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On the Principle of Legal Certainty in the Louisiana Civil Law Tradition: From the Manifesto to the Great Repealing Act and Beyond

John A. Lovett*

It will surprise no one to suggest that the promotion of legal certainty has always been one of the most important purported goals of the civil law tradition in Louisiana. What exactly, however, is this perennially important legal principle? When judges, lawyers, law professors, and others interested in the law refer to the value of legal certainty, or to the dangers of uncertainty in the law, they are often first thinking, on a functional level, of the perceived advantages of clearly defined legal rules that enable people to “know the nature of their rights and obligations and be able to plan their actions with some confidence about the legal consequences.”¹ This practical need for predictability in legal results is often regarded as particularly important in areas of the law where stability is highly valued, like property law and the law related to land titles.² Thinking a little more abstractly about this same phenomenon, Professor Carol Rose explains that this drive for predictability is particularly strong in areas of law that define legal relationships with strangers, those with whom

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1. John Henry Merryman, *The Civil Law Tradition* 48 (2d ed. 1985) (defining certainty as he believes it is commonly understood in the common law world). See also Albert Tate, Jr., *Techniques of Judicial Interpretation in Louisiana*, 22 La. L. Rev. 727, 748 (1962) [hereinafter Tate, *Techniques*] (asserting that “an underlying fundamental purpose of any legal system” is the establishment of “a certainty of legal rule, and a predictability of outcome in its application in the event of litigation, upon which men regulated by that system of laws can rely in their everyday dealings”).

2. Tate, *Techniques*, *supra* note 1, at 748 (“it is usually pointed out that the stability of land titles requires inflexible and unchanging rules and firm adherence to precedent, because many property rights are required in reliance thereupon”); Clarence J. Morrow, *An Approach to the Revision of the Louisiana Civil Code*, 10 La. L. Rev. 59, 70 (1949) (discussing appropriateness of providing “relatively narrow, precise rules for those fields” which demand a “maximum of predictability,” for instance, “inheritance, property and prescription”); Carol M. Rose, *Crystals and Mud in Property Law*, 40 Stan. L. Rev. 577, 577 (1988) (the commonly perceived value of “hard-edged” or “crystal” rules in property law “is that they signal to all of us, in a clear and distinct language, precisely what our obligations are and how we may take care of our interests”).

we are not engaged in an ongoing business, family, religious or other kind of long-term social relationship.³

At the same time, the value of legal certainty is often understood from a specific philosophical and political orientation—grounded in the theories of separation of powers and legal positivism—that seeks to limit a judge's discretionary power to render decisions based on sources and considerations other than the rules expressly stated in the positive law. In other words, it reflects a desire to make the law, as John Merryman puts it, essentially "judge-proof."⁴ The basic idea behind this objective to limit judicial discretion is that "if judges are not carefully controlled in the way they interpret legislation, the law will be made more uncertain;" that is, "to give discretionary power to the judge threatens the certainty of the law."⁵ This desire to restrict the sources of judges' *ex-post* decision making and law-finding activities to codified or statutory sources of law found one important early American expression in the codification movement of the 1820s to 1850s,⁶ inspired by foreign born reformers like Jeremy Bentham⁷ and William Sampson.⁸ It also found early and

3. See Rose, *supra* note 2, at 602 ("The enforceability of clear rules enables us to deal with the world of strangers" that extends beyond traditional geographic, familial or religious communities. In other words, "[c]rystalline rules thus seem to perform the service of creating a context in which strangers can deal with each other in confidence.").

4. Merryman, *supra* note 1, at 48.

5. *Id.* at 49. The potential danger of a legal system in which the value of certainty has failed and has been overridden by unbounded judicial discretion is illustrated, "so the argument goes," according to Merryman, by the example of German judges who "aggressively opted for judicial discretion at the expense of certainty in the 1920s, both to justify their use of general clauses and to follow the theory advanced by the 'free law' school of jurists," and who then, "[w]hen darkness fell . . . were unable to defend the legal order by calling on the importance of certainty." *Id.* at 54. Unfortunately, Merryman does not tell us whether he believes this historical assessment is accurate (he calls the issue "unimportant" for purposes of his comparative sketch). *Id.* In his latest edition of the *Civil Law Tradition*, however, he does observe that "[t]he obligatory reference to a 'source of law' in [German post-World War I decisions confronting problems associated with inflation] is an empty ritual that has little restraining effect on judges and, given the rejection of *stare decisis*, can hardly contribute much to certainty." *Id.* at 53. Compare John Henry Merryman, *The Civil Law Tradition* 56 (1969) (not containing the preceding statement).

6. See Charles M. Cook, *The American Codification Movement: A Study of Antebellum Legal Reform* 56-57 (1981) (citing instances in which supporters of American codification linked threats to legal certainty with the risks of judicial legislation and innovation).

7. See *id.* at 74-78, 97-103 (discussing influence of Jeremy Bentham on American codification movement). Bentham, in fact, labeled judicial discretion as the core reason that the common law resulted in legal uncertainty. See *id.* at 75 ("The common law method was oppressive because its 'very essence' made the law uncertain. Judges made the common law, he declared, 'as a man makes laws for

concrete expression in Louisiana law as well, for example, in the Constitution of 1812s requirement that judges refer to the statutory sources of their judgments.⁹ As this article will show, the quest for legal certainty was undoubtedly a pressing concern from the very inception of Louisiana's civil law tradition in the early nineteenth century.

Perhaps more surprising to this article's readers, however, will be the suggestion that goals often considered to be in competition with legal certainty—flexibility and equity—have also consistently been crucial values in Louisiana's legal culture. By the use of terms like "flexibility" and "equity" in contrast with "legal certainty," judges and scholars of the civil law (or of the common law for that matter) usually mean the ability or practice of judges to bend or adapt the requirements of fixed legal rules to respond to changing social circumstances, unprecedented facts, or unique demands for fairness presented by an individual case.¹⁰ As Vernon Palmer puts it, the term "equity," for instance, though capable of a variety of meanings, has generally come to mean in Louisiana simply "the [judicial] exercise of discretion in the pursuit of greater fairness."¹¹ Thus, although certainty is often seen to be a preeminent goal in any legal system, quite often we are content, in the language of Carol Rose, to "substitute fuzzy, ambiguous rules of decision for what seem to be perfectly clear, open and shut, demarcations of entitlements."¹² In other words, "crystalline rules" tend to be "muddied repeatedly by

his dog.' When your dog does anything you want to break him of, you wait till he does it and then you beat him for it. Being 'ex poste facto law,' the common law was 'pregnant with insecurity' for the individual and his rights.") (quoting Jeremy Bentham, *The Works of Jeremy Bentham* V: 235; IV, 459, 460 (John Bowring, ed., 1962)).

8. See Cook, *supra* note 6, at 58–60, 106–10, 125–26 (discussing William Sampson's critique of the common law and his influence on the American codification movement); Maxwell Bloomfield, *American Lawyers in a Changing Society, 1776–1876* 59–90 (1976) (same).

9. Vernon Palmer, *Two Worlds in One: The Genesis of Louisiana's Mixed Legal System, 1903–1812*, in *Louisiana: Microcosm of a Mixed Jurisdiction* 36 (Vernon V. Palmer ed., 1999) [hereinafter Palmer, *Two Worlds*] (citing Louisiana Constitution, art. IV, § 11 (1812)). *But see* Richard Holcombe Kilbourne, Jr., *A History of the Louisiana Civil Code: The Formative Years, 1803–1839* 76, n.60 (1987) (demonstrating through several decisions handed down between 1813 and 1817 how "the judges of the state supreme court showed themselves to be less than enthusiastic for this constitutional curtailment of judicial discretion").

10. Tate, *Techniques*, *supra* note 1, at 748 (noting that "the need for some flexibility" competes with the "demand for certainty of legal rule" and praising the desirable flexibility shown by tort law to respond to changing social conditions); Merryman, *supra* note 1, at 49.

11. Vernon V. Palmer, *The Many Guises of Equity in a Mixed Jurisdiction: A Functional View of Equity in Louisiana*, 69 *Tul. L. Rev.* 7, 11 (1994).

12. Rose, *supra* note 2, at 578.

exceptions and equitable second-guessing, to the point that the various claimants . . . don't know quite what their rights and obligations are."¹³

The purpose of this article, which has been inspired by the efforts of scholars and jurists from Louisiana, Quebec, France, and Spain to celebrate the 200th anniversary of the Louisiana Purchase,¹⁴ is to begin to trace through the development of Louisiana law the relationship between these supposedly competing goals of legal certainty on one hand, and flexibility, equity, and perhaps even uncertainty on the other. The article focuses first on the debate that took place in the first years after the Louisiana Purchase over what kind of private legal system Louisiana would create and recalls how the principle of legal certainty was initially linked with both legislative and judicial efforts to preserve the "ancient laws" of precession Louisiana. It then examines how the principle of legal certainty became inextricably intertwined in often contradictory ways in the struggle over whether and to what extent Louisiana would secure an essentially codified system of private law, culminating in the adoption of the 1825 Civil Code and the Great Repealing Act of 1828. It concludes with a brief reconsideration of one recent, late twentieth century legal dispute that reveals the continuing relevance of this tension between certainty on one hand and equity and flexibility on the other.

I. THE PRINCIPLE OF LEGAL CERTAINTY IN EARLY NINETEENTH CENTURY LOUISIANA

A. The Anxieties of 1806: Land, Slaves and "the Frightful Chaos of the Common Law"

Between 1803 and 1812, the period between the Louisiana Purchase and statehood, concerns about legal certainty were closely interwoven with the question of what kind of private law system Louisiana would adopt and what the authorized sources of law in that system would be. Quite frequently this period has been characterized as a "clash of legal cultures," a clash between the common law culture of newly arrived Americans and American governmental officials and the civil law culture of Louisiana's ancient inhabitants.¹⁵

13. *Id.* at 578-79.

14. This article grows out of a paper delivered by the author at the conference, "Louisiana Bicentenary: A Fusion of Legal Cultures, 1803-2003," sponsored by the Association Henri Capitant (Louisiana Chapter) and the LSU Paul M. Hebert Law Center, May 15-16, 2003.

15. See George Dargo, *Jefferson's Louisiana: Politics and the Clash of Legal Traditions* (1975) (dedicated to thesis that territorial era is best explained in terms

Occasionally, however, this traditional historiography of the period has been questioned.

In the 1940s, for instance, Mitchell Franklin claimed that the era was dominated by a clash, not between civil and common law, but between two kinds of civil law: “emancipatory,” revolutionary, Jeffersonian republicanism and its ideological cousin revolutionary French civil law versus “counter-revolutionary,” “medieval,” “feudal,” Spanish civil law.¹⁶ Decades later, the academic debate

of clash of common law and civil law traditions); John T. Hood, *The History and Development of the Louisiana Civil Code*, 33 Tul. L. Rev. 7, 8–10 (1958) (positing Edward Livingston as decisive figure in leading local opposition to Claiborne’s plan to establish common law in bitter contest between rival legal systems); Elizabeth Gaspar Brown, *Legal Systems in Conflict: Orleans Territory 1804–1812*, 1 Am. J. Leg. Hist. 35, 36–59 (1957) (chronicling developments as conflict between civil law and common law civilizations); Samuel B. Groner, *Louisiana Law: Its Development in the First Quarter Century of American Rule*, 8 La. L. Rev. 350, 372 (1948) (observing “the balance in the struggle over what system of law should prevail in Louisiana has swung definitely away from the common law”); Henry P. Dart, *The Place of the Civil Law in Louisiana*, 4 Tul. L. Rev. 163, 168–69 (1930) (depicting battle between local advocacy of civil law and Claiborne and Jefferson’s advocacy of common law); John H. Wigmore, *Louisiana: The Story of Its Legal System*, 1 So. L. Q. 1, 12 (1916) (claiming influx of common law lawyers sought to secure common law and were resisted by native lawyers and Livingston who believed in superiority of civil law). In recent years, this traditional view focusing on a clash of cultures has been given new life by Vernon Palmer and James Viator, who, in explaining how Louisiana ended up as a mixed jurisdiction, have emphasized the then dominant French linguistic and cultural character of the native Louisiana population. Palmer, *Two Worlds*, *supra* note 9, at 28–33; Vernon V. Palmer, *The French Connection and the Spanish Perception: Historical Debates and Contemporary Evaluation of French Influence on Louisiana Civil Law*, 63 La. L., Rev. 106–7 (2004); James E. Viator, Book Review, 33 Amer. J. Legal Hist. 368, 370 (1989) (reviewing, Richard Holcombe Kilbourne, Jr., *A History of the Louisiana Civil Code: The Formative Years, 1803–1839* (1987)) (suggesting that a linguistic “cultural crisis” also played a significant role in clash over legal systems). See also John H. Tucker, *The Code and The Common Law in Louisiana, in The Code Napoleon and the Common Law World*, 345, 355 (Bernard Schwartz ed., 1954) (contending it was natural for commissioners who drafted 1808 Digest to turn to Code Napoleon as source because Louisiana was “at that time predominantly French” and had “endured Spanish laws imposed a generation earlier against its will”); Dart, *supra* at 168 (contending that, after Louisiana purchase, French Louisiana residents experienced a return of “mental allegiance to the country of their origin”).

16. Mitchell Franklin, *The Place of Thomas Jefferson in the Expulsion of Spanish Medieval Law from Louisiana*, 16 Tul. L. Rev. 319, 320–23 (1942) [hereinafter Franklin, *Place of Thomas Jefferson*]; Mitchell Franklin, *The Eighteenth Brumaire in Louisiana: Talleyrand and the Spanish Medieval Legal System of 1806*, 16 Tul. L. Rev. 514, 515 (1942) [hereinafter Franklin, *Eighteenth Brumaire*]. Samuel Groner also seems to have been influenced by and receptive to Franklin’s theories that the real clash was between reactionary Spanish civil law and revolutionary French civil law. Groner, *supra* note 15, at 367, 371 (citing and quoting Mitchell Franklin’s work interpreting the era). Years later, Franklin still

between Professors Rodolfo Batiza and Robert Pascal over the actual sources of the Digest of 1808 also reflected, at least at some level, an understanding that there was a battle for dominance between two kinds of civil law, largely post-revolutionary French-Roman law and pre-revolutionary Spanish-Roman law.¹⁷ Most recently, legal historians Richard Kilbourne, Mark Fernandez and Judith Schafer have rejected the *Kulterkampf* interpretation of this period. Kilbourne and Schafer suggest that economic factors motivated the local inhabitants' resistance to common law intrusion as much as any cultural allegiance to Spanish or French civil law.¹⁸ Kilbourne and Fernandez also argue that jurisprudential and structural developments occurring in Louisiana legal culture at that time were remarkably similar to developments occurring elsewhere in the antebellum South and the United States, particularly to the extent common law methodology was employed by Louisiana courts in both the territorial period and in the first several decades after statehood.¹⁹ The purpose of revisiting this period, however, is not to reexamine these historiographical claims about the nature and depth of any local

saw a clash between French and Spanish civil law but modified his views on which tradition had prevailed after he had the opportunity to review the de la Vergne copy of the 1808 Digest containing notes purportedly made by Moreau Lisset and dating from 1814. The omission of any references to the Code Napoleon in these notes suggested to Franklin an intent, perhaps of misdirection, to orient Louisiana law "toward the Spanish feudal law and away from the bourgeois French Civil Code of 1804." Mitchell Franklin, *An Important Document in the History of American Roman and Civil Law: the De La Vergne Manuscript*, 33 Tul. L. Rev. 35, 36 (1958) [hereinafter Franklin, *Important Document*].

