INTRODUCTION OF ANICETO MASFERRER

Markus G. Puder

Thank you very much for coming. It is a great pleasure to have you for our 2025 Brendan Brown Lecture this evening, and this lecture will celebrate our bicentennial of the 1825 Civil Code, arguably the first codification in the Americas. The Brendan Brown Natural Law Institute, established through the generosity of the late Professor Brendan Brown, sponsors a major lecture and other activities in keeping with Professor Brown's love of natural law and scholarly discourse. This, some might say, also envelops music, so the natural-law piece we played for you was Schubert's last Piano Trio in E-flat major, Opus 100, Deutsch 929, also known as "The Comet in the Sky Passing Across the Musical World."* So again, Dr. Montès, Professor Qifan Wu, thank you very much for helping us out with this celebration. And so I might not bore you with how masterfully Schubert leveraged the asymmetrical double ternary form in the second movement that we just played, rather we'll transition to law.

I wish to recognize our professor who serves on the Supreme Court of Louisiana Historical Society Steering Committee for the bicentennial, Professor Monica Hof Wallace; also our colloquia chair, Nicole Tuchinda; our events coordinator, Laura Ponoroff; and IT and Media Service Assistant Remi Poirrier. Today's Brendan Brown Lecture will delve into the unwritten laws in the Louisiana Civil Code of 1825 from both a historical and comparative perspective.

Our speaker, Aniceto Masferrer (Setu) of the University of Valencia Faculty of Law, is a preeminent scholar and accomplished teacher of comparative law, the history of the law, jurisprudence

* The program began with a performance of Franz Schubert's Piano Trio in E-flat Major, Opus 100, Deutsch 929, performed by Professor Markus G. Puder on violin, Dr. Jean Montès on cello, and Professor Qifan Wu on digital piano. A video recording of the entire 2025 Brendan F. Brown Lecture program is available on YouTube at https://www.youtube.com/watch?v=R9BuTHeYzRs.

and philosophy, and numerous other subjects. Professor Masferrer holds a law degree from the University of Barcelona and a doctorate in law from the University of Girona. He served as a visiting professor, I should say, everywhere. If I go through the list, we might end up in the reception right away. So, I will just mention Cambridge University, Harvard Law, George Washington Law, Louisiana State University, and the Max Planck in the "Old Country" [Germany].

He has also served in countless other legal institutions of higher learning. He is the author of numerous books and law review articles. Setu—and this is near and dear to my heart—is a friend of our fair state. He is a friend of Louisiana, her laws, and our law school here at Loyola. Setu is guided by the ideal of service to others in the advancement of liberty. That's really a small way of expressing the magnitude of these endeavors. I'm not the technology guy, but even I follow his YouTube posts.

So, without further ado, it's our privilege and pleasure to have you here. The floor is yours. *Bienvenido*.

THE ROLE OF UNWRITTEN LAWS IN THE LOUISIANA CIVIL CODE OF 1825: A HISTORICAL AND COMPARATIVE PERSPECTIVE*

*Aniceto Masferrer***

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* The Editors of *Loyola Law Review* are grateful that Professor Masferrer chose to submit an expanded, full-length article of his Brendan F. Brown Lecture for publication in this special issue. A video of the lecture Professor Masferrer delivered at Loyola University New Orleans College of Law on March 27, 2025, is also available at https://www.youtube.com/watch?v=R9BuTHeYzRs&feature=youtu.be.

** This article contains the Brendan F. Brown Lecture I gave at Loyola University New Orleans College of Law on Thursday, March 27, 2025, at 5:00 p.m. I would like to thank all those who made the event possible, as well as those who served on the committee that graciously granted me the honor of being the 25th speaker at the prestigious Brendan F. Brown Lecture: Madeleine M. Landrieu, Dean of the College of Law; E. Phelps Gay, Supreme Court of Louisiana Historical Society Chair; Professor Monica Hof Wallace, representative of the College of Law on the Supreme Court of Louisiana Historical Society Steering Committee for the Bicentennial; Georgia Chadwick and Miriam Childs, former director and current director, respectively, of the Law Library of Louisiana; as well as Professor Markus G. Puder, who encouraged and supported me from the beginning, and who, together with two other colleagues, Professors Jean Montès and Qifan Wu, gave a short recital of music to give a festive atmosphere to the event, playing some pieces that, according to Markus, could be considered a "natural law composition": Franz Schubert, Piano Trio No. 2, Op. 100, D. 929 in E-flat major: Second Movement (*Andante con moto*). This study has also been carried out within the framework of the research project on "Tradition and Foreign Influences in the Spanish Criminal Codification: Contribution of Jurisprudence in the General Part (1870-1995)" (PID2023-150447NB-I00), financed by the Ministry of Science and Innovation.

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INTRODUCTION

Dear Distinguished Colleagues and Friends,

I am really humbled by your kind invitation to give the Brendan F. Brown Lecture here at Loyola University New Orleans College of Law. Today I feel my nothingness when considering the remarkable figures and scholars who have given this lecture in the past, many of them great lawyers, some also distinguished legal historians, such as Robert W. Gordon, Alan Watson, Jeremy J. Waldron, Richard Helmholz, James Gordley, and John W. Cairns, among others.

My gratitude to the College of Law, its dean, and the whole Brendan F. Brown committee, not only for their decision to count on me for this lecture in the context of the Commemoration of the Bicentennial of the 1825 Louisiana Civil Code, but also for their determination to spread the legacy of its sponsor, Brendan Francis Brown, a former faculty member in this College of Law who was described by some as a "most exciting classroom performer."[1] Unfortunately, I do not have such a gift, and I don't think this might be the proper occasion to try to be or to present myself as "exciting."

What I really find both exciting and fascinating is the topic of my lecture, even though you might be here for many reasons other than the topic of the lecture, which perhaps you might have no clue about. Or, if you know it well, you might have come with some degree of skepticism, considering that article 21 of the Louisiana Civil Code of 1825 is a so very well-known text, and some many scholars have written and published about it, that the lecturer will hardly be able to say anything new.

You might even think that the choice of the topic was due either to ignorance (to say "lack of knowledge" would be more delicate) or recklessness (perhaps "certain lack of prudence" is more delicate). Well, I fully understand this view and gladly accept

1. *See Speaker Series: Brendan F. Brown*, LOY. UNIV. NEW ORLEANS COLL. OF L., https://law.loyno.edu/student-resources/law-library/speaker-series-brendan-f-brown (last visited Aug. 6, 2025).

that challenge. To begin with, I'm glad to realize that the topic is in line with the legacy of Brendan F. Brown, "who highly valued scholarly discourse and the natural law."[2] This might explain why, in the titles of past lectures (surprisingly enough, of four years in a row from 2016 to 2019), the expression "natural law" appeared.[3]

"Natural law" has been—and is still in some jurisdictions—within the category of "unwritten laws." I have to confess that I feel really attracted to the Civil Codes of Louisiana for several reasons. The first one is that I studied the Louisiana Civil Code when I spent time in New Orleans and Baton Rouge working as a visiting scholar at LSU (2013), with my colleague and friend Olivier Moréteau, and that period of my life was so nice and enriching, during which I visited the Loyola College of Law and met some colleagues who became good friends of mine (Markus Puder, David Gruning, Ray Rabalais, and the former dean, Maria Pabón, among others) that I desired to stay here permanently; unfortunately, this did not happen. The second reason for my attraction to the Louisiana Civil Codes is that a few years ago, I supervised a doctoral thesis on the U.S. civil codes, including the Louisiana one. And the third reason, which is probably the most important one, is that the Louisiana Civil Codes are texts which clearly reflect their influence and, at the same time, have their own peculiarity and strong personality. More specifically, the 1825 Louisiana Civil Code has a notable and undeniable French and Spanish influence, and at the same time, some of its features or elements are completely genuine or characteristic of Louisiana, because they are neither French nor Spanish.

I've been working on codification (both in European and Anglo-American jurisdictions) from a historical and comparative perspective for more than two decades, and this has allowed me to perceive the shortcomings of scholars when studying codes, including not only legal historians and comparative lawyers, but also civil lawyers dealing with civil codes, criminal lawyers dealing with criminal codes, etc. Too frequently, mistakes are made by scholars out of a lack of perspective. Many scholarly discussions can be explained because the parties are not willing to look at things from a variety of perspectives. Usually, things are not black or white. Reality is complex; human beings are complex; human relations are even more complex; so society and law are necessarily

2. *Id.*
3. *Id.*

complex. "*Ubi societas, ibi ius*"—"Wherever there is society, there is law"—says the well-known Latin maxim. Then, if society is both rich and complex, law cannot be poor and simple.

Modern codifiers somehow disregarded such complexity and aimed at drafting a text, which once it was approved, could be easily understood by anybody and provide a solution for any case which might arise in the future. Besides, judges should limit themselves to a "mechanical application" of legal provisions, as Montesquieu pointed out with his famous description of judges as the "mouth of the law" ("*bouche de la loi*"). Of course, both objectives were really unattainable, but this was somehow the ideology—as Merryman called it[4]—of the codes.

Ideas or ideals are nice and even desirable inasmuch as they are somehow attached to reality. However, when some ideas or ideals depart too much from reality, even to the extent of disregarding or rejecting it, they're harmful to human beings and to society. I call them "ideology" or "ideologies." Myths are the consequence of both ideologies and ignorance, and there is nothing more contradictory than a scholarly debate based on myths, because both parties might be moved and led by more or less strong feelings or prejudices, rather than by rational and scientific purposes.[5] They replace reason or reasonableness with passion, kind cooperation with fierce confrontation and rivalry, and real scholarship with political or social ideology.

Is this not what happened with modern codification in the civil law and common law traditions? This is one of the conclusions I've come to after studying modern codes in the Western legal tradition, particularly criminal codes and also civil codes. I'm not saying that all the literature written and published about codes is more about ideology than scholarship. There is scholarship and good schol-

4. JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA 27 (2d ed. 1985).

5. *See generally* Aniceto Masferrer, *French Codification and "Codiphobia" in Common Law Traditions*, 34 TUL. EUR. & CIV. L.F. 1 (2019) [hereinafter Masferrer, *French Codification*]. On the discussion of David. D. Field's civil code project in New York, see my articles entitled *The Passionate Discussion Among Common Lawyers About Postbellum American Codification: An Approach to Its Legal Argumentation*, 40 ARIZ. STATE L.J. 173 (2008); *Defense of the Common Law Against Postbellum American Codification: Reasonable and Fallacious Argumentation*, 50 AM. J. LEGAL HIST. 355 (2008–2010).

arship indeed,[6] but there is also a great deal of ideology as well, as I've showed, particularly in Europe, England, and the United States. In Australia, I perceived a much less ideologically charged debate on codification than in other common law jurisdictions.[7]

What is the connection of this ideology with the unwritten laws and, more specifically, with the role of the unwritten laws in the Code of Louisiana? Yes, there is a clear connection, and that connection is precisely at the core of my lecture.

To properly explain that, I'll divide my presentation into four parts, and I'll conclude with a final question:

Part I: What Codes Say (or Pretend to Say): Ideology Leading to Reductionism

Part II: How Codes Really Work: Reality Encompassing a Rich and Multifaceted Variety

Part III: How Codes Are Applied: The Unwritten Laws in the Louisiana Supreme Court

Part IV: Is There a Future for the Unwritten Laws in Louisiana and Beyond?

I. WHAT CODES SAY (OR PRETEND TO SAY): IDEOLOGY LEADING TO REDUCTIONISM

Ideology necessarily oversimplifies reality, reducing its richness and complexity. Modern codes also did so. The ideology of the first modern code, the French Civil Code, is noticeable in certain aspects somehow related to its main purposes. Nobody would deny that the *Code Napoléon* was designed, or at least presented, to accomplish three objectives or ideals, namely,

(1) Legal unification (throughout France);

(2) The introduction of the revolutionary principles that presented law as a product of reason (rather than as a product of tradition); and

(3) The drastic reduction of legal sources, pretending to regulate social relations with only legal provisions or

6. A recent and good example of consistent scholarship on codification is the last book by DIRK HEIRBAUT, REDEFINING CODIFICATION: A COMPARATIVE HISTORY OF CIVIL, COMMERCIAL, AND PROCEDURAL CODES (2024).

7. *See* Masferrer, *French Codification*, *supra* note 5.

statutes (instead of resorting to other legal sources, such as customs, court decisions, jurisprudence, equity, natural sense, natural reason, natural law, etc.). This aim was connected to:

(a) a positivist conception of law, a tendency that even increased with the emergence of the French School of the Exegesis, and

(b) a liberal political regime based upon the national or popular sovereignty reflected in the Rousseauian myth of the law (or *lex*) as the expression of the general will.

We could discuss whether such purposes constituted ideals or ideology, or about the irreconcilable contradiction of conceiving the law as a product of reason (right reason) and at the same time its very opposite view of conceiving the law as an expression of the will (the will theory of law), but nobody will deny that these purposes were notedly present and intently pursued. All of these purposes could be summarized with the following statement: "A new, legislative text for the whole country," or if you prefer, "the validity of one single legislative text (the code) with a new, revolutionary content for the whole country."

Were these objectives attained? If yes, to what extent were they achieved?

Unification was probably the most successful achievement of the French Civil Code, which attained the desired legal unification throughout the whole territory of France. In fact, legal unification is one of the most characteristic features of modern codes, with the exception of Spain, whose civil code was approved to have a subsidiary validity in many parts of the country.

The idea that a code brought with it a break from the past since it involved the introduction of new, revolutionary principles is, in my view—and using Gordley's expression—just a myth.[8] It's true that codes tend to introduce new concepts, categories, and institutions, but most of them come from the *ius-commune* legal tradition. This is true not only in the realm of private law—as many Roman lawyers, legal historians, and some comparativists

8. James Gordley, *Myths of the French Civil Code*, 42 AM. J. COMPAR. L. 459, 491–92 (1994).

have shown[9]—but also in the public-law realm, including the criminal law.[10]

The ideal of simplifying the law by reducing its legal sources was somehow achieved but, at least in practice, not to the extent of entirely disregarding or dispensing with all legal sources other than legislative enactments. That was not possible for two reasons: first, because the judge was not allowed to refuse to decide a case for any reason: "The judge who shall refuse to determine under pretext of the silence, obscurity, or insufficiency of the law, shall be liable to be proceeded against as guilty of a refusal of justice."[11] And second, because it is beyond the power of any legislator to foresee all cases that might arise in the future.

However, the French Code preferred to be in this regard more faithful to the ideology (a positivist conception of law which drastically reduced all legal sources to legislative enactments) than respectful to the complexity of social relations and to the impossibility of foreseeing all future cases. If that was not enough, the judge was also threatened with the following additional prohibition: "The judges are forbidden to pronounce, by way of general and legislative determination, on the causes submitted to them."[12]

While some civil codes followed the French model in this regard and excluded any legal source other than statutes (Quebec 1866[13] or Germany 1896), other jurisdictions decided to depart from the French Civil Code and included other legal sources to which the judge could resort when code provisions were silent, obscure, or insufficient. The explicit inclusion of non-legislative

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9. *See, e.g.*, Markus G. Puder, *Romans Reloaded and Comparativists Charged—Living Law in Louisiana: The Case of Civil Possession*, 54 LOY. L. REV. 571, 592 (2008) (using the Krebsgang approach, which, emulating the walking crab, "works backward from the present to the past"); *see also* Aniceto Masferrer, *Codification as Nationalisation or Denationalisation of Law: The Spanish Case in Comparative Perspective*, 4 COMPAR. LEGAL HIST. 100 (2016).

10. THE WESTERN CODIFICATION OF CRIMINAL LAW: A REVISION OF THE MYTH OF ITS PREDOMINANT FRENCH INFLUENCE (Aniceto Masferrer ed., 2018); *see also* Aniceto Masferrer, *Codification of Spanish Criminal Law in the Nineteenth Century: A Comparative Legal History Approach*, 4 J. COMPAR. L. 96 (2009).

11. CODE CIVIL [C. CIV.] [CIVIL CODE] art. 4 (1804) (Fr.).

12. *Id.* art. 5.

13. *See* CIVIL CODE OF LOWER CANADA [CCLC], L.Q. 1866, c. 41, art. 11 (Prov. Can.) ("A judge cannot refuse to adjudicate under pretext of the silence, obscurity or insufficiency of the law."). The Civil Code of Lower Canada remained in effect in Quebec from 1866 until the Civil Code of Quebec replaced it in 1994.

sources, or unwritten laws, acknowledged the limitation of any legislative power in foreseeing a legal rule for all future cases and provided the judge with other legal sources when code provisions were insufficient.[14]

In Europe, the French influence was so powerful that few European jurisdictions admitted non-legislative legal sources, even though the 1811 Austrian Civil Code explicitly recognized the need to follow the footsteps of decided "analogous cases" and "the natural principles of law":

> If a legal case cannot be decided either from the words or from the natural meaning of a statute, consideration must be given to similar cases that have been decided in the statutes and to the grounds of other statutes related to it. If the legal case remains doubtful, it must be decided according to the natural principles of law with regard to the carefully collected and carefully considered circumstances.[15]

Nonetheless, such provision of the Austrian Civil Code did not have much influence. It took almost eight decades to approve another European civil code admitting the validity of non-legislative legal sources, namely the Spanish one (1888–1889), which, after reproducing—almost literally—article 4 of the French Civil Code of 1804, stated as follows: "When there is no law exactly applicable to the point of controversy, the customs of the place shall be observed, and in the absence thereof, the general principles of law."

Some years later, the Swiss Civil Code (1907) followed the same path with the following code provision: "If the law does not furnish an applicable provision, the judge shall decide in accordance with the customary law, and failing that, according to

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14. Besides, the admission of these secondary legal sources (general principles of law, equity, natural law, etc.) prevented judges from resorting to the lawmaker when they did not find a legal provision to settle the particular case, a possibility that was excluded because the legislature was only allowed to determine the law in general terms, not to decide a particular case.

15. ALLGEMEINES BÜRGERLICHES GESETZBUCH [ABGB] [CIVIL CODE] § 7 (Austria) (1811). This is my translation from the following original text:

> Läßt sich ein Rechtsfall weder aus den Worten noch aus dem natürlichen Sinne eines Gesetzes entscheiden, so muß auf ähnliche, in den Gesetzen bestimmt entschiedene Fälle, und auf die Gründe anderer damit verwandten Gesetze Rücksicht genommen werden. Bleibt der Rechtsfall noch zweifelhaft; so muß solcher mit Hinsicht auf die sorgfältig gesammelten und reiflich erwogenen Umstände nach den natürlichen Rechtsgrundsätzen entschieden werden.

Id. (text available at https://repertorium.at/qu/1811_oestabgb.html).

the rule which he would establish as legislator. In this he shall be guided by approved legal doctrine and judicial tradition."[16]

Nonetheless, the first and most remarkable jurisdiction whose code clearly departed from the French one was Louisiana. Article 21 of the 1825 Louisiana Civil Code, which was literally taken from article 21 of the 1808 Digest of the Civil Laws of Louisiana,[17] reads as follows: "In civil matters, where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is to be made to natural law and reason, or received usages, where positive law is silent."[18]

This is probably one of the most characteristic code provisions of the Louisiana legal system. It is one of the most studied texts by Louisianan and non-Louisianan scholars, particularly by private-law lawyers, comparativists, and legal historians. Thanks to them, we know very well the genealogy of that legal provision, which was borrowed from the *Projet du Gouvernement* of 1800 (Projet-VIII).[19] In fact, it is almost a literal transcription of its Lex

16. SCHWEIZERISCHES ZIVILGESETZBUCH [ZGB] [CIVIL CODE] Dec. 10, 1907, SR 210, art. 1 (Switz.).

17. DIGEST OF THE CIVIL LAWS NOW IN FORCE IN THE TERRITORY OF ORLEANS, WITH ALTERATIONS AND AMENDMENTS ADAPTED TO ITS PRESENT SYSTEM OF GOVERNMENT (1808) (available online at https://digestof1808.law.lsu.edu/). On the *De la Vergne Volume* of 1814, which is a particular copy of the aforementioned *Digest*, see John W. Cairns, *The de la Vergne Volume and the* Digest *of 1808*, 24 TUL. EUR. & CIV. L.F. 31 (2009); Mitchell Franklin, *An Important Document in the History of American Roman and Civil Law: The de la Vergne Manuscript*, 33 TUL. L. REV. 35, 38 (1958); and Joseph Dainow, *Moreau Lislet's Notes on Sources of Louisiana Civil Code of 1808*, 19 LA. L. REV. 43, 43–51 (1958).

18. See the French text of the Louisiana article, in which the original was written: "Dans les matières civiles, le juge, a défaut de loi précise, est obligé de procéder conformément a l'equité; pour décider suivant l'equité, il faut recourir à loi naturelle e à la raison, ou aux usages reçus, dans le silence de la loi positive." (I took it from Joseph Dainow, *The Method of Legal Development Through Judicial Interpretation in Louisiana and Puerto Rico*, 22 REV. JURÍDICA U.P.R. 108, 109 (1952–1953) [hereinafter Dainow, *Method of Legal Development*]).

19. 2 PIERRE-ANTOINE FENET, RECUEIL COMPLET DES TRAVAUX PRÉPARATOIRES DU CODE CIVIL 7 (1827); *see also* Joseph Dainow, *Codification et Révision du Droit Privé en Louisiane*, 8 REVUE INTERNATIONALE DE DROIT COMPARÉ 376, 378ff. (1956); John H. Tucker, *Tradition et technique de la codification dans le monde moderne: l'experience de la Louisiane*, *in* ÉTUDES JURIDIQUES OFFERTES À LÉON JULLIOT DE LA MORANDIÈRE 593 (Dalloz ed., 1964); Alain A. Levasseur, *Les codifications en Louisiane*, REVUE DE LA RECHERCHE JURIDIQUE 171 (1986); Vernon V. Palmer, *The French Connection and the Spanish Perception*, 64 LA. L. REV. 1067 (2003). *See also* Markus G. Puder, *Did You Ever Hear of the Napoleonic Code, Stella? A Mixed Jurisdiction Impact Analysis from Louisiana's Law Laboratory*, 85 TUL. L. REV. 635, 670 (2011) ("Moreover, the drafters in Louisiana looked to the proposed language

11 on interpretation, which stated, "In civil matters, where there is no express law, the judge must act as a minister of equity. Equity is the return to the natural law, or to received usages, where positive law is silent."[20] After a notable discussion as to whether "equity" was reconcilable with "law,"[21] Lex 11 ultimately was not introduced in the French Code of 1804, being replaced by another text (the former article 6 of the draft), that is its final article 4, already cited.[22] Article 21 of the 1808 Digest and the 1825 Code of Louisiana did not seek to evade or disregard positive law; otherwise, it would have made no sense to adopt another article from the same French draft code. I'm referring to article 13, which required "a very strict application"[23] of all code provisions: "When a law is clear and free from all ambiguity, the letter of it is not to be disregarded, under the pretext of pursuing its spirit."

As I said, the Louisiana legal tradition had no objection to taking almost literally two provisions of the French draft code; however, this also involved the decision not to follow the final path of the *Code civil*. Thus, while the French model rejected the general admission of unwritten laws (or non-legislative sources), the Louisiana civil codification has the merit of being the first jurisdiction whose code departed in this regard from the French Civil Code, and constituted the alternative model, authorizing and instructing the court to make appropriate decisions in "unprovided-for" cases. The Louisiana model exerted a notable influence over other European and American jurisdictions whose codes would contain a provision declaring the validity of unwritten laws when code provisions were silent, obscure, or insufficient.

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offered in the *Projet du gouvernment* of 1800 (Projet-VIII) in France because it was deemed more faithful to Roman law and Roman Visigoth law than the *Code Napoléon of 1804*."); ALAIN A. LEVASSEUR, MOREAU LISLET: THE MAN BEHIND THE DIGEST OF 1808 177 (2008).

20. 1 PROJET DU GOUVERNEMENT livre préliminaire tit. V, art. 11 (1800) ("Dans les matiéres civiles, le juge, á défaut de loi precise, est un ministre d'équite. L'équité est le retour á la loi naturelle, ou aux recus dans le silence de la loi positive."); *see also* Dainow, *Method of Legal Development*, *supra* note 18, at 109.

21. Mitchell Franklin, *Equity in Louisiana: The Role of Article 21*, 9 TUL. L. REV. 485, 495–96 (1935) [hereinafter Franklin, *Equity in Louisiana*]. Franklin writes,

> The discussions that developed about this article indicate with sharpness that the historical process of "equity" as a contradiction of "law" was not validated either by definitive Article 4 or by the earlier draught *lex* 11. Rather the purpose was to confine "equity" to the role of closing the gap revealed by the unprovided and unanticipated case.

Id.

22. *See supra* note 11.

