

The Role of Precedents in Mixed Jurisdictions: A Comparative Analysis of Louisiana and the Philippines

Ryan McGonigle

Readers are reminded that this work is protected by copyright. While they are free to use the ideas expressed in it, they may not copy, distribute or publish the work or part of it, in any form, printed, electronic or otherwise, except for reasonable quoting, clearly indicating the source. Readers are permitted to make copies, electronically or printed, for personal and classroom use.

Abstract

The modern trend of convergence between the legal systems of the civil- and common-law traditions offers a unique opportunity for mixed legal jurisdictions such as Louisiana and the Philippines. The flexibility of mixed jurisdictions is found in their ability to act as a ‘doctrinal sieve,’ straining out the inherent weaknesses of both parent traditions. This article aims at discovering the proper role of precedent (judge-made law) within the mixed or hybrid legal systems of Louisiana and the Philippines. By first setting out the historical and specific legal experiences of both jurisdictions, the question of whether the civilian concept of *jurisprudence constante* or the common-law theory of *stare decisis* obtains in our paradigmatic examples is answered, leaving room for the mixed category *sui generis*. By viewing our mixed jurisdictions through a comparative lens, this paper also presents comparatists with the opportunity to bypass stumbling blocks and legal chauvinism and obtain *vrai rapprochement*.

I. Introduction

The question of whether the common-law doctrine of *stare decisis* obtains in Louisiana has been an oft-debated theme recurring throughout the nearly two centuries of Louisiana statehood. Since the beginning of the 20th century, however, a ‘bright-line rule’ on the role of precedent has been hard to draw. The problem has its roots in the interpretation of the proper role of precedent within a Code-based system¹ that is, at once, a progeny of the great

¹ It should be noted at the onset of this discussion that civil codes, such as the Civil Code of Louisiana or the Civil Code of the Philippines, are books that regulate the legal relationships between individuals. Typical subjects covered by civil codes are: persons and the family, things and ownership, successions and donations, matrimonial property, obligations and contracts, civil responsibility, sale of goods, statute of limitations and real property. For more on the structure of the typical civil code, see Dainow, *infra* note 44 at 244. Code-based systems in the Romanistic tradition should not be confused with codes in common-law countries, such as the Uniform Commercial Code (UCC) and the Civil Code of California, just to name a few. See MERRYMAN, *infra* note 11 at 26-27. ‘[T]he existence of something called a code [is not] a distinguishing criterion. California has more codes than any civil law nation, but California is not a civil law jurisdiction . . . If, however, one thinks of codification not as a form but as the expression of an ideology, and if one tries to understand that ideology and why it achieves expression in code form, then one can see how it makes sense to talk about codes in comparative law. It is true that California has a number of what are called codes . . . [but] the conception of what a code is and of the functions it should perform in the legal process [are] not the same. There is an entirely

Romanistic traditions of France and Spain while being a part of the common-law whole that is the United States. Louisiana is, as one commentator figuratively expressed it, ‘a civil law island in a common law sea.’² Culturally juxtaposed between the world’s two greatest legal traditions - the civil law and the common law - Louisiana’s genius lies in its ability to act as a ‘doctrinal sieve,’ straining harsher elements inherent in both traditions and preserving those that suit its needs. This flexibility is the main characteristic of ‘mixed’ or ‘hybrid’ jurisdictions of which Louisiana and the Philippines form a part.

In the Philippines, however, the question of whether the doctrine of stare decisis obtains was not met with the same level of controversy, as had been the case in Louisiana. Using comparative legal analysis as a backdrop for this paper, the role of precedent in the mixed jurisdictions of Louisiana and the Philippines will be contrasted with the Anglo-American doctrine of stare decisis.³ In this paper, I shall attempt to place our ‘mixed’ jurisdictions into their proper category, seeking answers to a particularly difficult question that underlies the purpose of my thesis: ‘Does the common-law doctrine of stare decisis obtain here or do we adhere to the civilian concept of jurisprudence?’⁴ The answer to this elusive question may be neither positive nor negative - leaving room for a third category: ‘mixed jurisdiction *sui generis*.’

Part II traces the development of the Louisiana theory of precedents with a focus on the jurisprudence of the Supreme Court of Louisiana. The doctrine of stare decisis as it is known in Louisiana’s sister states will be distinguished from the civilian theory of *jurisprudence constante*. In addition, the current renaissance of the civilian tradition in Louisiana will be highlighted and what I call ‘cultural variables’ will be brought to the forefront in order to explain why Louisiana has adhered to a stricter civilian interpretation of the role of precedent. Part III introduces the mixed jurisdiction of the Philippines. It begins by setting out the historical course that led Philippine jurists to adopt the common-law doctrine of stare decisis, focusing on the case-law of the Philippine Supreme Court. The same cultural variables discussed in Part II will be applied to the situation in the Philippines. Lastly, Part IV concludes this paper with a general discussion on how mixed jurisdictions offer legal scholars

different ideology of codification at work in the civil law world.’ Id.

² SHAEL HERMAN ET AL., THE LOUISIANA CIVIL CODE: A HUMANISTIC APPRAISAL 3 (unpublished manuscript on file with Tulane Law School); see also Joachim Zekoll, *The Louisiana Private-Law System: The Best of Both Worlds*, 10 TUL. EUR. & CIV. L. F. 1, 2 (1995).

³ The common-law doctrine of stare decisis should be termed more precisely: ‘stare rationibus decidendis,’ which loosely translated means ‘let the decision stand.’ See ZANDER, *infra* note 45 at 179. See also Robert L. Henry, *Jurisprudence Constante and Stare Decisis Contrasted*, 15 A.B.A.J. 11 (1929); see generally Martin Shapiro, *Toward a Theory of Stare Decisis*, 1 J. LEGAL STUD. 125, 125 (1972) (defining stare decisis as the practice of Anglo-American courts of deciding new cases in accordance with precedents).

⁴ The civilian concept of ‘jurisprudence’ differs from the Anglo-American concept of stare decisis in that the word ‘precedent’ in French legal language never means a binding decision and that courts are not bound by the rationale laid down in those decisions. See Michel Troper & Christophe Grzegorzczak, *Precedent in France*, in INTERPRETING PRECEDENTS 103, 111 (D. Neil MacCormick & Robert S. Summers, eds., 1997). See F.H. LAWSON ET AL., AMOS AND WALTON’S INTRODUCTION TO FRENCH LAW 9-12 (2d ed. 1963). ‘There is some misunderstanding in England about the authority in France of decided cases, or, as it is called, the *jurisprudence* of the courts. It is perfectly true that whereas in England the decisions of the superior courts not only illustrate the law, but are law, in France they are not.’ Id. at 9. See also Yvon Loussouarn, *The Relative Importance of Legislation, Custom, Doctrine, and Precedent in French Law*, 18 TUL. L. REV. 235 (1958); see generally JOHN BELL ET AL., PRINCIPLES OF FRENCH LAW 25-27 (1998). In this discussion, the words ‘jurisprudence’ and ‘precedent’ and ‘case law’ may be used interchangeably.

and practitioners of both legal traditions greater room for ‘rapprochement.’ Today, the trend has been one of convergence between legal systems.⁵ Unfortunately, however, there are many obstacles to surmount before harmonization can be achieved - least of which is legal chauvinism that proponents of both systems seem to find first in asking: ‘Whose system is better?’ It is not that one system is *better* than the other but rather that they are merely different; the hope is that these differences will foster rapprochement. First beginning with mixed jurisdictions such as Louisiana and the Philippines, and recognizing that they are indeed ‘modèles vivants de droit comparé,’⁶ perhaps obstacles can be removed on the road toward the harmonization of divergent legal systems.

II. The historical development of Louisiana’s theory of precedents

If we could look at a pure civilian system in a vacuum and analyze it for its parts, we would see that it was comprised of only two components - legislation⁷ and custom.⁸ According to pure civilian theory, judicial precedents are not considered to be a source of law because the ‘legislative function is entrusted to the legislature and the people exclusively.’⁹ This theory is paralleled in Article I of the Louisiana Civil Code, which declares: ‘The sources of law are legislation and custom.’¹⁰ According to John Henry Merryman, this was so because of state positivism. In his book, *The Civil Law Tradition*, he writes:

... state positivism, as expressed in the dogma of the absolute external and internal sovereignty of the state, led to a state monopoly on lawmaking. Revolutionary emphasis on the strict separation of powers

⁵ See A.G. Chloros, *Principle, Reason and Policy in the Development of European Law*, 17 INT’L & COMP. L. Q. 849 (1968); see Shael Herman, *The Fate and the Future of Codification in America*, 40 AM. J. LEGAL HIST. 407 (1996); see Zekoll, *supra* note 2 at 2; see also Mathias Reimann, *Towards a European Civil Code: Why Continental Jurists Should Consult Their Transatlantic Colleagues*, 73 TUL. L. REV. 1337 (1999).

⁶ LOUIS BAUDOIN, *LE DROIT CIVIL DE LA PROVINCE DE QUÉBEC: MODÈLE VIVANT DE DROIT COMPARÉ* (1953) (noting that mixed jurisdictions such as Québec are ‘living models of comparative law’); see also Jean-Louis Baudouin, *Impact of Common Law in Louisiana and Québec*, in *THE ROLE OF JUDICIAL DECISIONS AND DOCTRINE IN CIVIL LAW AND MIXED JURISDICTIONS* 3 (Joseph Dainow ed., 1975).