17. See Rufolfo Batiza, *The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance*, 46 Tul. L. Rev. 4, 11 (1971) (classifying sources as predominantly French, including seventy percent from French Projet of 1800 and French Civil Code of 1804); *id.* at 28 (characterizing Digest's provisions on certain family law matters as using a "strikingly liberal and egalitarian approach for its time"); Robert A. Pascal, *Sources of the Digest of 1808: A Reply to Professor Batiza*, 46 Tul. L. Rev. 603, 608 (1972) (arguing that drafters of Digest only "borrowed phraseology from French legal writings to prepare, in the French language and in civil code form, as directed by the Territorial Assembly, a statement of law so closely based on the Spanish-Roman civil laws in force that it could be entitled a 'Digest' of those laws").

18. Kilbourne, *supra* note 9, at 8, 9, 13 and 21; Judith Kelleher Schafer, *Slavery, the Civil Law and the Supreme Court of Louisiana* 4 (1994); *see also infra* notes 40-45 and accompanying text discussing Kilbourne and Schafer's claims in relation to Manifesto of 1806.

19. Mark F. Fernandez, *From Chaos to Continuity, The Evolution of Louisiana's Judicial System, 1712-1862* 16-39, 55-88, 87 (2001) ("judges of the Supreme Court of Louisiana worked in exactly the same fashion as their brethren on Virginia's Supreme Court of Appeals"); Kilbourne, *supra* note 9, at 63-64 (suggesting that administration of justice in early Louisiana "was much influenced in practice by common law methodology" and that courts "adopted a pattern of jurisprudential thinking markedly akin to that of other states of the Union").

attachment to the civil law or any particular variant of the civil law tradition, but to gauge what role the concept of legal certainty played in the contemporary debates over the newly emerging legal system.

One episode from the territorial period that merits particular examination for the purpose of understanding the role of legal certainty in these debates emerges from the territorial legislature's attempt in 1806 to establish Spanish civil law as the reigning substantive private law of the territory and the intense reaction provoked by rejection of this legislative initiative. In early 1806, perhaps sensing that something had to be done to secure civil law as the substantive law of the territory,²⁰ the general assembly of both the Legislative Council and the House of Representatives of the Territory of Orleans attempted to enact what Rodolfo Batiza calls "a rather curious legal system predominantly based on Roman, Spanish and other civil law sources"²¹ then in force in the territory, including the Laws of Toro, French commentators like Domat, the Commentaries of Valin, and the Ordinance of Bilbao.²² In fact, there is a general consensus that the purpose of this proposed legislation was not just to implant the Spanish Civil law, but to clarify the precise content of the Spanish law then in force and, in particular, which laws and authors could be consulted, and to block generally the reception of the common law.²³

The Act, however, was promptly vetoed by the Tennessee lawyer and provisional governor, William C.C. Claiborne, on May 26, perhaps because Claiborne sought to prevent the wholesale reception of any legal system until a later date when demographic Americanization would have allowed reception of the common law instead,²⁴ or perhaps because he merely thought the act was redundant since he assumed Spanish law was already in place.²⁵ In

20. Dargo, *supra* note 15, at 135–36 (describing series of events and publications in late 1805 that signaled not only replacement of procedural and institutional aspects of civil law with common law alternatives, but risk that substantive civil law could be lost as well).

21. Batiza, *supra* note 17, at 6.

22. *Id.* n.20; Dargo, *supra* note 15, at 135–36; Kilbourne, *supra* note 9, at 39. The manuscript of the proposed legislative act, now housed in the National Archives, is reproduced in Franklin, *Place of Thomas Jefferson*, *supra* note 16 at 323–26, and in Brown, *supra* note 15, at 46–48.

23. Pascal, *supra* note 17, at 605, n.12. Palmer, *Two Worlds*, *supra* note 9, at 33; Dargo, *supra* note 15, at 135–36.

24. See Dargo, *supra* note 15, at 25 (on Claiborne's early career), 116, 130 (on Claiborne's views on Americanization of law); Palmer, *Two Worlds*, *supra* note 9, at 3 (same).

25. See Kilbourne, *supra* note 9, at 59 (noting that Claiborne's veto may not have been motivated by antipathy towards a civilian private law regime as traditional Louisiana legal scholarship assumed, but perhaps because he simply

any event, regardless of his motivations, Claiborne's veto immediately inspired the Legislative Council, the upper and still unelected of the two houses that formed the first representative assembly in the Louisiana territory,²⁶ to adopt a resolution purporting to dissolve itself.²⁷ The legislature's resolution of self-dissolution, an act of protest against Claiborne's perceived obstruction to legislative recognition of the ancient laws, appeared a few days later in local newspapers and was immediately labeled "a Manifesto" by Claiborne,²⁸ an appellation still observed by many Louisiana legal scholars.²⁹

This so-called Manifesto couched its condemnation of Governor Claiborne's veto in melodramatic terms that overtly appealed to the ideal of certainty in the law. At the outset, however, the Manifesto discounted one source of possible legal uncertainty that troubled other contemporary observers of American law—widespread variation in private law from state to state.³⁰ Rather than decry these

believed it was unnecessary as "none of the institutions of Spanish law had ever ceased to have the force of law"); *see also* Dargo, *supra* note 15, at 137 (same).

26. For discussion of the membership of the Legislative Council at this time, *see* Dargo, *supra* note 15, at 48. Dargo explains that after the March 2, 1805 Act of Congress, the formerly thirteen member Legislative Council, *id.* at 29, was converted to a five member council. *Id.* at 48. Ten candidates for council membership were to be nominated by the newly established and elected House of Representatives, from which five members would be chosen by the President and approved by the Senate. *Id.* When the first newly constituted Legislative Council met in the spring of 1806 in time for the crisis leading to the Manifesto, all five members had French backgrounds reflecting the French dominance in the recently elected House of Representatives. *Id.*

27. Kilbourne, *supra* note 9, at 10, 36–37 and 39–40; Dargo, *supra* note 15, at 136–67; A.N. Yiannopoulos, *A Requiem for a Civil Code, A Commemorative Essay*, 78 Tul. L. Rev. 379 (2003).

28. *See* Letter of Governor Claiborne to the Secretary of State, June 3, 1806, in *The Territorial Papers of The United States, IX, The Territory of Orleans 1803–1812* 642 (Clarence E. Carter ed. 1940) [hereinafter *Territorial Papers*]. The actual text of the Manifesto in both its original French and English translation, as excerpted from *Le Telegraph*, June 3, 1806, is reproduced in *Territorial Papers, supra*, at 643–657. Apparently, the resolution of dissolution was passed in the legislative council but narrowly failed to pass in the elected house of representatives, although it did receive 10 votes there. Dargo, *supra* note 15, at 137.

29. Yiannopoulos, *Requiem, supra* note 27, at 4; Palmer, *Two Worlds, supra* note 9, at 33–34; Dargo, *supra* note 15, at 136.

30. *See* Cook, *supra* note 6, at 30 (identifying state to state variations in law affecting commerce, contracts, real property, and descent as one of the sources of legal uncertainty that troubled lawyers and laymen during the period between 1776 and 1815 because "the reality of the federal system, with its numerous, largely autonomous jurisdictions" seemed to contradict the promotion of "transcendent, enduring legal principles" associated with English common law); *see also* Peter Stein, *The Attraction of the Civil Law in Post-Revolutionary America*, 52 Va. L.

“differences in local law,” the Manifesto, in fact, praised Congress for not imposing a “uniform common law” on all the States and allowing them the freedom to preserve and modify their private law as they see fit.³¹ The Manifesto thus lauded Congress for similarly allowing the Territory of Orleans “the privilege of keeping its old laws or changing or modifying them according as its legislatures might find it necessary.”³²

Picking up rhetorical steam, the Manifesto next focused on those “old laws” which “everyone knows . . . are nothing but the civil or Roman law”³³ and linked them to the ideal of certainty:

In any case it is no less true that the Roman law which formed the basis of the civil and political laws of the civilized nations of Europe presents an ensemble of greatness and prudence which is above all criticism. What *purity* there is in those decisions based on natural equity; what *clearness* there is in the wording which is the work of the great jurists, encouraged by the wisest emperors; what *simplicity* there is in the form of those contracts and what *sure and quick means* there are for obtaining the remedies prescribed by the law, for the reparations of all kinds of civil wrongs. . . .

*But it is a question here of overthrowing received and generally known usages and the uncertainty with which they would be replaced would be as unjust as disheartening.*³⁴

Notice the cluster of terms “purity,” “clearness,” “simplicity,” “sure and quick means”—all synonymous with certainty—that are associated with the “old laws,” that is, with the Roman and civil law traditions to which the legislators wished to adhere. In contrast, should the old law and its “generally known usages” be cast aside,

Rev. 403, 416–17 (1966) (pointing to observations of United States Supreme Court Justice Joseph Story and suggesting that a “multiplicity of jurisdictions and the mass of judicial opinions” led to legal elite’s interest in civil law as a way to “counteract the centrifugal tendencies” this multiplicity produced).

31. Territorial Papers, *supra* note 28, at 651–52. Here, the Manifesto is referring to the second of Congress’ two organic acts addressing the government of the Territory of Orleans, the Act of March 2, 1805, by which Congress provided that “[t]he laws which shall be in force in the said Territory at the commencement of this act, and not inconsistent with the provisions thereof, shall continue in force, until altered, modified or repealed by the Legislature.” *Id.* at 650–51. See Act of March 2, 1805, An Act Further Providing for the Government of the Territory of Orleans, 2 Stat. 322, art. 4 (1805), discussed in Kilbourne, *supra* note 9, at 10–11; Dargo, *supra* note 15, at 128, 136 (noting ambiguity of Act of March 2, 1805 because of its sanctioning of “civil law in some respects and common law in others”).

32. Territorial Papers, *supra* note 28, at 652.

33. *Id.* at 652–53.

34. *Id.* at 652 (emphasis added).

what the legislators feared would result was nothing less than an "unjust" and "disheartening" "uncertainty."³⁵ In short, continuity of the law, it was assumed, promoted certainty of the law; conversely, discontinuity provoked uncertainty.³⁶

But having established this linkage between preservation of the old laws and the qualities of a legal order characterized by legal certainty, the Manifesto also suggested that the concept of legal certainty was not only a proxy for cultural affinity and continuity, but had pragmatic connotations as well. Indeed, toward the end of the Manifesto, the legislators claimed that the local inhabitants possessed a widespread and deep understanding³⁷ of such topics as "how successions are transferred," and "the manner of selling, of exchanging or alienating one's properties with sureness."³⁸ Moreover, if the ancient inhabitants were forced to "[s]ubstitute new laws for the old laws," and the legal certainty these old laws presumably guaranteed, among the grave consequences that would certainly follow, according to the legislators, would be a tragic undermining "of the facility and sureness of transfers."³⁹ In other

35. Interestingly, the very word "uncertainty" (or "l'incertitude" in French) is repeated three more times in the Manifesto. Territorial Papers, *supra* note 28, at 654, 655, 656.

36. Dargo interprets the Manifesto primarily in political terms as an expression of the local inhabitants' natural desire to obtain legal continuity. Dargo, *supra* note 15, at 137-38 ("The sudden political transformation from one government to another made legal continuity an absolute necessity.").

37. The authors of the Manifesto claimed that an appreciation for legal certainty, the ability to predict the legal consequences of one's actions and juridical acts, was not restricted to the elite and educated members of their own social class but extended to "[e]ach of the inhabitants dispersed over the vast expanse of this Territory, however little educated he may be" because each inhabitant "has sucked this knowledge at his mother's breast, he has received it by the tradition of his forefathers and he has perfected it by the experience of a long and laborious life." Territorial Papers, *supra* note 28, at 653. Of course, not everyone agreed that this understanding of legal rules and norms was so all pervasive in the first decade of the nineteenth century in Louisiana. Governor Claiborne, in fact, suggested that "knowledge of the Laws, by which we were governed, was extremely confined" to the "Lawyers." Ferdinand Stone, *The Civil Code of 1808 for the Territory of Orleans*, 33 Tul. L. Rev. 1, 4 (1958) (quoting letter of Governor Claiborne to James Madison, dated April 5, 1808, in 4 Official Letter Books of W.C.C. Claiborne (1801-1816) 168 (Rowland ed. 1917) [hereinafter Claiborne Letters]). Moreover, the local bar, it has been estimated, numbered only twenty in 1805, out of which only a dozen seem to have been active before the Supreme Court of the Territory of Orleans during the eight years of its existence. Kilbourne, *supra* note 9, at 5, n.15, 59.

38. Territorial Papers, *supra* note 28, at 653.

39. *Id.* The authors of the Manifesto elaborated at length on this point: "Who will dare to sign a contract under a new regime the effects of which will not be known to him? What will be the lot of the inhabitant who is so unfortunate as not to have received sufficient education to earn these new laws . . . Will he not shudder every time that he wishes to dispose of his properties." *Id.*

words, despite its noble language and its self-conscious effort to link itself to the origins of the civil law tradition, the Manifesto's obsession with "sureness of transfers" and its alarm about "exchanging or alienating one's properties" suggested more practical concerns. The sources of those pragmatic concerns are not difficult to imagine.

According to several scholars, the two most significant obsessions of the Legislative Council, and of all of elite Louisiana at the time of the Manifesto, were not so much the continuation of "the legal institutions in which property rights were embodied," but rather two pragmatic economic concerns intimately associated with those property rights—the perpetuation of slavery and "the validation of [colonial] land grants."⁴⁰ As for slavery, legal historian Judith Kelleher Schafer, following the insights of Mitchell Franklin, goes so far as to claim that the local elites' fear that Jefferson and the new American government would prohibit slavery was the "underlying cause" for their legislative efforts in 1806 to retain the Spanish civil law.⁴¹ As for the question of land grants, Richard Kilbourne suggests, and early case law confirms, that the territorial legislature was not worried so much about which "laws governing the transmission of property *per se*" should be adopted, but rather, about how to confect an acceptable "system of recordation of land transfers and procedures for certifying colonial land grants."⁴² Support for

40. Kilbourne, *supra* note 9, at 11. The general concern of native Louisianians about perceived Congressional threats to the perpetuation of slavery in general and the importation of slaves in particular was closely intertwined with their concern over land titles. See *id.* at 8, 9, 13, 21 (discussing local concerns over slavery and land titles).