23. Dainow, *Method of Legal Development*, *supra* note 18, at 110.

II. HOW CODES REALLY WORK: REALITY ENCOMPASSING A RICH AND MULTIFACETED VARIETY

We just presented the two models contained in the civil codes of France and Louisiana. Each model was the result of a different conception or ideology of a code, endorsing in the French one the idea of a revolutionary legislative supremacy and exclusivity that somehow broke with the past, while the Louisiana one admitted the idea of legislative supremacy without neglecting the legacy of a legal tradition that acknowledged the convenience of combining statutes (*leges*) with other legal sources (*iura*) when the former might be insufficient.

As I said, ideals might be helpful to approach issues and problems without losing touch with reality. In fact, ideals might serve as a guide toward reasonable paths of approaching human and social reality. On the contrary, ideology might sometimes become so radical and dogmatic to the point of pretending to change or transform reality in order to domesticate and control it. In the realm of natural sciences, no ideology is so deluded as to pretend to change the law of gravity. The law of gravity is perfectly certain and predictable. Human behavior, human and social relations, are not that predictable, but at the same time, society needs laws granting a minimum sense of security and stability to citizens. In this vein, social sciences are quite different to natural sciences, in which certainty and predictability might be absolute.

The desire for absolute predictability and security is one of the main characteristic features of modernity. The introduction of mathematics and the empirical method, proper to natural sciences, in the realm of social sciences, particularly from the seventeenth century onwards,[24] is notably connected to the advance of legal positivism in the Western legal traditions, aided by the conviction that the administration of justice would become much simpler with legal systems based upon fewer laws, but laws so well-conceived and designed by the human mind that they could somehow cover all possible cases that could occur in the future. And these laws should be written, legislative enactments approved by parliaments since they are composed of representatives who have been elected by individuals.

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24. On this matter, see Yves Cartuyvels, *Entre la règle et le cas: réflexions sur les raisons et les impasses d'un modèle géométrique du droit*, 76 LA REVUE INTERDISCIPLINAIRE D'ÉTUDES JURIDIQUES 177 (2016).

That was an ideal—or ideology, as I'd prefer to call it—which contradicted many centuries of legal traditions, in the Western world and beyond. Is it possible to draft a code whose provisions might be so well-designed to the point of foreseeing and properly covering any possible case that might arise in the future? As the reader might perceive, by the way, as I'm formulating that question, my answer is negative. For me, answering "yes" to this question would be as awkward as denying human freedom or pretending to predict human behavior. This might be good for a fiction movie, but not for a reality which encompasses such a rich and multifaceted variety that cannot be encapsulated with simplistic approaches.

The main obstacle of some ideologies is the reality itself. For ideologies, reality is too tough to be accepted. I agree with T.S. Eliot's general statement that "human kind / cannot bear very much reality."[25] But this is particularly applicable to those whose ideology is at odds with reality itself.

The nineteenth-century Louisiana legislator did something remarkable by departing from the French model, but in doing so, resorted to a French source, the one drafted and proposed in 1801 by the drafters and rejected by the legislative assemblies: "*Dans toutes matières civiles, quand il n'existe pas une règle de droit positif, le juge doit décider suivant les principes de l'équité. Pour décider équitablement, recours est pris au droit naturel et à la raison, en face du silence de la loi.*"[26]

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25. T.S. Eliot, *Burnt Norton*, *in* FOUR QUARTETS: A POEM (1941) (available at http://www.coldbacon.com/poems/fq.html).

> Then a cloud passed, and the pool was empty.
> Go, said the bird, for the leaves were full of children,
> Hidden excitedly, containing laughter.
> Go, go, go, said the bird: *human kind*
> *Cannot bear very much reality*.
> Time past and time future
> What might have been and what has been
> Point to one end, which is always present.

Id. (emphasis added).

26. Ralph A. Newman, *La Nature de l'Équité en «Droit Civil»*, 16 REVUE INTERNATIONALE DE DROIT COMPARÉ 289, 295 (1964) (quoting art. 21 de l'avant-projet du code civil (1801)); *see also* FORTUNÉ ANTHOINE DE SAINT JOSEPH, CONCORDANCE ENTRE LES CODES CIVILS ÉTRANGERS ET LE CODE NAPOLÉON 460 (2d ed. 1856) ("Dans les matières civiles, le juge, à défaut de loi précise, est obligé de procéder conformément à l'équité; pour décider suivant l'équité, il faut recourir à la loi naturelle et à la raison, ou aux usages reçus, dans le silence de la loi primitive."). On this matter, see ANDRÉ-JEAN ARNAUD, ESSAI D'ANALYSE STRUCTURALE DU CODE CIVIL FRANÇAIS 25 (1973);

Note that the French legislative assemblies' rejection was not an abrupt, primary, ephemeral reaction, but a very conscientious one that stemmed from the conviction that a modern code should fully embrace legal positivism. In this vein, the 1791 French Constitution provided that judges might refer questions of interpretation to the legislature in order to resolve differences among the courts. It is the so-called *réferé législatif* that was suppressed in 1837 because of the danger of decisions inspired by biased, political considerations and the lack of the necessary independence to resolve existing disputes.[27] In this line of thought, the abovementioned article 4 of the French Civil Code forbade judges from deciding a case for any reason. Judges were not only supposed to, but also obliged to, decide cases based on the legal provisions contained in the code, without resorting to any kind of non-legislative source such as natural law, reason, custom, judicial decisions, general principles of law, etc.

Was that feasible? This is probably the most relevant question. A proper answer to this question would require me to resort to a variety of reasons (or arguments)—without fully neglecting authorities ("*reducendo auctoritates ad necessitatem rationum vel argumentorum*")[28]—and historical experiences.

However, here perhaps it may suffice to briefly describe, on the one hand, which code jurisdictions explicitly admitted the validity of unwritten laws, and on the other, which ones did not, and in that case, how they proceed in practice.

As mentioned, very few jurisdictions enacted civil codes that required judges to decide cases while offering "no guidance or limitation"[29] to fulfill that constitutional duty. France, Quebec, and Germany stand out as examples where judges are instructed to decide, yet the codes remain silent as to the principles—such as

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Robert A. Pascal, *Sources of Civil Order According to the Louisiana Civil Code*, 54 TUL. L. REV. 916, 923 (1980).

27. In this vein, the drafters of the French Civil Code had warned, in their *Preliminary Address*, of the danger of involving the legislature in particular disputes. Historical experience shows they were completely right.

28. RAIMUNDUS LULLUS, LECTURA ARTIS QUAE INTITULATUR BREVIS PRACTICA TABULAE GENERALIS 95 (XX ROL, 335–438) (1304) ("Nunc volumus facere applicationem solvendo quaestiones per auctoritates, *reducendo auctoritates ad necessitatem rationum vel argumentorum*. Et hoc facimus ad dandam doctrinam qualiter per hanc Artem reducuntur auctoritates ad demonstrations." (emphasis added)).

29. Dainow, *Method of Legal Development*, *supra* note 18, at 133.

natural law, equity, or reason—that should guide their decisions in unprovided-for cases. However, there is no code that neglects at least a provision "authorizing and instructing the court to make appropriate decisions in the 'unprovided-for' cases, including the above-mentioned ones."[30]

In this vein, article 4 of the French Civil Code contains a clear mandate to judges to decide all cases. And even though it could be argued that the code did not confer a general validity on any legal source other than a legislative one, the references to other non-legislative sources (such as custom[31] and equity[32]) contained in some code provisions can be easily used by judges in making decisions.

A decade ago, I gave a paper at the University of Marseille (in Aix-en-Provence) on the French Civil Code (I don't know how I dared to do that: a Spanish lawyer talking about the *Code civil* in a French faculty of law does not seem to be the best thing to do). At some point, I stated that the French Civil Code did not make a general, explicit admission of custom as a legal source, and someone fiercely disagreed with me. I asked him to show me the code provision making a clear recognition of custom as a legal source, but he could not do it. Now I understand that we're both somehow right: the French Civil Code did not contain a code provision declaring the general validity of custom, but did not prohibit its application either, and in addition to this, custom was explicitly referenced in some provisions throughout the code.[33]

Some weeks ago, talking to a French law professor who is a good colleague and friend of mine and an undisputed expert on the French legal tradition, I told him that I was curious to know what French civil law judges did when they found themselves in the position of having to settle an unprovided-for case. "Do they resort to other non-legislative sources?" I asked him. "Of course they do! There is no other way," he immediately replied. It was clear to me that one thing was ideology, what the code says (or pretends to

30. *Id.* at 110.

31. Yvon Loussouarn, *The Relative Importance of Legislation, Custom, Doctrine, and Precedent in French Law*, 18 LA. L. REV. 235, 247–54 (1958) (regarding and treating custom as an authoritative source of law, along with legislation).

32. *Id.* at 268–70 (regarding equity as a persuasive source of law); *see also* Jean-Louis Halpérin, *L'équité à l'épreuve du comparatisme*, *in* L'ÉQUITÉ HORS DU DROIT 219 (Dario Mantovani ed., 2023) (available at https://books.openedition.org/cdf/15981?lang=en).

33. *See, e.g.*, CODE CIVIL [C. CIV.] [CIVIL CODE] arts. 590, 593, 608, 663, 671 (Fr.).

say), and a quite different one was reality, how judges used the code in practice.[34]

In fact, some attempts have been made to introduce unwritten laws in a broader and more explicit way in the French Civil Code. By the middle of last century, for example, certain provisions for a preliminary draft were written by a subcommittee and submitted to the Commission for the Reform of the French Civil Code. This draft included the following two revealing provisions:

> Article 21: *If the meaning of a legislative provision is obscure or ambiguous, the judge shall interpret the provision by taking into account the intent of the legislature, the social needs of the time, and equity*.
>
> Article 24 [with the heading "Other Sources of Law"]: *In the absence of a legislative provision, a diplomatic treaty, or an administrative regulation, the judge shall decide according to custom, professional rules, usage, and equity*.[35]

The proposal was not adopted, but the fact that these two provisions were drafted and even submitted to the Reform Commission somehow shows that they were not entirely alien or strange to the French civil law system.[36]

Quebec's case is also worth considering. The Quebec Code (Civil Code of Lower Canada) of 1865 (coming into effect on August 1, 1866, until its replacement by the current Civil Code of Quebec, January 1, 1994) did not explicitly include any non-legislative source. However, the Quebec Civil Code's drafters took for granted that any code could not properly operate without resorting to some fundamental principles which are at the basis of code provisions. The evidence for such a *ius commune non scriptum* as being the foundation on which the code itself rests is found in the remarks of one of its draftsmen, Charles Dewey Day, who pointed out as follows: "Every Code of Laws however full and complete it may be, necessarily presupposes not only the existence but also the

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34. On the role of case law in France, *see, e.g.*, JOHN P. DAWSON, THE ORACLES OF THE LAW 401–31 (1968).

35. Léon Julliot de la Morandière, *The Draft of a New French Civil Code: The Role of the Judge*, 69 HARV. L. REV. 1264, 1267 (1956) (quoting TRAVAUX DE LA COMMISSION DE RÉFORME DU CODE CIVIL 153–54 (1950)).

36. In fact, this proposal is in line with Loussouarn's thought, whereby legislation and custom are considered as authoritative sources of law, whereas equity, doctrine, and judicial precedent are regarded as persuasive sources of law. *See* Loussouarn, *supra* note 31.

knowledge of certain primary and fundamental principles. These are Laws of God, of Nature, and of common sense which must underlie and sustain all positive legislation."[37]

For some Canadian lawyers (such as Brierley, Brisson, and Leclair, among others),[38] it would be wrong to regard the Civil Code of Lower Canada (1866)—as the "common law" ("*droit commun*") of Quebec—as being opposed to, or as the antithesis of, the English common law, with the view that the civil code represents the "written law" while English common law represents the "unwritten law." This is a too simplistic way of looking at the Quebec private-law system. The following paragraph might serve to illustrate such a peculiar view:

> To know the Quebec law of contract, it is sufficient to read the articles of the Civil Code dealing with this topic and the cases decided since its enactment. If in the common-law system it is absolutely necessary to know history to understand, for instance, the essential division between law and equity . . . this is not the case in France or in Quebec. There, the civil law is logically organized, it is not the product of a historical evolution or of a long line of decided cases.[39]

I could not disagree more. Fortunately, I'm not the only one who does not share this view. Other scholars, more expert than myself on the Quebec legal system, have criticized this position.[40] For Leclair, the *jus commune* is "the fundamental regime of *general*

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37. I took the text from John E.C. Brierley, *Quebec's "Common Laws" (droits communs): How Many Are There?*, *in* MÉLANGES LOUIS-PHILIPPE PIGEON 109, 115 (1989) [hereinafter Brierley, *Quebec's "Common Laws"*]. Brierley sees in this text the influence of Portalis, *Discours préliminaire prononcé lors de la présentation du projet*, *in* 1 RECUEIL COMPLET DES TRAVAUX PREPARATOIRES DU CODE CIVIL 463 (P.A. Fenet ed. 1827).

38. On the common law of Quebec, see MATTHIEU JUNEAU, LA NOTION DE DROIT COMMUN EN DROIT CIVIL QUÉBÉCOIS (2009) (available at https://www.collectionscanada.gc.ca/obj/thesescanada/vol2/QQLA/TC-QQLA-26391.pdf).

39. JEAN-GABRIEL CASTEL, THE CIVIL LAW SYSTEM OF THE PROVINCE OF QUEBEC 34 (1962).

40. David Howes, *Faultless Reasoning: Reconstructing the Foundations of Civil Responsibility in Quebec Since Codification*, 14:1 DAL. L.J. 90 (1991); Brierley, *supra* note 37; *see also* John E.C. Brierley, *La notion de droit commun dans un système de droit mixte: le cas de la province de Québec*, *in* LA FORMATION DU DROIT NATIONAL DANS LES PAYS DE DROIT MIXTE: LES SYSTÈMES JURIDIQUES DE COMMON LAW ET DE DROIT CIVIL 103 (1989) [hereinafter Brierley, *La notion*]; Jean-Maurice Brisson, *Le Code civil, droit commun?*, *in* LE NOUVEAU CODE CIVIL: INTERPRÉTATION ET APPLICATION/ JOURNÉES MAXIMILIEN-CARON 1992, at 293 (1993).

jural concepts and rules that govern the private law."[41] For Brierley, "the notion of common law is reduced to the idea that one set of rules applies unless another set of rules is not applicable [sic] by express derogation."[42]

Brierley argued that there is not just one common law of Quebec but three, and of those three, the Code ranks third. The first one is composed of ". . . those principles, variously described as universal, general or super-eminent, that enacted law itself supposes."[43] In this vein, many provisions of the Code contain explicit references to "public order and good morals" (article 13), to "the principles of natural equity" (article 429), to "fault" (article 1053), etc. From this perspective, article 11, which prescribes that "[a] judge cannot refuse to adjudicate under pretext of the silence, obscurity or insufficiency of the law" (that is, the enacted *droit commun*), makes perfect sense.[44]

The second common law of Quebec is inextricably connected to the legal tradition of Quebec and, more specifically, to a concrete "historical fact," namely, that the Quebec Code did not seek to be an entire statement of the existing law, but just a partial one. Consequently, unlike the French Civil Code, it did not pretend to abrogate the preexisting law. This second common law is composed of many heterogeneous elements, such as Roman law, *ancien droit français*, royal decrees, doctrinal opinion, judicial decisions, etc., which were in force in the Quebec of 1866.[45]

Thus, for Brierley, there are three common laws of Quebec, namely the "general" (general, universal principles), the "historic" (tradition or legal heritage), and the "enacted" (code provisions). Consequently, even though the Code of Quebec might not explicitly admit non-legislative sources (or unwritten legal sources), they

41. Jean Leclair, *Réflexions sur les Problèmes Constitutionnels Soulevés par l'Abrogation du Code Civil du Bas-Canada*, *in* L'HARMONISATION DE LA LÉGISLATION FÉDÉRALE AVEC LE DROIT CIVIL QUÉBÉCOIS ET LE BIJURIDISME CANADIEN: RECUEIL D'ÉTUDES 135 (1997) (emphasis added) (for an earlier version of this text, see *Mélanges Paul-André Crépeau* 579 (1997)).

42. Brierley, *La notion*, *supra* note 40, at 118 ("la notion de droit commun se ramène à l'idée qu'une série de normes s'appliquent à moins qu'une autre série de normes ne soit pas applicables [sic] par dérogation expresse").

43. Brierley, *Quebec's "Common Laws," supra* note 37, at 109–14; *see also* Howes, *supra* note 40, at 90.

44. Howes, *supra* note 40, at 91.

45. *See* John E.C. Brierley, *Quebec's Civil Law Codification: Viewed and Reviewed*, 14 MCGILL L.J. 521 (1968); *see also* Howes, *supra* note 40, at 91.

could be applied in Quebec *à titre de droit commun*. In this regard, Howes added that if this is correct, "it follows that the prevailing contemporary conception of 'the civil law system of Quebec' is unfounded."[46] I'd rather emphasize that what is unfounded is not "the civil law system of Quebec," but such a "prevailing contemporary conception" that finds its roots in a mythical, simplistic ideology of the French Civil Code which has somehow poisoned the way civil codes are regarded and interpreted and, in practice, operate in both civil law and common law jurisdictions.[47]

If there is a "common law" behind and at the basis of each civil code—as it is, even though no code provision might explicitly admit the validity of any non-written source of law—then article 4 of the French Civil Code ordering the judge to decide all cases (as did article 11 of the Quebec Civil Code and many other civil codes) makes perfect sense. Then, I fully agree with Dainow's statement that

> [w]hile Article 21 of the Louisiana Civil Code is not the same as Article 4 of the Civil Code of France, or Article 1 of the Swiss Civil Code, or Article 12 of the new Italian Civil Code, they are all directed at the same general purpose of authorizing and instructing the court to make appropriate decisions in the "unprovided-for" cases.[48]

Reality shows then that all civil codes—explicitly or implicitly—admit or include "unwritten laws" or "non-legislative sources." This is also clearly the case of the German Civil Code, which did not mention these "unwritten legal sources" because drafters took for granted that judges would need to resort to the principles which arise from the spirit of the legal order.[49]

The most common choice of civil codes has been the explicit admission of the validity of unwritten laws, the Louisiana Civil Code being the first one in the Western legal tradition. The merit

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46. Howes, *supra* note 40, at 91.

47. Masferrer, *French Codification*, *supra* note 5; *see also* Aniceto Masferrer, *Was the French Civil Code "the Model" of the Spanish One? An Approach to the Uniqueness of the Spanish Civil Code*, 15 GLOSSAE. EUR. J. LEGAL HIST. 99 (2018). Part of this article had already been published as Aniceto Masferrer & Juan B. Cañizares-Navarro, *Should Legal Uniqueness Be Compared? The Spanish Civil Code: Its Subsidiary Character*, *in* COMPARATIVE LAW AND . . . /LE DROIT COMPARÉ ET . . . 85 (Alexis Albarian & Olivier Moréteau eds., 2016).

48. Dainow, *Method of Legal Development*, *supra* note 18, at 110.

49. On the role of case law in Germany, *see, e.g.*, Dawson, *supra* note 34, at 432–502.

of Louisiana is not only the historical fact of being the first jurisdiction in drafting a nineteenth-century legislative text (digest in 1808,[50] a code in 1825) admitting the validity of unwritten laws, but also the determination with which Louisiana made that choice, "somehow" departing from two important models: the well-known Napoleonic Civil Code (1804), and the Spanish civil code draft (1821), which omitted any reference to unwritten laws.[51]

Spain persisted in this positivist approach to civil codes for a while,[52] but in 1888 approved a civil code whose content clearly departed from the French model in some respects,[53] one of them being the validity of unwritten laws (custom and general principles of law). In fact, private-law and comparative lawyers usually mention three models of civil codes with provisions which "indicate the successive paths for courts to attempt in the process of reaching

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50. Three years later, in 1811, the Civil Code of Austria also admitted the validity of unwritten laws, particularly natural law and custom in ALLGEMEINES BÜRGERLICHES GESETZBUCH [ABGB] [CIVIL CODE] § 7 (1811), which reads,

> Qualora una causa non si possa decidere nè dalle parole, nè dal senso naturale della legge, si avrà riguardo ai casi consimili precisamente dalle leggi decisi ed ai fondamenti di altre leggi analoghe. Rimanendo nondimeno il caso dubbioso, dovrà decidersi secondo i principi del diritto naturale, avuto riguardo a tutte le circostanze del caso maturamente ponderate.

ABGB § 10 mentioned the validity of custom as well.

51. CARLOS PETIT, UN CÓDIGO CIVIL PERFECTO Y BIEN CALCULADO: EL PROYECTO DE 1821 EN LA HISTORIA DE LA CODIFICACIÓN 117 (2019). Petit writes that

> Garelly did not regulate any source other than positive law (understood *lato sensu* in all its modalities), nor did he concern himself too much with problems of application; nor did principles appear: the Code seemed to disregard both the notion of "equity," a word totally foreign to the thesaurus of the codifiers, and any notion of "law" that went beyond pure legality. For the Commissioners implicitly accepted the equivalence between law and law . . . .

Id. Later on, Petit writes,

> Without customs, principles and equity, the simple hypothesis of insufficient law or the lack of an applicable (legal) rule was excluded a priori. To avoid it altogether, the commissioners followed the "theory of the spoils" . . . promising in the Discourse an all-encompassing text . . . and boasting of "the integrity of the Code" of which they composed . . . .

Id. at 128 (translation is mine).

52. The Spanish 1851 civil code Project (also called «Proyecto García Goyena») (available at https://webs.um.es/jal/leyes/1851-Proyecto.pdf) still followed in the French footsteps, as two articles reveal: Art. 5: "Laws cannot be repealed except by other laws; and neither disuse, nor custom or practice to the contrary, however ancient and universal they may be, can be invoked against their observance"; Art. 12: "A judge who refuses to rule on the pretext of silence, obscurity or insufficiency of the laws, shall incur liability."

53. See the references contained in note 47, *supra*, particularly Masferrer, *Was the French Civil Code "the Model" of the Spanish One? An Approach to the Uniqueness of the Spanish Civil Code*.

a decision,"[54] but also explicitly admitting a variety of unwritten laws that judges might resort to: Louisiana (1825, 1870), Spain (1888/89) and Switzerland (1907).[55] The influence of these three jurisdictions over others, both European and American, is undeniably remarkable.

The Spanish Civil Code (1888/89) is the only European code which considered custom to be a source of law. Its article 6 contained two paragraphs. The first stated that the court which refuses to reach a decision because of the silence, obscurity, or insufficiency of the laws (*las leyes*) incurs a legal liability (which was almost a literal translation of article 4 of the French Civil Code). The second paragraph instructed the judge how to proceed: "When there is no statute [*ley*] exactly applicable to the issue in question, one shall apply the custom of the place [*la costumbre del lugar*] and, in default, the general principles of the law [*los principios generales de derecho*]."[56]

Concerning custom, the influence of the Spanish Civil Code in Latin America was quite discrete because most of the American jurisdictions followed the Civil Code of Chile (1856), which explicitly rejected custom as a legal source and had been approved four decades before the Spanish one: "Following the example of almost all modern codes, custom has been stripped of the force of law,"[57] affirmed the President of Chile when presenting for approval the project drafted by Andrés Bello. Many jurisdictions followed the approach of the Civil Code of Chile: Ecuador (1858), El Salvador (1859), Panamá (1860), Uruguay (1868), and Argentina (1869). Custom was also ignored as a legal source in Bolivia (1831), the Dominican Republic (1845), Mexico (1870), Guatemala (1877), and Costa Rica (1887). Custom was only recognized as a source of law in the civil codes of Colombia (1887)

54. Dainow, *Method of Legal Development*, *supra* note 18, at 134.

55. One might wonder why the influence in this regard of the 1811 Austrian Civil Code has not been valued enough among private-law and comparative lawyers, as it was the first modern civil code to admit the "natural principles of law," which most probably is the origin of the common expression "general principles of law." This might reflect what happened to it historically, showing to which extent the Austrian Civil Code was overshadowed by the French one.

56. CÓDIGO CIVIL [C.C.] [CIVIL CODE] art. 6 (1889) (Spain).

57. Mensaje del Ejecutivo al Congreso proponiendo la aprobación del Código Civil de la República de Chile, firmado por Manuel Montt, Presidente de la República de Chile y Francisco Javier Ovalle, Ministro de Justicia, Culto e Instrucción Pública de la época (Santiago, noviembre 22 de 1855) ("Siguiendo el ejemplo de casi todos los códigos modernos, se ha quitado a la costumbre la fuerza de ley.").

and Cuba (1889), the latter country having adopted the Spanish code. Later, some twentieth-century American civil codes started to admit custom: Honduras (1906), Panamá (1916), Puerto Rico (1930), and Argentina as a result of Decree/Law 17.711 of 1968.

