. LEXIS 219, at 10. It is also ironic that Robert Livingston, Edward's brother and the negotiator of the Louisiana Purchase, figured among the largest slave owners in New York in the early 1800s. SLAVERY IN NEW YORK, *supra*, at 72.

⁹⁶ NOONAN, *supra* note 92, at 107.

⁹⁷ The institution of slavery permeated the Louisiana Civil Code from the early 1800s. According to Louisiana Civil Code article 461 (1825), "slaves, though movables by their nature, are considered immovables by operation of law." Article 173: "The slave is entirely subject to the will of his master; he possesses nothing of his own, except his peculium. . . ." Article 177: "The slave is incapable of exercising any public office. . . . He cannot be a party to any civil action . . . except when he has to claim or prove his freedom." On slave regulation in Louisiana, see generally JUDITH KELLEHER SCHAFFER, SLAVERY, THE CIVIL LAW, AND THE SUPREME COURT IN ANTEBELLUM LOUISIANA (1994); Shael Herman, *The Contribution of Roman Law to the Jurisprudence of Antebellum Louisiana*, 56 LA. L. REV. 257, 270-73 (1995).

⁹⁸ NOONAN, *supra* note 92, at 117.

Congress enacted a law declaring slave trading piracy, and making it an offense punishable by execution.⁹⁹ In 1824, England negotiated with the United States a treaty declaring slave trading piracy and establishing collaborative procedures for its suppression, including each nation's reciprocal right to board ships of the other nation for the purpose of inspecting cargos. When the United States Senate diluted the treaty's effectiveness by eliminating the treaty clause authorizing reciprocal boarding rights, the British refused to sign it.¹⁰⁰

Referring to an extensive list of compacts and enactments banning slave trading, Francis Scott Key, on behalf of the blacks, argued:

These acts constitute a solemn pledge to all nations interested in the suppression of this inhuman traffic, and to Africa itself, that if the objects of it should seek our protection where they may lawfully receive it within our territorial jurisdiction and at the feet of our tribunals . . . they should be entitled to that protection. . . . These are men, of whom it cannot be affirmed that they universally and necessarily have an owner. In some particular and excepted cases, depending upon the local law and usage, they be the subjects of property and ownership; but by the law of nature all men are free. . . . We contend . . . that this trade is now condemned by the general consent of nations, who have publicly and solemnly declared it to be unjust, inhuman and illegal.¹⁰¹

Chief Justice Marshall characterized the *Antelope* controversy as a conflict between "sacred rights of liberty and property."¹⁰² On a rhetorical plane the cause of liberty seems to have emerged victorious in *The Antelope* case. But in terms of concrete results, the ruling was a Pyrrhic victory for the abolitionist cause. In terms of practical effect, the ruling might even be deemed a defeat. Despite its lofty rhetoric holding that the slave trade violated natural law, the ruling ordered a lottery be conducted; at the conclusion of the lottery, some of the Africans were freed. But the court, relying upon artificial arithmetical reasoning inappropriate for recognition of human rights, designated thirty nine of the Africans as Spanish property. As a matter of principle, Justice Marshall's ruling seems not to have deeply impressed President Adams. Suggesting that the blacks were still property, Adams's diary described the result of the case as adjudication of a "number of Negroes . . . to the United States as having been illegally imported."¹⁰³

In reflecting upon Adams's diary entry, I cannot help but think that the case would have turned out much worse for the cause of human liberty had the individual owners of the blacks brought the action instead of the Spanish and Portuguese consuls. Questions of standing dogged the consuls throughout the proceedings; incomplete information about the owners' identities and rights hampered prosecution of their claims. Justice Marshall's technical decree seems to have swallowed whole the ideals of liberty couched in terms of restitution based upon ratable losses, ratios, and apportionment. The justice's order seemed to invite a conclusion that the blacks were to be counted as merchandise, not human beings.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 86-87. For the policies underlying the Senate's elimination of the provisions on reciprocal boarding rights, see *The Antelope*, 1825 U.S. LEXIS 219, at 100-05.

¹⁰¹ 1825 U.S. LEXIS 219, at 8-9.

¹⁰² NOONAN, *supra* note 92, at 111; 1825 U.S. LEXIS at 167.

¹⁰³ NOONAN, *supra* note 92, at 134.

XIX. BLENDING TRADITION WITH INNOVATION

Astride both the Romanist and Anglo-American traditions, the Louisiana drafters of the Civil Code of 1825 performed their legislative assignment by appealing to both tradition and innovation. In stressing both themes, the lawmakers had pragmatically to bridge the cultural and linguistic differences among members of the Louisiana legal community. Perhaps nowhere else in the fledgling republic could one find Spanish and French speaking civilians practicing law alongside common lawyers formed in an English mold.

Recognizing that the United States Constitution granted each state, including Louisiana, autonomy in elaborating its own system of private law, the drafters successfully enshrined the state's private law in a civil code unique among the American states. Surely different from the common law, the state's civil law was no less valid for its Romanist provenance. By contrast, a thoroughly Romanist civil procedure would have been doomed to failure. The regulation of trial and appellate practice had to accommodate national constitutional norms such as trial by jury, adversarial process, and prerogative writs. Newly arriving American lawyers would be bewildered by a procedural map that lacked these common law guideposts. Sooner or later, such a procedural map would be attacked as constitutionally frail or violative of standards of due process.

In view of these risks, the Code of Practice, while appearing to be rooted in civilian tradition, required political and legislative innovations. In a new mixed jurisdiction, unduly favoring either the common law or the civil law would have produced discomfort and even distrust among an important part of the bar. The state's civilians had to master common law institutions such as the prerogative writs; as editorial comments in the code of practice indicated, these lawyers distrusted other common law institutions such as civil juries. The new code of practice had to be as accommodating for the civilians as for their Anglo American counterparts, who had no experience with civil law institutions.

Our account of the code's incorporation of common law institutions has provided only half the story. Many distinctive titles in the Code of Practice projected a civilian lexicon upon daily law practice. A host of litigation devices enshrined in the Code were of civilian origin and thus unknown elsewhere in the United States.¹⁰⁴ Furthermore, a wide and flexible application of *analogia iuris* made the two codes close companions. The Civil Code regulation of a substantive issue was often echoed by a procedural rule in the Code of Practice.¹⁰⁵ Achieving a proper blend of the two traditions required of the drafters unusual sensitivity to their immediate local audience as well as a wider American audience who would evaluate their work for compliance with federal norms enshrined in a national constitution.

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¹⁰⁴ See Shael Herman, *The Public Reveries of a Solitary Promenader*, in *ESSAYS IN HONOR OF SAUL LITVINOFF* 146, 163-65 (O. Moreteau et al. eds., 2008).

¹⁰⁵ *Id.* at 154-59.