41. Schafer, *supra* note 18, at 4. Like Schafer, *id.* at 5–6, Mitchell Franklin cites statements of Thomas Paine to support the theory that the perpetuation of slavery was one of the primary reasons that the territorial legislators sought to enact a "medieval Spanish legal system" in 1806. Franklin, *Place of Thomas Jefferson*, *supra* note 16, at 321. Franklin likewise contends that "[t]he French inhabitants of Louisiana were . . . above all anxious to maintain slavery, the security of which was jeopardized by President Jefferson." *Id.* at 328. See also Franklin, *Eighteenth Brumaire*, *supra* note 16, at 516 (claiming that the essential purpose of the territorial legislature's actions in 1806 was "to shatter the political unity of American territorial Louisiana, and to defend negro slavery in Louisiana from the assaults made on it by President Jefferson"). George Dargo similarly notes the local inhabitants' concerns about federal limitations on slave importation imposed by the first organic law addressing the government of the territory on March 26, 1804. Dargo, *supra* note 15, at 29–30.

42. Kilbourne, *supra* note 9, at 30. As Kilbourne explains, "there was widespread *anxiety* over the future of land grants throughout the Louisiana Purchase territories after the cession, and that *anxiety* was particularly intense in the Orleans Territory because of the significant concentration there of post-colonial inhabitants living on French and Spanish law grants." *Id.* In an 1812 decision, the Louisiana Supreme Court attested to the source of this anxiety by noting that individuals

both of these assessments can be found in an 1807 letter from Thomas Jefferson to John Dickinson in which Jefferson observed that two of the primary sources of local dissatisfaction in Louisiana in the period prior to the enactment of the Digest—besides anxiety about the administration of justice in foreign “forms, principles and language” and the corruption of “bankrupt and greedy lawyers”—were Louisianians’ fears that the importation of slaves would be prohibited and that their weakly documented land titles would be rejected by newly established land commissioners.⁴³ Although the United States Congress, Claiborne, and other American officials may have been more sensitive to this concern about weakly documented land titles than the local inhabitants gave them credit for,⁴⁴ “the importance of the land claims problem in the context of Louisiana’s political and legal environment can hardly be overemphasized.”⁴⁵

Because the authors of the Manifesto linked the survival of their land titles, and their closely interrelated property rights in the slaves who exploited those lands,⁴⁶ to the survival of pre-cession Spanish (and French) law governing those property rights, it is hardly surprising that the Manifesto spoke with such intensity about the consequences of “overthrowing received and generally known usages and the *uncertainty* with which they would be replaced.”⁴⁷ In short, the concept of legal certainty here can be seen operating through the Manifesto in a decidedly functional and utilitarian manner. The local

asserting title to land originating in Spanish colonial land grants often could only point to unsealed petitions from Spanish governors to their purported ancestors in title, “it being seldom the case that the incipient right acquired by the governor’s signature, ripened into a formal grant.” *Hayes v. Berwick*, 2 Mart. (o.s.) 138, 139 (La. 1812).

43. Franklin, *Place of Thomas Jefferson*, *supra* note 16, at 334–35 (quoting Letter of Thomas Jefferson to John Dickinson, Jan. 13, 1807, in 10 *The Works of Thomas Jefferson* 540 (Federal ed. 1905)).

44. See Kilbourne, *supra* note 9, at 10–12, 16, 38 (suggesting Congress’ and Jefferson’s “sensitivity” on part of federal government to land grant problem was not appreciated by local inhabitants who feared divestiture of their property rights).

45. Kilbourne, *supra* note 9, at 34.

46. Positive evidence of the close connection between the local inhabitants’ property rights in their land and their property rights in the slaves who worked those lands can be found in the explicit linkage of these two sets of rights in the 1808 Digest, which provided that “[s]laves in this territory are considered as immovable by the operation of law, on account of their value and utility for the cultivation of lands.” Digest of 1808, Bk. II, tit. 1, Ch. 2, art. 19, at 98. This linkage was continued in Article 461 of the 1825 Civil Code which provided: “[s]laves, though movable by their nature, are considered as immovables, by the operation of law.” La. Civ. Code art. 461 Morgan ed., 1854). For discussion of the confusion and contradictions created by the legal classification of slaves as immovable property, see Schafer, *supra* note 18, at 25–26.

47. Territorial Papers, *supra* note 28, at 652–53.

inhabitants seem to have promoted legal certainty through continuity of the old Spanish laws in force, not only because of a professed cultural attachment to those laws, but because such laws were perceived to have the greatest likelihood of guaranteeing their investments in land and slaves.

Can the Manifesto, however, also be read to illustrate the other, more political or philosophical (and essentially negative) understanding of legal certainty—the “brooding anxiety about certainty”⁴⁸ that a civil law observer like John Merryman has found hovering over the entire legal process in the civil law tradition, an anxiety that reflects what was earlier described as the civil law’s desire to make the law essentially “judge-proof?”⁴⁹ According to Merryman, each of the key players in the legal process of a civil law system—the scholar, the legislator and the judge—has a particular role to play in relation to this “brooding anxiety about certainty” in the civil law: The *legal scholar’s* task is to “make the law *more certain* by making it systematic;” the *legislator’s* task is to make the law more certain by stating it “completely, clearly and coherently;” and, finally, “[j]udges are restricted to interpretation and application of ‘the law’ *in the interest of certainty*,” and thus their “prior judicial decisions are not ‘law.’”⁵⁰ Can we see any of this classic French civilian, Sampsonite or Benthamite⁵¹ preference for valuing positive, written law over judicial discretion reflected in the Manifesto’s statements about certainty?

At the outset, we should acknowledge that at the time of the 1806 Manifesto there may well have been only a few individuals located in or associated with Louisiana—namely, Thomas Jefferson, Edward Livingston, and perhaps C.C. Claiborne—who possessed any appreciation, as Richard Kilbourne puts it, “of the contemporary notion of absolute separation of powers and its counterpart, legislative positivism, postulated by Jeremy Bentham and fostered by

48. Merryman, *supra* note 1, at 82.

49. *Id.* at 48; *see also supra* notes 4–9 and accompanying text.

50. *Id.* at 88 (emphasis added).

51. *See supra* notes 4–8 and accompanying text. *See also* C.J. Friedrich, *The Ideological and Philosophical Background*, and Andre Tunc, *The Grand Outlines of the Code*, in *The Code Napoleon and the Common Law World* 1, 7–11 (Bernard Schwartz ed., 1956) (discussing philosophical heritage of Code Napoleon and contemporary understanding of roles of legislator and judge); Andre Tunc, *The Grand Outlines of the Code*, in *The Code Napoleon and the Common Law World* 19, 26–28 (Bernard Schwartz ed., 1956) (explaining classic French understanding of judicial decisions as secondary or supplementary sources of law and of the respective tasks of the legislator and of the courts), Merryman, *supra* note 1, at 28–29 (discussing fear of judicial lawmaking in pre-revolutionary France and its relation to stress on complete separation of powers).

the French Revolution.”⁵² Nevertheless, despite the limited penetration of this legal ideology in Louisiana, some of the Manifesto’s language is still interestingly suggestive of the civil law’s idealized concern for this kind of philosophical and politically oriented certainty. Notice, for starters, that after explaining the reasons for their attachment to the old Spanish legislation, the Manifesto’s authors’ first and fundamental proposed solution was to create a foundational civil code:

The first legislature of this Territory has to be particularly interested in establishing the fundamental bases; the secondary laws, accessory laws and details should only come later. . . . Now what is the first law, the most important law in the present situation of this country; what is the fundamental basis of the great edifice of its future legislation? It cannot be denied that it is the matter of giving to it a civil code.⁵³

Next, the Manifesto justifies the need for a code by appealing to the classic revolutionary civilian goal of creating a universally accessible source of law—that is, the desire “to place within the reach of all citizens, both in the French and English languages, a complete collection of the laws governing us.”⁵⁴ Further, although the Manifesto does not envision that this new proposed Code will constitute a radical substantive departure from the old laws, it analogizes the proposed code to “a *sure compass* which will facilitate the decision of the old lawsuits as well as the new *without leaving anything to arbitrary opinion*.”⁵⁵ In other words, this directional metaphor implies that the code would be designed to prevent judicial arbitrariness, a condition associated with “the frightful chaos of the common law.”⁵⁶ Finally, observe the concluding explanation of the purpose of the act vetoed by Claiborne:

The Legislature attached great importance to this bill for the purpose of *clarifying our present judicial system and doing away with its uncertainty, until it should have time to draw up*

52. Kilbourne, *supra* note 9; *see id.* at 30, 42-43, 56, 59, 63 (similarly expressing doubt about the degree to which legislative positivism had penetrated Louisiana legal culture in the period prior and up to the enactment of the Digest of 1808).

53. Territorial Papers, *supra* note 28, at 653.

54. *Id.* at 654. For discussions of the importance of universal accessibility of the law in the French civil law tradition, see Merryman, *supra* note 1, at 28; Friedrich, *supra* note 51, at 10; Tunc, *supra* note 51, at 22-23; Shael Herman, *The Louisiana Civil Code: A European Legacy for the United States* 11, 19 (1993).

55. Territorial Papers, *supra* note 28, at 654.

56. *Id.* at 655. *See also* Cook, *supra* note 6, at 15, 54-55 (noting contemporary American concerns about the arbitrary nature of justice under the common law).

a civil code. The legislature considered this provision as a *safeguard against dangerous innovations*, and a measure necessary to the tranquility of the citizens.⁵⁷

Although the need for “clarifying our present judicial system” and “doing away with uncertainty” might only have reflected an anxiety about which Spanish or French sources would be used to preserve property rights in colonial land grants and slaves, the Manifesto’s professed desire for a code to control “arbitrary opinion,” its fear of the “chaos of the common law,” its allusion to “dangerous innovations,” and its expectation that a “civil code” will soon be drafted to remedy this “uncertainty,” also contained the rhetorical seeds of another kind of anxiety, an anxiety supposedly peculiar to the civil law tradition and based on a philosophical attachment to the value of positive law.⁵⁸ Stronger evidence of this other, more political kind of understanding of legal certainty, however, emerged just a few years later from the pen of Governor Claiborne.

On October 22, 1808, in his circular letter to the local parish judges that followed the actual delivery of copies of the brand new Digest of 1808, Claiborne, the legislators’ partner in this dance around the issue of legal certainty, observed:

It being understood by our Courts of Justice that the principles of the Civil Law (except in Criminal cases) were in force thro’out the Territory, it became expedient to place them before the Public. Heretofore few citizens had a knowledge of the Civil Law; it was spread over innumerable Volumes, and was for the most part, written in a Language which few could read. *The uncertainty of the Law, was a source of great embarrassment, not only to private individuals, but to the Magistrate who was to administer it. By the adoption of the Digest, one desirable object is at least effected. The laws are rendered more certain, and if in their operation they should be found unjust, the legislature will, I am persuaded, loose [sic] no time in making the necessary amendments.*⁵⁹

In the same vein, only a few weeks earlier in a letter to James Madison also enclosing a copy of the new Digest, Claiborne used similar language to describe his primary reason for approving what he called the “Civil Code:”

57. *Id.* at 656.

58. *Supra* notes 4–9 and accompanying text.

59. Stone, *supra* note 37 (quoting 4 Claiborne Letters, *supra* note 37, at 220) (emphasis added).

Heretofore, few citizens had any knowledge of the existing Laws; not even the Magistrates, whose duty it was to execute them.—Under these conditions, I could not do otherwise than sanction the Code. *My first object has been to render the Laws more certain . . .*⁶⁰

Here, on one hand, Claiborne agreed with the authors of the Manifesto that “uncertainty of the Law” was a source of “great embarrassment.” But unlike the previously frustrated legislators, Claiborne did not perceive the greatest source of uncertainty to lie in the substitution of new laws for old, but in a continuation of the dispersal of the old law in “innumerable Volumes,” that is in an un-redacted, undigested form.⁶¹ Certainty, on the other hand, was to be achieved not merely by a continuation of the old laws in force, but in a tentative codification, the “one desirable object” of which—indeed the “first object” of which—was that “[t]he laws are made more certain.” Finally, but importantly, as Claiborne seemed to warn in his letter to the judges, it would be up to the legislature, not the judges, to perfect this new vehicle for achieving certainty. In short, at least for Claiborne, who by 1808 had begun to feel much stronger bonds of affection for the local inhabitants, certainty would now be achieved not merely by continuity of the old laws, but by something new—not exactly discontinuity—but something different than what the authors of the Manifesto of 1806 had in mind.⁶² Of course, as the next section will remind us, Louisiana courts did not necessarily share Claiborne’s faith in legislative supremacy in the first decades following the adoption of the Digest.

60. Territorial Papers, *supra* note 28, at 802 (emphasis added) (Letter of Claiborne to James Madison, Oct. 7, 1808).

61. This concern about uncertainty resulting from a vast dispersal of sources in a profusion of legal texts was common throughout American in the first thirty years of the nineteenth century and was one of the motivating factors behind the American codification movement. See Cook, *supra* note 6, at 50 (“By 1820, widespread grievances were again heard that the law was uncertain, but for the opposite reason: dearth was replaced by a no less troublesome deluge of legal materials.”). See also Stein, *supra* note 30, at 416–17 (“The mass of the law is, to be sure, accumulating with an almost incredible rapidity. . . . It is impossible not to look without some discouragement upon the ponderous volumes which the next half century will add to the groaning shelves of our jurists.”) (quoting Joseph Story, *Address to the Suffolk Bar*, 1 *American Jurist* 1, 13–14 (1929)).

62. See Dargo, *supra* note 15, at 169 (discussing Claiborne’s mature appreciation for and affinity with local ancient inhabitants by 1808); but see Kilbourne, *supra* note 9, at 59 (suggesting that neither Claiborne nor members of the territorial legislature had any philosophical grounding in legislative positivism).

B. Certainty and Resistance to Codification

As we have seen, tensions and contradictions were inherent in the legal debates leading up to the adoption of the 1808 Digest. Although the authors of the 1806 Manifesto primarily believed that legal certainty would be achieved by preserving application of the "ancient," predominantly Spanish-Roman, laws then in force, they also hinted at a proto-positivistic faith in a new codified legal order.⁶³ Someone like Governor Claiborne ironically seems to have shared with Edward Livingston, the leader of the native Louisianians' drive to preserve the civil law,⁶⁴ the belief that certainty would be promoted by continual legislative refinement of a new source of positive law.⁶⁵ It turns out that these contradictory assumptions about certainty would come into increasingly overt conflict after adoption of the 1808 Digest. In fact, actual developments in the courts and in the legislature after statehood frustrated the goal of achievement of legal certainty held by most of the participants in these early debates.