⁷ According to Professor Yiannopoulos, legislation is superior to all other sources of law in civil-law jurisdictions. What this means is that if a solution is to be found in the enacted law, ‘no jurisprudence, usage, equity, or doctrine can prevail against it. It is only in cases not covered by legislation that the lawyer or judge is entitled to look elsewhere for solutions.’ A.N. Yiannopoulos, *Introduction to LA. CIV. CODE ANN.* at XXXIII (West 1999).

⁸ Customary law is properly defined as ‘a long series of actions constantly repeated, which have by such repetition, and by uninterrupted acquiescence, acquired the force of a tacit and common consent.’ *Id.* According to John Henry Merryman, ‘[w]here a person acts in accordance with custom under the assumption that it represents the law, his action will be accepted as legal in many civil law jurisdictions, so long as there is no applicable statute or regulation to the contrary.’ MERRYMAN, *infra* note 11 at 23. Moreover, Merryman is of the opinion that ‘[t]o give custom the force of law would appear to violate the dogma of state positivism (only the state can make law) and the dogma of sharp separation of powers (within the state only the legislature can make law).’ *Id.*

⁹ A.N. YIANNOPOULOS, *CIVIL LAW SYSTEM: LOUISIANA AND COMPARATIVE LAW, A COURSEBOOK TEXTS, CASES AND MATERIALS* 146 (2d ed. 1999).

¹⁰ LA. CIV. CODE ANN. art. 1 (West 2000).

demanded that only specifically designated organs of the legislative and judicial powers of government were different in kind; in order to prevent abuse, they had to be very sharply separated from each other.¹¹

Strict separation of powers was a direct reaction to the French judiciary's abuse of power in pre-Revolutionary France. During the *ancien régime*, the French judiciary was possessed of seemingly unfettered discretion to adjudicate cases as they saw fit. The French regional high courts, known as *Les Parlements*, had the authority 'not only to judge cases, but also to promulgate regulations, known as *arrêts de règlement*,' which had the force of law.¹² Hence the origin of the old French proverb: 'Dieu nous garde de l'équité de parlements.'¹³ In the words of Professor Palmer, the existence of the adage itself 'still communicates to us something of the suffering of the people at the hands of judges who abused the proper functioning of a court.'¹⁴ Prior to the French Revolution, it was often said that 'the law was so confused that nobody, including the judges, was able to know it with certainty, and that they were at the mercy of the courts.'¹⁵ As a result, safeguards were sought and 'appeal was made very early to the idea that the law should be written, and written in clear and ordinary language, so that everybody would know his rights and that no discretion should be left to the judge.'¹⁶ The result was Article 5 of the *Code Napoléon*, which proscribes the use of precedents by judges: 'Judges are forbidden, when giving judgment in the cases which are brought before them, to lay down general rules of conduct or decide a case by holding it was governed by a previous decision.'¹⁷

¹¹ JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION* 22 (2d ed. 1994).

¹² Mitchel de S.-O.-l'E. Lasser, *Judicial (Self-)Portraits: Judicial Disclosure in the French Legal System*, 104 *YALE L.J.* 1325, 1330 (1995).

¹³ Translated into English, the adage states: 'May God protect us from the equity of parlements [courts].'

¹⁴ Vernon Valentine Palmer, '*May God Protect Us from the Equity of Parlements*': *Comparative Reflections on English and French Equity Power*, 73 *TUL. L. REV.* 1287, 1296 (1999). For more on the Judiciary's role in pre-Revolutionary France, see generally JOHN A. CAREY, *JUDICIAL REFORM IN FRANCE BEFORE THE REVOLUTION OF 1789* (1981).

¹⁵ André Tunc, *The Grand Outlines of the Code Napoleon*, 29 *TUL. L. REV.* 431, 431 (1955).

¹⁶ *Id.* at 431-32.

¹⁷ *CODE CIVIL* [C. CIV.] art. 5 (Fr.); see also *THE FRENCH CIVIL CODE*, art. 5 (trans., John H. Crabb, 1995). [An example of how legal translations can and do differ even when dealing with the same Article.] Crabb's edition translates Article 5 as: 'Judges are forbidden to pronounce decisions by way of general and regulative disposition on causes which are submitted to them.' 'Article 5 of the Civil Code further guarantees this exclusive authority of the legislature by forbidding judges to issue *arrêts de règlement*, that is to say, to indicate the constructions or interpretations of the legislation which would be followed in like future cases.' Loussouarn, *supra* note 4 at 237. The codification of this prohibition was a direct result of the Enlightenment in Europe and the ideas of Montesquieu. Under Montesquieu's influence, two important ideas concerning the role of the judiciary arose. The first idea was that the judge was nothing more than the 'bouche de la loi' or 'the mouth of the law' and in that sense she is not empowered to 'add anything to the law, [rather] . . . her power is limited to expounding what is already inside the statute.' Mario Ascheri, *Turning Point in the Civil-Law Tradition: From Ius Commune to Code Napoleon*, 70 *TUL. L. REV.* 1041, 1042 (1996). The second idea was that the judge's function was to be a 'référé législatif' (legislative referee) meaning that only the legislature can resolve legal questions and when the judiciary decides a case it does so through 'legislative will.' *Id.* 'Courts were denied all power 'to make regulations' (*règlements*) but were 'to address themselves to the legislature whenever they think it necessary either to interpret a law or to make a new one.' JOHN P. DAWSON, *THE*

In other words, precedent was not considered to be a source of law.¹⁸ By the time of the Article's enactment in 1804, Louisiana was no longer a possession of France, so the question remained whether Louisiana jurisprudence would follow the Revolutionary model or the Anglo-American model.

It was well known that the people of Louisiana were not pleased with the American judicial system or the American immigrants in general.¹⁹ The Americans viewed the French inhabitants of Louisiana with equal contempt.²⁰ The territory's first governor, William C.C. Claiborne, wrote President Jefferson that Louisianans were 'ignoramuses, and . . . childish . . . incapable of seeing the advantages of American laws.'²¹ The elected representatives of Louisiana, however, saw the advantages of the laws that were in existence before the Americans assumed control. During these tumultuous times, they stood as a voice of reason: 'The most inestimable benefit for a people is the preservation of its laws, usages, and habits. It is only such preservation that can soften the sudden transition from one government to another and it is by having consideration for that natural attachment that even the heaviest yoke becomes endurable.'²²

The first attempt at reason came in 1806, when the Legislature of the Territory of

ORACLES OF THE LAW 376 (1968).

¹⁸ Professor Loussouarn, citing the famed jurist François Géný, states: 'Theoretically, the judge is entitled to ignore the decisions of other courts and even his own. From this, Géný and others have concluded that the jurisprudence, or decisions, is not a source of law.' Loussouarn, *supra* note 4 at 257. See also 2 FRANÇOIS GÉNY, MÉTHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF: ESSAI CRITIQUE 145 (2d ed. 1954).

¹⁹ THE LOUISIANA GOVERNORS: FROM IBERVILLE TO EDWARDS 84-85 (Joseph G. Dawson III ed., 1990) [hereinafter LOUISIANA GOVERNORS]. Louisiana's first governor under American rule, William C.C. Claiborne, faced a formidable task. 'Previous American territories had been inhabited by people who spoke the English language, who were Protestant, and who had experience in representative government. The people of Louisiana were predominantly French in culture; they were Catholic; and nothing in their history had given them experience in representative government . . . Furthermore, the people of Louisiana had no love for the people of the United States. The Americans they had known had been pioneers from Kentucky and Tennessee, "Kaintucks" to the people of New Orleans, whose most notable characteristics had been drinking, wenching, and brawling.' *Id.*

²⁰ '[T]he Americans recognized that Louisiana's colonial experience had been different from that of the other states of the union. The existing states all had been nurtured by and eventually weaned from a common mother, English-speaking, Protestant, parliamentary Great Britain. Louisiana, on the other hand, had been reared by non-English speaking, papist nations led by absolute monarchs. The American government was afraid that this dissimilarity in experiences would cause friction and hinder national homogeneity. Therefore, anglicization of Louisiana was believed to be the best course of action.' Alain A. Levasseur & Roger K. Ward, *300 Years and Counting: The French Influence on the Louisiana Legal System*, 46 LA. B.J. 301.

²¹ ALFRED OLIVIER HERO, JR., LOUISIANA AND QUEBEC: BILATERAL RELATIONS AND COMPARATIVE SOCIOPOLITICAL EVOLUTION, 1673-1993 at 165 (1995). 'Educated in a belief of the excellencies of the civil law, the Louisianians have hitherto been unwilling to part with them, and, while we feel ourselves the force of habit and prejudice, we should not be surprised at the attachment that the old inhabitants manifest for many of their former customs and local institutions. The general introduction, therefore, into this Territory of the American laws must be the effect of time; the work of innovation must progress slowly and cautiously, or otherwise much inconvenience will ensue, and serious discontents will arise among a people who have the strongest claims upon the justice and the liberality of the American Government.' 4 CHARLES GAYARRÉ, HISTORY OF LOUISIANA 199 (1885).

²² Yiannopoulos, *supra* note 7 at XXXVI.