The admission of general principles of law as a subsidiary legal source in many civil codes constitutes a clear sign of the impossibility of getting rid of the unwritten laws (the Roman-law *iura*), the insufficiency of legal provisions (*leges*), as well as of the limits of legal positivism. Most of the nineteenth-century Western civil codes admitted the general principles of law. Many of them recognized only two legal sources, namely *lex* (provisions of the code) and the general principles of law (Belgium, Italy, the Netherlands, Chile, Uruguay, Guatemala, Brazil, Mexico, and Argentina), whereas others recognized three legal sources, including the previously mentioned two along with custom (Austria,[58] Spain, Cuba, Colombia, and Switzerland).

The development of the provision concerning unwritten laws in the Mexican Civil Codes is particularly rich and revealing, referring to "natural sense," "spirit of the law," and to "general principles of law" applied in an equitable way (which implies "taking into consideration all the circumstances of the case").[59]

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58. However, the 1811 Austrian Civil Code, instead of declaring the general validity of custom when there was no legal provision applicable to the case (as the Spanish Civil Code, among others, did), somehow did the opposite (following the practice of the French Code), that is, recognizing custom's validity only when the law explicitly refers to custom; Austrian Civil Code (1811) art. 10 reads as follows: "Customs can only be taken into account in cases where a law refers to them," which is my translation from the original version: "Auf Gewohnheiten kann nur in den Fällen, in welchen sich ein Gesetz darauf beruft, Rücksicht genommen werden."

The reason for that can be found in art. 8, which clearly stated that "[o]nly the legislature has the power to declare a law in a generally binding manner," establishing by default the retroactive effect of any legislative enactment, as the text made clear: "Such a declaration must be applied to all legal cases still to be decided, unless the legislature adds that its declaration is not to be referred to in deciding such legal cases which have as their object the acts undertaken and the rights referred to before the declaration." Such supremacy of legislative enactment explains why custom was applicable not in the absence of a legislative provision, but only when a provision explicitly referred to it; see the original version of art. 8:

> Nur dem Gesetzgeber steht die Macht zu, ein Gesetz auf eine allgemein verbindliche Art zu erklären. Eine solche Erklärung muß auf alle noch zu entscheidende Rechtsfälle angewendet werden, dafern der Gesetzgeber nicht hinzufügt, daß seine Erklärung bey Entscheidung solcher Rechtsfälle, welche die vor der Erklärung unternommenen Handlungen und angesprochenen Rechte zum Gegenstande haben, nicht bezogen werden solle.

59. CÓDIGO CIVIL [CC], art. 20 (1870) (Mex.) ("When a judicial controversy cannot be decided either by the text or by the natural sense or spirit of the law, it must be

The drafters of the Swiss Civil Code (1907) probably had in mind general principles of law when prescribing judges to decide "according to the rule which he would have established as a legislator," being guided "by approved legal doctrine and judicial tradition."[60]

The most peculiar trait of the Louisiana Civil Code provision concerning the unwritten law is the recourse to equity, which article 21 of the Louisiana Civil Codes (1825, 1870) connects to "natural law," "reason," and "received usages." Other civil codes, following the Louisiana model, resorted to equity as well, which is the case in the Code Civil of Puerto Rico, whose section 7 states as follows:

> Any court which shall refuse to render a decision on the pretext of silence, obscurity or unintelligibility of the laws, or for any other reason, shall be held liable therefor.
>
> When there is no statute applicable to the case at issue, the court shall decide in accordance with *equity, which means that natural justice, as embodied in the general principles of jurisprudence and in accepted and established usages and customs*, shall be taken into consideration.[61]

To sum up, it could be affirmed that there is reality beyond ideology. Reality can be somehow hidden or ignored, but never entirely suppressed. And reality shows that, even though a positivist approach to law made some lawyers believe that a code

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decided according to general principles of law, taking into consideration all the circumstances of the case."); CÓDIGO CIVIL DEL DISTRITO FEDERAL Y TERRITORIO DE LA BAJA CALIFORNIA, art. 20 (1884) (identical to article 20 of the 1870 Mexican Civil Code) (available in Spanish at https://legislacion.scjn.gob.mx/Buscador/Paginas/wfArticuladoFast.aspx?q=CDMddE+Bke8KMN205Fd+Cn/v5UhXhOLWDHEC0cEybdqD7p055SNQwduVlHmgteJFmVQYe5H8G4kxs+IcYnsPYQ==); CÓDIGO CIVIL [CC], art. 18 (1928) (Mex.) ("Silence, obscurity or insufficiency of the law shall not authorise judges or courts to fail to resolve a dispute."); CÓDIGO CIVIL [CC], art. 19 (1928) (Mex.) ("Civil judicial disputes shall be resolved in accordance with the letter of the law or its legal interpretation. In the absence of a law, they shall be resolved in accordance with the *general principles of law*." (emphasis added)).

60. ZGB SR 210, art. 1.

61. CÓDIGO CIVIL DE PUERTO RICO [CIVIL CODE OF P.R.] § 7 (1930) (emphasis added); *see also* Dainow, *Method of Legal Development*, *supra* note 18, at 134. For Dainow,

> A corresponding provision was found in the old Spanish sources (Part. I, tit. II, L. 6; Nov. Re., Lib. 3, tit. 2, L. 3) and in the Civil Code of Spain which was directly effective in Puerto Rico from 1889 until the revision under American dominion in 1902. There is also noticeable, in the second paragraph of the Puerto Rican provision, the resemblance to the Louisiana version of the same general idea.

Id. at 134–35.

could operate perfectly without unwritten laws (the case of the French Civil Code is paramount), real, ordinary life shows that, in practice, there is a considerable number of cases in which judges need to resort to these non-legislative sources, unless they are allowed to leave them undecided, which is not the case. Other evidence of the need for unwritten laws is that, while some jurisdictions which did not admit unwritten laws have attempted legal reforms to introduce the validity of unwritten laws (as the French case shows),[62] I don't know of a single case of a jurisdiction doing the opposite. In fact, no code has undertaken a reform to reduce or suppress the validity of unwritten laws and to be governed solely by statutes. In addition, as I have shown, those few codes which did not explicitly admit—or which even rejected—unwritten laws are, in practice, doomed to resort to them anyway.

III. HOW CODES ARE APPLIED: THE UNWRITTEN LAWS IN THE LOUISIANA SUPREME COURT

I just said that reality reveals the existence of a considerable number of cases in which judges need to resort to unwritten laws.[63] In Louisiana, article 21 of the Civil Code has been notably invoked by courts, as has been shown by distinguished comparative and civil law lawyers.[64]

A. HOW THE LOUISIANA EQUITY HAS BEEN REGARDED

Joseph Dainow, for example, studied some cases in which Louisiana courts applied equity.[65] In analyzing the cases in which courts resorted to natural law and reason,[66] he pointed out that

> [t]his phrase of Article 21 has been used as a variable container to hold different meanings and also as an empty

62. *See supra* notes 35–36. In this line, it should be explored whether the following affirmation would be true, namely, that while any of the codes which originally did not admit unwritten laws were eventually reformed to introduce the validity of unwritten laws, there is no single case of a code with unwritten laws doing the opposite.

63. For the common law jurisdictions of the United States, *see* Frederick G. McKean, Jr., *The Law of Laws*, 78 U. PA. L. REV. 950 (1930).

64. *See, e.g.*, Francois-Xavier Licari, *Francois Gény in Louisiana*, 6 J. CIV. LAW STUD. 475 (2013); Vernon V. Palmer, *The Many Guises of Equity in a Mixed Jurisdiction: A Functional View of Equity in Louisiana*, 69 TUL. L. REV. 7 (1994); Pascal, *supra* note 26; Dainow, *Method of Legal Development*, *supra* note 18; Ferdinand Fairfax Stone, *The So-Called Unprovided-For Case*, 53 TUL. L. REV. 93 (1978); Franklin, *Equity in Louisiana*, *supra* note 21.

65. Dainow, *Method of Legal Development*, *supra* note 18, at 116–18.

66. *Id.* at 118–19.

> word formula. The result is that it cannot be considered as having any significant meaning at all, especially in view of the fact that it is often found in conjunction with other terms.[67]

He came to the conclusion that ". . . these statements do not give any significant meaning to the phrase 'natural law and reason.' It is used merely as part of a word formula (usually in conjunction with other words), by means of which the court supports its decisions in a situation for which there is no positive law."[68] In studying the "received usages," Dainow concluded that such expression "has received a little more accurate treatment than the preceding one ["natural law and reason"], but still not enough to leave it with a clear or significant meaning."[69]

Mitchell Franklin, who devoted a consistent study to the role of equity in Louisiana, showed that "the only purpose of . . . Article 21 of the Louisiana Civil Code is to provide for the judicial solution of the unprovided problem where judicial action remains uncontrolled by the Code itself," and consequently, "that these texts [French Civil Code article 4 and Louisiana Civil Code article 21] do not consecrate repudiation of code texts to express the needs of new conditions and new needs."[70] Subsequently, he argued that in some cases, the courts broke with Louisiana's Franco-Romanism, filling up the natural law and equity of article 21 with a British content,[71] even to the point of interpreting equity as

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67. *Id.* at 118.

68. *Id.* at 119.

69. *Id.* at 119; at some point, he states that,

> On one occasion the court said that "received usages" meant judicial usage, that is, previous decisions in similar cases [citing the case Keller v. Haas, 24 So. 2d 610 (La. 1945)]. This is quite a different idea from established popular usages [citing Franklin, *Equity in Louisiana*, *supra* note 21, at 502] which might ordinarily be taken as the meaning.

Id. For Ferdinand Fairfax Stone, it was thought that article 21 would have become a vehicle for the importation of the common law into Louisiana under the cover of natural law and reason on the pretext that there is no applicable express law. Ferdinand Fairfax Stone, *Les cas non privus par le droit en vigueur*, *in* MÉLANGES DÉDIÉS À GABRIEL MARTY 1082 (1978). I don't think that was the case, so I endorse Licari's view, who gave evidence that "this threat did not come to fruition." Licari, *supra* note 64, at 486.

70. Franklin, *Equity in Louisiana*, *supra* note 21, at 497.

71. *Id.* at 507. Here, Franklin writes,

> *Fletcher v. Peck* has an important place in the breakdown of Louisiana's Franco-Romanism through its pretense that the Common Law expressed natural law principles. It is not surprising, therefore, that Article 21 has practically come to mean in the courts of Louisiana that the "natural law" of Article 21 is "natural law" with a British content, and that the "equity" of Article 21 is "equity" with a technical British content: a consecration of traditional British chancery law. This

meaning or referring to the British "courts of equity."[72] Franklin's final conclusion about the role of Louisiana Civil Code article 21 states as follows:

> Article 21 of the Louisiana Civil Code has considerable significance in the crisis in jurisprudence. What has happened in Louisiana in spite of Articles 1, 2 and 21 later happened, more or less, to the codified Roman law generally, despite texts similar to Article 21, such as Articles 4 and 5 of the French Civil Code. It may be true that Louisiana has gone further than France, Austria or Germany in altering the concepts of its Code, and it may be true that Louisiana has gone further than France, Austria or Germany in turning to a juridical method based on the primacy of the judiciary, but the difference is one of degree, though of sharp degree.[73]

After denouncing a "perversion of meaning" of the notions of "equity" and "natural law" of Louisiana Civil Code article 21, a perversion that, in Franklin's view, anticipated "the whole course of the late nineteenth and twentieth century European Civil Law," he concluded as follows: "Whether Article 21 will ever become a general American text, enjoying generally the role originally set for it in Louisiana by Livingston, is yet to be seen."[74]

If I understand Franklin's view correctly, I have to say that I cannot fully endorse his thesis because, as I said, there was an ideology behind the French Civil Code that reality could not fail to disprove. And the reality is that modern codes can appropriately operate inasmuch as judges can resort to unwritten laws when code provisions are silent, obscure, or insufficient. Was Franklin's claim correct that in some cases, judges somehow twisted the

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> has happened in spite of the chauvinism of early Louisiana, and in spite of the historic meaning of Article 21. The Louisianians "dreaded the common law of England," Livingston writes.

Id. (citing THE COMPLETE WORKS OF EDWARD LIVINGSTON ON CRIMINAL JURISPRUDENCE 125, 126 (1873)).

72. Franklin, *Equity in Louisiana*, *supra* note 21, at 508.

> By 1899, as in *Willey v. St. Charles Hotel Co.*, the court dared write that "There is no express law in Louisiana governing the same, but, because our courts are courts of equity as well as of law (Civ. Code, art. 21), it is recognized here, as it is in every enlightened system of jurisprudence." In *State v. Williams Cypress Co.*, the court said that the Louisiana system was one in which there were no separate equity courts, for the civil courts could exercise equity "jurisdiction" in appropriate situations under Article 21.

Id. (quoting Willey v. St. Charles Hotel Co., 28 So. 182, 186 (La. 1899); citing State v. Williams Cypress Co., 61 So. 988, 994 (La. 1913)).

73. Franklin, *Equity in Louisiana*, *supra* note 21, at 510.

74. Franklin, *Equity in Louisiana*, *supra* note 21, at 516.

meaning of natural law and equity? Yes, but, in my view—and after reading many cases brought to the Louisiana Supreme Court—Franklin's generalization regarding the "perversion of meaning" is notably exaggerated.[75]

B. TOWARDS A NATURAL-LAW APPROACH: *REYNOLDS V. SWAIN*

In my opinion, judicial cases of the Louisiana Supreme Court clearly reveal, more than a rivalry between the legislature and the judiciary, the peculiar ideal or the very spirit of the Louisiana civil law tradition, which is at odds with the positivist approach to law that France made clear when rejecting Portalis's preliminary book, where the unwritten law had an important role to play.[76] While the Napoleonic Civil Code sought to break with the French private-law tradition, nineteenth-century Louisiana private law took the opposite way, by explicitly prescribing the validity of some unwritten laws (equity based upon natural law, reason, and received usages).[77] This was based on the conviction that reducing law to legislative enactments was theoretically unfounded and

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75. Dainow, in *The Method of Legal Development Through Judicial Interpretation in Louisiana and Puerto Rico*, also seems to disagree with Franklin's view. Dainow, *Method of Legal Development*, *supra* note 18, at 119; *see also supra* note 69.

76. For Vernon V. Palmer, in Louisiana there was "a strange mixed marriage of European codes and American judges," a system that Palmer believed was destined to

> a life of turbulent monogamy. It would take considerable effort to subject these common law minds to a European code. The tension, if not contradiction between the nature of the codes and the culture of the justice, would make it difficult for a method worthy of a code to take root.

Vernon V. Palmer, *The Quest to Implant the Civilian Method in Louisiana: Tracing the Origins of Judicial Methodology*, 73 LA. L. REV. 793, 798 (2013) [hereinafter Palmer, *Quest to Implant*].

In my view, such "tension, if not contradiction between the nature of the codes and the culture of the justice" was present in the drafting and promulgation of the French Civil Code, and it was resolved in a way partly inconsistent with the thought of its drafters. In this vein, the Louisiana Civil Code of 1825 was more in line with the doctrine of Portalis and the *ius-commune* tradition than with the *Code civil* finally approved by the legislature and interpreted by the French School of the Exegesis. Perhaps the mistake is, again, to present the French text as the best exponent of a modern civil code when, in reality, it seems to me inappropriate to present it as a model, either of the civil law tradition, or of the common law tradition, as I defended elsewhere. On this matter, *see* Masferrer, *French Codification*, *supra* note 5.

77. Mack E. Barham, *A Renaissance of the Civilian Tradition in Louisiana*, 33 LA. L. REV. 357, 367 (1973) ("Our Code, then, has established in express language the primary source of law—legislative expression, the secondary source of law—custom, and even the tertiary source of law—natural law and reason or received usages. *It is important to note the Code's recognition that law is not always the legislative expression*." (emphasis added)); *see also* A.N. YIANNOPOULOS, LOUISIANA CIVIL LAW SYSTEM § 32 (1971).

practically unattainable,[78] because, as the Supreme Court repeated many times—following in Portalis's steps[79]—it is "evidently impossible in any code to provide specific rules for every case."[80]

It is a bit artificial to argue that Louisiana judges stuck to unwritten laws because of the U.S. common law judges' influence or contamination in order to enjoy primacy over the legislature. I rather think in a very different way, namely that the role of unwritten laws in the Western world came from the civil law tradition (particularly from the Roman law and canon law), and they were received and used also in common law jurisdictions. This explains why U.S. judicial decisions resort to expressions such as "just and right," "reason and justice," "good conscience," "plain justice and good faith," "equity in its broadest and most generous sense," "prevailing equity and justice," "equity and good

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78. It is interesting to note that, while in France the civil code drafters included the validity of unwritten laws but these were rejected by the legislative power, in Louisiana the drafters excluded the general validity of custom, but the legislators introduced and approved its inclusion, as Pascal explains in his work entitled *Sources of Civil Order According to the Louisiana Civil Code*:

> The redactors had proposed that article 3, on custom, not be included in the Civil Code of 1825 for the reason that it would be inconsistent to recognize custom in a jurisdiction in which "all" the laws were written. The redactors, then, had intended the formal source of positive law to be limited to legislation and therefore probably had eliminated the words "and customs" and "*et des coutumes*" from the captions of Chapter 1 in English and French texts of the *Projet* submitted to the legislature. The legislature, however, rejected the proposal, included article 3 in the Civil Code of 1825, and, probably working with only the French text of the *Projet*, reinserted the words "*et des Coutumes*" there, but neglected to reinsert the words "and customs" in the English text.

Pascal, *supra* note 26, at 919.

79. Portalis, Tronchet, Bigot-Préameneu & Maleville, Members of the Government-Appointed Commission, Preliminary Address on the First Draft of the Civil Code Delivered on the Occasion of the Presentation of the Draft of the Government Commission, on 1 Pluviôse IX (Jan. 21, 1801) (available at https://www.justice.gc.ca/eng/rp-pr/csj-sjc/ilp-pji/code/index.html).

> Foreseeing all is a goal impossible to attain. . . . We have also guarded against the dangerous ambition of wanting to regulate everything and foresee everything. . . . Whatever one might do, positive laws could never entirely replace the use of natural reason in life's affairs. The needs of society are so varied, the communication of men so active, their interests so numerous, and their relationships so far reaching, that the lawmaker cannot possibly foresee all.

Id.

80. *See, e.g.*, Hubgh v. New Orleans & Carrollton R.R. Co., 6 La. Ann. 495 (1851); Hermann v. New Orleans & Carrollton R.R. Co., 11 La. Ann. 5 (1856); *see also* Miller v. Holstein, 16 La. 395 (1840) ("[A]s it is impossible to provide for every case which fraud or malice may devise, we are obliged to authorize a discretion in the judicial tribunals, that will apply a remedy for every wrong.").

conscience," and "right and justice."[81] In this vein, a U.S. judicial decision contained a statement very similar to article 21 of the Louisiana Civil Code: "in the absence of direct authority [we] must hold . . . in accordance with what we take to be the dictates of reason, justice and equity."[82]

In this line of thought, Justice Blackburn recognized that "though the Civil law is not of itself authority in an English court, it affords great assistance in investigating the principles on which the law is grounded."[83] Some years later, the same judge cited some Roman law passages because "the principle of our law is the same as that of the civil law."[84] The principle of justice contained in the Roman-law definition of *aequum et bonum est lex legum* was at the bottom of the common law tradition, as Chancellor Kent recognized it. Referring to the doctrine of contribution as to party-walls, Kent pointed out that such doctrine "falls within the reason and equity of the doctrine of contribution which exists in the common law; and is bottomed and fixed on general principles of justice."[85]

Accordingly, an early twentieth-century case stated as follows:

> As eminent authority may be found for either position, and we have no precedent in this state to guide us, we must adopt that rule which in our opinion accords with the habits and customs of our people, and which will, in the majority of cases at least, be conductive to the settlement of controversies of this character, according to the right.[86]

Justice, reason, equity—they are all relevant principles of the civil law tradition, although the French Civil Code preferred not to explicitly recognize them. They also highly influenced the common

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81. McKean, *supra* note 63, at 951–52, where the author cites the references of cases in which these notions appear.

82. Wilson v. Mason (1876), 38 U.C.Q.B. 14, 30 (Can.) (cited by McKean, *supra* note 63, at 958).

83. Taylor v. Caldwell (1863) 32 L.J.C.L. (n.s.) 164, 166 (QB) (cited by McKean, *supra* note 63, at 959).

84. Kennedy v. Panama, New Zealand & Australian Royal Mail Co. Ltd. (1867) L.R. 2 Q.B. 580 (cited by McKean, *supra* note 63, at 960).

85. Campbell v. Mesier, 4 Johns. Ch. 334, 337, 339, 340 (N.Y. Ch. 1820) (cited by McKean, *supra* note 63, at 960).

86. Wicker v. Jones, 74 S.E. 801, 805 (1912). McKean cites this passage as an illustration of the "ancient rule, *aequum et bonum est lex legum*," which means "what is equitable and good is the law of laws." McKean, *supra* note 63, at 961.

law jurisdictions, whose judges were supposed to apply them, as Lord Stowell stated,

> All law is resolvable into general principles. The cases which may arise under new combinations of circumstances, leading to an extended application of principles, ancient and recognized, by just corollaries, may be infinite; but so long as the continuity of the original and established principles is preserved pure and unbroken, the practice is never new, nor is it justly chargeable with being an *innovation* on the ancient law; when in fact, the court does nothing more than apply old principles to new circumstances.[87]

For me, it does not make much sense to regard with suspicion those civil law judges who resort to these principles upon which the civil law tradition was founded. If a code provision could not foresee all possible cases which might arise, was it not reasonable to approve the validity of those principles that constituted the foundation of all laws, and particularly of all legislative enactments? If common law judges were fully aware of their need in cases in which their common law principles fell short, why were civil law judges not allowed to do the same, with more reason considering that such principles belonged to that tradition and constituted its very foundation?

It is quite revealing to see how often Louisiana judges made explicit references to some principles of justice, natural law, reason, etc., upon which law is founded, or to "those immutable principles on which all political society is founded."[88] Such references were not always made just as a means of justifying the application of unwritten laws contained in article 21 of the Louisiana Civil Code. The reference is also made when applying some rules contained in the code provisions, as a way to reinforce the legitimacy of the code provision applicable to the case. For example, in 1819, dealing with civil responsibility for ordinary neglect, the judge stated that such definitions and rules were "founded on the plain elements of natural law, and the principles contained in the codes of different nations, on this branch of jurisprudence, which we believe to be in conformity with the provision of our own laws on this subject."[89]

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87. The Atlanta, 6 C. Rob. 440, 458 (Eng. 1808) (cited by McKean, *supra* note 63, at 961).

88. Renthorp v. Bourg, 4 Mart. (o.s.) 97 (La. 1816).

89. Hunt v. Morris, 6 Mart. (o.s.) 676 (La. 1819). The opinion reads,

Another case under the 1808 Digest of Civil Laws of Louisiana argued that, although Roman law—"founded on the broad and equitable principles of natural law"—was not in force in Spain (having "no intrinsic authority"), it could be applied "where the Spanish law is silent, or where the Roman law coincides with, or is explanatory of it; or where it is founded on natural law or reason; and in these permitted cases, it is not cited as law, but as containing the opinions of wise men."[90]

The famous case *Reynolds v. Swain*, whereby, according to some scholars, the judiciary gained primacy over the legislature, is embedded with the idea that the civil law

> is necessarily confined to positive or written law. It cannot be extended to those unwritten laws which do not derive their authority from the positive institution of any people, as the revealed law, the natural law, the law of nations, the laws of peace and war, and *those laws which are founded in those relations of justice that existed in the nature of things, antecedent to any positive precept*.[91]

The idea of the existence of "relations of justice that existed in the nature of things, antecedent to any positive precept" originated in the civil law tradition and was received in the common law tradition. In fact, the statement referring to "*those laws which are founded in those relations of justice that existed in the nature of things, antecedent to any positive precept*" had been literally taken from Blackstone's *Commentaries on the Laws of England*,

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> Considered simply as bailees on a contract of hiring of carriage, they are answerable for ordinary neglect, which is the omission of that care which every man of common prudence, and capable of governing a family, takes of his own concerns. This is a definition and rule laid down, by Sir William Jones, as founded on the plain elements of natural law, and the principles contained in the codes of different nations, on this branch of jurisprudence, which we believe to be in conformity with the provision of our own laws on this subject.

Id. at 680.

90. Morgan v. Livingston, 6 Mart. (o.s.) 19 (La. 1819).

> It is not to be denied, that by the general or common law of Rome, founded on the broad and equitable principles of natural law . . . .
>
> The Roman law has no intrinsic authority in Spain: on the contrary, forensic use of it was formerly interdicted under heavy penalties. Fuero jus. 2, 1, 8. 1 part. 45; Part. 1, 1, 15; Part. 3, 4, 8; Aut. accord. 2, 1, 1; Nuev. Recop. 2, 1, 3. Now indeed it is permitted, in certain cases, to be cited; viz., where the Spanish law is silent, or where the Roman law coincides with, or is explanatory of it; or where it is founded on natural law or reason; and in these permitted cases, it is not cited as law, but as containing the opinions of wise men.