It is now well recognized that the conflict between the Louisiana Supreme Courts' predilection to act as if legal certainty could best be achieved by continuing preservation of "ancient" laws and the legislature's determination to take increasingly firm steps toward a more radical style of codification that limited the authoritative sources of law and broke sharply with the past produced chaotic problems of legal *uncertainty*.⁶⁶ This legal uncertainty arose most dramatically when the Digest or the Civil Code of 1825 did not expressly contradict or repeal prior Spanish law and the Louisiana Supreme Court, in important cases like *Cottin v. Cottin*⁶⁷ and *Cole's Widow v. His Executors*,⁶⁸ resorted to applying pre-codification Spanish law in spite of the existence of the newly drafted Digest and

63. *Supra* notes 21-23, 32-36, 45-58 and accompanying text.

64. Edward Livingston's conception of an idealized process for "continual recodification" through ongoing reports by the judiciary to the legislature regarding ambiguous provisions in the code is described in Clarence J. Morrow, *Louisiana Blueprint: Civilian Codification and Legal Method for State and Nation*, 18 Tul. L. Rev. 351, 392-93 (1943).

65. *Supra* notes 59-62 and accompanying text.

66. See generally Kilbourne, *supra* note 9, at 61-95 (demonstrating post-1812 decisions of Louisiana Supreme Court tended to diminish authority of Digest); *id.* at 134-39, 144-64 (same with respect to post 1825 decisions and Civil Code of 1825); Vernon V. Palmer, *The Death of a Code - The Birth of a Digest*, 63 Tul. L. Rev. 221, 243-50 (1988) (recounting sequence of judicial decisions spawning chaotic uncertainty as result of incomplete repeal in Digest of 1808 and Civil Code of 1825 of prior existing Spanish law); Groner, *supra* note 15, at 375 (1948) (commenting on "baffling mélange of legal perplexity and uncertainty" that resulted from judicial resistance to treat Digest as completely repealing prior law).

67. 5 Mart. (n.s.) 93 (La. 1817).

68. 7 Mart. (n.s.) 41 (La. 1828).

later the Civil Code of 1825.⁶⁹ As early as 1814, several years prior to the *Cottin* decision, an observer like Claiborne, using language reminiscent of his 1808 correspondence with the local judges and Madison, advised the new state legislature that the odd and "voluminous" mixture of "civil, common and statute law" that could be applied in many cases prevented lawyers from being able to predict legal consequences for their clients, and, therefore, he called for a series of simplifying "compilation[s]" on various subjects to remedy the "glorious uncertainty" currently confronting the layman and the lawyer.⁷⁰

By looking beyond *Cottin* and *Cole's Widow* to a host of cases covering a wide variety of subjects, recent scholarship has consistently emphasized the depth of the Louisiana Supreme Court's hostility to the notion that either the 1808 Digest or the 1825 Civil Code could constitute a complete and radical break from prior Spanish law,⁷¹ despite the increasingly strong evidence of a

69. *Cottin* and *Cole's Widow* are both discussed extensively in Palmer, *Death of a Code*, *supra* note 66, at 242-48; Kilbourne, *supra* note 9, at 65-70; Fernandez, *supra* note 19, at 72-73.

70. Kilbourne, *supra* note 9, at 106 (quoting Claiborne speech of January 4, 1814). As Charles Cook has persuasively demonstrated, concerns about the uncertainty of the law were abundant throughout America in the period between 1776 and 1815, and these concerns were a prime motivation for the American codification movement that lasted roughly between 1820 and 1850. See Cook, *supra* note 6, at 3-18 (chronicling and discussing sources of perceived uncertainty between 1776 and 1815), and at 54-55 (same concerns about "glorious uncertainty" between 1815 and 1830). As Cook explains, lawyers often complained about inaccessible and uncertain legal sources and materials, laymen lamented the unnecessary technicality and complexity of the law, and many laymen and lawyers alike were troubled by the largely English and foreign form and content of the law. *Id.* at 5. Summarizing the problematic state of legal materials, Cook writes, "it was a time . . . when statute law was, at best, inaccessible and the common law was often little better than slippery darkness." *Id.* at 12. These problems were not easily resolved and in many ways were magnified in subsequent years according to Cook as the volume of American law reports and statutes multiplied rapidly, creating further concerns about uncertainty. *Id.* at 47-50.

71. See Kilbourne, *supra* note 9, at 61-95 (demonstrating that post-1812 decisions of Louisiana Supreme Court, including but not limited to *Cottin*, tended to diminish authority of Digest); *id.* at 134-39 & 144-64 (same with respect to decisions following enactment of Civil Code of 1825); Fernandez, *supra* note 19, at 62-73 (same with respect to decisions from 1812 through *Cottin*). It is worth noting, however, as Kilbourne has observed, that "the judiciary's disinclination to accept the Digest of 1808 as 'a premier statement of law' was not absolutely foreordained." Kilbourne, *supra* note 9, at 69. In fact, several early decisions after statehood but predating *Cottin* demonstrate the willingness of some lawyers and judges to argue for or recognize that the Digest had repealed the Spanish law in force at least where the Digest and the ancient laws were in direct conflict on the same subject. See, e.g., *Cavelier & Petit v. Collins*, 3 Mart. (o.s.) 188, 191 (La. 1813) (suggesting that the Digest, and not prior Spanish law, can provide rule of

legislative intent to accomplish such a result in Article 3521 of the 1825 Civil Code,⁷² and then in the Great Repealing Act of 1828.⁷³ Indeed, in the years following *Cottin*, it became clear that judges and presumably many lawyers considered that “the Spanish law was Louisiana’s common law” and that, in their minds at least, the Digest of 1808 was not a revolutionary Civil Code which had broken dramatically with the past, but rather, as Richard Kilbourne puts it, “a kind of restatement of the essential principles of the law, its various titles and articles serving at most merely as points of departure for lengthy expositions of Spanish and Roman law.”⁷⁴ No less a contemporary observer than Edward Livingston sized up the status of the Digest in precisely these terms by arguing to the Louisiana Supreme Court in one case that the Digest had failed to attain the status of the Code Napoleon because it had only clearly repealed inconsistent provisions, not all prior law and custom.⁷⁵

What has not been assessed in most scholarship about the post-Digest era, however, is whether and to what degree lawyers and judges involved in these famous and not-so-famous cases, along with the jurists responsible for drafting the 1825 Code, cast their arguments and opinions precisely in terms of the dialectic between legal certainty on one hand and uncertainty, or perhaps even flexibility and equity, on the other. Several fascinating cases—the post-*Cottin*, pre-Civil Code case of *Marie v. Avart’s Heirs*,⁷⁶ the 1828 case of *Saul v. His Creditors*,⁷⁷ and the famous 1839 decision in

decision on question of how many witnesses are required for proof of extra-judicial confession); *Morse v. Williamson and Patton’s Syndics*, 3 Mart. (o.s.) 282, 283–84 (La. 1814) (recognizing that provisions of Spanish law failing to allow clearly for attorney’s privilege for fees against estate of insolvent debtor are “virtually repealed and abrogated” by 1806 Digest provisions which give privilege to law charges, or “frais de justice;” for certain “tax fees”); *Fitzgerald v. Phillips* 4 Mart. (o.s.) 290, 293 (La. 1816) (recognizing that Digest repeals provision of Spanish law prohibiting creditors from suing debtor who has turned over all his property when amount of debtor’s newly acquired property does not exceed amount necessary for his support).

72. La. Civ. Code art. 3521 (Morgan ed., 1854).

73. 1828 La. Acts No. 160, § 25; see also 1828 La Acts No. 66.

74. Kilbourne, *supra* note 9, at 69; see also *id.* at 75 (suggesting that Louisiana Supreme Court approached the Digest “as a kind of ‘Restatement of the Civil Law’ that still drew its sustenance from the uncodified law of the region”); *id.* at 93 (summarizing reasons for judicial attachment to Spanish law and resistance to “‘continental’ legal system; that is, a post-French revolutionary one wherein the legal principles espoused in a legislatively posited code are the sole guide for determining legal disputes”).

75. *Durnford v. Gross*, 7 Mart. (o.s.) 465, 474–75 (La. 1820).

76. 8 Mart. (o.s.) 512 (1820).

77. 5 Mart. (n.s.) 569 (1828).

Reynolds v. Swain,⁷⁸—along with the 1823 preliminary report to the legislature made by Livingston, Moreau Lislet, and Derbigny on the status of their efforts to prepare a new Civil Code,⁷⁹ are useful places to begin to make such an assessment.

1. *Marie v. Avart's Heirs: Legal Certainty in Flux*

Marie v. Avart's Heirs concerned the validity of a will by which the testator, Erasmus R. Avart, instructed his executor to purchase a mulatto slave named Marie, who was also his concubine, and their natural child, Gaston, from their current owner, Nicholas Lauve, and then to emancipate both Marie and Gaston.⁸⁰ The will also left the usufruct and naked ownership of a house, a lot, and a sum of money to Marie and Gaston respectively.⁸¹ Initially, the Supreme Court confronted the question of whether Marie possessed the legal capacity to sue someone other than her master, in this case the executor, for her emancipation.⁸² After the Supreme Court recognized that Marie enjoyed such a right because her suit was not opposed by her acknowledged master,⁸³ the intestate heirs of the testator were allowed to assert and eventually prove to a jury that Avart was insane at the time he wrote the will and thus the will was unenforceable.⁸⁴ This factual finding occurred, however, only after the trial court had rejected Marie's legal objection to the introduction of evidence of Avart's alleged insanity.⁸⁵ Her legal objection was based on an 1808 Digest provision, derived from the Code Napoleon, stating that "[a]fter the death of a person interdicted, the validity of acts done by him or her cannot be contested, for cause of insanity, unless the interdiction was pronounced or petitioned for previous to the death of such person."⁸⁶

78. 13 La. 193 (1839).

79. Preliminary Report of the Code Commissioners, February 13, 1823; 1 Louisiana Legal Archives, LXXXV (1937) (hereinafter *Preliminary Report*).

80. *Marie v. Avart*, 6 Mart (o.s.) 731 (La. 1819). This case has also been studied by Judith Schafer whose reading of the complete case file discloses several illuminating facts about the relationship of concubinage between Marie and Avart. See Schafer, *supra* note 18, at 197-99.

81. *Marie v. Avart Heirs*, 8 Mart. (o.s.) at 514.

82. *Marie v. Avart*, 6 Mart. (o.s.) at 732.

83. *Id.* at 733. In fact, the master (Lauve) was willing to sell Marie and her son for a "reasonable price." *Id.* at 731.

84. *Marie*, 8 Mart. (o.s.) at 512.

85. *Id.* at 512-13; see also *Marie v. Avart's Heirs*, 10 Mart. (o.s.) 25, 26-28 (La. 1821).

86. Digest of the Civil Laws Now In Force in the Territory of Orleans (1808) (hereinafter *Digest of 1808*), Bk. I, Title IX, Ch. 1, art. 16, at 80 (Claitor's 1971). See also Code Civil art. 504 (1804) ("Après la mort d'un individu, les actes par lui

Eventually, the Supreme Court was called upon to resolve the complex problem of statutory interpretation growing out of Marie's legal objection. On one hand, Marie's counsel, Christobal De Armas, maintained that the Digest provision was intended to prohibit the introduction of parole evidence of a deceased person's insanity except in cases where an interdiction had been pronounced or petitioned for prior to death and was thus a "legislative innovation" that clearly contradicted the previously governing Spanish law in force that always allowed wills to be challenged on the basis of insanity.⁸⁷ On the other hand, Etienne Mazureau, counsel for Avart's heirs, pointed out that another provision of the Digest, also based on the Code Napoleon, required generally that a donation *inter vivos* or *mortis causa* must be made by a person of "sound mind."⁸⁸ Moreover, according to Mazureau, most French courts, with one minor exception, interpreted the parallel provisions of the Code Napoleon (Articles 504 and 901) *in pari materia* and prohibited introduction of parole evidence of insanity *only* in cases concerning ordinary acts of life (*i.e.*, onerous alienations) and did not apply the limitation to donations and testaments, which, he claimed, always require a donor or testator to be of sound mind.⁸⁹

At the conclusion of his lengthy rebuttal argument in support of Marie's effort to prohibit introduction of parole evidence of Avart's alleged insanity, De Armas, seeming to paraphrase or borrow the words of a French scholar, M. Cotel, decried what he saw as the

faits ne pourrout etre attaques pour cause de demence, qu'autant que son interdiction aurait etre prononcee ou provoquee avant son deces; a moins que la prevue de la demence ne resulte de l'acte meme qui est attaque"). As Justice Porter eventually pointed out, the original French Digest provision may have mistranslated the Code Napoleon provision by changing the subject of the article from "un individu" (an individual) to "un interdit" (an interdicted person). *Marie v. Avart's Heirs*, 10 Mart. (o.s.) at 26. See also Digest of 1808, Bk. I, Title IX, Ch. 1, art. 16, at 81. As Justice Porter pointed out, the logic of the Digest provision left something to be desired: "Now can there be any interdicted person whose interdiction was not pronounced previous to the death of such person? Can anyone be interdicted after his death?" *Marie*, 10 Mart. (o.s.) at 26. Even if the original Code Napoleon version had been inserted into the Digest verbatim, however, the Digest article's logic might not have been much clearer.

87. *Marie*, 8 Mart. (o.s.) at 515. De Armas also asserted another legal reason, this one based on Spanish law, for objecting to the introduction of the evidence of the testator's insanity—the possibility that the testator made the will during a "lucid interval." *Id.* at 517–18. However, it would seem that De Armas would have had to prove this period of lucidity through parole evidence, thus opening the door to introduction of the same by Avart's heirs.

88. *Marie*, 8 Mart. (o.s.) at 567–68 (Etienne Mazureau's argument); see also Digest of 1808, Bk. 3, Title II, Ch. 2, art. 5, at 208; see also Code Civil art. 901 (1804).

89. See *Marie*, 8 Mart. (o.s.) at 567–68 (Etienne Mazureau's argument), 515–16 (De Armas' argument acknowledging this argument).

tendency of interpreters of the code (presumably the Code Napoleon) "of seeing in the code only new dispositions, and of thus detaching them from our ancient jurisprudence, for the purpose of explaining the code by new and particular considerations."⁹⁰ Such "an isolated mode of proceeding," De Armas argued, "tends to destroy the progress which our jurisprudence has already made" and lead to "such a course of *arbitrary decisions* that ages will be requisite to recover the elements of a sound, and above all, a constant and uniform jurisprudence."⁹¹ Strangely, here, the perceived threat of "arbitrary decisions" was linked in De Armas' argument with a fear that courts would try to detach new code provisions from ancient jurisprudence—exactly the kind of interpretative practice that the Supreme Court sought to limit in *Cottin* in any case in which the Digest did not directly contradict the former Spanish law in force.⁹² Thus, at the same time that he heralded the new Digest provision restricting invalidation of juridical acts to those performed by interdicted persons as an "innovation" from Spanish decisions promoting will contests in many cases, he also plead for legal certainty guaranteed by the continuity of prior jurisprudence. Not only are De Armas' arguments about legal certainty self-contradicting, but his rhetoric of legal certainty seems to mask an internal confusion about what kind of legal order is preferable. Far from reflecting a fixed notion about how best to interpret a civil code, the concept of legal certainty seems to serve as an open-ended rhetorical device that an ardent attorney like De Armas would try to deploy to support any interpretative position he needed to take to advance his client's interests.