Orleans convened and declared that ‘the Territory of Orleans²³ should be governed by Roman and Spanish civil law and by the ordinances and decrees that previously applied in Louisiana.’²⁴ Initially, Governor Claiborne vetoed this legislation and this sparked protests within and without the Legislature. Notwithstanding the veto, the move was seen as pragmatic because of the confused, uncodified state of Spanish law that had been in force in Louisiana at the time of the Purchase.²⁵ In particular, there were ‘six different compilations of Spanish laws . . . and it was unclear which of over 20,000 individual laws of Spain applied in the territory.’²⁶ This state of confusion prompted both sides to seek greater compromise, which had culminated in the adoption, on March 31, 1808, of a work entitled ‘A Digest of the Civil Laws now in Force in the Territory of Orleans, with Alterations and Amendments Adapted to its Present form of Government.’²⁷ This Digest,²⁸ known as the Louisiana Civil

²³ The Territory of Orleans, as we would know it today, is comprised of the modern-day state of Louisiana. In 1811, the Eleventh Congress delineated the boundaries of the Territory of Orleans in the Act of Feb. 20, 1811, 2 Stat. 641. The Act, officially entitled ‘An Act to enable the people of the Territory of Orleans to form a constitution and state government, and for other purposes’ reads, in the pertinent part: ‘That the inhabitants of all that part of the territory or country ceded under the name of Louisiana, by the treaty made at Paris . . . between the United States and France, contained within the following limits, that is to say: beginning at the mouth of the river Sabine, thence by a line to be drawn along the middle of said river, including all the islands to the thirty-second degree of latitude; thence due north, to the northernmost part of the thirty-third degree of north latitude; thence along the said parallel of latitude to the river Mississippi; thence down the said river to the river Iberville; and from thence along the middle of said river and lakes Maurepas and Ponchartrain, to the gulf of Mexico; thence bounded by said gulf to the place of beginning: including all islands within three leagues of the coast, be, and they are hereby authorized to form for themselves a constitution and state government, and to assume such name as they may deem proper . . .’ Id.

²⁴ YIANNOPOULOS, *supra* note 9 at 63.

²⁵ It should be noted that Louisiana was ceded to Spain in 1762 by the Treaty of Fontainebleau. French laws, however, continued to be applied until 1769 when Spanish Governor Don Alejandro O’Reilly, an Irishman in the service of Spain, issued an ordinance ‘designed to organize an efficient government and administration of justice in accordance with the Spanish laws.’ Yiannopoulos, *supra* note 7 at XVI. The ordinance, which became known as ‘O’Reilly’s Code,’ had the effect of transforming Louisiana into a ‘Spanish ultramarine province, governed by the same laws as the other Spanish possessions in America and subject to the same system of judicial administration.’ Id. at XVII. Nevertheless, Louisiana was receded to France by the Treaty of San Idelfonso in 1800, yet France reassumed sovereignty on November 30, 1803, for only twenty days before ceding the territory to the United States. As a result, ‘the bulk of the pre-existing laws [Spanish] remained in force until the United States took possession of the territory on December 20, 1803.’ Id.

²⁶ William Tetley, *Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)*, 60 LA. L. REV. 677, 697-98 (2000); see John T. Hood, Jr., *The History and Development of the Louisiana Civil Code*, 19 LA. L. REV. 18, 19 (1958) (noting that even in Spain there was no consensus over which laws would apply in case of a conflict); see also ALAIN A. LEVASSEUR, LOUIS MOREAU-LISLET: FOSTER FATHER OF LOUISIANA CIVIL LAW (1996); see also Rodolfo Batiza, *The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance*, 46 TUL. L. REV. 4 (1971); but cf. Robert A. Pascal, *Sources of the Digest of 1808: A Reply to Professor Batiza*, 46 TUL. L. REV. 604 (1972).

²⁷ Yiannopoulos, *supra* note 7 at XIX (West 2000); see also Roger K. Ward, *The French Language in Louisiana Law and Legal Education: A Requiem*, 57 LA. L. REV. 1283. Discussing the state of Louisiana jurisprudence before codification, Roger Ward argued that ‘Louisiana’s decision to adopt a civil code was based on necessity. Because of its motley colonial past, Louisiana’s legal system was actually an interesting amalgamation of Spanish and French law. The Spanish law in effect at the time of the transfer of the territory to the United States was composed of eleven different codes, containing more than 20,000 laws, with many conflicting provisions. Relatively few Spanish legal treatises were available to help Louisianians understand and interpret these laws.’ Id. at 1302; but cf. Rodolfo Batiza, *The Influence of Spanish Law in Louisiana*, 33 TUL. L.

Code of 1808, was inspired largely by the French *projet du gouvernement* of 1800, better known as the *Code Napoléon*.²⁹ In particular, approximately seventy percent of the Code's 2,160 Articles, or 1,516 articles, was based upon the French Code.³⁰ This being said, it is surprising to note that Louisiana never enacted a codal provision corresponding to Article 5 of the *Code Napoléon* relating to the prohibition of judge-made law (precedent).³¹ Considering that the French Civil Code was adopted and promulgated four years prior to the Louisiana Civil Code of 1808, and in light of the 'close ties then existing with the old country,' there must have been 'ample opportunity for [the Code] to have found its way to Louisiana.'³²

The absence of a provision prohibitive of judge-made law, however, should not be interpreted as an attempt by the redactors of the Code to adopt the Anglo-American common-law doctrine of *stare decisis*. On March 24, 1822, Messieurs Edward Livingston,³³ Louis Moreau-Lislet,³⁴ and Pierre Derbigny³⁵ were commissioned by the Louisiana Legislature to

REV. 29, 33 (1958) (arguing that the redactors of the Digest of 1808 were influenced by Spanish law, in particular the fifth book of *Las Siete Partidas* relating to contracts and sales of goods).

²⁸ According to Professor Yiannopoulos, a 'digest code' is a 'clarification and systemization of existing law without significant alterations. It secures orderly arrangement of legal provisions, convenience of ascertaining, and accessibility of the law. This type of code, which is exemplified by the Justinian legislation, is a compilation rather than a true codification.' YIANNOPOULOS, *supra* note 9 at 43.

²⁹ For more on the sources of the law in Louisiana, see *id.*, at 65. See also Henry Plauche Dart, *The Sources of the Civil Code of Louisiana*, in SAUNDERS, LECTURES ON THE CIVIL CODE OF LOUISIANA (1925). 'In preparing the Digest of 1808 there is no doubt that Moreau-Lislet and Brown followed the first projet of the Napoleonic Code. There are very many articles identical with articles of the Napoleonic Code, from which the legend gathered strength, until it is customary now to say that the Digest of 1808 was a mere transcript of the first projet of the Napoleon Code.' *Id.* at XXXV. For more on the Napoleonic Code's 'territorial expansion' by conquest, direct persuasion and inspiration, see, e.g., Jean Limpens, *Territorial Expansion of the Code*, in THE CODE NAPOLEON AND THE COMMON LAW WORLD 93-99 (Bernard Schwartz ed., Greenwood Press 1975) (1956). 'The dynamic influence of the Code did not stop at the borders of Europe. America, with its boundless territories, was to furnish new areas for expansion. Strangely enough, it was in North America on the soil of the United States that the Code found its first foothold. *Louisiana*, a French establishment from 1682 to 1762, a Spanish possession from 1762 to 1800, a part of the United States from 1804, was first and foremost a land of French culture. The first code of 1808 amply demonstrated its heritage. Although it is not known if the drafters of the code were in possession of the definitive text of the Code Napoleon, it is interesting to note that the divergences from it were not great.' *Id.* at 98-99.

³⁰ YIANNOPOULOS, *supra* note 9.

³¹ C. Girard Davidson, *Stare Decisis in Louisiana*, 7 TUL. L. REV. 100, 100 (1932).

³² *Id.* at 101.

³³ Edward Livingston was a New York lawyer who emigrated to Louisiana in 1803 and was fundamental in assuring the survival of the civil law in his adopted state. According to Judge Hood, '[t]here [was] little question but that the common law system would have been established here shortly after the United States assumed sovereignty, and that Louisiana would be a common law state today, were it not for the fact that . . . Livingston . . . emerged as a leader in opposing this action, and as a champion for the cause of retaining a civil law system in the territory.' Hood, *supra* note 26 at 20.

³⁴ Louis Moreau-Lislet was born in Saint-Domingue (modern-day Santo Domingo) on the Isle of Hispaniola when it was a French dependency. He received his legal training in France and immigrated shortly after the Louisiana purchase. Moreau-Lislet has 'perhaps contributed more to the legal literature of this state than has any other person. During his busy career, he participated in more than 200 cases before the State

‘revise the civil code by amending the same in such a manner as they will deem advisable.’³⁶ A year later, in a report to the Louisiana Senate, these esteemed jurists wrote about the proper role of judges and, in doing so, showed their contempt for precedent as a source of law. They wrote:

[W]hat is the true meaning of the Law when it is doubtful; to decide how it applies to facts when they are legally ascertained is the proper office of the Judge - The exercise of his discretion is confined to these, which are called CASES OF CONSTRUCTION: in all other he has none, he is but the organ for giving voice, and utterance, and effect, to that which the Legislative branch has decreed. In cases where there is no Law, according to strict principles he can neither pronounce nor expound, nor apply it. *Governments under which more is required from, or permitted to, the Magistrate are vicious because they confound Legislative power with Judicial duties, and permit their exercise in the worst possible shape, by creating the rule, after the case has arisen to which it is applied. This is a vice inherent in the Jurisprudence of all nations governed wholly, or in part, as England is by unwritten Laws, or such as can only be collected from decisions.*³⁷

The Louisiana Civil Code of 1825 was printed in French³⁸ and English, and the redactors of the Code drew inspiration from the *Code Napoléon* as well as French doctrine and jurisprudence.³⁹ The French version of Article I of the Code of 1825 put the matter to rest when it declared that ‘[l]a loi est une déclaration solennelle de la volonté législative.’⁴⁰ Thus, without expressly declaring that precedent is not law along the lines of Article 5 of the *Code Napoléon*, the redactors of the Louisiana Civil Code came back within the ambit of the

Supreme Court, and also served at various times as a member of the State House of Representatives, a State Senator, as a Parish Judge, as Attorney General, and as a representative in Congress.’ *Id.* at 24.