Id. at 185–93.

91. Reynolds v. Swain, 13 La. 193, 198 (1839) (emphasis added).

contained in his introduction dealing with the "law of nature."[92] Curiously enough, Blackstone's source was an Aristotelian, scholastic notion of law and justice,[93] which finds its roots in Roman law and is embedded in the *ius-commune*, civil law tradition.[94] In fact, Blackstone cited the notion of justice contained in the Institutes 1.1.3: "The precepts of law are these: to live honestly, to injure no one, [and] to give to each his own."[95]

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92. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1758) (I have used the online version by Yale University, available at https://avalon.law.yale.edu/18th_century/blackstone_intro.asp.) In *Of the Nature of Laws in General*, Blackstone writes the following:

> THIS will of his maker is called the law of nature. For as God, when he created matter, and endued it with a principle of mobility, established certain rules for the perpetual direction of that motion; so, when he created man, and endued him with freewill to conduct himself in all parts of life, he laid down certain immutable laws of human nature, whereby that freewill is in some degree regulated and restrained, and gave him also the faculty of reason to discover the purport of those laws.
>
> CONSIDERING the creator only as a being of infinite power, he was able unquestionably to have prescribed whatever laws he pleased to his creature, man, however unjust or severe. But as he is also a being of infinite wisdom, he has laid down only *such laws as were founded in those relations of justice, that existed in the nature of things antecedent to any positive precept*. These are the eternal, immutable laws of good and evil, to which the creator himself in all his dispensations conforms; and which he has enabled human reason to discover, so far as they are necessary for the conduct of human actions.

Id. § 2, *39, *39–40 (emphasis added).

93. *Id*. § 2, *40 (which is evident when referring, for example, to "the discovery of these first principles of the law of nature depended only upon the due exertion of right reason, and could not otherwise be attained than by a chain of metaphysical disquisitions," "the universal principle of action" or to "the laws of eternal justice").

94. *See, e.g.*, Alejandro Guzmán Brito, *Las Fuentes de las Normas Sobre Interpretación de las Leyes del "Digeste des Lois Civiles" ("Code Civil") de la Luisiana (1808/1825)*, 31 REV. DE ESTUDIOS HISTÓRICO-JURÍDICOS 171 (2009) (available at https://www.rehj.cl/index.php/rehj/article/view/512) (showing that parts of Blackstone's *Commentaries* were notably indebted to Grotius and Pufendorf).

95. BLACKSTONE, *supra* note 92, at § 2, *40.

> Such among others are these principles: that we should live honestly, should hurt nobody, and should render to every one it's due; to which three general precepts Justinian [*Iuris praecepta funt haec*, *honeste vivere*, *alterum non laedere*, *suum cuique tribuere*, Inst. 1.1.5] has reduced the whole doctrine of law.
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> BUT if the discovery of these first principles of the law of nature depended only upon the due exertion of right reason, and could not otherwise be attained than by a chain of metaphysical disquisitions, mankind would have wanted some inducement to have quickened their inquiries, and the greater part of the world would have rested content in mental indolence, and ignorance it's inseparable companion. As therefore the creator is a being, not only of infinite power, and wisdom, but also of infinite goodness, he has been pleased so to contrive the constitution and frame of humanity, that we should want no other prompter to enquire after and pursue the rule of right, but only our own self-love, that universal principle of action. For he has so intimately connected, so inseparably interwoven the laws of eternal justice with the happiness of each individual, that the latter cannot be attained but by observing the former; and, if the former be punctually obeyed, it cannot but induce the latter.

The idea of a social order that was supposed to be based upon a natural order ("in the nature of things"),[96] upon the existence of the truth,[97] also concerning human nature,[98] was well known in the

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96. *See, e.g.*, Marie v. Avart's Heirs, 8 Mart. (o.s.) 512, 524–28 (La. 1820) ("The wisdom of this doctrine, founded on the nature of things . . . .").

97. *See, e.g.*, *id.*

> This doctrine rests upon considerations of morality and justice, the wisdom of which cannot certainly be disputed. Truth is one; it is the same at all times and in all places. If, in order to administer justice, it be necessary to know the truth, can one flatter himself to know it, when, like a chameleon, it will, according to time and place, put on different colors and present itself under different forms?

Id. at 527.

98. *See, e.g.*, Perkins v. Frazer, 31 So. 773, 774 (La. 1901).

> Their refusal was unadvised, for they could not go on using the right of way, and not furnish water,-enjoy the benefits of the contract, and reject its obligations; but plaintiff had refused to pay the water rent for 1899, and the refusal, therefore, *though founded narrowly in law, was, beyond question, founded broadly in human nature*; and it is certain that no court would have denied permission to take back this harmless and not unprovoked threat, and go on with the contract. Defendants having performed their contract, the two demands of the plaintiff must fail.

Id. (emphasis added); Minor v. Young, 89 So. 757, 765 (La. 1920), in which the court said,

> Acknowledgment by the father may be said to be highly exceptional; whereas non-acknowledgment by the mother might be said to be equally highly exceptional. *To place the two upon exactly the same plane in the law of inheritance would be going against the well-known law of human nature, and the law of successions is founded on human nature.*

Id. (emphasis added); Richard v. Cain, 122 So. 866, 867 (La. 1929) ("We do not think that the inference is a reasonable one, since Dr. Richard was not indebted to plaintiff until he had received payment on account of the notes, and *it is contrary to human nature for a debtor to discharge his debt before it is due*." (emphasis added)); Logwood v. Logwood, 168 So. 310, 312 (La. 1936), in which the court wrote,

> *It is wholly contrary to the principles of human nature, developed in universal experience, that a person will use reasonable diligence to vindicate a right or to avenge a wrong*. We are satisfied that the reason why plaintiff failed to press her charge of bigamy against Benjamin Logwood was because she was informed by the district attorney of the divorce Logwood had obtained against her.

(emphasis added); McGregor v. McGregor, 107 So. 2d 437, 447–48 (La. 1958) ("Moreover, *appealing again to reason and common sense and some knowledge of human nature*, the Court cannot believe that anybody, under the same circumstances . . . ." (emphasis added)); Henderson v. Travelers Ins. Co., 354 So. 2d 1031, 1035 (La. 1978) (Summers, J., dissenting).

> *The "family" is an outgrowth of human nature refined as a civilized institution. Its present form was instituted to preserve and strengthen society. Marriage is an integral part of this concept. It is not a purely moral obligation. It is a legal requirement which carries with it responsibilities and obligations lending stability to the family unit and providing order for its existence. Any erosion of this principle is bound to lessen needed restraints and weaken a vital element of society.* This decision plays a part in the process of erosion by bestowing on concubines the same privileges and benefits to which married women are entitled under the Workmen's Compensation Act. In doing so the decision demeans the dignity of marriage and to that extent strikes a blow at the family unit and the stability of the social structure.
>
> Furthermore, since there was no legal or moral obligation on the part of the deceased employee to support his concubine, I see no reason why the employer should bear that burden at the employee's demise. For, among other reasons, this

civil law jurisprudence, applicable not only to private law,[99] and had legal consequences in the administration of justice, as Justice Martin wrote in the abovementioned case:

> We, therefore, conclude, that the Spanish, Roman, and French civil laws, which the legislature repealed, are the positive, written, or statute laws of those nations, and of this state; and only such as were introductory of a new rule, and not those which were merely declaratory—that the legislature did not intend to abrogate those principles of law which had been established or settled by the decisions of courts of justice.[100]

While I find it coherent to state that a legislature cannot abrogate those principles of law upon which the legal order was founded, one might perceive a certain degree of common law influence in the last part of the sentence: "principles of law which had been established or settled by the decisions of courts of justice." One might wonder whether there might exist a principle which never "had been established or settled by the decisions of courts of justice." The question might be logical but useless because it is difficult—if not impossible—to find that principle, particularly considering that those principles had been somehow applied by judges for centuries in the civil law tradition.

More specifically, Justice Martin referred to "the daily practice in our courts to resort to the laws of Rome and France, and the commentaries on those laws, for the elucidation of principles applicable to analogous cases."[101] In his view, as it happened in Louisiana under the Digest of 1808 with the Spanish law, "[a]lthough the Roman law . . . had no intrinsic authority here, the reason that dictated that law has great cogency."[102] In other words,

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> burden is in time passed on to society at large when the employer, to meet the added costs, increases the price of his product to the customer.

Id. (emphasis added).

99. For the criminal law domain, see Aniceto Masferrer, *The Role of Nature in the Secularization of Criminal Law in Europe (17th–19th Centuries): The Criminal Law of the Enlightenment Revisited*, *in* CRIMINAL LAW AND MORALITY IN THE AGE OF CONSENT: INTERDISCIPLINARY PERSPECTIVES 97 (Aniceto Masferrer ed., 2020).

100. Reynolds v. Swain, 13 La. 193 (1839). For Pascal, "[e]ver since then the judiciary has construed and applied the Civil Code of 1825, and that of 1870 as well, in a manner more consistent with the recognition of the Civil Law in general and the Spanish law in particular as background law for our legal order." Robert A. Pascal, *Louisiana Civil Law and Its Study*, 60 LA. L. REV. 1, 2–3 (1999).

101. *Reynolds*, 13 La. at 199.

102. *Id.* at 198–99.

> Testing the judgment of this court, in the case of *Christy v. Cazanave*, by these rules, we do not find it grounded on any statute of Spain, of the late territory or

the principles that the Roman law embodied (natural law, justice, and reason) could be neither approved nor suppressed by any legislature.

In my opinion, *Reynolds v. Swain*'s argument shows a deep natural-law approach to law in line with the doctrine and with Portalis and Domat,[103] as opposed to the legalistic or positivist conception of law reflected in the final version of the French Civil Code and later the one interpreted by the French School of the Exegesis.[104] In other words, if code provisions were supposed to be founded on the "relations of justice that existed in the nature of things, antecedent to any positive precept," it was beyond the scope of the legislative power to suppress "those principles or maxims which regulated the conduct of men, before the formation of civil society."[105]

> the present state. We know not any Roman or French statute which was in force in this country at the period of the cession, and to which the repeal in the code and the act of 1828 could extend. Nevertheless, it is the daily practice in our courts to resort to the laws of Rome and France, and the commentaries on those laws, for the elucidation of principles applicable to analogous cases. Although the Roman law, on which the case of *Christy v. Cazanave* was determined, had no intrinsic authority here, the reason that dictated that law has great cogency.

Id.

103. 1 JEAN DOMAT, *Treatise of Laws*, *in* THE CIVIL LAW AND ITS NATURAL ORDER: TOGETHER WITH THE PUBLICK LAW 11.20 (Luther S. Cushing ed. & William Strahan trans., 1861); Jean Domat, *Preliminary Book*, *in id.* 1.1.3–4.

> The universal justice of all laws consists in the relation which they have to the order of society, of which they are the rules. But there is this difference between the justice of the laws of nature and the justice of arbitrary laws, that, the laws of nature being essential to the two primary laws, and to the engagements which are consequences of them, they are essentially just; and that their justice is always the same, at all times and in all places. But the arbitrary laws being indifferent to these foundations of the order of society, so that there is not any one of them which may not be altered, or abolished, without overturning the said foundations; the justice of these laws consists in the particular advantage that is found by enacting them, according as the times and the places may require.

Id.

104. In this regard, I fully endorse Licari's view in *Francois Gény in Louisiana*, who pointed out as follows:

> The reception of Gény's work was probably made easier by the reluctance that Louisiana courts have always shown towards positivism. This is demonstrated by the interpretation they made of the provisions of the 1808 and 1825 codes which aimed at repealing all laws predating codification, a jungle of customary law, French law and Spanish law. Thus, in the *Reynolds v. Swain* case, Chief Justice François-Xavier Martin stated, without beating around the bush, that the legislature did not repeal unwritten law such as natural law or the law of nations, or even *jurisprudence constante*.

Licari, *supra* note 64, at 489 (citations omitted).

105. Morgan v. Livingston, 6 Mart. (o.s.) 19, 87 (La. 1819).

C. EQUITY AS NATURAL-LAW JUSTICE

Many other Louisiana Supreme Court cases emphasize the idea that some rights are "founded in natural law, in Roman law, in Spanish law, in the Louisiana Code, and in the declarations of jurists and others of what the Louisiana law is and has been administered."[106] The alluvion, for example, was "a right founded on natural law, in which the maxim certainly applies with all its force, that *where the reason is the same, the law is the same . . . .*"[107]

As can be seen, the expressions "justice," "natural law," and "reason" were inextricably linked: "where the reason is the same, the law is the same." Note that Roman law was connected to all these expressions, being regarded as the "*ratio scripta*" by many legal traditions deriving or stemming from it (such as the French and Spanish ones).[108] In addition, Roman law connected the notions of justice and equity ("*justice ex aequo et bono*"), being considered as a "great mine of equity and natural justice."[109]

Louisiana Supreme Court decisions insisted on the idea that code-provision rules were also founded upon natural law and

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106. Mun. No. 2 v. Orleans Cotton Press, 18 La. 122, 160 (1841).

107. *Mun. No. 2*, 18 La. at 215–16.

> If all things, if all the burdens and risks, were alike, I would say that the law of alluvion should apply to a city lot, as well as to a country estate: I would invoke the principle: "*Ubi est eadem ratio, eadem est lex*."
>
> I open then the Code of Alonzo the Wise, which, *putting aside some slight imperfections, attributable solely to the age in which its immortal author lived, is still one of the most splendid monuments of human wisdom*.
>
> Many years have not elapsed since we were governed by that Code, not enough, at least, to prevent us from feeling the evil which its abrogation has inflicted upon our legislation.

Id. at 141 (emphasis added). In civil law, *alluvion* refers to the gradual and imperceptible increase of land along the banks of a river or stream, caused by the natural action of the water. Under Roman law—and later in the Louisiana Civil Code—the land thus formed belongs to the riparian owner, as a natural extension of his property. This rule, founded upon natural law and equity, recognizes that the riparian owner bears the risks and losses produced by the river's erosion; therefore, the newly formed land is granted to him as a fair compensation. The doctrine exemplifies the maxim "*ubi eadem est ratio, idem est jus*"—where the reason is the same, the law must be the same.

108. Aniceto Masferrer & Juan A. Obarrio, *The* Ius Commune *as the* Ratio Scripta *in the Civil Law Tradition: A Comparative Approach to the Spanish Case*, *in* COMPARATIVE LEGAL HISTORY 212 (Olivier Moréteau, Aniceto Masferrer & Kjell A. Modéer eds., 2019).

109. Lynch v. Postlethwaite, 7 Mart. (o.s.) 69, 111–13 (La. 1819) ("Although we are of opinion that the lex loci contractus ought to govern this contract, we have no objection to resort to that great mine of equity and natural justice, to which the lawyers of all modern nations have had recourse, the body of the Roman law.").

justice. For example, following Justice Story's work, the highest court of Louisiana asserted that "[i]f one lends his name as a partner, or suffers his name to be used in the business, he is responsible to third persons as a partner . . . . This doctrine is founded in the enlarged principles of natural law and justice."[110] In other cases, when there is no code provision to settle the case, judges should follow a doctrine "founded in the enlarged principles of natural law and *justice ex equo et bono*."[111]

The idea that any rule or doctrine applicable to the case should be founded on the principles of justice was recurrent, although the particular expressions could vary: "the most evident principles of justice,"[112] "a general rule, and one founded on reason and justice,"[113] "a general rule, and one certainly founded on principles of justice,"[114] "evidently founded on the soundest principles of justice,"[115] "the general rule . . . founded on obvious principles of justice,"[116] "rule . . . founded in wisdom, and the clearest principles of justice,"[117] "founded . . . on principles of

110. Grieff v. Boudousquie, 18 La. Ann. 631, 632 (1866).

111. Hamilton v. Eimer, 20 La. Ann. 391, 392 (1868) ("Mr. Justice Story says at § 64, already quoted: 'This doctrine turns upon no peculiar principles of municipal jurisprudence, but is founded in the enlarged principles of natural law and justice *ex equo et bono*; for wherever one of two innocent persons must suffer from a false confidence or trust reposed in a third, he who has been the cause of that false confidence or trust, and is to be benefitted by it, ought to suffer rather than the other.'").

112. Read v. Bailey, 2 Mart. (o.s.) 60, 67 (Orleans 1811) (". . . is founded upon the most evident principles of justice.").

113. Sinnet v. Mulhollan, 3 Mart. (o.s.) 398, 399–400 (La. 1814).

> It is a general rule, and one founded on reason and justice, that when the plaintiff is permitted to amend, the defendant has a right to answer to the amendment; as otherwise the plaintiff might intentionally omit some important allegation which, after the defendant had answered, he would insert by way of amendment, and which the defendant would be prevented from repelling by any proof, as it would not be denied by the answer, under the principle that the *allegata et probata* must keep even pace. It is also a rule equally well founded, that when one party appeals to the discretion of the court for a favor, the indulgence granted to him ought to be extended to his adversary—it ought to be reciprocal: short of this would be partiality.

Id.

114. *Id.* at 403 ("It is a general rule, and one certainly founded on principles of justice, that where permission is given to one of the parties to amend his pleadings, the other has a right to answer over or reply.").

115. Gale v. Davis' Heirs, 4 Mart. (o.s.) 645, 653 (La. 1817) (". . . is evidently founded on the soundest principles of justice.").

116. Breedlove v. Turner, 9 Mart. (o.s.) 353, 376–77 (La. 1821) ("This is the general rule, and it is founded on obvious principles of justice.").

117. Sargent v. Davis, 3 La. Ann. 353, 354 (1848) ("The reason of this rule is founded in wisdom, and the clearest principles of justice.").

justice and equity,"[118] and "founded on common sense and principles of justice,"[119] among others. As can be seen, the expressions "justice" and "equity" were sometimes used indistinguishably.

Considering such a philosophical approach to law, so reluctant towards positivism,[120] most of the judicial references to equity have to be understood as deriving from the Roman-law notion of justice (*justice ex aequo et bono*), rather than the reception of English equity, as Franklin mistakenly regarded.[121] In fact, some judicial decisions reflect that even when a court has been seriously called on to confine its views to mere terms of technicality, the purpose would be the enforcement of "broad and universal principles of

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118. R.B. George Mach. Co. v. New Orleans, T. & M.R. Co., 119 So. 473, 475 (La. Ct. App. 1 Cir. 1928), *rev'd*, 119 So. 432 (La. 1928).

> Such are the considerations which usually govern in estoppels in pais, founded as they are on principles of justice and equity, and there is no reason why they should not be invoked in this case where an estoppel by record is relied upon by defendant railway company. The estoppel pleaded was properly overruled, and judgment was correctly rendered for the amount demanded.

Id.

119. Byrnes v. St. Charles Dairy, 79 So. 2d 584, 586 (La. Ct. App. 1955).

> The rule of law, which requires that judgment should be rendered *super allegata et probata*, is founded on common sense and principles of justice. The illegality of a contract, arising from transactions in *fraudem legis*, may be taken advantage of by a plea in bar, a peremptory exception of the civil law, and should be regularly pleaded as that of *doli mali or rei judicatae*. Such pleas, of necessity, carry with them a suggestion of facts, in avoidance of those stated by the plaintiff, and often require testimonial proof of their truth, which the opposite party may rebut.

Id. (quoting Harvey v. Fitzgerald, 6 Mart. (o.s.) 530, 550 (La. 1819)).

120. On this matter, see Olivier Moréteau, *De Revolutionibus: The Place of the Civil Code in Louisiana and in the Legal Universe*, *in* LE DROIT CIVIL ET SES CODES: PARCOURS A TRAVERS LES AMERIQUES 1, 11 (Jimena Andino Dorato, Jean-Frédérick Ménard & Lionel Smith eds., 2011) (later on, republished in 5 J. CIV. L. STUD. 31 (2012)); Robert A. Pascal, *Of the Civil Code and Us*, 59 LA. L. REV. 301 (1998) (republished in ROBERT ANTHONY PASCAL: A PRIEST OF RIGHT ORDER 129 (Olivier Moréteau ed., 2010)); Pascal, in his *Sources of Civil Order According to the Louisiana Civil Code*, concludes as follows:

> The Louisiana Civil Code, then, is neither philosophically nor legislatively positivistic. . . . Legislation and custom reflect the presumably collective judgment of the society, applicable to all, and convention and unilateral cooperative action reflect the judgment of particular persons concerning order relevant to themselves or those for whom voluntary cooperative action is taken. All these positive sources of order, however, are to be envisioned as attempts to specify in particular the order demanded by the principles of philosophical judgment, represented in the Civil Code primarily as "natural law and reason." In the failure of order specified by legislation, custom, convention, or unilateral voluntary cooperative action, natural law and reason, or usages not custom but deemed evidence of judgments according to natural law and reason, provide the principles to be applied.

Pascal, *supra* note 26, at 940.

121. *See supra* notes 71–75.

equity."[122] In this vein, the Supreme Court made clear that Louisiana, unlike the common law jurisdictions,[123] "has always been a country of written (civil) law," and added, "[i]ts Constitutions have always contained the prohibition, directed especially against the common-law and equity systems . . . and its Legislatures have conferred no other equity jurisdiction upon its judges than as contained in [Civil Code article 21]."[124]

If that statement were not clear enough or might be regarded as too theoretical, the Supreme Court continued its line of thought as follows:

> The ordinary measure of the jurisdiction of Louisiana courts, sitting in equity, has therefore never been the measure by which the jurisdiction of courts of equity in general is determined, but has been, and is, neither greater nor less than as declared in the written law by which it is conferred; hence the precedents established by chancellors, administering a system forbidden in this state, not of law, but of jurisprudence, must be here considered with respectful caution.[125]

In short, the English "common law" and "equity" were explicitly forbidden by the Louisiana Constitutions.[126] In Louisiana, Civil Code article 21 allowed judges only to remedy the deficiencies of the law, but not to overtake it and prevail against it, as the English courts of equity were called to do.[127] Unlike in the common law, where the courts of equity were "capable of overriding the law, according to the conscience of the chancellor and the exigencies of the particular case, or according to fixed principles applicable to all

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122. Lynch v. Postlethwaite, 7 Mart. (o.s.) 69, 181 (La. 1819) ("This is perhaps the first instance in which this court has been seriously called on to confine its views to mere terms of technicality, by which to enforce these broad and universal principles of equity which heretofore have received their sanction.")

123. LeBlanc v. City of New Orleans, 70 So. 212, 212 (La. 1915) ("The present system known as 'equity' is the result of a struggle between the courts of countries of unwritten law [referring to common law jurisdictions], and its principles and precedents, established by its courts, are applied, not only to remedy the deficiencies of, but, at times, to overlap, and to prevail against, the law.").

124. *Id.*

125. *Id.*

126. *Id.* at 217 ("Since 1812 there have been seven Constitutions adopted in Louisiana, exclusive of that with which she became a state, and inclusive of one which is not yet two years old, and each has contained the same original prohibition against the adoption of 'any system of laws' especially directed, as is well known historically, against the 'common-law' and 'equity' systems established in the other states.").

127. To say in a different way what was stated by the Supreme Court, *see supra* note 123.

cases alike," Louisiana judges could resort to equity "where there is no express law" and "*where positive law is silent*."[128] The Louisiana Legislature conferred that authority upon the civil courts only "in the absence of express law."[129]

Thus, the resort to justice and equity was only pertinent when there was no code provision applicable to the case:

> If, therefore, there were no positive enactment, stating what rule should prevail in cases where the code or statutory law is silent, the courts of Louisiana would be governed by those principles of justice and equity, generally recognized by enlightened nations. But the 21st Article of the Civil Code, *furnishes a clear rule for the court*, in cases not provided for by positive law.[130]

As can be seen, for the Louisiana Supreme Court, article 21 "furnishes a clear rule for the court." Curiously enough, while courts regarded that provision as a "clear" code provision, many academics have not seen it as clear. In the *Bass v. Chambliss* case, after literally transcribing that provision, the court stated that the "construction of this Article is, that the courts of Louisiana, in such cases, will look to the decisions of courts in other States, in analogous cases, for the rule to govern them."[131] After citing previous cases where the Supreme Court had invoked, interpreted, and applied this provision,[132] the opinion added that "[l]ooking then to the decisions of courts of equity in England and America, and also to the civil law, we find it laid down, as a *principle of universal jurisprudence*, that . . . ."[133] The cases cited do not say

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128. *Le Blanc*, 70 So. at 217.

> What the Legislature did (after some years) with reference to equity was, not to adopt the system as it then existed elsewhere (whether it was capable of overriding the law, according to the conscience of the chancellor and the exigencies of the particular case, or according to fixed principles applicable to all cases alike), but to declare that: "*In civil matters, where there is no express law*, the judge is bound to proceed according to equity. To decide equitably, an appeal is to be made to natural law and reason, or received usages, *where positive law is silent*."