Perhaps even more significant than the instability of the idea of legal certainty in De Armas' arguments was Justice Martin's final opinion for the Supreme Court upholding the jury finding that invalidated the will and thus perpetuated Marie and Gaston's enslavement. In that opinion, Justice Martin hardly acknowledged De Armas' ambiguous pleas regarding certainty. Instead, after briefly ridiculing the logical absurdities inherent in the Digest's poor

90. *Id.* at 592 (emphasis added). Here, De Armas seems to be referring specifically to French jurists, including those of the French court of cassation, whose interpretations of the relevant French articles he characterizes as having constituted a "useless and dangerous subversion of a just, enlightened, and reasonable jurisprudence, which has hitherto prevailed." *Id.* at 596.

91. *Id.* at 592 (emphasis added).

92. See *Cottin v. Cottin*, 5 Mart. (o.s.) 93, 94 (La. 1817) (holding that prior Spanish laws in force "must be considered as untouched, whenever the alterations and amendments, introduced in the digest, do not reach them; and that such parts of those laws are only repealed, as are either contrary to, or incompatible with the provisions of the [digest]").

translation of the original Code Napoleon article,⁹³ he confidently read the Digest articles *in pari materia*, just as the French jurists and courts did with the respective Code Napoleon articles, and determined that the legislative intent behind the Digest was not to impose an interdiction prerequisite for attacking donations on the basis of *insanity*, but to make *sanity* “a *sine qua non* of this kind of donation, which the donee, or the person claiming under him, may be called on to establish.”⁹⁴ His reasoning seems entirely unconcerned with determining the precise legislative source or doctrinal authority, be it Spanish or French, for the rule he eventually derived, except to admit that the dispute must be resolved in the context of the Digest, which, because of its apparent contradiction of the Spanish law, would provide “the only rule of conduct,” even though, he added, the court “may be aided by the labors of law writers, and by the decisions of courts.”⁹⁵

In fact, Martin’s deepest interest seems to lie in the social policy he found to support the entire legislative framework—the policy of preventing those surrounding a dying but delirious man from procuring an apparent will that would defeat the rights of his otherwise lawful intestate heirs.⁹⁶ In this sense, *Marie v. Avart’s Heirs* typifies a different kind of legal reasoning altogether that is beginning to emerge throughout antebellum America, a movement away from thinking of the law as fixed doctrine to be used only for the adjudication of a particular dispute but toward consideration of legal rules from a functional or instrumental perspective.⁹⁷ Thus, the quest for certainty of legal result—whether flowing from reliance on a continuous and uninterrupted stream of prior jurisprudence or based on a positivistic and anti-historical civil code that breaks with the past—can be seen giving way to judicial flexibility, if not to a kind of teleological jurisprudence.

In the end, these complex permutations on the principle of legal certainty in *Marie v. Avart’s Heirs* produced two significant ironies. First, the kind of pragmatic legal certainty that would have been promoted had Marie prevailed—that is, the fixing of a relatively strict, bright-line rule forbidding challenges to a testator’s will based on insanity in all cases except those involving prior interdiction—was here ironically rejected in favor of a broad and more vaguely defined preference for *ex poste* adjudication to determine in any case whether

93. *Marie*, 10 Mart. (o.s.) at 26; see also *supra* note 86 (discussing translation problems).

94. *Marie*, 10 Mart. (o.s.) at 26–28.

95. *Id.* at 26.

96. *Id.* at 28.

97. Morton J. Horwitz, *The Transformation of American Law, 1780-1860* 1–4 (1977).

a testator possessed a sound mind, an interpretative rule that has survived in Louisiana jurisprudence and in Civil Code revisions more or less untouched for almost two hundred years.⁹⁸ Second, the court's preference for a rule allowing more equitable discretion to probe a testator's intent and capacity led to a result—Marie and Gaston's continued enslavement—that probably frustrated Avart's testamentary intentions and will disturb most twenty first century readers' sense of justice.⁹⁹

2. *The Preliminary Report of 1823: Towards System, Order, and Accessibility*

Another revealing example of the ambiguous use of the concept of legal certainty can be found in the 1823 preliminary report to the Louisiana legislature prepared by the jurisconsults appointed by the legislature to revise the 1808 Digest and prepare a new Civil Code, Edward Livingston, Louis Moreau Lislet, and Pierre Derbigny. Although this document has been called a "remarkable piece of conservative thinking, considering that it was presented as a reform of the existing legal order,"¹⁰⁰ the jurisconsults' report is marked by contradictory notions about legal certainty and the proper legal order. Toward the beginning of their report, the jurisconsults promise to "keep a reverent eye on those principles, which have received the sanction of time, and on the labors of the great Legislators, who have

98. See La. Civ. Code art. 1477 rev. cmt.(f) (2000) ("Cases involving challenges to capacity are fact intensive."); Frederick W. Swaim, Jr. & Kathryn V. Lorio, Successions and Donations, 10 Louisiana Civil Law Treatise § 10.4, at 246–52 (1995) (explicating "sound-mind" standard for challenges to testator's capacity formerly found in Article 1475 of the 1870 Civil Code and the 1991 revision of this standard effected by current Article 1477 of the Civil Code); see especially *id.* at 248 ("The question of mental capacity [under the old article], thus, became a question of fact with great discretion placed in the trier of fact."), 251 (noting that new standard under Civil Code article 1477 "is even looser than the previous one in Louisiana").

99. The moral discomfort one feels today is heightened by the Supreme Court's rejection of De Armas' attempt to offer allegedly newly discovered evidence tending to prove the testator's sanity, *Marie*, 8 Mart. (o.s.) at 513, because of relatively technical pleading deficiencies. See *Marie*, 10 Mart. (o.s.) at 29. In addition, it is noteworthy that the result in this case seems to deviate from the relatively tolerant attitude of the Louisiana Supreme Court that Judith Schafer observes in other cases involving the attempted emancipation of concubines in antebellum Louisiana. Schafer, *supra* note 18, at 180–200. In particular, in a long passage that apparently excerpted from part of the unpublished case files, Schafer shows us that Justice Martin himself displayed some personal sympathy for Avart's testamentary intent to benefit his concubine and natural children. *Id.* at 198 ("It is evident, therefore, that Erasmus R. Avart, not only obeyed the dictates of nature, but, also, acted under the authority of the law.")

100. Kilbourne, *supra* note 9, at 110.

preceded us," whose works—including "The Laws of the Partidas, and other Statutes of Spain, the existing digest of our own Laws, the abundant stores of the English Jurisprudence, the comprehensive Codes of France"—they promise to harmonize by resort to oracles of "eternal truth" and to "those inspirations of prophetic Legislation" that inspired Roman jurists.¹⁰¹ In other words, at the outset, Livingston, Moreau Lislet, and Derbigny seemed to adopt the voice of a natural law jurist, or at least a jurist perfectly comfortable with the Louisiana Supreme Court's narrow and dismissive interpretation of the Digest of 1808 in *Cottin v. Cottin*,¹⁰² a jurist who would find legal certainty, like the authors of the 1806 Manifesto, primarily in continuity of ancient jurisprudence and gradual judicial development of the law.

Yet, at the same time, the juriconsults also admitted that the "principal object" for their legislative appointment was to "provide a remedy for the existing evil, of being obliged in many [c]ases to seek for our [l]aws in an undigested mass of ancient edicts and Statutes, decisions imperfectly recorded, and the contradictory opinions of Jurists."¹⁰³ Here, then, it was the uncertainty provoked by the sheer volume and breadth of possible legal sources that appeared to trouble the legislators who charged Livingston, Moreau Lislet, and Derbigny with the task of creating a new Civil Code¹⁰⁴—an uncertainty magnified by the problem of those sources having been expressed in "[l]anguages not generally understood by the people."¹⁰⁵ Further, these three drafters, all of whom were involved in *Cottin* (Derbigny as author, Moreau Lislet as defendant's counsel, and Livingston as plaintiff's counsel),¹⁰⁶ seemed to lament the incompleteness of the Digest, which they called "an advance towards the establishment of system and order," and its imperfect repeal of the preceding Spanish legal regime.¹⁰⁷ Their apparent desire for a complete and more radical transformation of the private law emerged

101. *Preliminary Report*, *supra* note 79, at LXXXIX–XC.

102. 5 Mart. (o.s.) 93, 94 (La. 1817) (holding that the 1808 Digest was merely "a digest of the civil laws, which were in force in this country, when it was adopted; that those laws must be considered as untouched, wherever the alterations and amendments, introduced in the digest, do not reach them").

103. *Preliminary Report*, *supra* note 79, at LXXXVII.

104. As noted previously, this concern about the unwieldy growth of written sources of law, particularly in the form of new volumes of case reports, was common throughout the United States in this era. See Cook, *supra* note 6, at 49–50.

105. *Preliminary Report*, *supra* note 79, at LXXXVII.

106. Kilbourne, *supra* note 9, at 110.

107. See *Preliminary Report*, *supra* note 79, at LXXXVIII ("But it [the Digest] was necessarily imperfect: not purporting to be a Legislation on the whole body of the Law; a reference to that which existed before, became inevitable, in all those cases (and there were many) which it did not embrace.").

even more clearly in their praise of the “Napoleon Code, that rich [l]egacy which the expiring Republic gave to France and to the world . . . a system approaching nearer to perfection than any which preceded it,” whose perfection was directly attributable to the fact that it was designed to “supersede [sic] all the other [l]aws of the country; and be for future cases, the only rule of conduct.”¹⁰⁸

Finally, despite several indications of a purportedly modest and conservative ambition that would suggest an intent to preserve much of the existing Spanish law in force as represented in the Digest or in other unrepealed sources,¹⁰⁹ the juriconsults launched an inspired rhetorical defense of their project that again combined practical criticism of the uncertainty resulting from an excessively large and unwieldy mass of sources with a defense of radical codification, written law, and the bridling of judicial discretion that seems as if it could have been lifted directly from the works of William Sampson¹¹⁰ or Jeremy Bentham.¹¹¹ The following two excerpts illustrate this double-edged movement in the report:

To determine what is the true meaning of the Law when it is doubtful; to decide how it applies to facts when they are legally ascertained is the proper office of *the Judge*—[t]he exercise of his discretion is confined to these, which are called Cases of Construction: in all others he has none, *he is but the organ for giving voice, and utterance, and effect, to that which the Legislative branch has decreed. In cases where there is no [l]aw, according to strict principles he can neither pronounce nor expound, nor apply it. Governments*

108. *Preliminary Report*, *supra* note 79, at LXXXIX. It is particularly striking, as Mitchell Franklin noticed years ago, that the redactors here explicitly acknowledged their admiration for the Code Napoleon in light of Moreau Lisset's apparent failure to acknowledge that source in his notes on the de la Vergne copy of the 1808 Digest where he focused primarily on Spanish sources. Franklin, *Important Document*, *supra* note 16, at 36, 38.

109. *Preliminary Report*, *supra* note 79, at XC–XCI (promising not to “innovate in any case where a change is not called for by some great inconvenience in the existing [l]aw;” promising “no material change in the order and great divisions of our Civil Code;” suggesting that the expanded Code would provide for as many cases “as can be foreseen and rendering a reference to any other authority necessary in as few cases as our utmost care can avoid”).

110. See Cook, *supra* note 6, at 58–60, 106–08 (discussing Sampson's critique of common law); Bloomfield, *supra* note 8, at 59–90 (reviewing same in context of Sampson's entire career).

111. For a summary of Bentham's views on codification, see Cook, *supra* note 6, at 76–78. For a sample of Bentham's own writing on codification and related topics, see Jeremy Bentham, “*Legislator of the World:*” *Writings on Codification, Law, and Education* (Philip Schofield & Jonathan Harris eds., 1998), in the series *The Collected Works of Jeremy Bentham* (F. Rosen & P. Schofield gen. eds.).

*under which more is required from, or permitted to, the Magistrate are vicious because they confound Legislative power with Judicial duties, and permit their exercise in the worst possible shape, by creating the rule, after the case has arisen to which it is applied. This is a vice inherent in the Jurisprudence of all nations governed wholly, or in part, as England is by unwritten [l]aws, or such as can only be collected from decisions*¹¹²

We have seen that in England this source, in cases where there were neither precedent nor authority, was the undefined and undefinable common [l]aw; and that there the Judge drew his own rule, sometimes with Lord Mansfield, from the pure fountain of the Civil Code, sometimes from the turbid stream of doubtful usage, often from no better source than his own caprice. That in France, because the Great Code had no provision on this subject, they were obliged to make out these supplementary rules of decision, from the rubbish of ancient ordinances, local customs and forgotten edicts; and to introduce in all omitted cases, the confusion of jurisprudence from which it was the intent of the Code to relieve them. *We in the execution of our trust determined that we should not perform it in the manner required of us; unless we relieved your courts in every instance from the necessity of examining into Spanish Statutes, ordinances and usages, Latin Commentaries, the works of French and Italian Jurists, and the heavy tomes of Dutch and Flemish annotations, before they could decide the Law; and at last giving their opinions under the mortifying doubt, whether in some book not now to be found in the state, a direct authority might not hereafter be discovered, which would shew [sic] their decision to be illegal; unless we gave to your constituents a Code accessible and intelligible to all; and unless we removed the oppression, the reproach, the absurdity, of being governed by laws, of which a complete collection has never been seen in the state, written in languages which few, even of the advocates or judges, understand, and so voluminous, so obscure, so contradictory, that human intellect however enlarged, human life however prolonged, would be insufficient to understand, or even to peruse them.*¹¹³

Another crucial symptom of the ambivalence displayed in the preliminary report is the tension between (1) the call for “an express

112. *Preliminary Report*, *supra* note 79, at XCI (emphasis added).

113. *Id.* at XCII (emphasis added).

repeal of all former laws and usages defining civil rights," (2) the recommendation that in cases involving lacunae in the Code, judges should be required to employ "the dictates of natural equity," and (3) the advice that such gap-filling decisions "shall have no force as precedents unless sanctioned by the legislative will" and instead should be reported to the legislature.¹¹⁴ In other words, "the remedy for the evil of a confused and uncertain jurisprudence," the juriconsults suggested, would be strict devotion to the separation of legislative and judicial powers "within their proper spheres of action."¹¹⁵ Although this assertion of the principles of legislative supremacy may only evidence a belief in separation of powers, not "any belief in the absolute power of the legislature to posit a legal order at odds with natural law—or the ancient laws, for that matter, to the extent that the ancient laws best represented natural order,"¹¹⁶ it does seem connected to the promotion of the kind of legal certainty informed by a philosophical aversion to uncontrolled judicial discretion.