³⁵ Pierre Derbigny was a French nobleman who was forced to flee during the Revolution. He settled in Louisiana and joined Edward Livingston’s efforts to oppose Governor Claiborne’s plan to install the common-law system in the territory. Derbigny is perhaps best remembered for his service as a Justice of the Louisiana Supreme Court and for his tenure as Governor. *Id.* at 29; see generally LOUISIANA GOVERNORS, *supra* note 19.

³⁶ 1822 La. Acts. 108.

³⁷ LIVINGSTON, MOREAU-LISLET, & DERBIGNY, REPORT ON THE REVISION OF THE CIVIL CODE 8-10 (1823) (emphasis added).

³⁸ The Civil Code of 1825 was drafted originally in French and was translated into English. Both versions, however, were official, but since the English translation was known to contain errors, the French text became controlling. See Tetley, *supra* note 26 at 698-99. ‘The English translation proved to be spectacularly bad. Recognizing the deficiencies in translation, the Louisiana Supreme Court ruled that, in the event of a conflict between the two texts, the French would prevail. This French preference rule has been applied constantly by Louisiana courts.’ Levasseur & Ward, *supra* note 20 at 304. See generally *Dunford v. Clark’s Estate*, 3 La. 199 (La., 1831); *Phelps v. Reinach*, 38 La. Ann. 547 (La., 1886); *Straus v. City of New Orleans*, 166 La. 1035, 118 So. 125 (La., 1928); *Sample v. Whitaker*, 172 La. 722, 135 So. 38 (La., 1931).

³⁹ YIANNOPOULOS, *supra* note 9 at 69.

⁴⁰ LA. CIV. CODE ANN., art. I (1825). The English version of the same text reads: ‘Law is a solemn expression of legislative will.’ According to Professor deVries, in the civilian tradition, ‘loi,’ or legislation, is the most fundamental source of law. HENRY P. DEVRIES, CIVIL LAW AND THE ANGLO-AMERICAN LAWYER 248 (1975).

French revolutionary model.⁴¹ That is to say, although it may seem that the judge must decide the case, the decision itself is not to be considered law.⁴²

The opposite is true of the common law. To the student of the common law, the law is created and molded by judges, and legislation is viewed as ‘serving a kind of supplementary function.’⁴³ Consequently, it can be said that the common law has its fundamental basis on the idea of precedent or *stare decisis*. The rationale for this rule is consistency.⁴⁴ According to Zander, one of the ‘fundamental characteristics of law is the objective that like cases should be treated alike.’⁴⁵ It is therefore rational that, all things being equal, ‘one court should follow the decision of another where the facts appear to be similar.’⁴⁶ The greatest mind of the common law, Sir Edward Coke in his *Institutes of the Laws of England*, opined:

Nihil quod est contra rationem est licitem; for reason is the life of the law, nay the common law itself is nothing else but reason; which is understood of an artificial perfection of reason, gotten by long study, observation, and experience, and not of every man’s naturall reason; for, *Nemo nascitur artifex*. This legall reason *est summa ratio*. And therefore if all the reason that is dispersed into so many severall [sic] heads, were united into one, yet could he not make such a law as the law in *England* is.⁴⁷

Moving several hundred years to the present, reason still requires that, as one commentator put it, ‘similar cases be understood and dealt with similarity. Otherwise nothing makes sense. In order to understand one another and reason accurately we must be consistent. So if law is to be a rational (rather than irrational and arbitrary) process, judicial decisions must be consistent with one another. The pragmatic ground for the rule of precedent is predictability: Lawyers and citizens want to be able to assess their future behavior in terms of current

⁴¹ ‘Nevertheless, the [Louisiana] Code does contain a provision which is not found in the French Civil Code, that might be said to indicate an intention on the part of the codifiers to reach the French result. Article 1 [of the Louisiana Civil Code of 1870] provides that “Law is a solemn expression of legislative will.”’ Davidson, *supra* note 31 at 102.

⁴² *Id.*

⁴³ MERRYMAN, *supra* note 11 at 34.

⁴⁴ Professor Dainow states that the common-law theory of precedents developed during England’s formative years when there was no strong legislative power. He writes: ‘When a court decided a particular case, its decision was not only the law for the parties, but had to be followed in future cases of the same sort, thereby becoming a part of the general or common law. Thus, the common law, as a body of law, consisted of all the rules that could be generalized out of judicial decisions. New problems brought new cases, and these enriched the rules of the common law.’ Joseph Dainow, *The Civil Law and the Common Law: Some Points of Comparison*, 15 AM. J. COMP. L. 419, 424-25 (1967).

⁴⁵ MICHAEL ZANDER, *THE LAW-MAKING PROCESS* 179 (3d ed., 1989).

⁴⁶ *Id.*

⁴⁷ 1 EDWARD COKE, *INSTITUTES ON THE LAWS OF ENGLAND** §138 (emphasis in original); but cf., for an attack on Coke’s assertion that the common law is grounded in reason alone, THOMAS HOBBS, *A DIALOGUE BETWEEN A PHILOSOPHER AND A STUDENT OF THE COMMON LAW* 54-55 (J. Cropsey, ed. 1971). The use of reason as a basis for the common law, according to Hobbes, threatens the foundation of the legal system as a whole because ‘any Man, of any Law whatsoever may say it is against Reason, and thereupon make a pretence of his disobedience.’ *Id.* See also Gerald J. Postema, *Some Roots of Our Notion of Precedent*, in *PRECEDENT IN LAW* 11 (Laurence Goldstein ed., 1988) (noting that equating reason with law, in Hobbes’s view, was a dangerous undertaking).

decisions of the courts.’⁴⁸ Civilian lawyers and citizens also want predictability but they have ‘felt the need [for it] less keenly because of the background of rules provided first by Roman law and codified custom, and later by the codes of the Napoleonic era.’⁴⁹ Predictability, even in a pure civilian system, however, can be achieved by the use of precedents. According to Justice Barham of the Louisiana Supreme Court, jurisprudence is a major source of law in Louisiana. He writes:

Under our Code and through the historical civilian tradition, jurisprudence is not a major source of law, yet it has been and it remains such in reality. Possibly the belief in jurisprudence as a primary source of law is so strongly embedded in the minds of many of the judiciary and the practicing bar of Louisiana because our civil law system coexists in a nation with states which because of their common law heritage so regard jurisprudence. Even if our bar really believes that legislation is the primary source of law, it practices under the principle that jurisprudence is a major source of law. Lawyers often only perfunctorily examine legislative expression before they turn for final authority to the jurisprudence to resolve the legal question posed by their clients’ cases. When the court asks the lawyer in argument to give the authority for a point which he advocates, the court probably expects a case citation even when there is positive codal or statutory authority. As a result of the pressure under which we perform our various roles in our legal system, there has been a tendency to stray from strict civilian methods and concepts.⁵⁰

Even if the tendency has been ‘to stray from strict civilian methods’ as Justice Barham put it, the common-law doctrine of *stare decisis* has no place in the jurisprudence of Louisiana.⁵¹ Scholars familiar with both traditions, however, have not always agreed upon this statement. In 1937, Professor Gordon Ireland authored a controversial Article entitled *Louisiana’s Legal System Reappraised*,⁵² which broadly declared that ‘*Louisiana is today a common law State*,’ based in part on a misconception of the doctrine of *stare decisis*.⁵³ At first glance, the doctrines of *stare decisis* and *jurisprudence constante* appear quite similar, but ‘the difference between them is one of the chief things which distinguishes the two great systems of law.’⁵⁴ According to Professors Daggett, Dainow, Hébert, and McMahon, who wrote the famed response to Professor Ireland entitled *A Reappraisal Appraised: A Brief for the Civil Law of Louisiana*,⁵⁵ there are two fundamental differences between the legal doctrines:

⁴⁸ PATRICIA SMITH, *THE NATURE AND PROCESS OF LAW: AN INTRODUCTION TO LEGAL PHILOSOPHY* 141 (Patricia Smith ed., 1993).

⁴⁹ ZANDER, *supra* note 45 at 219.

⁵⁰ Mack E. Barham, *A Renaissance of the Civilian Tradition in Louisiana*, 33 TUL. L. REV. 357, 359 (1973).

⁵¹ See Harriet Spiller Daggett, Joseph Dainow, Paul M. Hébert, & Henry George McMahon, *A Reappraisal Appraised: A Brief for the Civil Law of Louisiana*, 12 TUL. L. REV. 12 (1937); see also John H. Tucker, Jr., *The Code and the Common Law in Louisiana*, 29 TUL. L. REV. 739 (1955); but cf. Ireland, *infra* note 52 at 585.

⁵² Gordon Ireland, *Louisiana’s Legal System Reappraised*, 11 TUL. L. REV. 585 (1937).

⁵³ *Id.* at 596.

⁵⁴ Henry, *supra* note 3 at 11.

⁵⁵ Daggett et al., *supra* note 51.