Id. (quoting LA. CIV. CODE art. 21).

129. Expression used in Osborn v. City of Shreveport, 79 So. 542, 545 (La. 1918), which followed the ruling of *Le Blanc v. City of New Orleans*.

130. Bass v. Chambliss, 9 La. Ann. 376, 377 (1854) (emphasis added).

131. *Id.* (citations omitted).

132. DeLizardi v. Gossett, 1 La. Ann. 138, 139 (1846); Gridley v. Conner, 2 La. Ann. 87 (1847); Brown v. Union Ins. Co., 3 La. Ann. 177 (1848); Stark v. Burke, 5 La. Ann. 740 (1850).

133. *Bass*, 9 La. Ann. at 377 ("Looking then to the decisions of courts of equity in England and America, and also to the civil law, we find it laid down, as a *principle of*

anything other than that. The *DeLizardi v. Gossett* court, for example, "consider[ed] it safe to resort to proceedings analogous to those by which the courts of the other States have reached the equity of cases of this description."[134]

In *Gridley v. Conner*, dealing with a peculiar case on the proper application of the partnership property to the extinguishment of the partnership debts (Civil Code article 2794), the Supreme Court of Louisiana recognized

> the power . . . to appoint a receiver in a case of this kind, to be necessary for the purpose of effecting the object of this suit, which is the liquidation and settlement of a partnership, and it falls within that class of incidental powers which courts have full authority to exercise.[135]

Later on, it asserted that "[o]ur courts are not organized with the proper machinery for the settlement of complicated partnership concerns" but "are still obliged to determine and conclude matters of this kind, and they have the powers necessary for the exercise of their jurisprudence, although such powers may not be expressly given them by law."[136] *Stark v. Burke* also dealt with the dissolution of a corporation.[137]

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universal jurisprudence, that trustees can only hold and act for their beneficiaries; that all profits and gains tenure to their use, and that interest, sometimes simple, sometimes compounded, will be given as the standard or value of the money used." (emphasis added)).

134. *DeLizardi*, 1 La. Ann. at 139.

> Our laws have not provided for such an emergency; but art. 21 of the Civil Code ordains that, in civil matters, where there is no express law, the judge is bound to proceed and decide according to equity. Commanded to proceed in this cause and to decide it justly, notwithstanding the silence of the law, we consider it safe to resort to proceedings analogous to those by which the courts of the other States have reached the equity of cases of this description.

Id.

135. *Gridley*, 2 La. Ann. at 90–91 (citing JOSEPH STORY, COMMENTARIES ON THE LAW OF PARTNERSHIP, AS A BRANCH OF COMMERCIAL AND MARITIME JURISPRUDENCE, WITH OCCASIONAL ILLUSTRATIONS FROM THE CIVIL AND FOREIGN LAW § 333 (1841); LA. CIV. CODE art. 21).

136. *Id.* (citing CODE OF PRACTICE art. 130).

137. Stark v. Burke, 5 La. Ann. 740, 741 (1850).

> We do not understand the law to be, as contended for by counsel, that in the dissolution of a corporation the personal property of the corporation vests in the State, and the debts due to and from the corporation cannot be recovered. On the contrary, by the civil law on the dissolution of corporations of this class, the property of the corporation belongs to its members and must be divided among them. Nor do we consider the corporation, in any sense, as revived by this appointment. As a corporation it has ceased to exist; the appointment is merely a saving of the rights of creditors and of the property of the association.

Id.

In *Brown v. Union Insurance Co.*, which revolved around a peculiar corporation's dissolution,[138] the Supreme Court, considering that the case was similar to another one "involving the question of the neglect of the managers of the association of the Bankside Brewery to act,"[139] came to the conclusion that "[u]nder the equity powers vested in our courts and the imperative command of the law that, in cases not provided for, the judge shall proceed and decide according to equity, they might adopt a similar course, if it became necessary to prevent a failure of justice."[140]

As can be seen, these cases in particular do not seem to clarify much about the meaning of Civil Code article 21. One might wonder whether there might be other cases in which the Supreme Court made clearer statements on the content and the meaning of the notions of "equity," "natural law," "reason," and "received usages." The truth is that all these expressions frequently appear in the sources, but their meaning seems to be taken for granted. As explained, sometimes they appear separately, other times together, presenting them as being inextricably connected, sometimes even as synonymous.

D. THE NOTIONS OF NATURAL LAW AND REASON

The expression "natural law and reason," which is "an exact translation of '*la loi naturelle et la raison*' in the French texts of the

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138. Brown v. Union Ins. Co., 3 La. Ann. 177, 182 (1848).

> A corporation never can dissolve itself so as to defeat any of the just rights of its creditors. In this case, the officers once appointed are required by the charter to continue in office until others are elected, and, if they should die, absent themselves, resign, or refuse to act, and it was made to appear that the shareholders neglected to appoint others to the injury of the creditors, we would, on a proper case being made out, feel ourselves authorized to order the appointment of a manager in the interim, for the purpose of winding up and putting an end to the concern. This appointment would in no wise differ from that of receiver, which our courts frequently make to settle the affairs of insolvent banks and partnerships.

Id.

139. *Id.* at 182.

> In the case of *Carlan* v. *Drury*, 1 Ves. and B. 154, involving the question of the neglect of the managers of the association of the Bankside Brewery to act, the Lord Chancellor said: "This court is not to be required on every occasion to take the management of every play-house and brew-house in the kingdom. But if the case justified the interference of the court, it may appoint a manager in the interim, for the purpose of winding up and putting an end to the concern. If a case of delinquency was clearly made out, I do not hesitate to declare the court would act. But there must be a positive necessity for the interference, arising from the refusal or neglect of the committee to act."

Id.

140. *Id.* at 182.

Digest of 1808 and Civil Code of 1825,"[141] appears frequently in the Louisiana Supreme Court cases throughout the nineteenth and twentieth centuries. As Pascal pointed out, it is "uniquely that of the Louisiana legislation," and both terms seem to be "synonymous."[142]

Concerning the notion of "natural law," the court asserted, for example, that governments are allowed to "exercise . . . power consistently with the principles of natural law,"[143] and that courts should "adhere to the principles which regulate it in cases arising under foreign . . . laws,"[144] only if that is equally required by "the principles of sound policy, of natural law, of moral justice."[145] The

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141. Pascal, *supra* note 26, at 928–29.

142. *Id.* at 929.

> The phrase appears to be uniquely that of the Louisiana legislation, for if it has any precise antecedent, the writer has not discovered it. The *French Projet* of 1800 uses simply "*la loi naturelle*" and Domat "*les principes naturelles de l'équité*." If "*loi naturelle*" and "*raison*" were to be considered the equivalent of *jus naturale* and *jus gentium* as used in Justinian's Institutes, or of *derecho natural* and *derecho comunal de todas las gentes* as used in *Las Siete Partidas*, to mean the rules of order observed in non-rational animals and the rules of order "natural reason has established among all peoples," then the answer would be that the terms are synonymous.

Id.

143. Debora v. Coffin, 1 Mart. (o.s.) 40, 45 (Orleans 1809).

> The government then, by the act of confiscation, not only actually prohibited any future payment of their debt by the defendants to the plaintiff in Cuba, but it had a right so to do. It not only prevented the plaintiff from acquiring the right which he might otherwise have acquired of suing the defendants upon their contract in Cuba, but it exercised that power consistently with the principles of natural law. For it is most evidently just, that when the sovereign power in the state takes from an individual, without his fault, and only to effect a general benefit, the property with which he intended to discharge his debts, it should protect that individual from suits that might be instituted against him for not so employing the property of which he is thus deprived. This confiscation of the defendants' property, to an amount sufficient for the payment of all their debts, and subject to such payment may be not inaptly considered as the forced payment of a debt to a person constituted by law to receive it for the real creditor, and resembles payments made to curators, tutors, husbands, receivers of hospitals, &c., payments which would be valid . . . .

Id.

144. *Id.* at 55.

145. *Id.*

> Do not then the principles of sound policy, of natural law, of moral justice, all equally require that this court should in the present case, adhere to the principles which regulate it in cases arising under foreign insolvent laws? Ought it not to judge the plaintiff by the strict rule of his own laws? And deny him every remedy that could not be indulged to him under the act of confiscation? *Potter v. Brown*. 5 East, 131. Shall we not otherwise be aiding the execution of the penal laws of a foreign government? If, in the present case, the plaintiff should prevail, if the funds seized by the Spanish government are not to be allowed to operate the extinction of their Spanish debts, the defendants would be rendered unnecessarily insolvent. The act in question was not penal but beneficial and remedial to the plaintiff.

court also stated, following a Pothier quotation, that acquiring property of a thing from another person "is derived from natural law."[146] However, not all natural-law rules could be invoked and applied, unless they "have been established by positive provision, and cannot extend beyond the country for which [they were] made."[147]

However, it would be wrong to think that references to natural law appear only when judges had to solve an unprovided-for case. The idea that some rules or principles stem from natural law,[148] that judges have no authority to intervene against natural-law

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146. Orleans Navigation Co. v. City of New Orleans, 2 Mart. (o.s.) 214, 238 (La. 1812) ("'A third manner of acquiring property,' says Pothier, 'is delivery by which the property of a thing passes from one person to another. Doctors call it, modus acquirendi domini derivativus. This manner of acquiring property is derived from natural law.'").

147. Cresse v. Marigny, 4 Mart. (o.s.) 50, 54–55 (La. 1815).

> The appellant resists this claim of the appellees on two grounds. He alleges first, as a general principle, that judicial adjudications do, in some cases, transfer the property even of third persons, and that this is one of the cases to which the rule is applicable. In support of this position, he quoted the authority of Pothier, who, in his *Traité de la Propriété*, nos. 76, 251, 152, asserts, that even where the goods of a third person have been advertised for sale, if such a third person does not oppose the sale in due time, the right of property passes to the purchaser. *Without questioning the correctness of Pothier's assertion, it is obvious that a rule so widely swerving from the principles of natural law, must have been established by positive provision, and cannot extend beyond the country for which it was made.* By that provision, a delay is fixed within which the third person, whose property is about to be sold, must come forward and oppose the sale. After that delay he forfeits his right, as a punishment for his neglect to obey the laws of his country. The necessity of quieting purchasers of property exposed to sale by order of government, may be pleaded in justification of such a disposition; but nothing short of some such positive law among us could justify this Court in recognising a sale of this nature as capable of transferring the right of property. Neither could the sale, in such case, be deemed valid and binding upon the real owner, unless it . . . .

Id. (emphasis added).

148. *See, e.g.*, Dufour v. Camfranc, 11 Mart. (o.s.) 675, 687 (La. 1822).

> Any provision of law operating such unjust effects must be strictly construed. *No law, permitting one to enrich himself at the expense of another, without his assent, can or ought to be favored*: if courts carry it beyond the letter of the law, it appears to me, that they legislate, and I should say, that their legislation is neither legal nor wise. Nothing seems more incontestable than that—no one has a right to the use of my property, unless by my consent or the operation of law; if positive statutes have in certain cases contravened this principle, even though we should not acknowledge its justice or wisdom, we must submit; although I cannot myself see why a legislature should be permitted to give to another the use of my property, without my consent, when they are restricted from depriving me of the benefits I may derive from a contract; the one is no more my property, my right, than the other.

Id. (emphasis added). *See also* Joyce v. Poydras de la Lande, 6 La. 277 (1834), cited *infra* note 161; Crow v. Manning, 45 La. Ann. 1221 (1893) ("Natural law does not allow one person to enrich himself at the expense of another" (citing ROBERT JOSEPH POTHIER, A TREATISE ON THE LAW OF OBLIGATIONS, OR CONTRACTS 166 (William David Evans trans., 3d Am. ed. 1853) (1806)).

principles,[149] that cases are supposed to "stand if tested by the dictates of natural law," and above all, that cases should be decided "according to the principles of natural law,"[150] was frequently used, even when there was a code provision applicable to the case.[151] The reason was that judges thought that many of the code provisions were an "imperfect" expression of natural-law principles.

In 1819, the Supreme Court made a statement which provided insight into what "the first principles of natural law" were. According to the court, anybody "might have invoked those principles themselves, which, under a free government, need not the sanction of legislative acts to be respected as eternal truths."[152] In this vein, some rights were "inherent in man,"[153] for example, the right to acquire property. However, "this right, which took its rise in the law of nature, has received its perfection, and had a permanency given to it, by municipal or civil law; and it is in relation to this law, that the right of individuals to the possession and enjoyment of things, must be examined."[154] In other words, the exercise of some natural laws should be examined in relation to their positive-law regulation, and

> modifications which legislative power may make, in the possession, use, and distribution of property, are infinite; and nearly every contest which arises in courts of justice, proceeds from the real or imputed violation of some one of those modifications; any one of which might be urged to be a violation of natural law.[155]

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149. *See, e.g.*, Succession of Reiss, 46 La. Ann. 347 (1894).

> There are well-considered decisions holding that the precept, "Honor thy father and thy mother," as embodied in the Civil Code, includes the grandmother or grandfather as a legal obligation. Other courts and certain writers lay down the principle that *under a law of nature the child is under the authority of the father or mother alone, and that the law has conformed to natural law, and that the judge has no authority to intervene.*

Id. (emphasis added).

150. Renthorp v. Bourg, 4 Mart. (o.s.) 97 (La. 1816).

151. *See, e.g.*, Jourdan v. Barrett, 13 La. 24, 29 (1839) ("This is conformable to the plainest principles of natural law; and the contrary doctrine could only have arisen from the confusion of ideas above mentioned, the confounding of a right with a claim.").

152. State Bank v. Seghers, 6 Mart. (o.s.) 724, 726 (1819).

> . . . because having had no opportunity to defend himself, he would have nothing to lay before the court of appeals. That is certainly true, but without resorting to this consequence of a departure from the first principles of natural law, he might have invoked those principles themselves, which, under a free government, need not the sanction of legislative acts to be respected as eternal truths.

153. Milne v. Davidson, 5 Mart. (n.s.) 409, 412 (La. 1827).

154. *Id.*

155. *Milne*, 5 Mart. (n.s.) at 412–13.

In a few cases, the court identified "natural law" with "the law of nations."[156] In this vein, stating that a rule was founded on natural law implied that its principles were "contained in the codes of different nations," and thus "in conformity with the provision of our own laws on this subject."[157] In other cases, the court explicitly distinguished between "natural law" and the "law of nations" (or *ius gentium*)—the former being defined as "the immutable principles of reason"[158]—and connected "natural law" with Roman law, "founded on the broad and equitable principles of natural law."[159] A natural law might constitute the only source of regulation for some institutions like the right of alluvion on rivers, which belonged to the private riparian proprietor.[160]

> It is true, that the right to acquire property may be regarded as one of those which is inherent in man; but this right, which took its rise in the law of nature, has received its perfection, and had a permanency given to it, by municipal or civil law; and it is in relation to this law, that the right of individuals to the possession and enjoyment of things, must be examined. The modifications which legislative power may make, in the possession, use, and distribution of property, are infinite; and nearly every contest which arises in courts of justice, proceeds from the real or imputed violation of some one of those modifications; any one of which might be urged to be a violation of natural law, with as much reason as that of which the appellant now complains. Our code defines absolute ownership to be, that which gives the right to enjoy, and to dispose of one's property in the most unlimited manner; *provided it is not used in a way prohibited by laws or ordinances.*

Id. (citing LA. CIV. CODE art. 483).

156. Le Breton v. Nouchet, 3 Mart. (o.s.) 60, 62 (La. 1813).

> It is certainly true, as a general principle, that contracts must be interpreted, and have their effects, according to the laws and customs of the place in which they are made; and that the lex loci, in this respect, will be respected in the tribunals of any other country in which the parties may afterwards remove, or the contract is sought to be enforced. *This is a principle of the law of nations, indeed of natural law, which is recognized every where.* The contract of marriage never was excepted from the general rule; indeed, the rule is universal.

Id. (emphasis added).

157. Hunt v. Morris, 6 Mart. (o.s.) 676, 680 (La. 1819).

158. Morgan v. Livingston, 6 Mart. (o.s.) 19, 99 (La. 1819).

159. *Id.* at 186.

160. *See, e.g.*, Morgan v. Livingston, 6 Mart. (o.s.) 19 (La. 1819); Mun. No. 2 v. Orleans Cotton Press, 18 La. 122 (1841), in which the court says,

> . . . as the Roman law instructs us, the right of acquiring by alluvion is derived from natural law, from the "jus gentium," as it is called by Justinian. That if, with us, as among the Romans, the civil law sanctions the right of alluvion, it is from the supremely just and equitable consideration that the land of the riparian owner, which has no other limit than the river, is exposed to be damaged, impaired, diminished, and carried away by that river; and that the alluvion is given to him as a compensation and indemnity for the risks and charges which the law imposes upon him.

Id. at 154; Kennedy v. Mun. No. 2, 10 La. Ann. 54 (1855) ("The right to alluvial formations is a vested one, and is inherent in the property itself, and forms an essential attribute of it, resulting from natural law in consequence of the local situation of the land."); Delogny's Heirs v. Mercer, 43 La. Ann. 205 (1891) ("Right to batture is a right inherent in riparian property. It results from natural law, in consequence of the local

The connection between natural law and Roman law was clearly made in some cases. In *Gravier v. Livingston*, the Supreme Court regarded Roman law "as the fountain from which the soundest principles of natural law have flowed into the Spanish code."[161] However, it was not applicable when it touched upon "dispositions which are of the domain of positive law, and which do not coincide with the Spanish law, there it is of no authority whatsoever."[162] The *Bonnabel v. First Municipality* case pointed out that some parts of Roman law—such as the contract of exchange (as a *contractus innominatus*)—were "governed exclusively by the broad rules of natural law and plain common sense."[163]

In the Louisiana legal culture, natural law was also connected to Spanish and French laws. In this sense, even before 1828 and before *Reynolds*, Moreau Lislet and Carleton gave clear evidence that Spanish law was regarded as natural law. In their preface to the *Partidas* (written only a year before Moreau's appointment to the 1825 Code Commission),[164] they wrote as follows:

> Since the promulgation of the Partidas, some of its provisions have been abrogated, or amended by subsequent laws, particularly by the laws of the Recopilación of Castille, of

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situation of the land to which it attaches."); Sapp v. Frazier, 51 La. Ann. 1718 (1899), in which the court opines,

> From the definition of the word, "alluvion" is the land formed by sedimentary deposits, and added to an ordinary tract by the imperceptible action of the waters bordering the latter. It is a mode of acquiring property by natural law,—"jure gentium,"—by those principles or maxims which regulated the conduct of men before the formation of civil society.

Id. at 1723 (citing *Morgan*, 6 Mart. (o.s.) at 242).

161. Gravier v. Livingston, 6 Mart. (o.s.) 281, 316–17 (La. 1819).

> The Roman body of laws, entitled as it is to our veneration, is not law in Spain. It is consulted with respect as the fountain from which the soundest principles of natural law have flowed into the Spanish code: it is resorted to as containing a vast deal of information on the matters contained in that code. But wherever it treats of dispositions which are of the domain of positive law, and which do not coincide with the Spanish law, there it is of no authority whatsoever.

162. *Id.*

163. Bonnabel v. First Mun., 3 La. Ann. 699, 700 n. (1848); *see also* McGregor v. McGregor, 107 So. 2d 437, 447–48 (La. 1958) ("Moreover, *appealing again to reason and common sense and some knowledge of human nature*, the Court cannot believe that anybody, under the same circumstances . . . ." (emphasis added)).

164. Robert A. Pascal, *A Recent Discovery: A Copy of the "Digest of the Civil Laws" of 1808 with Marginal Source References in Moreau Lislet's Hand*, 26 LA. L. REV. 25 (1965); ALAIN A. LEVASSEUR, MOREAU LISLET: THE MAN BEHIND THE DIGEST OF 1808 (2008); *see also* Pascal, *supra* note 26, at 927–28, where he affirms that "[t]here should be no doubt, however, that *derecho* as used in the Partidas was understood to include the non-legal norms of order that were considered the bases of positive law."

> which we shall presently speak. But these alterations have not, in any way, changed the great principles of natural law, contained in the Partidas. They relate to certain laws only of a positive nature, which nations establish, modify or repeal, as their wants, interests or situation may require. . . .
>
> The Partidas may therefore be considered as containing the fundamental principles of the laws of Spain.[165]

Some judicial decisions treated natural law and justice—or natural justice—as synonymous. For example, in *Morgan v. Robinson*, Justice Martin agreed with the plaintiff's counsel in relying on the maxim "*contra non valentem agere, non currit prescription*," "being an axiom, or *first principle of natural law and justice*, and therefore applicable to every system of jurisprudence, wherein the contrary is not expressly established by legislative power."[166] Consequently, "notwithstanding the express terms of limitation in our code, it is thought, that they ought not to be interpreted as to conflict with this *universal maxim of justice* established by legislative power."[167] Referring to the same principle, almost half a century later, the Louisiana Supreme Court regarded it as "an axiom or first principle of natural law, and notwithstanding the terms of limitation in prescription, contained in the old, as well as the new, Code, have interpreted these terms in such a manner as to harmonize with this *maxim of universal*

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165. LOUIS MOREAU LISLET & HENRY CARLETON, THE LAWS OF LAS SIETE PARTIDAS WHICH ARE STILL IN FORCE IN THE STATE OF LOUISIANA x (1820); see Thomas W. Tucker, *Interpretations of the Louisiana Civil Codes, 1808-1840: The Failure of the Preliminary Title*, 19 TUL. EUR. & CIV. L.F. 57, 167–68 (2004).

166. Morgan v. Robinson, 12 Mart. (o.s.) 76, 77 (La. 1822).

167. *Id.* at 76.

> He relies principally on the maxim, "contra non valentem agere, non currit prescription": as adopted and recognized by the Spanish law, and *being an axiom, or first principle of natural law and justice, and therefore applicable to every system of jurisprudence, wherein the contrary is not expressly established by legislative power*. In this view of the subject we agree with the counsel of the plaintiff, and, *notwithstanding the express terms of limitation in our code, it is thought, that they ought not to be interpreted as to conflict with this universal maxim of justice*. The time prescribed by law for commencing a redhibitory action, is six months from the date of the sale, or six months from the discovery of the defects, and recovery of the things sold. In the present case, it is shown that the defendant was within the jurisdiction of the state only four months, during the whole year of limitation, and consequently that two months remained . . . .

Id. at 77–78 (emphasis added); in the same line of thought, *see* Garland v. Holmes, 1 La. Ann. 405, 406 (1846) (literally repeating some statements and the reference to the "universal maxim of justice").

justice."[168] Almost two decades later, the highest court of Louisiana declared that "[p]rescription is not a reprobated defense," but a natural-law institution.[169]

Another way of defining or describing what natural law is in relation to jurisprudence is an unavoidable requirement of any legal order. Fifteen years earlier than the *Reynolds v. Swain* case, the *Joyce v. Poydras de la Lande* opinion (1834) contained a revealing paragraph that resembled what the Louisiana Supreme Court would rule:

> As our Code does not seem to have provided expressly for a case of this kind, we are compelled to resort to *first principles, to natural law and reason. The safest interpretation of natural law, and the best aids of our reason, are those profound thinkers whose works have come down to us, and whose spirit breathes throughout our civil jurisprudence; and although the ancient civil laws have no longer in our tribunals the sanction of legislative authority, we cannot shut our eyes to the light they shed along our path, while following the imperfect clue of a written Code.*[170]

The court, after analyzing the regulation contained in the Roman-law digest and the commentaries of Gregorio López to the *Siete Partidas*, felt "fully authorized" to decide the case: "These authorities, which are in fact but deductions from acknowledged axioms of law, and particularly that which forbids one man to enrich himself at the expense of another, seems to us fully to authorise the court to decree . . . ."[171]

Some lessons can be learned from this case: first, that "natural law" and "reason" seem to be the same, both connected with the "first principles"; second, that the best way to find the natural-law

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168. Rabel v. Pourciau, 20 La. Ann. 131, 131 (1868) (emphasis added); *see also* Reynolds v. Batson, 11 La. Ann. 729 (1856), to which the *Rabel v. Pourciau* case resorted.

169. Ferrand v. Bres' Heirs, 35 La. Ann. 908 (1883).

> *Prescription is not a reprobated defense.* It is established by the very necessity of things for the good order and quiet of society and of its members. The law forbids that it be considered as odious. It rests upon a presumption of payment, of settlement of liabilities, or upon a remission of obligations, or an abandonment or relinquishment of rights. *Natural law declares it, civilization accepts it, and the civil law consecrates and enforces it, as well for the acquisition of rights as for the release from obligations.*

Id. at 911 (emphasis added).