In sum, whether the product of their labors, the 1825 Code, surreptitiously deepened the French influence and lessened the Spanish-Roman influence on the Civil Code, as Rodolfo Batiza and Vernon Palmer suggest,¹¹⁷ or actually represented a further restatement of the existing Spanish laws that had never been repealed, as Richard Kilbourne maintains,¹¹⁸ it seems clear that the juriconsults who prepared that Code could not help but think of their task in terms of legal certainty. And for them, legal certainty appears to have had philosophical underpinnings that were closely aligned with a preference for written, codified law that would be clearly accessible to a broad swath of the population and would reduce, though not totally eliminate, opportunities for the exercise of judicial discretion.

3. *Saul v. His Creditors and Reynolds v. Swain: Preserving Flexibility in an Increasingly Positivist Legal Structure*

Another revealing example of the use of the concept of legal certainty (and also of the emergence of the competing principle of judicial flexibility) surfaces in the important and keenly fought case of

114. *Id.* at XCII–XCIII.

115. *Id.* at XCIII–XCIV.

116. Kilbourne, *supra* note 9, at 112.

117. Rodolfo Batiza, *The Actual Sources of the Louisiana Projet of 1823, A General Analytical Survey*, 47 Tul. L. Rev. 1, 8–9, 23–24 (1972) (demonstrating enhanced French influence through redactors' heavy use of French doctrinal writers as sources in preparation of 1823 Projet); *Id.* at 6–8 (demonstrating apparent concealment of movement toward French sources in the 1825 Code); Palmer, *supra* note 15, at 1068–69) (highlighting enhanced French influence on 1825 Code).

118. Kilbourne, *supra* note 9, at 114–20.

Saul v. His Creditors,¹¹⁹ and specifically in the opinion authored by Justice Alexander Porter. Porter's hostility to legislative efforts to reduce Louisiana's law to legislatively posited codes has been well documented¹²⁰ and is manifested most famously by his anti-positivist construction of Article 3521 in *Cole's Widow v. His Executors*,¹²¹ in which he defiantly refused to recognize the legislature's seemingly transparent intent to sever once and for all Louisiana private law from pre-codification Spanish law and to found it entirely on the Civil Code and other legislative enactments.¹²² Significantly, in his 1828 opinion in *Cole's Widow*, Porter also acknowledged his debt to the decision one year earlier in *Saul* in which, according to Porter, key principles were established which "facilitate[d]" the final determination in *Cole's Widow*.¹²³

*Saul v. His Creditors*¹²⁴ concerned a simple but important legal issue: whether property acquired by a man and wife while residing in Louisiana during their marriage was subject to the community of acquets and gains even though the man and wife were originally married in another state that did not recognize the legal community.¹²⁵ Given the large numbers of Americans migrating to Louisiana from other states and territories during this period,¹²⁶ this

119. 5 Mart. (n.s.) 569 (La. 1828). In the introductory portion of his opinion, Justice Porter remarked on the high quality of the legal work in the case:

The different questions of law arising on these claims, have been argued with an ability worthy of their importance. Some of these questions . . . have been examined with so much care by the counsel, and have received such additional light from the laborious investigation bestowed on them, that they come upon our consideration with as much freshness, as if this was the only time our attention had been drawn to them.

Id. at 570.

120. Kilbourne, *supra* note 9, at 134. However, when confronted with direct and unmistakable evidence of recent legislation contradicting the prior Spanish law, Porter was prepared, albeit reluctantly, to enforce the new, and typically French inspired, legislation. *Id.* at 135–36 (discussing *Erwin v. Fenwick*, 6 Mart. (n.s.) 229, 231–32 (1827)).

121. 7 Mart. (n.s.) 41 (La. 1828).

122. *Id.* at 46 (limiting effect of Article 3521's repeal of prior law only to cases "specifically provided for"); see also Kilbourne, *supra* note 9, at 136–37 (discussing same). Two other striking examples of his *Cottin*-like aversion to treating the Digest as a break from the previously existing Spanish law and his preference for the Spanish jurisprudence over French jurisprudence, even in a case in which a Digest provision has a clearly parallel source in the Code Napoleon are found in *Ozanne v. Delile*, 5 Mart. (n.s.) 21, 28–29 (1826), and *Lacroix v. Cocquet*, 5 Mart. (n.s.) 527, 527–29 (1827).

123. 7 Mart. (n.s.) at 43 (citing *Saul*).

124. 5 Mart. (n.s.) at 569.

125. *Id.* at 571.

126. Between 1803 and 1810, the population of the Territory of Orleans swelled

was an increasingly common problem that required significant judicial attention. In this case, the creditors of a bankrupt husband, a group including John Jacob Astor, contended that the property acquired by the husband after the married couple moved to Louisiana was his alone and not subject to any claims based on the community of gains because the couple had been married in a non-community property state (Virginia).¹²⁷ In opposition, the children of the insolvent husband asserted privileged claims to one-half of the same property acquired in Louisiana because (1) their mother had died in 1819 and (2) all of the property either one acquired in Louisiana, they argued, was subject to the community of gains.¹²⁸

From its outset, Justice Porter's opinion recognized the centrality of the principle of legal certainty to the conflict facing the court. Up until the moment this case reached his court, he explained, it was well understood in Louisiana jurisprudence that when a husband and wife who have been married elsewhere moved to Louisiana, all the property either spouse acquired *after* their arrival in Louisiana was part of the community and thus subject to equal division upon dissolution of the marriage.¹²⁹ When such a fundamental rule of community property law has been "already settled by the decisions of the tribunal of last resort in the state," Porter wrote, "the subject *ought not to be opened again*, and that the most important interests of society require, *there should be a time when contested points of jurisprudence may be considered as at rest*."¹³⁰ In other words, Porter opened by recognizing that legal certainty in its pragmatic sense—the need for predictability of legal rules upon which persons can order their juridical acts—was so important that it should cut off further jurisprudential second guessing. In short, he seemed to be making a classic utilitarian argument for the binding effect of *jurisprudence constante*.

And yet, in his very next judicial breath, Porter revised this position with the following exposition on the limits of the binding effect of judicial precedent:

But these considerations are not in this case of sufficient weight to preclude a reexamination of the principles on which the doctrine already stated has been established. A sufficient

from 43,000 to 76,000, an increase of over 75% in seven years. Dargo, *supra* note 15, at 6. By 1820, Louisiana's population had increased to 153,000, and by 1830 it had reached 216,000. 1 Historical Statistics of the United States: Colonial Times to 1970, 28 (U.S. Dept. of Commerce, Bureau of the Census 1975).

127. *Saul*, 5 Mart. (n.s.) at 569–71.

128. *Id.* at 571.

129. *Id.* at 572. For discussion of the jurisprudence to which Porter seems to refer here, see *infra* note 132.

130. *Saul*, 5 Mart. (n.s.) at 572 (emphasis added).

period has not elapsed to enable it to derive much authority from the acquiescence of others. The decision of the court cannot be supposed to have influenced parties entering into the marriage contract, or greatly to have affected any important interests in society. . . . We shall therefore, proceed to the examination of the question as if the case was now presented for the first time, and, we trust, without any bias which might be supposed to exist in our minds from the opinions we have already expressed.¹³¹

Thus, despite the primary importance of practical certainty to the legal order, Porter implied that certainty was not the only value and, indeed, in some cases—especially where the temporal proximity of previous judicial decisions necessarily limited the extent to which they have been relied upon¹³²—other “considerations” may become more important than certainty. What were those other considerations then?

To understand the considerations Porter seems to have had in mind, we must focus briefly on the relevant sources of law that Porter had arrayed before him. The essential interpretative problem posed by the case was created by a discrepancy between the 1808 Digest and the 1825 Code and particularly by the under-inclusiveness of the relevant Digest provision. The relevant Digest article provided only for a community of acquets and gains on “every marriage contracted within this territory,”¹³³ but did not address the disposition of property in cases of marriage contracted elsewhere. The 1825 Code reproduced this provision but added Article 2370 to address this apparent gap in the law and to provide that “[a] marriage contracted out of this State, between persons who afterwards come to live here, is also subjected to the community of acquets, with respect to such property as is acquired after their arrival.”¹³⁴ If the court had been

131. *Id.* at 572–73 (emphasis added).

132. The previous Louisiana judicial decisions to which Porter refers here may be the decisions in *Gales v. Davis' Heirs*, 4 Mart. (o.s.) 645, 649 (La. 1817) (holding that when a married couple emigrates from a country where marriage was contracted into another country, property acquired in the new country is governed by the law of that place), and *Murphy v. Murphy*, 5 Mart. (o.s.) 83, 84–85 (La. 1817) (recognizing *Gales*, but noting that when couple entered into express marriage contract providing for community of gains wherever they go, change of residence to non-community state does not terminate community). Porter reconciles these decisions later in his opinion in *Saul*. See *Saul*, 5 Mart. (n.s.) at 605 (noting presence of express contract in *Murphy* and absence in *Gales*).

133. Digest (1808), Bk. 3, Tit. 5, ch. 2, art. 63, at 336 (“Every marriage contracted within this territory, superinduces of right, partnership or community of acquets and gains.”); *Saul*, 5 Mart. (n.s.) at 573–74.

134. La. Civ. Code art. 2370 (1825) (Morgan ed., 1853); *Saul*, 5 Mart. (n.s.) at 573–74.

willing to apply this article retroactively to the marriage at issue, which had been dissolved by the wife's death in 1819, the case would have admittedly been easily solved within the four corners of the new article.¹³⁵ The problem, however, was that the court in this period was generally unwilling to give retroactive effect to any legislative enactment, be it the Digest or the 1825 Code, and this case was no exception.¹³⁶ Thus, the only applicable Louisiana legislative provision was the under-inclusive Digest article whose limited focus on marriages contracted within the state could be read, in the absence of any other source of law, Porter admitted, according to the principle of construction "*inclusion unius, est exclusio alterius*," to evidence a legislative intent to exclude the community of acquets and gains for marriages contracted outside of Louisiana.¹³⁷

The key legal datum that allowed Porter to avoid the conclusion seemingly mandated by the "*contrario sensu*" reading he had just acknowledged, however—and perhaps the catalyst for his lengthy musings on certainty—was that in this case "there already exists positive legislation [*i.e.*, Spanish law] on the same subject matter, providing for the very case which it [the argument *contrario sensu*] is presumed [to exclude]."¹³⁸ Consequently, Porter reasoned:

The law [the Digest provision] must then be interpreted by a well known rule of jurisprudence, that *an intention to repeal laws can never be supposed; that subsequent statutes do not abrogate former ones by containing different provisions on the same subject; they must be contrary to produce such effect. This rule, which is true in relation to all laws, is more particularly applicable to our codes, which were only intended to lay down general principles and provide for cases of the most common occurrence.* If then, the provisions in our code cannot be considered to have repealed the former law, no argument can be drawn from them as to the intention of the legislature to do so, or their opinion on this subject.¹³⁹

With this deft restatement of the principles underlying *Cottin* and similar decisions from this era,¹⁴⁰ Porter remarkably positioned the

135. *Saul*, 5 Mart. (n.s.) at 574 ("If the acquets and gains, in respect to which the present suit exists, had been made under the dominion of the law last cited [the 1825 Code], there would be an end to any dispute about their distribution; but the marriage of the insolvent and his wife was dissolved by the death of the latter, before that law was enacted.")

136. Kilbourne, *supra* note 9, at 131, 135, 140 n.27 (discussing supreme court's refusal to apply any legislative enactments retroactively).

137. *Saul*, 5 Mart. (n.s.) at 574–75.

138. *Id.* at 575.

139. *Id.* at 575–76 (emphasis added).

140. See *Cottin*, 5 Mart. (o.s.) at 94 (La. 1817) ("It must not be lost sight of, that

court to apply in this 1827 decision the pre-Digest, positive Spanish law dating from the thirteenth century (here found in the *Fuero Real* and the *Partidas*) that was presumably still in force in Louisiana because the case was not covered by the Digest and had arisen prior to the enactment of the 1825 Code.¹⁴¹ Strangely, then, a willingness to question the primacy of legal certainty led Porter back to a traditional, conservative position that embraced, just like the authors of the Manifesto and Justice Derbigny in *Cottin*, the continuity of ancient laws as the means of securing legal certainty.

One more complication still confronted Porter in *Saul*, however, and led to an even more curious statement about legal certainty. The relevant provisions of the *Partidas* and *Fuero Real* were not easily reconcilable. The *Partidas* provision seemed to stand for the proposition that the law of the place of marriage governed the disposition of property acquired during the marriage, while the *Fuero Real* provision implied that all property acquired during a marriage, regardless of the geographic site of the marriage, falls into the community.¹⁴² As a result of this conflict, Porter had to turn for guidance to the Spanish commentators who, he claimed, uniformly interpreted these conflicting provisions to limit the effect of the *Partidas* and expand the reach of the *Fuero Real* provision, thus allowing the law or custom of the place of the marriage to apply only to property acquired in the place where the marriage was contracted and, conversely, requiring that property acquired elsewhere be governed by the law of the place to which the spouses have removed.¹⁴³ In short, the law of the place where the property was acquired controlled. Consequently, according to Porter, the children's privileged claims to their mother's one-half interest in the property acquired by the father after he and his wife moved to Louisiana were enforceable.¹⁴⁴

our civil code is a digest of the civil laws, which were in force in this country when it was adopted; that those laws must be considered as untouched, wherever the alterations and amendments, introduced in the digest, do not reach them; and that such parts of those laws only are repealed, as are either contrary to, or incompatible with the provisions of the code.”); *Lacroix v. Coquet*, 5 Mart. (n.s.) 527, 528 (La. 1827) (Porter, J.) (“Subsequent laws do not repeal former ones, by containing different provisions; they must be contrary.”); *Flower v. Griffith*, 6 Mart. (n.s.) 89, 91–92 (La. 1827) (Porter, J.) (holding that 1825 Code had not repealed Digest articles that were not expressly amended, modified or suppressed and thus creating possibility that a kind of shadow code, consisting of unrepealed Digest provisions, existed side by side with 1825 Code).

141. *Saul*, 5 Mart. (n.s.) at 576.

142. *Id.* at 577–79 (quoting and discussing *Partidas* 4, tit. 11, ley 23, and *Fuero Real*, *Novissima Recop.* lib. 10, tit. 4, ley 1.)

143. *Id.* at 580–81.

144. *Id.* at 608.

In a remarkable passage defending the Spanish commentators' equitable, non-literal interpretation of these Spanish laws and *his court's* right to rely on them, Porter stated:

In every nation that has advanced a few steps beyond the first organization of political society, and that has made any progress in civilization, a more extensive and equally important part of the rules which govern men, is derived from what is called, in certain countries, common law, and here jurisprudence.