The two most important differences . . . between the doctrine of *jurisprudence constante* and the rule of *stare decisis*, are: (1) a single case affords a sufficient foundation for the latter, while a series of adjudicated cases all in accord forms the predicate of the former; and (2) case law in civilian jurisdictions is merely law *de facto*, while under the common law technique it is law *de jure*.⁵⁶

In *Quaker Realty Company v. Labasse*,⁵⁷ the Louisiana Supreme Court held that ‘only seldom can a single decision serve as a basis for *stare decisis* . . . never where opposed to previous decisions, and especially where such previous decisions are overruled without being referred to, as if having escaped altogether the attention of the court.’⁵⁸ The use of the words *stare decisis*, as noted above, has caused much uncertainty in the state of the law.⁵⁹ To resolve uncertainty, a change of terminology was in order.⁶⁰ Today, civilian doctrine on precedents in Louisiana is referred to as *jurisprudence constante*.⁶¹ The change of terminology, however, did not alter the theory behind the doctrine. The court in *Lagrange v. Barré*,⁶² as far back as 1845, knew how to apply the civilian interpretation of jurisprudence. Justice Simon, writing for the court, held: ‘[A]s we have often said, it requires more than one decision to establish the jurisprudence of a country, particularly when, in a solitary one, the point in controversy does not appear to have been thoroughly investigated and examined.’⁶³

More than thirty years earlier, in 1813, the Louisiana Supreme Court decided *Agnes v. Judice*,⁶⁴ where it was held that common-law terms introduced into the courts of Louisiana

⁵⁶ Id. at 17.

⁵⁷ 131 La. 996, 60 So. 661 (La., 1912).

⁵⁸ Id. at 1008, 60 So. at 665.

⁵⁹ According to Professors Daggett, Dainow, Hébert and McMahon, Professor Gordon Ireland was misled by this erroneous label. ‘Anyone making a superficial examination of Louisiana jurisprudence is quite apt to reach entirely erroneous conclusions because of the loose manner in which common law terminology is employed as being synonymous with accepted civilian nomenclature. Thus the repeated use of the terms “fee simple title” and “deed” might induce the reader to conclude that Louisiana has adopted the common law of real property. This conclusion would be absolutely erroneous.’ Daggett et al., *supra* note 51 at 19, n.19. ‘Ainsi, l’utilisation du vocabulaire de la common law par les hommes de loi et les magistrates de Louisiane ne signifie pas l’incorporation des theories et des techniques de la common law.’ My translation: ‘Thus, the use of common-law vocabulary by legal scholars and judges from Louisiana does not imply the incorporation of common-law theories and techniques.’ Dainow, *infra* note 104 at 32.

⁶⁰ As a practical matter, ‘[w]hen the Louisiana civilian uses the term “*stare decisis*,” he is not using it in the same sense in which it is employed in the common law. He is using it as being synonymous with “judicial precedent,” and the specific brand of the latter which he has in mind is that which the French civilians refer to as *jurisprudence constante*.’ Daggett et al., *supra* note 51 at 19.

⁶¹ *Jurisprudence constante* is defined as a ‘long line of decisions on a certain subject [that] may thus be taken to establish rules of customary law.’ YIANNOPOULOS, *supra* note 9 at 147. According to Professor Yiannopoulos, the *jurisprudence constante* exception in France rests on doctrinal considerations, whereas in Louisiana the doctrine has its foundation in the Civil Code. Id.

⁶² 11 Rob. 302 (La., 1845).

⁶³ Id. at 310.

⁶⁴ 3 Mart. 182 (La., 1813).

'ought to be considered rather as a translation of the name formerly used than as emanations from the English jurisprudence and their adoption as words could not be considered as having introduced the English practice itself.'⁶⁵ Reverting to the French term as the learned scholars in *A Reappraisal Appraised: A Brief for the Civil Law of Louisiana*⁶⁶ had done was the first step towards reclaiming a threatened French-civilian heritage that had been in decline since the late 1800s.⁶⁷

The precipitous decline of the French legal and cultural heritage in Louisiana began with the Constitution of 1845.⁶⁸ According to Roger Ward, the debates over the 1845 Constitution were conducted in an ethnically charged atmosphere. He states:

French-Louisianian delegates to the convention no longer assumed that their language would continue to thrive in the State's judicial and legislative bodies. On the contrary, French-speaking delegates were not naïve: they realized that the English language was a cancer growing on their mother tongue. To fight the malignancy, they needed to gain official constitutional protection for the French language.⁶⁹

The debates were spearheaded by Bernard Marigny, a francophone senator from New Orleans.⁷⁰ Senator Marigny proffered a resolution to be included in the Constitution to the effect that anyone had a right to address members of the Legislature in either language.⁷¹ The resolution passed but not without some controversy. Anglophone Louisianian delegates objected on the ground that the use of French would be too burdensome to the Legislature's English-speaking members.⁷² Senator Marigny and the francophone delegates responded in turn, accusing the anglophone members of the Legislature of seeking to impose the common law upon Louisiana.⁷³ In the debates, Marigny stated: 'The hostility to the French language is stimulated by the design to abrogate our civil system of law . . . They have supremacy in both houses of the legislature. I know that the Anglo-Saxon race are [sic] the most numerous, and therefore the strongest. We are yet to learn whether they will abuse the possession of

⁶⁵ Ireland, supra note 52 at 19.

⁶⁶ Daggett et al., supra note 51.

⁶⁷ For more on the threatened status of the French language in Louisiana, see HERO, supra note 21 at 183. 'The erosion of French language and culture in relative numbers and influence in Louisiana became increasingly clear well before the Civil War,' citing American anglophone and nonfrancophone immigration exceeding foreign French immigration as factors for this decline. Id. 'Americans flowed into Louisiana in large numbers during the Reconstruction and thereafter via the railroad into the growing rice-producing and, by World War I, petroleum-producing southwestern prairies and by the 1930s the newer oil-producing northwest and southeast.' Id. at 184.

⁶⁸ Ward, supra note 27 at 1294.

⁶⁹ Id. at 1295.

⁷⁰ JOHN WILDS, CHARLES L. DUFOUR & WALTER G. COWAN, LOUISIANA, YESTERDAY AND TODAY: A HISTORICAL GUIDE TO THE STATE 268 (1996).

⁷¹ Ward, supra note 27 at 1295.

⁷² Id.

⁷³ Ward notes that, in response to anglophone protests, 'Marigny accused those who opposed his resolution for a bilingual legislature of secretly favoring the imposition of the common law upon the state, a heretical position for any upstanding Louisianian.' Id.

numerical force to overwhelm the Franco-American population.⁷⁴ That answer would come in the form of two new constitutions - the Constitutions of 1864 and 1868. In the former, the Louisiana Legislature overturned the provision put forth by Senator Marigny twenty years earlier.⁷⁵ In the latter, the Legislature provided that ‘the laws, published records and judicial and legislative proceedings of the State . . . be promulgated and preserved in the English language; and no laws shall require judicial process to be issued in any other than the English language.’⁷⁶

This decline would only begin to retrocede in 1937 with *A Reappraisal Appraised: A Brief for the Civil Law of Louisiana*.⁷⁷ Since then, however, civilian proponents would strive to undertake measures to reclaim their civilian cultural and legal heritage. Writing in 1955, John H. Tucker, Jr., in his article *The Code and the Common Law in Louisiana*,⁷⁸ argued that Louisiana was ‘forced by the complexity of its legal inheritance to exercise [a certain] selectivity or eclecticism’,⁷⁹ which included assimilating certain areas of the common law into Louisiana’s legal institutions. According to Tucker, however, ‘the Civil Code of Louisiana had been developed by legislation, doctrine and jurisprudence concurrently with some statutory adaptations of the common law of its sister states and of England on a variety of subjects mostly beyond the scope of the Civil Code.’⁸⁰ In his article, Tucker also refuted Professor Ireland’s claim that Louisiana was a common-law state. Tucker argued that ‘[t]he effect of judicial precedent cannot be accepted as a safe criterion by which to evaluate the effect of the common law on the civil law of Louisiana as contained in its civil code.’⁸¹ Citing the fact that ‘[t]he essential difference between the civil and the common law lies in the generating force of authority,’ Tucker then contrasted the weight of legislation (civil law) against that of decisions of the court (common law).⁸² He pointed out that ‘[a] code is not intended to provide for every contingency that might arise’ and that a code is rather ‘a statement of general principles that are to be applied by deduction or analogy to particular cases.’⁸³ To prove his point, Tucker stated: ‘It is the function of courts in the common law

⁷⁴ HERO, supra note 21 at 183 and 331 n.7. For more on the content of Senator Marigny’s speech, see 2 PROCEEDINGS AND DEBATES OF THE CONVENTION WHICH ASSEMBLED AT THE CITY OF NEW ORLEANS, JANUARY 14, 1844 at 831-36 (1845).

⁷⁵ LA. CONST. of 1864, art. 103 (1864).

⁷⁶ LA. CONST. of 1868, art. 109 (1868).

⁷⁷ Daggett et al., supra note 51.

⁷⁸ John H. Tucker, Jr., *The Code and the Common Law in Louisiana*, 29 TUL. L. REV. 739 (1955), reprinted in *THE CODE NAPOLEON AND THE COMMON LAW WORLD* 346-388 (Bernard Schwartz ed., Greenwood Press 1975) (1956).