170. Joyce v. Poydras de la Lande, 6 La. 277, 284 (1834).

171. *Id.*

and reason-based solution was resorting to jurisprudence (Roman law and other "ancient civil laws" that embedded, enriched, and expressed jurisprudence); and third, that even though these "ancient civil laws have no longer in our tribunals the sanction of legislative authority," they should serve as a guiding reference when enforcing "the imperfect clue of a written Code."[172]

In other words, according to that Supreme Court decision, a legal order will never be an adequate tool to achieve justice with a written code which is not guided and enlightened by the unwritten law contained in a jurisprudence which had been built and developed upon ancient laws. As can be seen, the notions of natural law and reason were treated as synonymous, and were inextricably linked to Roman law, jurisprudence, and justice. It could be said that natural law was regarded as the basis of the civil law tradition because it was connected with reason, equity, the "universal maxims of justice,"[173] and with the Roman law, and they were all closely related to one another. As it was nicely expressed by the Louisiana Supreme Court, "[t]he civil law does not do violence . . . to the natural law. On the contrary, the natural law introduces the civil law, and travels along with it."[174]

The judicial concern as a consequence of the General Repealing Act of 1828 was apparent in other decisions that seem to have left judges unaided by the code provisions alone. Several judicial cases whose opinions were delivered by Justice Mathews show the judicial unrest triggered by the Repealing Act. In 1834, in *Lewis v. Casenave*, Justice Mathews, after assuming that a provision of the old Code (1825) had not been repealed, particularly considering that that doctrine had been supported by two decisions made prior to the General Repealing Law,[175] stated as follows:

> The clause of repeal is sweeping in its effects, tremendously sweeping, and an *unwise or inconsiderate interpretation on the part of the courts of justice, would have left the community without any civil laws, except those contained in the Louisiana*

172. *Joyce*, 6 La. at 284.

173. *See supra* note 167.

174. Zerega v. Percival, 46 La. Ann. 590, 615 (1894).

175. Testamentary Ex'r of Lewis v. Casenave, 6 La. 437, 440–41 (1834).

> As to the first of these grounds, it is assumed in the proposition, that the article 74, page 358, of the Old Code, has not been repealed, a doctrine supported by two decisions to be found in [*Flower v. Griffith*] 6 N. S. pages 89 and [*Pignatel v. Drouet*] *Id.* 434. These decisions were made prior to the general repealing law, approved on the 25th of March, 1828.

> *Code and Code of Practice; an evil so great as to be irreconcilable with the wisdom that must be conceded to our legislatures. Decisions in this court have limited its effects to the Roman Civil Law and the Spanish laws, in force in the country at the time of the repealing act*; having the provisions of our own legislative acts still in force, according to general rules of abrogation. But an exception in the repealing clause, in favor of a particular chapter of the old Civil Code, shows clearly the intention of the legislature to repeal all other parts of it. It is not pretended that any provision, similar to those found in the Old Code, is any where retained in our laws subsequently enacted.[176]

The concern might be theoretical, but it rather seemed to be practical, since such a repealing act left many gaps in the civil law of Louisiana, whose judges felt better served with the possibility of resorting to Roman, Spanish, and French laws whenever needed. In this particular case, believing that the most appropriate, applicable rules of evidence on the subject of redhibition had been borrowed from Spanish law, Justice Mathews "presume[d] it cannot be viewed as a judicial offence [against the legislature], to resort to them in aid of interpretation."[177]

A year later, in *Boismare v. His Creditors*, Justice Mathews faced another gap to fill concerning fraud, and compared the former law with the present one after the Repealing Act of 1828:

> According to the laws, as they existed formerly in this state, fraud was to be presumed in cases of insolvency. These laws

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176. *Id.* For Palmer,

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

Palmer, *Quest to Implant*, *supra* note 76, at 816.

177. *Lewis v. Casenave*, 6 La. at 442.

> It is believed that this rule of evidence was borrowed from the Spanish law on the subject of redhibition, and although these laws are now repealed, we presume it cannot be viewed as a judicial offence, to resort to them in aid of interpretation. We find in the 25th number, under the head of Redhibitoria, in the Curia Philipica, provisions very similar to those contained in the article 2508 of the Louisiana Code . . . .

> were repealed by the act of 1828; *but the repeal of them, as laws absolutely obligatory in the administration of justice, ought not to destroy the force of principles which were established by them, when these principles are found to comport with justice, and may be considered as having been induced from rational and well founded opinions of the probable conduct of men in civil society*.[178]

As can be seen, Justice Mathews did not just literally repeat the same argument in this opinion, but instead, he enriched it by resorting to the principles of justice as "induced from rational and well founded opinions of the probable conduct of men in civil society."

Some years later, in 1839, *Reynolds v. Swain* went a step further and made more explicit what the previous cases had implicitly established. In doing so, Justice Martin used the distinction between the written law and the unwritten law and resorted to the notion of natural law. In a few words, if the power of the legislature was "necessarily confined to positive or written law,"[179] then it was beyond its power to repeal laws (e.g., unwritten laws) it had not enacted. Thus, legislative power

> cannot be extended to those unwritten laws which do not derive their authority from the positive institution of any people, as the revealed law, *the natural law*, the law of nations, the laws of peace and war, *and those laws which are founded in those relations of justice that existed in the nature of things, antecedent to any positive precept*.[180]

The consequence of the distinction between the written, positive laws on the one hand, and the unwritten, non-positive laws on the other, was clearly made in the judicial decision and concerned the limited scope of the legislative Repealing Act of 1828.[181] The most remarkable and concise explanation of the choice made by the Louisiana Supreme Court reads as follows:

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178. Boismare v. His Creditors, 8 La. 315, 319 (1835) (emphasis added). Justice Mathews delivered the opinion of the court.

179. Reynolds v. Swain, 13 La. 193, 198 (1839) (citing BLACKSTONE, *supra* note 92, at *44).

180. *Id.* (emphasis added).

181. *Reynolds*, 13 La. at 198 ("The repeal spoken of in the code, and the act of 1828, cannot extend beyond the laws which the legislature itself had enacted; for it is this alone which it may repeal; *eodem modo quiquit constitutur, eodem modo dissolvitur*."); Tucker, *supra* note 165, at 162–63.

> We, therefore, conclude, that *the Spanish, Roman, and French civil laws, which the legislature repealed, are the positive, written, or statute laws of those nations, and of this state*; and only such as were introductory of a new rule, and not those which were merely declaratory—that *the legislature did not intend to abrogate those principles of law which had been established or settled by the decisions of courts of justice*.[182]

The court recognized that the *Christy v. Cazanave* case was "not . . . grounded on any statute of Spain, of the late territory or the present state," and that there was no "Roman or French statute which was in force in this country at the period of the cession, and to which the repeal in the code and the act of 1828 could extend."[183] However, the court explained that "it is the daily practice in our courts to resort to the laws of Rome and France, and the commentaries on those laws, for the elucidation of principles applicable to analogous cases."[184] And then, it added, "*Although the Roman law*, on which the case of *Christy v. Cazanave* was determined, *had no intrinsic authority here, the reason that dictated that law has great cogency*."[185] In short, Roman law, upon which the judicial decision had been founded, was not valid, but the "reason" behind it could be perfectly used by judges because that "reason" was not a positive, written law, but a non-positive, unwritten law, whose repeal was totally beyond the legislative power.

One might wonder whether such interpretation was somehow founded or grounded upon Civil Code article 21. In other words, would that interpretation have been made by the Louisiana Supreme Court without having a particular code provision making an explicit reference to natural law and reason? It is a difficult question to answer. On the one hand, it might be argued that it would have been more difficult for the Louisiana Supreme Court to come to the same conclusion; on the other, the text of *Reynolds v. Swain* does not contain any reference to article 21, so it seems the court did not ground its interpretation on that code provision, but precisely on a broad and old principle of jurisprudence that, coming from the civil law tradition—which distinguished *leges* and

182. *Reynolds*, 13 La. at 198 (emphasis added).
183. *Id.* at 198–99.
184. *Id.* at 199.
185. *Id.* (emphasis added).

iura—was also received or used by Blackstone in his *Commentaries on the Laws of England*.

One might think that the Louisiana Supreme Court's reference to Blackstone's distinction constitutes clear evidence of how the common law highly influenced the court's interpretation or reasoning. However, a closer examination of Blackstone's distinction between written and unwritten laws reveals that he quite faithfully adopted the civil law tradition's distinction. According to Blackstone, while the written or statute law was the law enacted by parliament, the unwritten laws were composed of the judicial common law and customs, also including local customs and other particular laws observed in certain courts and jurisdictions:

> The municipal law of England, or the rule of civil conduct prescribed to the inhabitants of this kingdom, may with sufficient propriety be divided into two kinds; the *lex non scripta*, the unwritten, or common law; and the *lex scripta*, the written, or statute law.
>
> The *lex non scripta*, or unwritten law, includes not only general customs, or the common law properly so called; but also the particular customs of certain parts of the kingdom; and likewise those particular laws, that are by custom observed only in certain courts and jurisdictions.[186]

As can be seen, for Blackstone, the unwritten laws were not just composed of "the common law properly so called" and "particular customs," but also of "particular laws, that are by custom observed only in certain courts and jurisdictions."[187]

What were, according to Blackstone, these "particular laws" which eventually became observed by custom "in certain courts and jurisdictions"? The civil and canon laws. Although "[i]t may seem a little improper at first view to rank these laws" as unwritten laws, Blackstone argued, "it is not on account of their being written laws, that either the canon law, or the civil law, have any obligation within this kingdom; neither do their force and

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186. BLACKSTONE, *supra* note 92, at § 2, *63.

187. BLACKSTONE, *supra* note 92, at § 3, *67.

> THIS unwritten, or common, law is properly distinguishable into three kinds: 1. General customs; which are the universal rule of the whole kingdom, and form the common law, in it's stricter and more usual signification. 2. Particular customs, which for the most part affect only the inhabitants of particular districts. 3. Certain particular laws; which by custom are adopted and used by some particular courts, of pretty general and extensive jurisdiction.

efficacy depend upon their own intrinsic authority; which is the case of our written laws, or acts of parliament."[188] Later, he explains why these particular laws are part of the unwritten laws of England:

> But all the strength that either the papal or imperial laws have obtained in this realm, or indeed in any other kingdom in Europe, is only because they have been admitted and received by immemorial usage and custom in some particular cases, and some particular courts; and then they form a branch of the *leges non scriptae*, or customary law: or else, because they are in some other cases introduced by consent of parliament, and then they owe their validity to the *leges scriptae*, or statute law.[189]

Blackstone was fully aware that the origin of the distinction between the written and the unwritten laws came from Roman law, the Justinian Code being the paradigmatic written law and the Digest the paramount exponent of the unwritten law.[190] The

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188. BLACKSTONE, *supra* note 92, at § 3, *79.

189. *Id.* § 3, *80.

> THE third branch of them are those peculiar laws, which by custom are adopted and used only in certain peculiar courts and jurisdictions. And by these I understand the civil and canon laws.
>
> IT may seem a little improper at first view to rank these laws under the head of *leges non scriptae*, or unwritten laws, seeing they are set forth by authority in their pandects, their codes, and their institutions; their councils, decrees, and decretals; and enforced by an immense number of expositions, decisions, and treatises of the learned in both branches of the law. But I do this, after the example of sir Matthew Hale, because it is most plain, that it is not on account of their being written laws, that either the canon law, or the civil law, have any obligation within this kingdom; neither do their force and efficacy depend upon their own intrinsic authority; which is the case of our written laws, or acts of parliament. They bind not the subjects of England, because their materials were collected from popes or emperors; were digested by Justinian, or declared to be authentic by Gregory. These considerations give them no authority here: for the legislature of England doth not, nor ever did, recognize any foreign power, as superior or equal to it in this kingdom; or as having the right to give law to any, the meanest, of it's subjects. But all the strength that either the papal or imperial laws have obtained in this realm, or indeed in any other kingdom in Europe, is only because they have been admitted and received by immemorial usage and custom in some particular cases, and some particular courts; and then they form a branch of the *leges non scriptae*, or customary law: or else, because they are in some other cases introduced by consent of parliament, and then they owe their validity to the *leges scriptae*, or statute law.

Id. § 3, *79–80.

190. Ermanno Calzolaio, *The Distinction Between Written and Unwritten Law and the Debate About a Written Constitution for the United Kingdom*, 4 J.L. & ADMIN. 55 (2016), where he shows how current that distinction is today, and briefly explains that unwritten and written law can both be expressed in a written form:

> One should not be misguided as to the meaning of written-unwritten law. Written law does not mean rules of law expressed in writing, but a law which is dictated in an imperative way, "an express precept which not only declares or contains, but

relevant question for Blackstone was two-fold: (1) how these unwritten customs, laws, and maxims could be known, and (2) by whom was their validity to be determined? The answer was clear: by the judges, since they are "the depositary of the laws" and "the living oracles," so "precedents and rules must be followed, *unless flatly absurd or unjust*."[191]

Blackstone's answer has a clear common law flavor. In some civil law jurisdictions, judicial decisions were reasoned, published, and collected; and when two or more decisions followed a particular rule, these judicial precedents were regarded as custom, and hence as an authoritative source of law. In short, some judicial precedents became a source of law because they were regarded as custom.[192] However, contrary to Blackstone's view, not all unwritten laws needed to be declared or approved by judges, because—among other reasons—some of them were written and well-known (e.g., Digest). In addition, there was another difference

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> in its very words constitutes the law" [quoting FREDERICK POLLOCK, A FIRST BOOK OF JURISPRUDENCE 233 (1929).]. Conversely, unwritten law does not mean a law which is not formulated in writing, but one which consists in the reason and spirit of cases and not in the letter in particular cases [citing Lord Mansfield, *Fisher v. Prince*, 3 Burr. 1363 (1762).]. The difference lies in the fact that the former is compulsory because it is enacted, whereas the latter is compulsory as general custom.

Id. at 55–56.

191. BLACKSTONE, *supra* note 92, at § 3, *69–70.

> BUT here a very natural, and very material, question arises: how are these customs or maxims too be known, and by whom is their validity to be determined? The answer is, by the judges in the several courts of justice. They are the depositary 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. Their knowlege of that law is derived from experience and study. . . .
>
> THE doctrine of the law then is this: that precedents and rules must be followed, *unless flatly absurd or unjust*: for though their reason be not obvious at first view, yet we owe such a deference to former times as not to suppose they acted wholly without consideration.

Id. (emphasis added).

192. Aniceto Masferrer, *Plurality of Laws and* Ius Commune *in the Spanish Legal Traditions: The Cases of Catalonia and Valencia*, *in* THE LAWS' MANY BODIES: STUDIES IN LEGAL HYBRIDITY AND JURISDICTIONAL COMPLEXITY, C1600–1900, at 193 (Seán Patrick Donlan & Dirk Heirbaut eds., 2015). In this vein, William Thomas Tête, *The Code, Custom and the Courts: Notes Toward a Louisiana Theory of Precedent*, 48 TUL. L. REV. 1 (1973), argues that article 3 of the 1825 Civil Code was based on Spanish law, not French, and that the Spanish concept of custom "closely linked customary law and judicial decision." *Id.* at 7. Thus, he concludes that the courts' repeated enforcement of a rule could create customary law. *Id.* at 7, 12.

For the opposite view, see Gail S. Stephenson, *Custom as a Source of Law in Louisiana*, 79 LA. L. REV. 1045, 1053 (2019), for whom "Louisiana legislators and judges have rejected the third school of thought—that judicial decisions are customary law"; on this matter, see, more specifically, *id.* at 1053–54.

between the Roman law's and common law's notions of unwritten laws. As Blackstone recognized it, unlike the law of England—where "general immemorial custom, or common law, from time to time [was] declared in the decisions of the courts of justice"—Roman law adopted custom (and other unwritten laws, I add) "only . . . when the written law [was] deficient."[193]

Ten years later, *Packwood v. Dorsey* (1849) somehow reflected the outcome of the Supreme Court's doctrine which emerged as a consequence of the Repealing Act of 1828. The main effect was to resort to article 21 whenever code provisions were insufficient:

> It is admitted that the common law remedy of an action for the slander of title does not go as far as the civilians have carried the above remedies. But the common law has no binding force on us. And though the same be true of the civil law, *the principles of the civilians are more conformable to natural law and reason, and more consonant with equity*. And, if all the Spanish and civil law has been repealed, yet our courts are required, "in civil matters, when there is no express law, to proceed and decide according to equity. To decide equitably, an appeal is to be made to natural law and reason, or received usages where positive law is silent."[194]

E. THE NOTION OF RECEIVED USAGES

As can be seen, Louisiana judges did not intend to apply the common law—because it has "no binding force on us"—but the civil law. If the Code was silent, and not many laws were in force anymore after the Repealing Act, then the right thing to do was to resort to two sources: either "natural law and reason" or the "received usages." That was so because Roman law, Spanish laws,

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193. BLACKSTONE, *supra* note 92, at § 3, *73.

> AND thus much for the first ground and chief corner stone of the laws of England, which is, general immemorial custom, or common law, from time to time declared in the decisions of the courts of justice; which decisions are preserved among our public records, explained in our reports, and digested for general use in the authoritative writings of the venerable sages of the law.
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> *THE Roman law, as practised in the times of it's liberty, paid also a great regard to custom; but not so much as our law: it only then adopting it, when the written law is deficient*. Though the reasons alleged in the digest will fully justify our practice, in making it of equal authority with, when it is not contradicted by, the written law. "For since," says Julianus, the "written law binds us for no other reason but because it is approved by the judgment of the people," therefore those laws "which the people hath approved without writing" ought also to "bind every body."

Id. (emphasis added).

194. Packwood v. Dorsey, 4 La. Ann. 90, 91 (1849) (quoting LA. CIV. CODE art. 21 (1825)).

and French laws constituted and contained clear expressions of natural law, reason, and received usages; and even though they had "no intrinsic authority here [in Louisiana], the reason that dictated those laws had great cogency," as Justice Martin asserted.[195] This was particularly clear with the expression "received usages," whose meaning was clear for the Supreme Court, at least in *Packwood v. Dorsey*:

> Now the usages of the civil law, as interpreted in Spain and other nations of Europe, have been generally received in Louisiana. And if we appeal to natural law and reason on this subject, there can be nothing inequitable in the manner of the proceedings which the civilians have pointed out for the redress of such injuries as those set forth in the plaintiff's petition. Admitting that the roman [sic] and spanish [sic] laws have been fully repealed, "we presume," says Judge Mathews, "it cannot be viewed as a judicial offence to resort to them in aid of interpretation."[196]

The notion of "received usages" allows Louisiana judges to learn and take whatever they might need, if anything, from other jurisdictions,[197] particularly from civil law judges, but without excluding the fair outcomes from the U.S. common law jurisdictions. It is true that, with the passage of time, in some cases the Supreme Court adopted received usages from common law judges.[198] However, it can be perceived as a considerably

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195. *See supra* note 185.

196. *Packwood*, 4 La. Ann. at 91 (citing Lewis v. Casenave, 6 La. 437, 442 (1834)). Immediately after, the following was added:

> The same judge, afterwards in *Boismare v. His Creditors*, 8 La. 319, said that "the repeal of these laws by the act of 1828 as laws absolutely obligatory in the administration of justice ought not to destroy the force of principles which were established by them, when these principles are found to comport with justice."

Id.

197. There were particular cases whose decisions could not be grounded on either legislation or judicial cases. *See, e.g.*, Chaney v. Gray, 7 Rob. (LA) 144 (1844).

> . . . but, he has admitted that he knows of no positive legislation, nor of any adjudged case which he can adduce in support of his position; and that, in the absence of any authority of this kind, courts are directed by the Civil Code, art. 21, to decide according to equity, and that an appeal is to be made to natural law and reason, or received usages. He also admits, that no instance can be adduced of the judicial sale of land taking place in any other parish than that in which it is situated.

Id. at 145.

198. *See, e.g.*, Le Blanc v. City of New Orleans, 70 So. 212 (La. 1915).

> But cases arise where the respective jurisdictions appear to conflict, and the law appears to be silent as to the line between them, as where prosecutions under such ordinances alleged to be unconstitutional or illegal are said to operate as invasions of property rights, and in such cases the judge of the civil district court, being

regular tendency to follow the received usages from the Louisiana courts,[199] and also from other civil law jurisdictions. In this vein, just three decades ago, the highest court of Louisiana, addressing the issue of what type of fault will bar a needy spouse from receiving permanent alimony, concluded as follows: "Past decisions of the Louisiana Supreme Court constitute *received usages*. . . . And, these past decisions have become a part of the law to which courts must resort when deciding similar issues."[200]

In 1946, the *Keller v. Haas* case shed some light on how the "received usages" should be understood. In that case, the Supreme Court set out some criteria to distinguish the "received usages" from "natural law and reason." First, the court pronounced, "Were this the first case of its kind, the Court would decide it principally

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bound to decide according to equity, as defined by article 21 of the Civil Code, may be aided by the precedents of the courts of equity elsewhere established, according to which he may grant an injunction to restrain a prosecution, or threatened prosecution, under an illegal ordinance, until the alleged invasion of property rights is inquired into. But in such case no injunction should be granted unless there be found three concurring conditions . . . .

Id. at 245. *See also* Osborn v. City of Shreveport, 79 So. 542, 545 (La. 1918).

. . . that, in the absence of express law conferring that authority upon the civil courts, they may appeal to "natural law and reason and received usages," including the practice in the courts of equity in this country and England. Turning then to the usages recognized in the courts of equity in this country, we find that, in an exhaustive opinion, handed down in 1887, the Supreme Court of the United States, in considering an application for habeas corpus, by certain municipal officers, imprisoned for contempt committed in disregarding an injunction issued by a Circuit Court of the United States, prohibiting them from further proceeding in the matter of the impeachment of a police judge, defined the jurisdiction of a court of equity . . . .

Id. at 545 (citing *Le Blanc*, 70 So. at 212).

199. *See, e.g.*, Spencer v. Child.'s Hosp., 432 So. 2d 823, 826 (La. 1983).

These principles were early recognized in Louisiana to provide procedural devices where none existed under positive law: *Morris v. Cain*, 35 La. Ann. 759, 762 (1883), where the court adopted interpleader practice when none was provided in the Code of Practice; *In re Liquidation of Mitchell-Borne Construction Co.*, 145 La. 379, 390, 82 So. 377, 381 (1919), where the court provided for the appointment of a receiver to a partnership despite no express provision in the law. In other jurisdictions, mistrial is available when, prior to the completion of the trial and rendition of a judgment, the court determines that there is some error or irregularity in the case which prevents reaching a proper judgment.

Id.

200. Allen v. Allen, 94-1090 (La. 12/12/94), 648 So. 2d 359, 364.

Although the legislature has not specifically addressed the issue of what type of fault will bar a needy spouse from receiving permanent alimony, this issue can be resolved by resort to jurisprudential precepts because when no rule for a particular situation can be derived from legislation or custom, the court is bound to proceed according to equity, and to decide equitably, resort is made to justice, reason, or prevailing usages. Past decisions of the Louisiana Supreme Court constitute *received usages*. . . . And, these past decisions have become a part of the law to which courts must resort when deciding similar issues.

Id. (Kimball, J., concurring) (citing Keller v. Haas, 24 So. 2d 610, 614 (La. 1945)).

on 'natural law and reason.' However, the decisions of this Court in previous cases of a similar nature constitute 'received usages.'"[201] The second criterion was a direct consequence of the first one:

> There is a second reason for following the decided cases. These cases have become a part of the law, and according to well-established rules "Equity follows the law." "Judicial continuity" is important even in the interpretation of specific written provisions of the Constitution and Code, as many of these are not certain until ultimately defined by judicial decision. In the decision of cases involving an equitable question, like the present one, the absence of the "express law" means that orderly development of the law depends entirely upon this Court's acceptance of and adherence to its past decisions, rather than following the personal views of the individual judge who prepares the opinion in each successive case.[202]

As can be seen, the application of Civil Code article 21 led the courts to resort to either the principles of justice behind the Roman, Spanish, and French laws (through "natural law and reason"), or the judicial precedents with a somehow apparent common law flavor (through the "received usages," which were applicable only "when there is no express law on the subject," as the Supreme Court emphasized in 1976).[203]

Did the Louisiana courts have a real common law flavor? Did Louisiana judges use—or perhaps even abuse—Civil Code article 21, particularly after the *Reynolds v. Swain* decision in 1839, to somehow operate as if they were common law judges? I don't really think so, even though, as has been said, the resort to the "received usages" sometimes did not exclude the adoption of common law equity and remedies.

If some nineteenth-century scholars of the French School of the Exegesis would look at the Louisiana courts and some of the Supreme Court's statements concerning the role of judges, they would certainly come to the opposite conclusion, but this would be

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201. *Keller*, 24 So. 2d at 614.