This jurisprudence, or common law, in some nations, is found in the decrees of their courts; in others, it is furnished by private individuals, eminent for their learning and integrity, whose superior wisdom has enabled them to gain the proud distinction of legislating, as it were, for their country, and enforcing their legislation by the most noble of all means:—that of reason alone *No civilized nation has been without such a system. None, it is believed, can do without it;* and every attempt to expel it, only causes it to return with increased strength on those, who are so sanguine as to think it may be dispensed with. Duponceau, on Jurisdiction, 105.

Spain, who was among the first of the European nations that reduced her laws into codes, and who carried that mode of legislation farther any other people, *early felt the necessity of a jurisprudence, which would supply the defects, and soften the asperities of her statutes.* The opinions of her jurisconsults, seem to have obtained an authority with her, of which the history of no other country offers an example.¹⁴⁵

Although this passage was not central to the court's ultimate holding, it illustrates a very telling and perhaps novel reinterpretation of the concept of legal certainty.

Writing eerily like a twentieth century legal critic,¹⁴⁶ Porter here viewed judicial gap-filling and interpretation as a way of softening

145. *Id.* at 581–83 (emphasis added).

146. See Rose, *supra* note 2, at 603 (noting that: (i) we tend to call for crystals when we are in a "rulemaking" mode, "when legislatures make prospective law for an unknown future," (ii) when we later "stand before judges;" we want them to make exceptions, (iii) judges, because of their ex-post positions, "lean ever so slightly to mud;" and thus (iv) this judicial preference for post hoc adjustments "will gradually place an accretion of mud rules over people's crystalline arrangements"). *Id.* at 604 ("We are more likely to find that judicial solutions veer towards mud rules, while it is legislatures that are more apt to join with private parties as 'rulemakers' with a tilt towards crystal.").

the “asperity”—the clarity and perhaps harshness—of a state’s positive law. The flexibility provided by creative jurisprudential interpretation, whether that of judges or scholars, was seen as an essential antidote to positivism, provided there had not been a specific rejection of the jurisprudential interpretation by the sovereign.¹⁴⁷ Although this passage in part typified the supreme court’s general hostility in this period toward legislative efforts to limit its discretion to reach back to pre-codification sources and indeed foreordained the court’s continued resistance to such legislative efforts at least through the end of the 1830’s,¹⁴⁸ it is equally striking that Porter couches this hostility in terms of the dialectic between certainty and flexibility. His effort suggests that these concepts, like the dialectic between positive law and reliance on unwritten law and judicial discretion, were subject to manipulation and that certainty was not always the preeminent legal value for Louisiana judges in this period.

Later in his opinion in *Saul*, when Porter claimed that “the people of Louisiana have the same right to have their cases decided by that [Spanish] jurisprudence, as the subjects of Spain have, except so far as the genius of our government, or our positive legislation has changed it,” he was not only signaling to the legislature his court’s attachment to Spanish law in particular, but also was sending a message about the value of gradualist rule-softening jurisprudence and doctrine in general, whether it be of Spanish or French origin.¹⁴⁹

147. *Saul*, 5 Mart. (n.s.) at 584.

148. The generally recognized final example of such resistance, after which the Court’s insistence upon its ability to apply pre-codification Spanish law presumably waned, is *Reynolds v. Swain*, 13 La. 193 (1839), discussed in Kilbourne, *supra* note 9, at 162–64, and Fernandez, *supra* note 19, at 81–88. Some scholars, however, have pointed to even later examples of such hostility and disdain for the legislature’s civil codes. See Schafer, *supra* note 18, at 19 (discussing *Foley and Townsend v. Bourg*, 10 La. Ann. 129, 129 (1855) (referring to Civil Code of 1825 as “this lose amended codification”)).

149. *Saul*, 5 Mart. (n.s.) at 608. Porter’s regard for the value of doctrinal work is clearly not limited to commentators on Spanish law, for much of the rest of his opinion in *Saul* is devoted to a detailed and lengthy elaboration of Dutch and French writers’ views on the doctrine of real and personal statutes and on the theory of conflicts of laws. *Id.* at 589–607. Similarly, in the more famous case of *Cole’s Widow v. His Executors*, 7 Mart. (n.s.) 41 (La. 1828), although Porter asserts the court’s right to interpret Louisiana’s “former law” to the extent it has not been repealed by the enactment of new positive legislation specifically providing for the case at issue, *id.* at 75, his actual consideration of this “former law” was informed by the “ancient customs of France” as much as “the rule in Spain,” and he cites Pothier along with the *Febrero* to support the court’s ultimate holding that a voluntary separation between husband and wife has no effect on the operation of Louisiana’s community property law on property found in Louisiana. *Id.* at 78–80. Thus, based at least on these seminal Porter opinions, this writer would mildly disagree with Kilbourne’s assertion that the Supreme Court employed French commentaries in the

Thus, when Richard Kilbourne observes that the Supreme Court in this period "saw itself as the co-equal of the legislature in the process of illuminating the sources of law," that is, saw itself as *not* being "restricted to reasoning deductively from legislative enactments" *but* "free to reason inductively toward general principles from the body of specific provisions that constituted Louisiana's common law,"¹⁵⁰ he can also be understood as describing the court's predilection to preserve a kind of judicial flexibility, an ability to fashion remedies that might appear to have been plucked from an ancient and mist-shrouded jurisprudential past, rather than restrict itself to the latest clear statement of French inspired positive law.

Finally, as important as Justice Porter's decision in *Saul* was for the Supreme Court one year later in *Cole's Widow* when it faced another closely related community property and conflicts of law issue,¹⁵¹ his overt challenge to the supremacy and sufficiency of positive law in 1827 may have been even more significant to the extent it motivated the legislature to adopt the famous repealing acts of 1828 that specifically sought to abrogate both the Digest and all the ancient civil law previously in force.¹⁵² And yet even though the Louisiana Supreme Court clearly recognized that the legislature intended for the repealing acts to accomplish a complete repeal of all

interpretation of the Digest "only in a limited and rather incidental sort of way." Kilbourne, *supra* note 9, at 150. Porter, it must be acknowledged, could also display a lack of concern for doctrinal work of any national origin when his court's "reason and common sense" led it to reach a conclusion different from "the doctrine of any jurist, ancient or modern." *Daquin v. Coiron*, 8 Mart. (n.s.) 608, 616 (La. 1830).

150. Kilbourne, *supra* note 9, at 155.

151. At the conclusion of this exhaustive study of the doctrine of real and personal statutes in *Saul*, see *supra* note 149, Porter reached the conclusion that "the state and condition of both husband and wife are fixed by the marriage, *in relation to every thing but property*, independent of this law; and as it regulates property alone, it is not a personal statute." *Saul*, 5 Mart. (n.s.) at 608 (citing Boullenois, *Traité des statuts*). It is this holding that Porter relied upon one year later to help resolve the narrow legal issue in *Cole's Widow v. His Executors*, 7 Mart. (n.s.) 71 (La. 1828), of whether Louisiana's community property law applied to property acquired by a husband while he was residing in Louisiana during the marriage, even though the marriage was contracted in New York and the wife never resided in Louisiana. In *Cole's Widow*, Porter explained that in *Saul v. His Creditors*, the court had "determined that the law, or to adopt the language of the jurisprudence of the continent of Europe, the statute, which regulated the rights of husband and wife, was real, not personal; that it regulated things, and subjected them to the laws of the country within which they were found." *Id.* at 73-74. Consequently, any property located in Louisiana acquired by married persons would "on the dissolution of the marriage, be distributed according to the laws of Louisiana, no matter where the parties reside . . ." *Id.* at 74.

152. Kilbourne, *supra* note 9, at 140-41, 150, 158. See also 1828 La. Acts No. 160, § 25; 1828 La Acts No. 66.

Spanish law,¹⁵³ it continued to display its reluctance to abandon the judicial flexibility that its previous habit of delving into ancient Spanish civil law had provided.

Thus, in 1839 in *Reynolds v. Swain*,¹⁵⁴ when the Louisiana Supreme Court in an opinion by Justice Martin declared that the effect of both Article 3521 of the 1825 Code and the 1828 repealing acts had only been to repeal “positive, written or statute laws” of Rome, Spain, France, and Louisiana and not principles established by prior judicial precedent,¹⁵⁵ the Court may have been seeking to do more than just preserve its ability to use its own pre-1825 jurisprudence to the extent those decisions were based on principles of Spanish or Roman law. As always, a brief consideration of the factual context in which *Reynolds* unfolded is suggestive. Recall that the case arose because Reynolds had leased to Swain and his partners a prime piece of commercial real estate in New Orleans under a verbal one year lease with the rent due monthly. The defendants occupied the premises for two months operating as apothecaries and then abandoned the premises without cause and without having paid any rent. When Reynolds sued, the district court gave him a judgment for the entire amount of rent due under the lease and a privilege on the lessee’s property up to the amount of the rent that had already come due.¹⁵⁶

On appeal, the defendants’ counsel, Tom Slidell, later a Justice of the Louisiana Supreme Court,¹⁵⁷ ingeniously argued that Reynolds was not entitled to a judgment on the full year’s rent as it had not yet become due, primarily because the rule of law which held to the contrary—allowing a lessor to sue immediately upon a lessee’s abandonment of the premises for the full amount due on a lease with a definite term—was sustained by a 1824 Louisiana Supreme Court decision which was “founded on an express provision of Roman civil law, which has long since been repealed in this State.”¹⁵⁸ In other words, Slidell was arguing that Article 3521 of the 1825 Code and

153. See *Louisiana Bank v. Kenner’s Succession*, 1 La. 384, 394 (1830) (“the laws of Spain have been considered as the laws of this State in relation to civil suits, until their entire abrogation in 1828 by an act of our legislature”); *Dixon v. Dixon*, 4 La. 188, 190 (1832) (noting inapplicability of Spanish laws to same factual scenario presented in *Cole’s Widow* because such laws “were repealed previous to the [1931] death of the husband”); *Testamentary Executor of Lewis v. Casenave*, 6 La. 437, 441–42 (1834) (noting “tremendously sweeping” effect of 1828 repealing act and its repeal of Spanish law).

154. 13 La. 193 (1839).

155. *Id.* at 198.

156. *Id.* at 194–95.

157. Fernandez, *supra* note 19, at 98.

158. *Reynolds*, 13 La. at 195 (citing *Christy v. Cazanave*, 2 Mart. (n.s.) 451 (La. 1824)).

the 1828 repealing act had stripped a lessor like Reynolds of the practical right to sue for the full rent due under a definite term lease even though the lessee had already abandoned the premises and demonstrated no intention of paying his rent. This practical remedy of the lessor to an immediate remedy for the full amount due under the terms of the lease had simply evaporated, according to Slidell, because it was based on a pre-1825 case grounded on Roman law principles. Given this factual scenario and the plainly impractical gap in the law that a strict interpretation of the repealing act would have entailed (requiring a lessor like Reynolds to wait until the entire lease term expires to liquidate a claim for back rent or damages), it is not surprising that the court in *Reynolds v. Swain* chose to preserve its ability to fashion a pragmatic and flexible judicial remedy to what would have been an unprovided for factual situation.¹⁵⁹ In short, certainty, or least that kind of certainty centered on a positivistic faith in written law, here had to take a back seat to the pragmatic certainty that the exercise of judicial discretion could afford.

II. ARTICLE 466 AND COMPONENT PARTS OF IMMOVABLES: DEBATING THE DAWN OF AN "ERA OF UNCERTAINTY"

With an appreciation for the complexity and ambiguity of jurists' and legislators' views about legal certainty during the struggles concerning codification and authoritative sources of law in early nineteenth century Louisiana, it would be worthwhile to trace these same themes through the rest of the nineteenth century and into the twentieth century. A particularly important time period to investigate would be the so-called "civilian renaissance," which began in the late 1930's with academic debates as to whether Louisiana's civil law tradition was still discernable,¹⁶⁰ and which culminated in the 1970's with a flourishing of scholarly writing and judicial opinions that self-consciously sought to vitalize the civil law tradition.¹⁶¹ In addition,

159. See Fernandez, *supra* note 19, at 87 (arguing that Martin's holding in *Reynolds v. Swain* "ensured that the Anglo-American judicial style Louisiana had adopted in the territorial period would continue to define the role of the judiciary for the rest of the century").

160. See Gordon Ireland, *Louisiana Legal System Reappraised*, 11 Tul. L. Rev. 585, 590-96 (1937) (arguing that Louisiana had become a common law state); Leonard Greenburg, *Must Louisiana Resign to the Common Law?*, 11 Tul. L. Rev. 598, 598 (1937) (agreeing with Ireland); Harriet S. Daggett, Joseph Dainow, Paul M. Hebert, & Henry G. McMahon, *A Reappraisal Appraised: A Brief for the Civil Law of Louisiana*, 12 Tul. L. Rev. 12, 13 (1937) (seeking to refute Ireland).

161. See generally Mack E. Barham, *A Renaissance of the Civilian Tradition in Louisiana*, in *The Role of Judicial Decisions in Civil Law and in Mixed Jurisdictions* 38 (Joseph Dainow ed., 1974); Mack E. Barham, *Methodology of the Civil Law in Louisiana*, 50 Tul. L. Rev. 474 (1976); Albert Tate, Jr., *The Role of the*

studies of legislation and decisions by the Louisiana Supreme Court in specific areas of private law might well reveal further tensions and ambiguity regarding legal certainty. Several subject areas particularly ripe for examination include legislation and cases addressing partition of community property rights in pension plans,¹⁶² servitudes of passage to public roads,¹⁶³ and exceptions to Louisiana's "pure-race" public records doctrine for assuring title to immovable property.¹⁶⁴ What might emerge from such a study,

Judge in Mixed Jurisdictions: the Louisiana Experience, in *The Role of Judicial Decisions in Civil Law and in Mixed Jurisdictions* 23 (Joseph Dainow ed., 1974) [hereinafter Tate, *Role of the Judge*]; Albert Tate, Jr., *Civilian Methodology in Louisiana*, 44 Tul. L. Rev. 673 (1970). *But see also* Kenneth M. Murchison, *The Judicial Revival of Louisiana's Civilian Tradition: A Surprising Triumph for the American Influence*, 49 La. L. Rev. 1, 32-34 (1989) (arguing that the ultimate flowering of the civilian renaissance in the 1970s owed as much to broad developments in American legal thought in the 1960s and 1970s, particularly American legal realism, as it did to a rediscovery of pure civilian traditions).