⁷⁹ Id. at 747. For more on the selectivity of Louisiana law, see Thomas Jones Cross, *The Eclecticism of the Law in Louisiana: A Charcoal Sketch of the Legal System of that State*, 55 AM. L. REV. 405 (1921) (qualifying Louisiana law as an ‘assembled’ legal system).

⁸⁰ Tucker, supra note 78 at 740.

⁸¹ Id. at 757.

⁸² Id.

⁸³ Id.

jurisdictions to make the law. In the civil law the function of the court is one of interpretation.’⁸⁴ In order to make his thesis ‘fool-proof,’ Tucker enumerated several reasons why Professor Ireland’s thesis is incorrect. First of all, he reiterated Professor Ireland’s colleagues’ claim that ‘if there is any subject of Louisiana law to which the rule of stare decisis does not apply, it is the subject of *stare decisis* itself.’⁸⁵ Furthermore, Tucker pointed out that stare decisis advocates in Louisiana can be found more often than not in the dissenting opinions of judges,⁸⁶ showing that ‘*the doctrine of stare decisis has been honored more in the breach than in the observance.*’⁸⁷ Tucker then stated emphatically that the ‘Louisiana doctrine of *stare decisis* is a myth’⁸⁸ and that the Louisiana Supreme Court had ‘never adopted *stare decisis*, and whatever chances it had of creeping into our system have been reduced to the vanishing point by the passage of time.’⁸⁹ Concluding, as did Professors Daggett, Dainow, Hébert and McMahon, Tucker argued that: ‘Our courts have always followed, and show every disposition to continue to follow, the essentially civilian judicial technique of never letting today become either the slave of yesterday or the tyrant of tomorrow.’⁹⁰

Outside of the courts, however, there was a Franco-Louisianian renaissance occurring in the late 1960s and early 1970s, through which ‘[p]ride in French heritage thrived and there was a growing movement to reintroduce the French language to Louisiana.’⁹¹ The end result was Act 409 of 1968,⁹² establishing the Council for the Development of Louisiana-French, known better as its acronym, CODOFIL.⁹³ Under the Act, the Governor is ‘authorized to establish the Council for the Development of Louisiana-French, said agency to consist of no more than fifty (50) members and including a chairman appointed by the Governor from names recommended to him by legislators, and said Council is empowered to do any and all things necessary to accomplish the development, utilization and preservation of the French language as found in the State of Louisiana for the cultural, economic and tourist benefit of the State.’⁹⁴ Act 409 had done what 165 years of statehood could not: essentially, ‘[it] guaranteed . . . that all Louisianians attending public schools would have an opportunity to be

⁸⁴ Id. at 757-58.

⁸⁵ Id. at 758-59; see also Daggett et al., supra note 51 at 20.

⁸⁶ Tucker, supra note 78 at 759.

⁸⁷ Daggett et al., supra note 51 at 20 (emphasis in original).

⁸⁸ Id. at 23; Tucker, supra note 78 at 759.

⁸⁹ Daggett et al., supra note 51 at 23; Tucker, supra note 78 at 759.

⁹⁰ Daggett et al., supra note 51 at 23-24; Tucker, supra note 78 at 759.

⁹¹ Ward, supra note 27 at 1299.

⁹² LA. ACT 409, vol. II (1968).

⁹³ *Council for the Development of French in Louisiana* (visited Nov. 10, 2000) <<http://www.codofil.org>>.

⁹⁴ LA. ACT 409, §1 (1968).

exposed to French language and culture.⁹⁵ Compelled by the increased interest in the French language, francophone and francophile legislators alike pushed for constitutional recognition and protection of the language.⁹⁶ Their aims, however, fell short of the mark but they were able to secure ‘the right of the people to preserve, foster, and promote their respective historic, linguistic and cultural origins.’⁹⁷

Back within the courts and the universities, the *cause célèbre* was the Civil Code and its grand French civilian tradition. In his article, *A Renaissance of the Civilian Tradition in Louisiana*,⁹⁸ Justice Barham enumerated five factors that contributed to the civilian renaissance in Louisiana. They were: (1) the increasing enrollment of students in Louisiana law schools that required able professors conversant in civil-law and common-law doctrine;⁹⁹ (2) the proliferation of the civil-law doctrine in the English language through translations sponsored by the *Louisiana Law Review*;¹⁰⁰ (3) the efforts of the Louisiana State Law Institute;¹⁰¹ (4) the contributions of the Institute of Civil Law Studies at Louisiana State University;¹⁰² and (5) the inclusion into the first-year curriculum of an introductory course in the civil law.¹⁰³ While Barham’s five factors all are indicative of the civilian renaissance in Louisiana and its continued vibrancy, there are other factors that prove that Louisiana is an evolving civilian system *sui generis*.¹⁰⁴ First, despite the renewed interest in the role of precedent in Louisiana, ‘there is little support in the Louisiana bench and bar for the civilian theory that the role of judges is to decide cases only, leaving doctrinal development to the scholarly writers.’¹⁰⁵ The necessity of earning a living by the practice of law has to be balanced with the desire to keep a vibrant civilian tradition.¹⁰⁶ According to Barham, ‘by teaching law students how to be winning advocates, and by making quick judicial decisions to keep up with an ever-increasing caseload has made it expedient for the lawyer, the teacher, and the judge to adopt methods and give answers which, if they do not detract from the civil

⁹⁵ Ward, *supra* note 27 at 1300.

⁹⁶ *Id.*

⁹⁷ LA. CONST. art XII, §4.

⁹⁸ Barham, *supra* note 50.

⁹⁹ *Id.* at 360.

¹⁰⁰ *Id.* at 360-61.

¹⁰¹ *Id.* at 361.

¹⁰² *Id.* at 361-62.

¹⁰³ *Id.* at 362.

¹⁰⁴ Joseph Dainow, *Le droit civil de la Louisiane*, 6 REVUE INTERNATIONALE DE DROIT COMPARÉ [R.I.D.C.] 19, 32 (1954).

¹⁰⁵ Albert Tate, Jr., *The Role of the Judge in Mixed Jurisdictions: The Louisiana Experience*, in THE ROLE OF JUDICIAL DECISIONS AND DOCTRINE IN CIVIL LAW AND IN MIXED JURISDICTIONS 28 (Joseph Dainow ed., 1975).

¹⁰⁶ Barham, *supra* note 50 at 358.

law tradition, at least do not support it.’¹⁰⁷ These necessities have made Louisiana what it is today, a civil-law system *sui generis*.

III. The Philippine doctrine of stare decisis

The discovery of the Philippines by Magellan on March 16, 1521, heralded a new era in the history of Philippine jurisprudence. The Spanish colonists brought with them a Romanistic system of laws,¹⁰⁸ which mixed with the Malay customary laws¹⁰⁹ that were utilized by the Filipino people in their everyday affairs.¹¹⁰ After 377 years of Spanish domination, the ‘Pearl of the Orient Seas’ found itself with a new colonial master, the United States. The victory of Admiral George Dewey in the battle of Manila Bay on May 1, 1898,¹¹¹ and the formal transfer of sovereignty over the Philippine Islands in the Treaty of Paris,¹¹² transformed ‘the Philippine legal system from its traditional Spanish civil law orientation, into one patterned after Anglo-American juridical principles.’¹¹³ According to Professor Villanueva, the merger of the two greatest legal traditions in the Philippines gave the legal system great ‘elasticity and progressiveness.’¹¹⁴ This progress came in the form of the common-law doctrine of stare decisis.

In the mixed jurisdiction of the Philippines, the main sources of law are legislation, precedent, and custom.¹¹⁵ In typical civilian fashion, legislation is the only source of law that

¹⁰⁷ Id. at 358-59.

¹⁰⁸ ‘Among the collections and compilations of Spanish laws which were probably in force in the Philippines before the movement for the scientific codification of the laws of Spain, were: the *Fuero Juzgo*, the *Fuero Real*, the *Siete Partidas*, *El Ordenamiento de Alcalá*, *Las Leyes de Toro*, the *Recopilación de las Leyes de las Indias*, and the *Novisima Recopilación*.’ Gamboa, *infra* note 110 at 304.

¹⁰⁹ See José P. Laurel, *What Lessons May Be Derived by the Philippine Islands from the Legal History of Louisiana*, 2 PHIL. L.J. 63, 76 (1915). ‘Crude though it was, the attempt of the Filipinos at legal ordering started rather early.’ Arturo E. Balbastro, *Philippine Legal Philosophy*, 41 PHIL. L.J. 635, 636. According to Balbastro, ‘[a]s early as the 15th century, the Philippines could boast of two legal codes, namely, the Code of Sumakwel or Maragtas (1250 A.D.) and the Code of Kalantiao (1433 A.D.)’ Id. at n.3.

¹¹⁰ The Filipinos of the pre-Spanish period were living under ‘. . . a native system of customary laws. They were fragmentary and unorganized; not general but localized, hence diverse. There was no attempt at systematization. Notwithstanding these defects they were not entirely devoid of good qualities. We must not judge them by twentieth-century standards.’ Melquiades J. Gamboa, *The Meeting of the Roman Law and the Common Law in the Philippines*, 49 PHIL. L.J. 304, 304 (1974).

¹¹¹ For more on the battle of Manila Bay, see generally COMMANDER NATHAN SARGENT, U.S.N., *ADMIRAL DEWEY AND THE MANILA CAMPAIGN* (1947); see also G.J.A. O’TOOLE, *THE SPANISH WAR: AN AMERICAN EPIC - 1898* (1984).