202. *Id.*

203. State v. Mitchell, 337 So. 2d 1186, 1188 (La. 1976) ("A court can only consider received usages when there is no express law on the subject." (citing LA. CIV. CODE ANN. art. 21; Sublet v. United T.V. Rental, Inc., 284 So. 2d 783 (La. Ct. App. 4 Cir. 1973))).

because of their peculiar, reductionist way of understanding law and the judiciary. They never captured a simple idea that was at the core of modern civil codes, as it was clearly understood by many civil law lawyers, and reflected in the following paragraph of the Louisiana Supreme Court:

> The court reject this conclusion, and assign their reasons in an elaborate argument . . . "they say that *our codes were only intended to lay down general principles, and provide for cases of the most common occurrence*." That it is more than probable the thoughts of the Legislature were not turned to a case of not frequent occurrence; that had the Legislature intended to have repealed the former law, they would have said so, and not left it to be inferred. This we consider to be sound reasoning. *Legislation is intended for matters of common occurrence, and of general interest, and is not expected to cover isolated and particular cases: those may well be left to the sound discretion of courts, to be determined by the principles of equity, of natural law, and of general jurisprudence*.[204]

Both aspects, namely that codes only intend to lay down general principles (instead of covering isolated and particular cases) and that particularities are supposed to be left to the sound discretion of courts, was at the core of modern civil codes, as it happens with the common law principles (rather than with statutes, which tend to be as detailed as possible) and their interpretation by common law judges.

Since code provisions usually contained general principles, judges were called to apply these principles to particular cases,[205] and also when cases might be new, as Justice Ashhurst pointed out:

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204. Succession of McGill, 6 La. Ann. 327, 330 (1851) (emphasis added).

205. That was the way many common law lawyers looked at the French Civil Code. *See, e.g.*, M. Meyer & John James Park, *Written and Unwritten Systems of Laws*, 9 AM. JURIST & L. MAG. 5 (1833).

> The French code, so far from excluding analogical reasoning, relies upon it as forming a sort of complement of the text. Instead of spreading itself out into more than a million of distinct articles, containing as many special rules, in the vain hope of giving a special rule for each case, all these particular rules are traced up and resolved into 2281 general rules. Each article of the code therefore contains a general principle involving a large number of cases, and it is the office of jurisprudence to expound these general principles by sound juridical reasoning, and apply them to cases as they occur in the business of life; and it is supposed that every possible combination of facts, to which the various transactions of active life can give rise, may, by just and logical induction, be shown to fall within the principle of some article of the code.

Id. at 16–17.

> That when a case was only new in instance, and the only question is on the application of a principle recognized by law to such a new case, it will be just as competent for courts of justice to apply the acknowledged principle to any case which may arise two centuries hence, as it was two centuries ago.[206]

Being "evidently impossible in any code to provide specific rules for every case,"[207] thanks to Civil Code article 21, "[n]o suitor, then, need go unredressed."[208] In those cases, asserted Justice Ashhurst, judges need to carefully regard the "concurrence of mankind in different ages and countries . . . as the highest evidence of what is natural law and reason."[209]

As such court pronouncements made evident, natural law and reason were sometimes connected to "received usages," which themselves were composed of the rich legal heritage, of a long and complex history of legal traditions, principles, and systems that had shaped a society's laws and justice system. In other words, when facing an unprovided-for case, a judge was supposed to declare "the principles of natural law and the laws of nations, from the writings of the philosophers, poets, historians, and orators of antiquity. He does not confound one with the other, and distinguishes both from the civil or municipal law."[210] In doing so, the judge could resort to codes from other jurisdictions, such as France,[211] with similar or identical general provisions expressing common principles,

> not for the purpose of making any change in the law, but because it was a principle which was in its proper place in a code; a principle which would be equally recognized as a

206. Hubgh v. New Orleans & Carrollton R.R. Co., 6 La. Ann. 495, 506 (1851).

207. *Id.*; *see also* Hermann v. New Orleans & Carrollton R.R. Co., 11 La. Ann. 5, 16 (1856) (literally repeating the same sentence).

208. *Hubgh*, 6 La. Ann. at 506.

209. *Id.* (adding, "There has been such general concurrence in regard to the right of relations to claim damages for homicide, in all nations and ages of which we have records"). *See also Hermann*, 11 La. Ann. at 16 (literally repeating the same paragraph).

210. *Hubgh*, 6 La. Ann. at 509; *see also Hermann*, 11 La. Ann. at 6 (literally repeating the same paragraph).

211. *Hubgh*, 6 La. Ann. at 510 ("The right of action is claimed on the ground on which it has been allowed in France; the articles of the codes of that country and of Louisiana being identical, which provide that every act whatever of man that causes damage to another . . . .").

> necessary conservative element of society, and equally obligatory, whether it was formally enacted in a code or not.[212]

In this vein, resorting to the opinion of Merlin, Justice Ashhurst argued that some provisions contained in codes find their origin in natural law: "It is drawn from the natural law; and long before the Napoleon Code, the Roman laws had solemnly proclaimed it; long before that code, the French laws had recognized and assumed its existence."[213]

There were also cases in which the court acknowledged that the solutions given by English and American courts and civil law courts were not that different, even though at first glance they might appear to be in disagreement. That was because the principles behind these decisions arose "from natural law, and [were] subject to precisely the same rules."[214] In such cases, "[t]he civil and the common law being the same, there must be error on

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212. *Id.*

> . . . time in the code, not for the purpose of making any change in the law, but because it was a principle which was in its proper place in a code; a principle which would be equally recognized as a necessary conservative element of society, and equally obligatory, whether it was formally enacted in a code or not. Would an injunction in an article of a code *jus suum cuique tribuendi*, *or*, *sic utendi tuo ut alienum non lædas* under the duties implied, be more extensive or more obligatory?

Id. at 511.

213. *Id.*

> Merlin, in giving his conclusions before the Court of Cassation, in the case of *Michel, Reynier et al*, respecting the article 1382 of the Code Napoleon, which is identical with the article 2294 of our Code, says, the principle laid down in article 1382 is not new. It is drawn from the natural law; and long before the Napoleon Code, the Roman laws had solemnly proclaimed it; long before that code, the French laws had recognized and assumed its existence.

Id. (citing Merlin, R. *verbo* Reparation Civile, § 2, 3, bis.). *See also Hermann*, 11 La. Ann. at 14–15 (literally repeating Merlin's argument).

214. Camp v. Church Wardens of Church of St. Louis, 7 La. Ann. 321 (1852).

> It places servants, in all cases, on the same footing as strangers, while the English and American courts hold, as we did in the case of *Hubgh*, that the master is not responsible when the servant, by whose fault the injury occurred, was a person of ordinary skill and care. Those countries being governed by different systems of jurisprudence, it might, at first sight, be supposed that the conflict in the decisions of their courts, arose from different legislation. But their disagreement is not to be explained in that way. The decisions made on both sides, show that the law, so far as it protects strangers, is the same under the two systems, and it will be conceded that in both, the contract of hire, of labor and services, is considered as arising from natural law, and subject to precisely the same rules.

Id. at 327 (citing JOSEPH STORY, COMMENTARIES ON THE LAW OF BAILMENTS § 454 (2d ed. 1840)). *See also* Bass v. Chambliss, 9 La. Ann. 376, 377 (1854) ("Looking then to the decisions of courts of equity in England and America, and also to the civil law, we find it laid down, as a *principle of universal jurisprudence* . . . ." (emphasis added)).

one side in the interpretation of it."[215] In other cases, when an institution was grounded upon "a distinct principle—a principle of universal jurisprudence—a principle of a sound, enlightened policy,"[216] if the code was silent, "the courts of Louisiana would be governed by those principles of justice and equity, generally recognized by enlightened nations."[217] In doing so, it might happen that judges find that "the principles of English and American equity jurisprudence, on this head, are based upon the civil law."[218]

However, the most common way Louisiana judges proceeded and decided unprovided-for cases was by looking at the legacy of the civil law tradition, starting from the Louisiana tradition, without neglecting Roman law, and going through the French and Spanish laws, sometimes to the point of being assisted by reports or briefs concerning the disputed issue. In 1941, for example, a judge facing a peculiar case of disinherison to be settled using article 21,[219] appreciated that the defendant's counsel gave him a

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215. *Camp*, 7 La. Ann. at 327.

> The civil and the common law being the same, there must be error on one side in the interpretation of it. In France, we find but one case which does not appear to have been fully argued. In England and in this country, the question has been viewed in all its bearings, and thoroughly examined in a series of uniform adjudications. Under those decisions, the exemption, from responsibility in the master, has not been limited to cases where the employment of the servant was of a dangerous kind. The greater or less danger, attending the particular employment could not be converted into a rule of law, and if it could, the present case would not come under it, as there are few employments more . . . .

Id.

216. *Bass*, 9 La. Ann. at 377.

> But the argument is founded on a total misapprehension of the question. Interest is not, and never has been adjudged against trustees, upon the ground that it is given by statutory enactment, or the positive provisions of a code. Nor is it given by any analogy to such statutory provision. Trustees are charged upon a distinct principle—a principle of universal jurisprudence—a principle of sound, enlightened policy. It is this: that trustees will not be permitted to use the trust fund for their individual benefit, nor will they be permitted to trade with the fund, or make profit on it, or use it any way inconsistent with the terms of the trust; nor to retain it, where it is their duty to invest it, or to pay it over.

Id.

217. *Id.*

218. *Id.*

219. Successions of Lissa, 3 So. 2d 534, 535–36 (La. 1941).

> Counsel for defendant contend that since this court has never passed on the issues squarely presented under the facts of this case, and there being no specific provision in the Revised Civil Code for the manner in which a disinherison may be revoked, a thorough understanding of the causes that gave rise to the law of disinherison is essential to our decision under Article 21 of the Revised Civil Code, which provides that: "In all civil matters, where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is to be made to natural law and reason, or received usages, where positive law is silent."

Id. at 535.

brief, which had been drafted by a lecturer at Loyola University School of Law, that was "of great assistance":

> To this end they have submitted a brief which has been of great assistance to the court because of the collection and translation of the Roman, Spanish, and French authorities on this subject, and the exhaustive review of the historical development of the doctrine of disinherison, stated in the brief to be the work of Mr. Léandre Maréchal, Lecturer on Civil Law Research in the Loyola University School of Law.[220]

F. EQUITY AS A SOURCE AND MEANS TO ATTAIN JUSTICE IN THE ABSENCE OF LAW

In any case, according to article 21 of the Revised Civil Code, entitled "Equity in Absence of Law," "[t]he function of judges is to administer justice in all cases brought before them. They cannot do justice without knowledge of the facts on which a litigant grounds his cause of action or his defense."[221] In doing so, they resorted to natural law, reason, and the received usages. In fact, that was precisely the purpose of Civil Code article 21, namely that of providing courts with other legal sources to resort to when code provisions were silent.[222] Otherwise, article 21 was not used, no

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220. *Successions of Lissa*, 3 So. 2d at 535–36.

221. Gliptis v. Fifteen Oil Co., 16 So. 2d 471, 477–78 (La. 1943). The court added the following:

> To say that the law has not conferred upon judges the power to order a search made in cases of this kind for the discovery of evidence which might aid plaintiff in the prosecution of his cause, or aid the adverse party in making his defense, is tantamount to saying that their power to do justice is limited. But such power is conferred upon them by the Code of Practice. Furthermore, the Revised Civil Code confers upon judges broad and sweeping equity powers in cases where there is no express law to guide them, and "Equity will not suffer a right to be without a remedy."

Id. at 478.

222. Generally, the Supreme Court just recognized that, facing an unprovided-for case, Louisiana Civil Code article 21 was applicable, without interpreting or developing the meaning of that provision; in this line, *see, e.g.*, Thompson v. Mylne, 6 La. Ann. 80, 86 (1851) ("And if, from the paucity of our legislation on the subject of partnership, it be true that no provision of law expressly applies to the case, it is one to which the court is bound to apply that general provision of equity contained in the 21st article of our code."); Lobe v. Cary, 33 La. Ann. 914 (1881); Miltenberger v. City of New Orleans, 2 McGl. 283, 290–91 (La. Ct. App. 1884).

> But there is no room for equity on the point under consideration. It is only when there is no express law, that the judge may, or is ever bound to, proceed and decide according to equity. See revised Civil Code Article 21. *No appeal then can be made herein to natural law and reason, there being a positive law governing this matter, which is upheld by an uninterrupted current of decisions emanating from the highest tribunal of this state.*

matter whether any of the parties might invoke it.[223] This approach was in line with the role of Roman law, canon law, natural law, or equity in the European *ius-commune* tradition, where the *iura propria* was complemented by a *ius commune* based upon Roman law (*Corpus Iuris Civilis*) and canon law (*Corpus Iuris Canonici*).[224] When medieval and early-modern judges resorted to

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> It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and that this cause be remanded to such court for further proceedings on the plea of prescription filed, the appellee paying the costs of this appeal, those of the lower court to abide the final results of this suit.

Id. (emphasis added). *See also* Covas v. Bertoulin, 45 La. Ann. 160 (1893); Succession of Purkert, 167 So. 444, 448 (La. 1936); Thibodeaux v. Bergeron, 171 So. 34, 35 (La. 1936).

223. *See, e.g.*, Succession of Morgan v. Morgan, 23 La. Ann. 502, 503 (1871).

> If it be considered that the appellants appealed from this judgment of removal, we can not revise it, as the plaintiff in the proceeding, Edward Morgan, has neither made appearance nor been cited. Upon the other branch of the subject, it is said: "As Louisiana has no express law to regulate the proceedings and make proper provision in the matter, the court must decide according to natural law and reason. C. C., art. 21."
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> *We are unable to recognize any law or reason in the judgment or demand. Our code has made ample provision for the protection of the rights of coproprietors of property*, in which, however, is not embraced the right to judicially force one to make a contract and incur a debt for the improvement . . . .

Id. (emphasis added). *See also* State *ex rel.* Kneeland v. City of Shreveport, 29 La. Ann. 658, 661 (1877).

> Conceding, says defendant's counsel, that the city has not already exhausted its powers of taxation, then the issue is here directly presented and broadly made, that, there is no law of this State under which an ordinary judgment creditor of a municipal corporation can compel, by mandamus, or otherwise, the municipal authorities to levy and collect a special tax to pay his judgment.
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> *Were it so, when positive law is silent, an appeal must be made to natural law and reason; but it is not so.* "When the creditor's claim is reduced to judgment, the duty to provide for its payment becomes perfect, and if it can be paid in no other way, it must be done by the levy and collection of a tax for that purpose, and this duty will be enforced by mandamus."

Id. (emphasis added) (quoting JOHN FORREST DILLON, TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS 780, 776 n. (1872); citing LA. CODE PRAC. art. 830). *See also* Pirtle v. Price, 31 La. Ann. 357, 361 (1879).

> The facts alleged and sworn to by the curator do disclose a sufficient cause for the issuance of the writ of sequestration, and—as to that cause—the law, by implication, if not otherwise, is not absolutely silent. *Were it silent, this is—manifestly—one of the few instances when an appeal would have to be made to natural law and reason, to baffle and to defeat a criminal and infamous speculation.*

Id. (emphasis added).

224. On this matter, see, for example, the classical works by MARIO ASCHERI, INTRODUZIONE STORICA AL DIRITTO MEDIEVALE (2007); FRANCESCO CALASSO, MEDIO EVO DEL DIRITTO (1954); PAOLO GROSSI, L'ORDINE GIURIDICO MEDIEVALE (1995); ENNIO CORTESE, LE GRANDI LINEE DELLA STORIA GIURIDICA MEDIEVALE (2000); ANTONIO PADOA SCHIOPPA, STORIA DEL DIRITTO IN EUROPA. DAL MEDIOEVO ALL'ETÀ CONTEMPORANEA (2007); EMANUELE CONTE, DIRITTO COMUNE. STORIA E STORIOGRAFIA DI UN SISTEMA DINAMICO (2009).

these "foreign" laws, doctrines, and decisions from other jurisdictions, nobody thought that this way of deciding a case represented a common law contamination. Except for the kings of some geographical and chronological contexts, who disdained and disregarded Roman laws because they had not been approved by themselves, everybody knew that the "integrative" and articulated way of conceiving law and administering justice was at the core of the *ius commune* tradition, from which stemmed our civil law tradition. In fact, the French Civil Code, as it was eventually approved—neglecting the validity of unwritten laws or *iura*—and interpreted by the French School of the Exegesis, was somehow at odds with the civil law tradition. In this regard, the Louisiana Civil Code, and particularly its article 21, was much more faithful to the richness, complexity, and beauty of the civil law tradition.

One might wonder whether the interpretation of Civil Code article 21 changed much from the 1960s to the present time. Leaving aside the 1987 Law Reform,[225] which made four changes (it became article 4 instead of 21;[226] "and decide" was deleted; the expression "natural law" was replaced with "justice";[227] and "received usages" by "prevailing usages"[228]), courts' decisions

225. Act No. 124, 1987 La. Acts § 1 (effective January 1, 1988).

226. LA. CIV. CODE ANN. art. 4 ("When no rule for a particular situation can be derived from legislation or custom, the court is bound to proceed according to equity. To decide equitably, resort is made to justice, reason, and prevailing usages.")

227. Interestingly enough, the expression "natural law" was replaced by "justice" using the same argument whereby the Preliminary Discourse of Portalis was rejected. In France in the 1800s, that book was "criticized for containing 'metaphysical-legal abstractions' which were 'subject to . . . controversy.'" Bernard Beignier, *Portalis et le Droit Naturel dans le Code Civil*, 6 REVUE D'HISTOIRE DES FACULTÉS DE DROIT ET DE LA SCIENCE JURIDIQUE 77, 86–87 (1988). *See also* L. FAVOREU, LE DÉNI DE JUSTICE EN DROIT PUBLIC FRANÇAIS (1964).

In 1985, the Louisiana State Law Institute rejected the phrase—by six votes out of eight—for presupposing "the existence of some natural order created by a higher being" (Saúl Litvinoff) and because of its potential to create "a lot of emotional controversy" (Thanassi Yiannopoulos). The members of the Louisiana State Law Institute were fully aware that, in the Louisiana civil law tradition, the expression "natural law" was inextricably linked to that of "justice," and that justice also presupposed "some natural order" that could have been created by a higher being, but for whatever reasons—I don't know of what they were really afraid—they preferred to go with "justice" instead of "natural law." At the end of the day, the meaning of both expressions is so connected in the civil law tradition that the change became—both theoretically and in practice—more symbolic than real or effective. LA. STATE L. INST., MEETING MINUTES (Dec. 9, 1985).

228. However, the Louisiana State Law Institute revision commented on only two of the changes: "(a) this provision reproduces the substance of Article 21 of the Louisiana Civil Code of 1870. It does not change the law. (b) The term 'natural law' in Article 21

continued to use and interpret article 21 (article 4 from 1988 onwards) in a similar way.[229]

As it is well known, in the sixties and seventies of the last century, much attention was paid to judicial interpretation, which affected Civil Code articles 13 to 18, but sometimes in relation to the unwritten laws articles (article 3 on custom and article 21 on equity). In this regard, Justice Albert Tate, a prominent figure in Louisiana jurisprudence,[230] sought to resort to Civil Code article 21

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of the 1870 Code has no defined meaning in Louisiana jurisprudence and is not reproduced in this revision." LA. CIV. CODE ANN. art. 4 cmts. (a), (b).

229. On this matter, see Aniceto Masferrer, *From Natural Law to Justice: Continuity and Change in the Louisiana Civil Law Tradition*, *in* LIBER AMICORUM IN HONOR OF PROFESSOR OLIVIER MORÉTEAU (Agustín Parise, Mariano Vitetta & Michel Séjean eds., forthcoming 2026); *see, e.g.*, La. Irrigation & Mill Co. v. Pousson, 265 So. 2d 756, 763 (La. 1972) (Barham, J., dissenting), in which Justice Barham said the following in his dissent:

> Under Civil Code Articles 3 and 21 we are required to look to custom, to natural law and reason, and to received usages when the positive law is silent. Our courts in dealing with another real right, the mineral right, were able to develop law on that subject by resort to custom and through analogy to the law governing other real rights. We cannot and need not decide here the full nature of this particular right or the legal ramifications which are the natural appendages of such a right. We need only determine whether plaintiff has possessed that right as owner sufficiently to maintain its possessory action.
>
> In my opinion this record supports a finding that under the Civil Code and the Code of Civil Procedure plaintiff continually possessed the right to operate the irrigation canal for many years until disturbed in that possession by the defendant's cutting of the canal levee in April of 1970, shortly before suit, and that therefore the plaintiff's possession satisfies the requirements for the possessory action of Civil Code Articles 3454, 3455, and 3456 and Code of Civil Procedure Articles 3655, 3658, and 3663. Moreover, when we resort to custom, natural law, and received usages as well as analogy to the law affecting similar rights, it is clear that plaintiff has established its right to maintain that action.

Id. *See also* T.L. James & Co. v. Montgomery, 332 So. 2d 834, 855 (La. 1975), in which Justice Tate, on rehearing and in his concurrence in part, wrote,

> This legislative recognition of the contractual right of the beneficiary to receive the proceeds—without an equivalent legislative recognition of his right to do so free of his duty to account to forced heirs for invasion of their legitime, or to spouses in community for the share of the funds attributable to the latters' ownership interest in them—presents questions not expressly provided for by statute, insofar as the interests of forced heirs and of spouses for community ownerships. As in other unprovided-for situations, Civil Code Article 21 enjoins the judiciary: "In all civil matters, where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is to be made to natural law and reason, or received usages, where positive law is silent."

Id. (citing Minyard v. Curtis Prods., Inc., 205 So. 2d 422 (La. 1968)).

230. Albert Tate was a judge of the Louisiana Court of Appeal for the First Judicial Circuit from 1954 to 1960, and presiding judge of the Louisiana Court of Appeal for the Third Judicial Circuit from 1960 to 1970. He was also a professor of law at Louisiana State University from 1967 to 1968. Upon his election to the Third Circuit Court of Appeal, Tate was the youngest state court of appeal judge ever elected in Louisiana; he eventually became the senior presiding judge of all the courts of appeal

to achieve fair outcomes when a strict, mechanical application of law might have led to an unjust result, believing that misapplication, rather than the law itself, was the cause of injustice. Justice Tate believed that the law should be interpreted with a focus on achieving justice, rather than being rigidly applied. He defended a civilian legal philosophy which emphasized the importance of interpreting and applying the law in a way that achieved justice in specific cases.[231]

Being both a civil law judge and professor, Tate extensively wrote and published on a variety of aspects revolving around the function of a civil law judge.[232] Having received an LL.B. from Yale Law School in 1947 and being fully acquainted also with the common law tradition, he thought that "the Louisiana judge possesses the best of both worlds."[233] In his article *The Law-Making Function of the Judge*,[234] Tate described four judicial functions: (1) choosing the law or rule in the unprovided-for case, (2) synthesizing the new law with the rest of the Code, (3) revising the law to reflect social changes, and (4) interpreting the law to reflect legislative will.[235] For him, the first function of choosing the law-rule was particularly necessary in the unprovided-for case.[236] When dealing with the need for choosing or selecting the law or rule in the unprovided-for case,[237] after mentioning Louisiana Civil Code article 21 and article 1 of the Swiss Civil Code, he affirmed

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in the state. He served as an associate justice of the Louisiana Supreme Court from 1970 to 1979.

231. Mack E. Barham, *A Civilian for Our Times: Justice Albert Tate, Jr.*, 47 LA. L. REV. 929 (1987) [hereinafter Barham, *A Civilian for Our Times*].

232. *See, e.g.*, Albert Tate, Jr., *Civilian Methodology in Louisiana*, 44 TUL. L. REV. 673 (1970); Mack E. Barham & Albert Tate, Jr., *Jurisprudential Development in Louisiana Civil Law*, 34 LA. L. REV. 953 (1974); Albert Tate, Jr., *The Role of the Judge in Mixed Jurisdictions: The Louisiana Experience*, 20 LOY. L. REV. 231 (1974) [hereinafter Tate, *The Role of the Judge*].

233. Tate, *The Role of the Judge*, *supra* note 232, at 29 ("[T]he judge of a mixed jurisdiction such as Louisiana has the best of both worlds available to him for the performance of his judicial function. He may take advantage of the techniques and perspectives of both legal systems.").

234. Albert Tate, Jr., *The Law-Making Function of the Judge*, 28 LA. L. REV. 211 (1968) [hereinafter Tate, *Law-Making Function*]; *see also* Albert Tate, Jr., *The "New" Judicial Solution: Occasions for and Limits to Judicial Creativity*, 54 TUL. L. REV. 877 (1980).

235. Tate, *Law-Making Function*, *supra* note 234, at 217–34; *see also* Barham, *A Civilian for Our Times*, *supra* note 231, at 931–33.

236. Tate, *Law-Making Function*, *supra* note 234, at 217; *see also* Barham, *A Civilian for Our Times*, *supra* note 231, at 931.

237. Tate, *Law-Making Function*, *supra* note 234, at 216–17.

that "[e]ven without such legislative mandate, I suggest, courts do or should follow this approach in devising the law-rule by which to decide the unprovided-for case."[238] I fully agree with him. In fact, this is what the French courts do without having any of these provisions, as my French colleague and friend frankly recognized.

For Tate, legislative intention was so important that, sometimes, with the passage of time, a substantial change in the social conditions the statute was called to regulate would produce unfair outcomes if judges were to limit themselves to a "mechanical adjudication by reference to the statute's literal wording alone."[239] This is precisely what happened, for example, in *Loyacano v. Loyacano*.[240] Civil Code article 160 granted alimony to a divorced wife in need,[241] and the husband—who did not seek alimony for himself—claimed that the article, being gender-based, violated the equal protection guaranteed by both state and federal law.[242] The *Loyacano* case involved a challenge to the constitutionality of Civil Code article 160. It was clear that based on the social and cultural context in which that article was drafted and approved, the legislature did not intend to discriminate, simply because alimony for necessitous husbands was something unknown to the legis-

238. Tate, *Law-Making Function*, *supra* note 234, at 217.

239. Tate, *Law-Making Function*, *supra* note 234, at 229. Tate writes,

> . . . the words of legislation contain a principle of regulation intended by the legislators to apply to contemplated norms of their own and succeeding times. But if there is a substantial change in the social conditions the statute is designed to regulate, the mechanical adjudication by reference to the statute's literal wording alone may, under the changed conditions, amount to an irresponsible application of a legal rule devised neither by legislative intention nor by the deciding court.

Id.

240. Loyacano v. Loyacano, 358 So. 2d 304, 307–09 (La. 1978), *vacated*, Loyacano v. LeBlanc, 440 U.S. 952 (1979), *overruled by*, Lovell v. Lovell, 378 So. 2d 418 (La. 1979). *See, e.g.*, Licari, *supra* note 64, at 495–99.

241. LA. CIV. CODE art. 160 (1964) read as follows: "When the wife has not been at fault, and she has not sufficient means for her support, the court may allow her, out of the property and earnings of the husband, alimony which shall not exceed one third of his income."

242. Since there was no provision expressly authorizing a court to grant alimony after divorce to the husband, the husband, who was also the defendant, argued that article 160 was unconstitutional because it violated both the Fourteenth Amendment of the United States Constitution and article I, § 3 of the Louisiana Constitution of 1973, written in similar language; *see* U.S. CONST. amend. XIV, § 1, which provides,

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

lators. Considering that it was an unprovided-for case, the court decided to resort to article 21 so a necessitous husband would not be denied alimony in spite of the language of article 160. In this vein, Justice Dennis argued that

> [t]he failure of the legislature to expressly authorize the allowance of alimony after divorce for male citizens, however, does not necessarily invalidate Civil Code article 160. Because Louisiana is a civil law jurisdiction, the absence of express law does not imply a lack of authority for courts to provide relief. In all civil matters, where positive law is silent, the judge is bound by the Civil Code to proceed and decide according to equity, i.e., according to natural law and reason, or to received usages. This Court has recognized its duty to proceed and decide important issues under these circumstances on many occasions.[243]

Justice Dennis somehow resorted to Tate's doctrine of judicial interpretation when referring to the existence of "the doctrine of reputable scholars, which teaches that civilian judges are not required to depend merely upon a logical analysis of the existing statutes, but may employ other recognized methods of interpretation. They may perform extensive exegesis to discover the original legislative intent."[244]

For Justice Dennis, it seemed clear that the "different treatment accorded husbands and wives" was based on "the assumption that married men were capable of supporting dependents, whereas married women usually could not support themselves."[245] However, considering that this view is "clearly

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243. *Loyacano*, 358 So. 2d at 307–08.

244. *Loyacano*, 358 So. 2d at 308.

> We are also mindful of the doctrine of reputable scholars, which teaches that civilian judges are not required to depend merely upon a logical analysis of the existing statutes, but may employ other recognized methods of interpretation. They may perform extensive exegesis to discover the original legislative intent; legislative texts may be interpreted so as to give them an application that is consistent with the contemporary conditions they are called upon to regulate; and a particular conflict of interests before the court may be resolved in accordance with the general policy considerations which induced legislative action rather than by reliance on logical deductions from the language of the text.

Id.

245. *Id.* at 308–09.

> Both the codal and the doctrinal principles should be employed to discover the meaning of the words of the law.
>
> The general policy consideration and practical reason which appear to have induced the legislature to provide alimony after divorce was to prevent divorced women without sufficient means from becoming wards of the state. Although the legislative history of Civil Code article 160 sheds little light on the different

outmoded in today's society,"[246] Justice Dennis concluded that the case should be decided according to article 21, because "[e]quity and our constitution demand that the husband be awarded alimony under the same circumstances in which it can be claimed by the wife."[247] However, the husband requested rehearing, contending that the court had engaged in judicial legislation by providing for alimony to a necessitous husband when article 160 specifically addressed the wife's needs. Such request led to a new majority agreeing with this contention and holding article 160 to be unconstitutional, effectively removing the legislative source of alimony for any necessitous spouse.[248]

> treatment accorded husbands and wives, the most reasonable and probable basis is the assumption that married men were capable of supporting dependents, whereas married women usually could not support themselves.

Id.

246. *Id.* at 309.

> Although the assumption may have had substantial empirical support at the time of the legislation's enactment, it is clearly outmoded in today's society in which nearly half of the married women are employed and contribute to the standard of living of their families. The evolving nature of the role played by women in our state was clearly and emphatically recognized by the provision banning invidious gender-based discrimination in the Louisiana Constitution of 1974. Indeed, the debates at the 1973 Louisiana Constitutional Convention concerning the provision reflect that the delegates considered alimony to be an important statutory right and contemplated that the new equal protection clause would require that it be granted equally to both sexes. Consequently, when we attribute to Article 160 the meaning that a present day legislator would have attributed to it, we must assume that he would have taken cognizance of the increasing and expanding nature of women's activities and responsibilities, as well as our constitution's prohibition of arbitrary or unreasonable gender based legal classifications, and that he would not have intended by the legislation to discriminate against husbands who have not sufficient means for their maintenance by declaring them ineligible for alimony after a divorce.

Id.

247. *Id.*

> Accordingly, the question of alimony for a husband after divorce is a civil matter upon which there is no express or implied law, and we are bound to proceed and decide according to equity. Our appeal to natural law and reason informs us that the general policy considerations which induced the legislature to authorize alimony allowances for wives after divorce would also be served by granting such support to either spouse when the circumstances provided by Article 160 prevail. Equity and our constitution demand that the husband be awarded alimony under the same circumstances in which it can be claimed by the wife. For these reasons, we conclude that a Louisiana court may allow alimony to a husband after divorce, under the same circumstances in which it can be claimed by the wife, and that the contention of the defendant-respondent that Civil Code Article 160 denies equal protection of the law is without merit.

Id. (citing LA. CIV. CODE ANN. art. 21). For Licari, "[t]he reasoning which led Justice Dennis not to annul this provision, while reaching a solution adapted to the evolution of Louisianan society, constitutes a topical application of the free objective search for a rule." Licari, *supra* note 64, at 496.

248. Barham, *A Civilian for Our Times*, *supra* note 231, at 933.

As Barham noted, Tate believed in this case that "law-revision would have been appropriate."[249] In fact, Tate joined the majority on original hearing and adopted the opinion by Justice Dennis on rehearing as a concurrence, considering that such legislative silence as to post-divorce alimony for husbands would have allowed the courts to use article 21 to provide a gender-neutral rule in accordance with the Code's general principle of equity. In his opinion, the legislative will was of such primary importance, that "this will must be obeyed even if the words of a statute dictate otherwise."[250] However, he thought that "this type of interpretation must be used sparingly and with restraint—and never as an excuse to thwart the legislative will. That is, the policies and preferences of the judge, under the guise of interpretation, cannot be substituted for those of the legislature."[251]

Another reason that the judicial function of creating—or selecting—a rule should be used with great measure and caution, even when judges pursue the legislative intent, is that such undertaking does not necessarily "guarantee unanimous agreement among judges as to the legislative will,"[252] as it happened in *Tannehill v. Tannehill*,[253] in which the Supreme Court supported Tate's decision in *Loyacano*, agreeing with his opinion as to the legislative will, but Justice Barham dissented, "finding that the legislative intent was to allow disavowal based on 'unnatural impotence' by negative inference from former Article 185."[254] In short, the recourse to the equity provided by article 21 could lead to different outcomes, even when searching for the legislative intent where positive law is silent.[255]

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249. Barham, *A Civilian for Our Times*, *supra* note 231, at 934.

250. Barham, *A Civilian for Our Times*, *supra* note 231, at 934.

251. Barham, *A Civilian for Our Times*, *supra* note 231, at 934.

252. Barham, *A Civilian for Our Times*, *supra* note 231, at 933.

253. Tannehill v. Tannehill, 261 So. 2d 619, 627–28 (La. 1972).

254. Barham, *A Civilian for Our Times*, *supra* note 231, at 934. He adds, "Having concluded that sterility due to a childhood disease was not a 'natural impotence,' the father was allowed his cause of action."

255. For a similar case, see the dissenting opinion by Justice Hamlin in *Washington v. Washington*, 127 So. 2d 491, 502 (La. 1960), where he said,

> I respectfully dissent from the majority opinion on rehearing in this matter for the reasons expressed in the original opinion of this Court, of which I was the author. October 5, 1960, and for the further reasons hereinafter set forth.
>
> I have searched for and have been unable to find any provision of our law relating specifically to the prescription of the privilege granted a widow under Article 3252 of the LSA-Civil Code. Article 21 of the LSA-Civil Code provides as follows:

IV. IS THERE A FUTURE FOR THE UNWRITTEN LAWS IN LOUISIANA AND BEYOND?

My answer is affirmative because real needs always prevail over ideological theories or prejudices. And there are many reasons, historical experiences, and authorities giving clear evidence of the need for the unwritten laws. However, as a final conclusion of my lecture—and not to abuse the patience of this distinguished audience any further—I will only give, as evidence of my thesis, four arguments, a brief historical consideration as evidence, and just one authority.

Three (out of the four) arguments find their roots in the well-known article 4 of the French Civil Code: "*The judge who shall refuse to determine under pretext of the* ***silence, obscurity,*** *or* ***insufficiency*** *of the law, shall be liable to be proceeded against as guilty of a refusal of justice.*"

First argument: the silence of code provisions. Unlike physical laws, human or positive laws regulating social relations cannot foresee in advance all possible cases which might arise in the future, because the exercise of human freedom will never be entirely predictable, so legislation in general, and civil codes in particular, necessarily need to be supplemented or complemented with unwritten laws such as custom, usages, equity, natural law, common sense, justice, reason, or the general principles of law.

Second argument: the obscurity of code provisions. If "*errare humanum est*," as Seneca affirmed, the human legislator also makes mistakes because he is not infallible, so his texts are always perfectible. Judicial interpretation in search of the meaning of obscure legal texts might be considerably aided and enlightened by

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> "In all civil matters, where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is to be made to natural law and Reason, or received usages, where positive law is silent." . . .
>
> Reason dictates that a widow is able to decide immediately after the death of her husband whether she is in necessitous circumstances and will thereby feel the pinch of poverty; she should be able to decide within three months whether or not she will claim the privilege granted to her under Article 3252, supra. Justice demands that she should require recognition of her privilege within the same time as the Civil Code provides for the demand for separation of patrimony. She should not be permitted to hold a sword over the estate of her deceased husband for an unreasonable length of time and thereby subject many titles to real property to question.
>
> Try as I will, I cannot perceive why title examiners should be compelled in many cases to require affidavits to the effect that the "widow's thousand" has been satisfied before finally passing upon the merchantability of a title. Property owners have enough burdens without adding this additional one to their travail.

Id. (Hamlin, J., dissenting).

unwritten laws such as equity, custom, received usages, common sense, or some general principles of law.

Third argument: the insufficiency of code provisions. Since the text of code provisions in civil law jurisdictions (as common law principles in common law territories) tend to contain general and not very detailed statements and descriptions, and because the text's scope falls short many times, the fair application of these provisions is hardly something mechanical or automatic. Consequently judges, in "taking into consideration all the circumstances of the case" (as reads article 20 of the Mexican Civil Codes of 1870 and 1884), need to resort, in addition to analogy, to some supplementary unwritten legal sources.

Fourth argument: law goes beyond the written words of any text. Law is more than just a text. A text is meaningful inasmuch as it faithfully reflects its spirit in its own context. A text without spirit or with a spirit of a different context becomes inadequate. St. Paul stated, referring to the Ten Commandments, that "[t]he letter kills, but the Spirit gives life."[256] In saying this, he compared the Mosaic law—which had been written (with words) on stone tablets—to the work of the Spirit of God—whose new laws had been written (without words) in the new human heart.[257] This

256. 2 *Corinthians* 3:6.

257. 2 *Corinthians* 3:3–4 ("Clearly you are an epistle of Christ, ministered by us, written not with ink but by the Spirit of the living God, not on tablets of stone but on tablets of flesh, that is, of the heart. And we have such trust through Christ toward God."); *Hebrews* 8:10 ("This is the covenant I will establish with the people of Israel after that time, declares the Lord. I will put my laws in their minds and write them on their hearts. I will be their God, and they will be my people."); *Hebrews* 10:16 (the source of these texts can be found in the Old Testament). *See also Ezekiel* 36:25–27, which reads as follows:

> Then I will sprinkle clean water on you, and you shall be clean; I will cleanse you from all your filthiness and from all your idols. I will give you a new heart and put a new spirit within you; I will take the heart of stone out of your flesh and give you a heart of flesh. I will put My Spirit within you and cause you to walk in My statutes, and you will keep My judgments and do them.

Id. See also Jeremiah 31:31–34.

> Behold, the days are coming, says the LORD, when I will make a new covenant with the house of Israel and with the house of Judah—not according to the covenant that I made with their fathers in the day that I took them by the hand to lead them out of the land of Egypt, my covenant which they broke, though I was a husband to them, says the LORD. But this is the covenant that I will make with the house of Israel after those days, says the LORD: *I will put my law in their minds, and write it on their hearts*; and I will be their God, and they shall be my people. No more shall every man teach his neighbor, and every man his brother, saying, "Know the LORD," for they all shall know me, from the least of them to the greatest of them, says the LORD. For I will forgive their iniquity, and their sin I will remember no more.

Id. (emphasis added).

consideration might also be applied to human or civil laws in different ways. The most immediate one is that the tendency to a law enforcement too much focused on the letter of the law, rather than on its spirit, might easily lead to "killing" the very thing the law intended to preserve or protect. However, it has three even more relevant implications that concern the role of unwritten laws in any legal system.

First, if it is true, as we might experience in our lives, that some laws have been written (without words) "on our hearts"—meaning that humans have an innate sense of right and wrong, fair and unfair—then laws cannot be entirely reduced to words. Consequently, civil or positive laws seeking to attain justice in all cases cannot go without the necessary supplement of unwritten laws.

Second, if the primary purpose of law is to achieve justice by establishing a system that promotes fairness, equality, and the protection of individual rights—providing a framework for resolving conflicts and regulating behavior within a society—legislative, written texts cannot attain that purpose unless they are conveniently supplemented by unwritten laws, as all Western legal traditions, and beyond, demonstrate.

And third, if humans might have an internal understanding of basic moral principles, even without formal laws, a position that Plato and Aristotle defended, this means that civil or positive laws do not come from nothing or are not the result of a will ("a command of the sovereign," as John Austin defined it[258]), but instead, they are a reflection of an existing reality, cognizable by reason;[259] in other words, that law is not a transcript of an arbitrary will, but a transcript of reason which is capable of apprehending reality and understanding what is just in each particular case. Thus, the fact that the main laws or principles have already been written (without words) in our hearts reminds us that we cannot do whatever we want, using laws to satisfy our

258. *See* Samuel Enoch Stumpf, *Austin's Theory of the Separation of Law and Morals*, 14 VAND. L. REV. 117 (1960).

259. Aniceto Masferrer & P. Talavera, *Law as Reason vs Law as Will in the Fight Against Terrorism: From a Hobbesian Conception of Law to an Orwellian Society*, *in* PRECURSOR CRIMES OF TERRORISM: THE CRIMINALISATION OF TERRORISM RISK IN COMPARATIVE PERSPECTIVE 44 (Mariona Llobet Anglí, Manuel Cancio Meliá & Clive Walker eds., 2022).

particular, biased interests or desires,[260] but, on the contrary, we must always put them at the service of the common good.

A positivist conception of law, which excludes the validity of any law other than the written, legislative one, not only falls short in providing solutions that cover the variety and richness of human social relations, but it also runs the risk of making law a slave to politics, rather than a bulwark for the protection of individuals against the abusive exercise of political power.[261]

The brief historical consideration as evidence has already been asserted: while some jurisdictions which did not admit unwritten laws have attempted legal reforms to introduce the validity of unwritten laws (as the French case shows), I don't know of any single case of a jurisdiction having done the opposite, undertaking a reform to reduce or suppress the validity of unwritten laws to be governed only by statutes. In this vein, although the French Code rejected the general validity of unwritten laws or non-legislative sources, the imperative of real needs has led to resort to some of them anyway (e.g., custom and equity). The idea that law is composed of legislative enactments (*leges*) and other legal sources (*iura*),[262] which finds its origin in Roman law and was enforced throughout the centuries in Western legal traditions (and beyond), was called into question by the nineteenth-century jurisprudence (particularly by the French School of the Exegesis and the German Historical School), which was highly influenced by legal positivism (John Austin, Jeremy Bentham) and by Rousseau's conception of the *lex* as the "expression of general will."[263]

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260. *See, e.g.*, Aniceto Masferrer, *The Emergence of Desire-Rights in Postmodern Culture*, 71 LOY. L. REV. 299 (2025).

261. On this matter, see two of my recent works: Aniceto Masferrer, *How could laws support the Holocaust? How to prevent it from happening again?*, 3 REV. ROMÂNĂ DE ISTORIA DREPTULUI [ROMANIAN J. LEGAL HIST.] (forthcoming 2025); Masferrer, *supra* note 260.

262. Ignazio Castellucci, *Law v. Statute, Ius v. Lex: An Analysis of a Critical Relation in Roman and Civil Law*, 8 GLOB. JURIST Art. 5 (2008).

263. See Aniceto Masferrer, *Rousseau and the Rule of Law, in* ELGAR CONCISE ENCYCLOPAEDIA OF THE RULE OF LAW (Nadia E. Nedzel ed., forthcoming 2026); Aniceto Masferrer & Anna Taitslin, *The ill-fated union: Constitutional Entrenchment of Rights and the Will Theory from Rousseau to Waldron*, *in* THE LEGAL DOCTRINES OF THE RULE OF LAW AND THE LEGAL STATE 105 (James E. Hickey & James R. Silkenat eds., 2014); *see also* Aniceto Masferrer, *The Fragility of Fundamental Rights in the Origins of Modern Constitutionalism. Its Negative Impact in Protecting Human Rights in the "War on Terror" Era*, *in* COUNTER-TERRORISM, HUMAN RIGHTS AND THE RULE

The Napoleonic Civil Code, in rejecting the general validity of any unwritten law, constitutes the most faithful expression of this extreme legal doctrine. The Louisiana Civil Code, on the contrary, took a different approach, which enlightened and marked the alternative path to follow to many other civil code drafters, both in Europe and in America. From the beginning of the nineteenth century onwards, concerning the validity of the unwritten laws, there were two models: the French one and the Louisiana one. History shows that the vast majority of codes followed the Louisiana model, which was more in line not only with the Western legal tradition, but also with the demands of real life.

Many authorities who argue for the need of unwritten laws could be mentioned, but considering his role and influence in the drafting of both civil codes, the French one and the Louisiana one, the most appropriate figure is Jean-Étienne-Marie Portalis,[264] one of the chief draftsmen of the Napoleonic Civil Code.[265] As Alain Levasseur explained in an interesting piece of work, at the age of nineteen, Portalis became a lawyer at the Parliament of Aix, where his method of pleading practically revolutionized court procedure. One of Portalis's old colleagues, after attending Portalis's first pleading, said to him, "You have pleaded with great effectiveness; but you must change your method which is not that of the bar." But Portalis proudly replied, "Sir, it is the method of the bar that needs to be changed, not me."[266]

I refer to this anecdote to emphasize that Portalis was not afraid of revolutionary changes, if needed. In fact, most of the text of the *Code civil* was drafted by him, under the undeniable influence of the French lawyers Domat and Pothier. The only part of Portalis's project that was rejected by the French legislative assemblies was the preliminary book (entitled *Du Droit et des lois*, articles 1–41),[267] being criticized for containing "metaphysical-legal abstractions" which were "subject to . . . controversy."[268] The

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OF LAW: CROSSING LEGAL BOUNDARIES IN DEFENCE OF THE STATE 37 (Aniceto Masferrer & Clive Walker eds., 2013).

264. He was born April 1, 1746, Le Beausset (France) and died August 25, 1807, Paris.

265. Alain A. Levasseur, *Code Napoleon or Code Portalis?*, 63 TUL. L. REV. 762 (1969).

266. *Id.* at 765.

267. Tucker, *supra* note 165; *see also* Licari, *supra* note 64, at 485–86.

268. *See supra* note 227.

French Civil Code, based upon Domat's philosophical ideas,[269] was eventually cut by political assemblies, not by a committee composed of lawyers. Otherwise, perhaps they could have realized that cutting the part that contained the very basis or foundations of the whole text might have an undesirable impact on the code. That was not the case. The final title, the work of the Council of State and the Tribunate, was closed with a round of applause from the First Consul, but without any reference to other legal sources to which the judge could have recourse to resolve possible lacunae that might arise over time.

This explains why article 4 of the French Civil Code ordered judges to decide all cases, but did not provide any further instruction concerning the sources they could resort to when code provisions were silent, obscure, or insufficient. And this also explains why many of the assertions contained in the *Preliminary Address* delivered on the occasion of the presentation of the draft of the government commission (21 January 1801) do not fit with the final version of the French Civil Code. In fact, it is quite surprising to perceive the divorce, in many aspects, between that *Preliminary Address* and the text of the French Civil Code.

Let me conclude with a selection of some of Portalis's statements whereby he clearly affirmed the need for the unwritten laws (emphasis is mine):

> *Foreseeing all is a goal impossible to attain*. . . .
>
> *We have also guarded against the dangerous ambition of wanting to regulate everything and foresee everything*. Who would imagine that those who always consider a code too voluminous are the very ones who dare to imperiously give the lawmaker the dreadful task of leaving nothing to the judge's decision.
>
> Whatever one might do, *positive laws could never entirely replace the use of natural reason in life's affairs*. The needs of society are so varied, the communication of men so active, their interests so numerous, and their relationships so far reaching, that the lawmaker cannot possibly foresee all. . . .
>
> *A code, however complete it may seem, is no sooner finished than thousands of unexpected questions present themselves to the magistrate*. For these laws, once drafted, remain as

269. This is precisely what did not happen in the Louisiana legal tradition. *See, e.g.*, Pascal, *supra* note 26, at 923–24.

> written. Men, on the other hand, never rest. They are always moving; and this movement, which never ceases and whose effects are variously modified by circumstances, continually produces some new fact, some new outcome.
>
> *Many things are therefore necessarily left to the authority of custom, to the discussion of learned men, to the arbitration of judges.*
>
> The function of the statute is to set down, in broad terms, the general maxims of the law, to establish principles rich in consequences, and not to deal with the particulars of the questions that may arise on every subject.
>
> *It is left to the magistrate and the jurisconsult, fully alive to the overall spirit of laws, to guide their application. . . .*
>
> It would doubtless be desirable for all matters to be provided for by laws.
>
> But, *in the absence of a specific enactment on every subject, an old, consistent and well-established custom, an unbroken succession of similar rulings, a received opinion or maxim serves as law. When not guided by anything established or known, when faced with an entirely new occurrence, one returns to the principles of natural law. For while the foresight of lawmakers is limited, nature is limitless; it applies to every thing that may be of interest to men.*
>
> All this assumes compilations, compendia, treatises, numerous volumes of studies and dissertations.
>
> . . .
>
> *One would be mistaken in thinking there could exist a body of laws that would anticipate every possible case, yet be within the grasp of the humblest citizen*.[270]

The legal wisdom underlying Portalis's statements—which an ideologically charged France was unable to accept—was fully grasped by the Louisiana jurists who drafted article 21 of the Digest of 1808. It was later literally reproduced in the Civil Codes of 1825 and 1870, and has remained in force—with a notably minor, though symbolically significant, reform in 1987—to this day.[271] As seen, it has been considerably applied in courts. In this

270. Portalis, Tronchet, Bigot-Préameneu & Maleville, *supra* note 79.

271. On the true impact of this reform, see Aniceto Masferrer, *From Natural Law to Justice: Continuity and Change in the Louisiana Civil Law Tradition*, *supra* note 229.

regard, article 21 of the Louisiana Civil Code is and has been a great example and a source of common sense and deep legal wisdom for both civil law and common law jurisdictions, and for the whole world.

My sincere congratulations. Thanks for your attention!