¹¹² Treaty of Peace between the United States of America and the Kingdom of Spain, Dec. 10, 1898, U.S.-Spain, 30 Stat. 1754.

¹¹³ Cesar Lapuz Villanueva, *Comparative Study of the Judicial Role and Its Effect on the Theory on Judicial Precedents in the Philippine Hybrid Legal System*, 65 PHIL. L.J. 42, 42 (1990).

¹¹⁴ Id.

¹¹⁵ MELQUIADES J. GAMBOA, *AN INTRODUCTION TO PHILIPPINE LAW* 10 (7th ed., 1969).

is absolutely binding.¹¹⁶ However, in the words of one commentator, ‘the influence of Anglo-American law has not been wholly lost on us and we are willing to concede that the judges do their bit in building up the mosaic of the law.’¹¹⁷ But where does the Philippines stand on the spectrum of precedents - towards the civil law, the common law or is it properly within its own ambit? In *Alzua and Arnalot v. Johnson*,¹¹⁸ the Philippine Supreme Court, in holding that a rule recognized and applied in the common-law courts of America and England did not apply in the Philippines, said:

[W]hile it is true that the body of the Common Law as known to Anglo-American jurisprudence is not in force in these Islands, ‘nor are the doctrines derived therefrom binding upon our courts, save only in so far as they are founded on sound principles applicable to local conditions, and are not in conflict with existing law’ (U.S. vs. Cuna, 12 Phil., 241); nevertheless many of the rules, principles, and doctrines of the Common Law have, to all intents and purposes, been imported into this jurisdiction, as a result of the enactment of new laws and the organization and establishment of new institutions by the Congress of the United States or under its authority; for it will be found that many of these laws can only be construed and applied with the aid of the Common Law from which they are derived, and that to breathe the breath of life into many of the institutions introduced into these Islands under American sovereignty recourse must be had to the rules, principles, and doctrines of the Common Law under whose protection aegis the prototypes of these institutions had their birth.¹¹⁹

In *United States v. De Guzman*,¹²⁰ the Philippine Supreme Court reiterated its position as per the importation of common-law doctrine:

We have frequently held that, for the proper construction and application of the terms and provisions of legislative enactments which have been borrowed from or modeled upon Anglo-American precedents, it is proper and oftentimes essential to review the legislative history of such enactments and to find an authoritative guide for their interpretation and application in the decisions of American and English courts of last resort construing and applying similar legislation in those countries.¹²¹

In *United States v. Abiog and Abiog*,¹²² Justice Malcolm of the Supreme Court introduced the concept of a Philippine common law. In the instant case, the Court dealt with a homicide where two brothers, acting independently and separately of each other, inflicted mortal wounds on the victim who had insulted one of the former.¹²³ Justice Malcolm was faced with a problem - if he followed the common law he could end up with an inequitable result. Citing *People v. Woody*,¹²⁴ Justice Malcolm noted the common-law rule: ‘If two or

¹¹⁶ Id.

¹¹⁷ Perfecto V. Fernandez, *Sixty Years of Philippine Law*, 35 PHIL. L.J. 1389, 1391 (1960).

¹¹⁸ 21 Phil. 308 (1912).

¹¹⁹ Id. at 331-32.

¹²⁰ 30 Phil. 416 (1915).

¹²¹ Id. at 419.

¹²² 37 Phil. 137 (1917).

¹²³ Id. at 138-39.

¹²⁴ 45 Cal. 289 (Cal. 1873).

more are acting independently, and the actual perpetrator of the homicide cannot be identified, all must be acquitted, although it is certain that one of them was guilty.’¹²⁵
Choosing not to adopt the common-law position, Malcolm writes:

Two reasons impel us not to follow blindly the authorities just cited. In the first place, it is believed that the facts in the present instance can be distinguished from these American Cases. However this may be, there is another doctrine embodied in our jurisprudence which reaches the same result. To elucidate - the principles of the Anglo American Common Law are for the Philippines, just as they were for the State of Louisiana and just as the English common law was for the United States, of far-reaching influence. The common law is entitled to our deepest respect and reverence. The courts are constantly guided by its doctrines. Yet it is true as heretofore expressly decided by this court that - ‘neither English nor American common law is in force in these Islands, nor are the doctrines derived therefrom binding upon our courts, save only in so far as they are founded on sound principles applicable to local conditions, and are not in conflict with existing law.’ (U.S. vs. Cuna [1908], 12 Phil., 241).¹²⁶

What Malcolm had in mind was a blend of all three systems:

What we really have, if we were not too modest to claim it, is a Philippine common law influenced by the English and American common law, the *derecho común* of Spain, and the customary law of the Islands and builded [sic] on a case law of precedents. Into this Philippine common law, we can properly refuse to take a rule which would estop other courses of reasoning and which, because of a lack of legal ingenuity, would permit men guilty of homicide to escape on a technicality.¹²⁷

With the departure of the Americans and the establishment of an independent Philippine Republic on July 4, 1946,¹²⁸ one could have expected Anglo-American legal

¹²⁵ Id. at 290-91.

¹²⁶ 37 Phil. at 141.

¹²⁷ Id.

¹²⁸ Proclamation No. 2695, 60 Stat. 1352 (1946). Independence of the Philippines by the President of the United States of America: A Proclamation, reads:

‘WHEREAS the United States of America by the Treaty of Peace with Spain of December 10, 1898, commonly known as the Treaty of Paris, and by the Treaty with Spain of November 7, 1900, did acquire sovereignty over the Philippines, and by the Convention of January 2, 1930, with Great Britain did delimit the boundary between the Philippine Archipelago and the State of North Borneo; and

WHEREAS the United States of America has consistently and faithfully during the past forty-eight years exercised jurisdiction and control over the Philippines and its people; and

WHEREAS it has been the repeated declaration of the legislative and executive branches of the Government of the United States of America that full independence would be granted the Philippines as soon as the people of the Philippines were prepared to assume this obligation; and

WHEREAS the people of the Philippines have clearly demonstrated their capacity for self-government; and

WHEREAS the Act of Congress approved March 24, 1934, known as the Philippine Independence Act, directed that, on the 4th day of July immediately following a ten-year transitional period leading to the independence of the Philippines, the President of the United States of America should by proclamation withdraw and surrender all rights of possession, supervision, jurisdiction, control and sovereignty of the United States of America in and over the territory and people of the Philippines, except certain reservations therein or thereafter authorized to be made, and, on behalf of the United States of America, should recognize the independence of the Philippines:

NOW, THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, acting under and by virtue of the authority vested in me by the aforesaid act of Congress, do proclaim that, in accord

influence to have dropped off dramatically. This, however, was not the case. After independence, one commentator noted:

Today, we stand as an independent republic, but the reception of American rules into our law continues unabated. This holds true both as to its substance and to its methods. Much of the legislation of the past fourteen years is undisputedly of American origin. Our law on labor relations, on social insurance, on taxation, on banking and currency, to mention the more important examples, is local enactment of corresponding American statutes, with adaptations here and there to fit our circumstances. So pervasive is American influence as to have penetrated the last strong-hold [sic] of civil law in this country. Our Civil Code, as revised, now embodies the common law principles of trusts and estoppel, as well as the latest American systematization of the law on sales and partnership.¹²⁹

Speaking about the reliance upon precedent in the Philippines, the same commentator noted:

Our reliance on precedent, our insistence on actual controversies and our recognition of such doctrines as the law of the case and *res judicata*, betray how deeply are our tribunals steeped in American judicial habits. We might as well mention also the propensity of our local courts to be persuaded by the pronouncement of American appellate courts. The official theory is that American decisions, being expressions of foreign law, are not binding on our courts, but our judges, nevertheless, behave as though they were. Many an argument has been able to push through a point across the threshold of judicial belief because it is buttressed with citation of American authorities. . . . So pervasive, indeed, has been the impact of American influence upon our legal system that an American jurist who surveys its content would find most of it as familiar ground.¹³⁰

To typify the extent of the common law's influence upon the legal traditions of the archipelago, we need not look any further than Article VIII of the Civil Code of the Philippines, the codification of *stare decisis*. Article VIII declares: '*Judicial decisions applying or interpreting the laws or Constitution shall form a part of the legal system of the Philippines.*'¹³¹ However, according to Professor Villanueva, 'in its theory of judicial precedents,' the Philippine courts have 'blended together the underlying philosophies of the principle of *stare decisis* of the common-law system, and the evolving principles of judicial precedents of the civil law systems.'¹³² A good example of the Philippine Supreme Court

with and subject to the reservations provided for in the applicable statutes of the United States,

The United States of America hereby withdraws and surrenders all rights of possession, supervision, jurisdiction, control, or sovereignty now existing and exercised by the United States of America in and over the territory and people of the Philippines; and

On behalf of the United States of America, I do hereby recognize the independence of the Philippines as a separate and self-governing nation and acknowledge the authority and control over the same of government instituted by the people thereof, under the constitution now in force.'

¹²⁹ Fernandez, *supra* note 117 at 1396. For more on the incorporation of trusts and estoppel into the Civil Code, see Vicente Abad Santos, *Trusts: A Fertile Field for Philippine Jurisprudence*, 25 PHIL. L.J. 519 (1950).

¹³⁰ Fernandez, *supra* note 117 at 1396-97.

¹³¹ CODE CIVIL [C. CIV.] art. 8 (Phil.) (emphasis added).

¹³² Villanueva, *supra* note 113 at 45. But cf. Gamboa, *supra* note 110 at 314 (standing for the premise that there has never been a 'Philippine common law.'). Professor Gamboa denies outright that there has ever been a Philippine common law: '[A]lthough many common-law provisions and principles are being literally grafted on the law tree of the Philippines, the case-law method of adjudication, which is a *sine qua non* of the common-law

applying its own theory arose shortly after Independence in the case of *Tan Chong v. Secretary of Labor*.¹³³ In *Tan Chong*, the Court dealt with an application for naturalization of a native of the Philippines, born of a Chinese father and a Filipino mother.¹³⁴ According to the laws that were in force at the time of the appellant's birth, however, this native-born Filipino was not considered a citizen of the Philippines.¹³⁵ Prior to Independence, the jurisprudence favored the application of the principle of *jus soli*¹³⁶ and the rule of law in the case of *United States v. Wong Kim Ark*,¹³⁷ that is, a person born in the United States of Chinese parentage and domiciled therein is a citizen of the United States.¹³⁸ The Philippine Supreme Court adhered to the rule in *Wong Kim Ark* until the time of Independence, when the respondent in this case, the Secretary of Labor, urged that reliance upon the principle of *jus soli* be abandoned.¹³⁹ Declaring that the petitioner in *Tan Chong* was born of alien parentage and was not a citizen of the Philippines, the Court as per Padilla, J., held:

While birth is an important element of citizenship, it alone does not make a person a citizen of the country of his birth. . . . Citizenship is a political status. The citizen must be proud of his citizenship. He should treasure and cherish it. In the language of Mr. Chief Justice Fuller, 'the question of citizenship in a nation is of the most vital importance. It is a precious heritage, as well as an inestimable acquisition.' (U.S. vs. Wong Kim Ark, supra.) Citizenship, the main integrate element of which is allegiance, must not be taken lightly. Dual allegiance must be discouraged and prevented. But the application of the principle of *jus soli* to persons born in this country of alien parentage would encourage dual allegiance which in the long run would be detrimental to both countries of which such persons might claim to be citizens.

The principle of *stare decisis* does not mean blind adherence to precedents. The doctrine or rule laid down, which has been followed for years, no matter how sound it may be, if found to be contrary to law, must be abandoned. The principle of *stare decisis* does not and should not apply when there is conflict between the precedent and the law. The duty of this Court is to forsake and abandon any doctrine or rule found to be in violation of the law in force.¹⁴⁰

One could say that the Philippine Supreme Court's reversal of *jus soli* suited its needs at a time when the young Philippine Republic needed stability. Having a segment of their so-

system, is not adopted. The doctrine of *stare decisis* does not obtain in the Philippines in the same sense that it obtains in common-law countries.' Id. Moreover, Gamboa opines that 'the greater bulk of Philippine law is Romanesque' and that 'despite the rapid increase of the common-law element, the Romanesque portion of the Philippine law still predominates and will continue to predominate.' Id. at 313-14.

¹³³ 79 Phil. 249 (1947).

¹³⁴ Id. at 257.

¹³⁵ Id. at 252.

¹³⁶ 'Jus Soli,' also known as the 'right of the soil,' is the rule that a child's citizenship is determined by the place of birth. This is the rule in the United States as affirmed by the 14th Amendment to the U.S. Constitution. BLACK'S LAW DICTIONARY 868 (7th ed. 1999).

¹³⁷ 169 U.S. 649 (1898).

¹³⁸ Id. at 691.

¹³⁹ See *Tan Chong*, 79 Phil. at 253.

¹⁴⁰ Id. at 256-57.

called ‘native’ population, with questionable or divided loyalties, could be a dangerous prospect. In order to fashion their own definition of stare decisis, the Philippine Court searched for a solution that would be flexible enough so that when ‘in the light of changing conditions, a rule has ceased to be of benefit and use to society, the courts may rightly depart from it.’¹⁴¹ For over four centuries, the Filipino people were not able to create their own legal structures and theories.¹⁴² Speaking on the Filipino people’s inability to fashion their own legal thinking, one commentator noted that the ‘phenomenon resulted in the emergence of a legal system which is a hybrid of Roman Civil Law and Anglo-American Common Law.’¹⁴³ This hybrid, as irony would have it, was and still is ‘neither civil nor common law,’ but rather ‘typically Filipino.’¹⁴⁴

IV. Conclusion

The comparatist Ernst Rabel once wrote that ‘[c]ommon law and civil law are generally believed to be different, like oil and water, which do not mix.’¹⁴⁵ The purpose of studying comparative law, however, has been to mix the unmixable - that is, adherents of the common law consider civil law ‘uncommon’ and civilians view the common law as ‘uncivil.’¹⁴⁶ Through the study of comparative law, however, common ground is sought in uncommon areas. Traditionally, scholars have applied comparative law as a tool to perform two crucial purposes. First, the lessons of comparative law ‘promised to provide insights on our own legal order through a comparison with other legal systems.’¹⁴⁷ Second, by applying comparative analysis we ‘illuminate the structures and internal processes of foreign legal systems, either for the purpose of legal harmonization, or to facilitate negotiations with foreign lawyers and business entities.’¹⁴⁸ One particularly fertile area of comparison occurs naturally in mixed jurisdictions, such as Louisiana and the Philippines.¹⁴⁹ It has been said that members of the legal community in mixed jurisdictions are ‘born comparatists.’¹⁵⁰ As this paper has shown, Louisiana and the Philippines have been ‘particularly fortunate in that [they

¹⁴¹ Villanueva, *supra* note 113 at 56, citing *Helvering v. Hallcock*, 309 U.S. 106 (1940).

¹⁴² Balbastro, *supra* note 109 at 636.

¹⁴³ *Id.*; see also Arturo E. Balbastro, *The Legal Philosophy of José P. Laurel*, 37 PHIL. L.J. 728, 729 (1962).

¹⁴⁴ Balbastro, *supra* note 109 at 636.

¹⁴⁵ Ernst Rabel, *Private Laws of Western Civilization*, 10 LA. L. REV. 431, 431 (1950).

¹⁴⁶ *Id.*

¹⁴⁷ Nora V. Demleitner, *Combating Legal Ethnocentrism: Comparative Law Sets Boundaries*, 31 ARIZ. ST. L.J. 737, 738 (1999).

¹⁴⁸ *Id.*

¹⁴⁹ KONRAD ZWIEGERT & HEIN KÖTZ, *INTRODUCTION TO COMPARATIVE LAW* 115 (Tony Weir trans., Clarendon Press 3d ed. 1998) (1998). ‘Mixed jurisdictions is [sic] a very privileged and fertile field of observation for the sociology of law.’ Baudouin, *supra* note 6 at 3.

¹⁵⁰ Baudouin, *supra* note 6 at 3.

have], as a basic law, a civil code not unlike those in force in civil countries; but . . . also [have] adopted to a marked degree the common-law view of the binding effect of judicial decisions.’¹⁵¹ Thus, these mixed jurisdictions are ‘blest with the basic certainty of the civil law, together with that flexibility of the common law which comes from a strong and powerful judiciary.’¹⁵² The experience of these mixed jurisdictions is immeasurable because of their innate ability to circumvent the weaknesses inherent in, and enhance the strengths of, both traditions. For proponents of the common law, mixed jurisdictions such as Louisiana and the Philippines, can serve as a guide to point out stumbling blocks in administering a system of codified law.¹⁵³ For civilians, mixed jurisdictions can show the advantages of having a powerful judiciary and molding the civil law to fit the requirements of an ever-changing world.¹⁵⁴ For both traditions, mixed jurisdictions offer a unique opportunity for closer contact - *vrai rapprochement* - because of their ability to walk through both systems with ease. It has been said, however, that the apparent is often elusive to perceive, and this might be the case with our two sample mixed jurisdictions. Comparative law analysis ‘implies the ability to judge one’s system through another,’ whereas in Louisiana and the Philippines, ‘the system of reference is, to a certain degree, already integrated in the object of the comparison.’¹⁵⁵ Therefore, if the harmonization of legal structures is a goal that adherents of both legal traditions value, and the result one that would enhance the efficiency of how we conduct legal business, then both legal traditions will have to work in tandem in order to achieve the desired results.

¹⁵¹ Frederick K. Beutel, *The Place of Louisiana Jurisprudence in the Legal Science of America*, 4 TUL. L. REV. 70, 71 (1929).

¹⁵² *Id.* at 71.

¹⁵³ *Id.* For another example of how a mixed jurisdiction can bridge gaps between the common law and the civil law, see A.G. Chloros, *The Projected Reform of the Civil Law of the Seychelles: An Experiment in Franco/British Codification*, 48 TUL. L. REV. 815 (1974). At the time Professor Chloros wrote this article, the Civil Code of the Seychelles was still in the form of a Draft Code. However, the Draft Code dealt with several interesting issues, among them was the conversion of common-law principles into codified form. ‘It was clear that an attempt to insert a most detailed and elaborate English statute into a code of general principles would play havoc with the structure and substance of the Code. To appreciate the problem one need look only at the definitions abounding in any English statute and compare them with the neat, concise, and elegant definitions of the Civil Code. The solution adopted was to insert the substance of some English statutes or cases, but in the style appropriate to the Civil Code. It was easier to insert the spirit of English law into the Code, for instance by extending considerably the powers of the court [i.e., ability to create precedents].’ *Id.*

¹⁵⁴ Chloros, *supra* note 153.

¹⁵⁵ Baudouin, *supra* note 6 at 3.