162. See *T.L. James & Co. v. Montgomery*, 332 So. 2d 834, 844-46 (La. 1975) (on rehearing 1976) (holding that pension benefits are a form of community property because they are "the produce of the reciprocal industry and labor of both husband and wife"); *Sims v. Sims*, 358 So. 2d 919, 921 (La. 1978) (expanding and building on *T.L. James* to make clear that a spouse's interest in participant spouse's pension benefits includes "any right to receive proceeds attributable to such employment during the community"); La. R.S. 9:2801 (1997) (providing each spouse with "property of an equal net value" and granting courts broad equitable discretion in partitioning of community assets); *Hare v. Hodgins*, 586 So. 2d 118, 123 (La. 1991) (emphasizing that the partition of community property interests in pension plans should be guided by equitable principles derived not just from community property articles in the Civil Code but also from equitable principles expressed in other jurisdictions). For a useful and insightful study of the Supreme Court's application of the basic principles of Louisiana community property law to solve problems associated with pension benefits, see Dian Tooley Arrubarrena, *Applying Louisiana's Community Property Principles to Pensions*, 33 Loy. L. Rev. 241 (1987).

163. See, e.g., *Rockholt v. Keaty*, 237 So. 2d. 663, 666-68 (1970) (citing Planiol and developments in French law to demonstrate that French law has opted for particularized decision making, rather than strict, black letter rule, to determine entitlement to legal servitude of passage to public road, and considering contemporary social needs in making same determination under Louisiana law).

164. Compare 1 Peter S. Title, *Louisiana Real Estate Transactions*, § 8.1 (2d ed. 2002) ("all sales, contracts, judgments and other instruments in writing affecting immovable property which are not recorded are utterly null and void except between the parties"); La. R.S. 9:2756. (1991) (same); Title, *supra*, § 8.3 (explaining that a third person should not be bound or barred by unrecorded claims against property acquired by purchase, even when that third person acquires actual knowledge of the interest outside the public records); *McDuffie v. Walker*, 51 So. 100, 105 (1909) (same) with Title, *supra*, § 8.16-8.18 and 8:21-8.26 (outlining exceptions to Louisiana's public records doctrine applicable to persons who are (1) universal successors to the parties of an unrecorded instrument, (2) spouses in community, (3) parties by separate instruments, (4) holders of tort claims, and (5) persons in bad faith or who did not give value). Compare *Jackson v. D'Aubin*, 338

which this writer hopes to undertake in a future article but whose length precludes inclusion here, is an understanding of the degree to which "new cycles of certainty and uncertainty"¹⁶⁵ are occurring in modern Louisiana scholarship and property law jurisprudence.

Yet before concluding this article it is worth examining, if only briefly, at least one recent legal dispute that reveals how some of the same conflicts about legal certainty that were generated by the crisis of 1806 and in early Louisiana jurisprudence interpreting the 1808 Digest and the 1825 Civil Code are still with us. This example of contemporary conflict about the nature of legal certainty emerges from the recent debate over the proper method of interpreting Article 466 of the Civil Code and, specifically, how to determine, in the absence of contractual agreement or a relevant juridical act, whether movable objects attached to a building or other construction are "permanently attached" to the building or construction and thus can be considered "its component parts."¹⁶⁶

Although the "component part" classification scheme presented by Article 466 might seem to be applicable in only narrowly confined legal situations, it actually serves as a key building block in the Civil Code's property law structure. Under Article 462 of the Civil Code, "[t]racts of land, with their *component parts*, are immovables."¹⁶⁷ Under Article 463, "[b]uildings, other constructions permanently attached to the ground," along with standing timber, unharvested crops and ungathered fruits, are all considered "component parts of a tract of land when they belong to the owner of the ground."¹⁶⁸ As a result, objects that might otherwise be considered movable if *not* attached to a building or other construction can be effectively *immobilized* if they are determined to be a component part of a building or other construction permanently attached to the ground.

So. 2d 575, 580 (La. 1976) (holding that a co-trustee's interest in a testamentary trust in immovable property could be effective as to third persons because it was created by operation of law, despite the non-recording of the trust instrument) *with* *Camel v. Waller*, 526 So. 2d 1086, 1094 (La. 1988) (declining to recognize effectiveness of pre-1980 community property interest in immovable property acquired by a wife by operation of law when wife failed to record and cement effectiveness of judgment of separation of bed and board that was granted by a court to prevent husband from conveying that interest). *See also* Rose, *supra* note 2, at 385-90 (outlining the oscillation between crystal and mud rules, certainty and uncertainty, affecting land recording systems in common law jurisdictions).

165. Rose, *supra* note 2, at 586.

166. La. Civ. Code art. 466 (1980). For a detailed study of this entire dispute in its full historical context, see John A. Lovett, *Another Great Debate?: The Ambiguous Relationship Between the Revised Civil Code and Pre-Revision Jurisprudence as Seen Through the Prytania Park Controversy*, 48 Loy. L. Rev. 615 (2002).

167. La. Civ. Code art. 462 (1980) (emphasis added).

168. La. Civ. Code art. 463 (1980).

Objects that have been subject to this “component part” immobilization include light fixtures and carpeting installed in a home,¹⁶⁹ tile flooring, ceiling fans, and burglar alarms installed in a condominium,¹⁷⁰ a stadium scoreboard system,¹⁷¹ individual heating and air-conditioner units installed in motel rooms,¹⁷² and, most famously, expensive chandeliers installed in a mansion-like home.¹⁷³

Perhaps the most common application of the component part classification occurs in the basic real estate conveyance situation and under the general rules of accession. For instance, the Civil Code guarantees that the transfer or encumbrance of an immovable will, in the absence of a contrary agreement or a previously recorded security interest, include its “component parts.”¹⁷⁴ Similarly, under the accession articles, otherwise movable objects permanently attached to a building or other construction so as to become “component parts” will be considered to be owned by the owner of that immovable in the absence of a contractual agreement to the contrary.¹⁷⁵ Other more specific accession rights concerning objects attached to an immovable with the consent of the immovable’s owner also depend on classification of objects as “component parts of a building or other construction” under Article 466.¹⁷⁶ Finally, even some

169. *Am. Bank & Trust Co. v. Shel-Boze, Inc.*, 527 So. 2d 1052, 1054–55 (La. App. 1st Cir. 1988).

170. *Berot v. Norcondo P’ship*, 544 So. 2d 508, 510–11 (La. App. 5th Cir. 1989).

171. *In re Chase Manhattan Leasing Corp.*, 626 So. 2d 433, 434 (La. App. 4th Cir. 1993).

172. *Hyman v. Ross*, 643 So. 2d 256, 258–61 (La. App. 2d Cir. 9/19/94).

173. *Equibank v. United States Internal Revenue Service*, 749 F.2d 1176, 1180 (5th Cir. 1985).

174. La. Civ. Code art. 469 (1980). Under revised Chapter 9 of Louisiana’s Commercial Laws, the term “fixtures” refers to “goods, other than consumer goods and manufactured homes, that after placement on or incorporation in an immovable have become a component part of such immovable as provided in Civil Code articles 463, 465 and 466.” La. R.S. 10:9–102(41) (2002). Security interests in movables that will become “fixtures” under this definition—that will become component parts—preserve their effectiveness and ranking over the conflicting interests of real estate owners or real estate mortgages in certain circumstances. See generally Title, *supra* note 164, § 1.21–1.31; La. R.S.10:9–101 *et seq.* (2002); La. R.S.10:9–334 (2002).

175. See La. Civ. Code art. 493.1 (2003) (“Things incorporated in or attached to an immovable, so as to become its component parts under Articles 465 and 466 belong to the owner of the immovable.”). Under the Civil Code, however, buildings and other constructions permanently may be owned by someone other than the owner of the ground and thus can be considered separate immovables. See La. Civ. Code arts. 464 & 491 (2003). “Nevertheless, they are presumed to belong to the owner of the ground, unless separate ownership is evidenced by an instrument filed for registry in the conveyance records of the parish in which the immovable is located.” La. Civ. Code art. 491 (2003).

176. For example, if an object classified as a component part under Article 466 is

provisions located outside of Book II of the Civil Code incorporate the component part classification found in Article 466. For example, certain accession articles based in Title VI, Book III, the matrimonial regimes section of the Civil Code, give rise to special reimbursement claims among former spouses with respect to component parts.¹⁷⁷

In short, the analytical framework provided by Article 466 is a powerful interpretative instrument. It can be used to classify an object as a movable or an immovable in a wide variety of legal contexts, from the common place and predictable—ownership claims between disputing vendors and purchasers of immovables, and the determination of whether objects are subject to seizure and the respective priority of competing creditors' liens¹⁷⁸—to the less predicable and even novel case that extends well beyond the strict confines of the Civil Code—the applicability of certain kinds of taxes,¹⁷⁹ imposition of fines for environmental contamination,¹⁸⁰ the imposition of tort liability for personal injuries based on ownership of underlying immovables,¹⁸¹ and insurance and property damage claims related to the destruction of underlying immovables.¹⁸²

Before the revision of Title I of Book II of the Civil Code in 1978, the classification of otherwise movable objects as immovables was addressed by Articles 467, 468, and 469 of the 1870 Civil Code,¹⁸³ articles whose lineage was directly traceable to the 1808 Digest and Articles 523, 524, and 525 of the Code Napoleon, provisions still in force in France today.¹⁸⁴ The articles of the 1870

attached to an immovable belonging to another with the consent of that immovable's owner, then, in the absence of some other contractual arrangement, the Civil Code permits the original owner of the attached object to remove the object subject to his obligation to restore the property to its original condition. La. Civ. Code art. 495 (2003). If the owner of the attached component part does not elect to remove it, the owner of the immovable is granted various rights, including the right to compel the separate owner of the component part to remove the thing at *his* expense or to keep the component part by indemnifying the original owner of the component part. *Id.*

177. See La. Civ. Code art. 2367.1, 2367.2 (2003).

178. *Equibank*, 749 F.2d at 1177–79; *Hyman*, 643 So. 2d at 257–61; *Am. Bank*, 527 So. 2d at 1053–55.

179. *Showboat Star P'ship v. Slaughter*, 789 So. 2d 554, 558–61 (La. 2001).

180. *U.S. Evtl. Prot. Agency v. New Orleans Pub. Serv.*, 826 F.2d 361, 364–69 (5th Cir. 1987).

181. *Coulter v. Texaco, Inc.*, 117 F.3d 909, 916–18 (5th Cir. 1997).

182. *Prytania Park Hotel, Ltd. v. Gen. Star Indem. Co.*, 179 F.3d 169, 178–83 (5th Cir. 1999); *In re Exxon Coker Fire*, 108 F. Supp.2d 628, 631–38 (M.D. La. 2000); *Exxon Corp. v. Foster-Wheeler Corp.*, 805 So. 2d 432, 435–38 (La. App. 1st Cir. 12/28/01).

183. La. Civ. Code arts. 467–469 (West comp. ed. 1972) (1870).

184. La. Civ. Code arts. 467–469 (West comp. ed. 1972) (1870) (historical notes); Digest of 1808, Bk. 2, tit. 1, ch. II, arts. 18, 20, and 21, at 98–99; Code Civil arts. 523–25 (101 ed. Dalloz 2002); Batiza, *supra* note 17, at 63 (classifying Code Napoleon sources of relevant 1808 Digest articles as verbatim or almost verbatim

Civil Code and the Code Napoleon addressed this classification problem through the categories of immovables by destination and immovables by nature. As this author and others have tried to show, the jurisprudence interpreting these old articles and the entire classification architecture relying on the distinction between immovables by destination and immovables by nature was, to put it mildly, complex and confusing.¹⁸⁵ Because of the confusion and uncertainty inherent in the old jurisprudence, as well as the general obsolescence of the old categories in light of contemporary reality, the 1978 revision suppressed altogether the concepts of immovables by destination and immovables by nature and replaced them with the simpler categories of corporeal immovables and incorporeal immovables.¹⁸⁶

At the same time, the 1978 revision also addressed the classification of movable objects attached to immovables such as buildings and other constructions permanently attached to the ground through two new articles, Articles 465 and 466. Article 465, which classifies as component parts “things incorporated into a tract of land, a building, or other construction, so as to become an integral part of it, such as building materials,”¹⁸⁷ has provoked hardly any doctrinal or jurisprudential controversy. New Article 466 is another story.

The text of revised Article 466 literally provides:

Things permanently attached to a building or other construction, such as plumbing, heating, cooling, electrical or other installations, are its component parts.

Things are considered permanently attached if they cannot be removed without substantial damage to themselves or to the immovable to which they are attached.¹⁸⁸

On its face, this new article seems to simplify dramatically—and thus render more certain—the legal immobilization of movables attached to buildings or other constructions. Rather than requiring courts to consider a myriad of often antiquated factors that were implicated under the old articles and their jurisprudential gloss,¹⁸⁹ the new article

sources).

185. Lovett, *supra* note 166, at 653–60; A.N. Yiannopoulos, *Of Immovables, Component Parts, Societal Expectations and the Forehead of Zeus*, 60 La. L. Rev. 1379, 1382–85 (2000); A. N. Yiannopoulos, *Movables and Immovables in Louisiana and Comparative Law*, 22 La. L. Rev. 517, 525–28, 530–42 (1962).

186. Expose des Motifs, 3 La. Civ. Code arts. 3,10–12 (1980).

187. La. Civ. Code art. 465 (1980).

188. La. Civ. Code art. 466 (1980).

189. These factors implicated under the old articles and jurisprudence included: whether a movable was attached to a building for the “use and convenience of the building” (former Article 467); whether a movable was placed on a tract of land for

imposes a singular and lapidary test in its second paragraph: “Things are considered permanently attached if they cannot be removed without substantial damage to themselves or to the immovable to which they are attached.”¹⁹⁰ Although the term “substantial damage” is arguably capable of affording some necessary room for judicial contextualizing about how much absolute or relative damage is necessary to transform the legal status of an object from movable to component part,¹⁹¹ the overall thrust of the article seems to have been to provide a simple, bright-line rule that would produce predictable and consistent results¹⁹²—the very essence of the functional sense of legal certainty. After all, it would seem that most individuals could simply observe with their own senses (and courts could determine through fairly straightforward types of evidence and testimony) whether a particular object could be removed from a building or other construction without causing substantial damage to itself or to the building or construction to which it was attached.

In addition, and just as importantly, it would seem that the risk of potentially harsh results that could follow such an apparently “crystalline”¹⁹³ rule could always be mitigated or softened by parties’

“its service and improvement” (former Article 468, first paragraph); whether a movable was “permanently attached to the tenement or to the building” (former Article 468, second paragraph); and whether an owner had “attached to his tenement or building *forever*” a movable by having “affixed [it] with plaster or mortar or such,” so that it could not be removed without breaking or injuring the movable or the thing to which it was attached (former Article 469). See Lovett, *supra* note 166, at 653–60; Yiannopoulos, *Zeus*, *supra* note 185, at 1382–85; Yiannopoulos, *Movables and Immovables*, *supra* note 185, at 525–28, 530–42.

190. La. Civ. Code art. 466 (1980).

191. See *Prytania Park Hotel, Ltd. v. Gen. Star Indem. Co.*, 179 F.3d 169, 183 n.37 (5th Cir. 1999) (discussing how some “elasticity in art. 466’s bright-line test for permanence of attachment lies in adjective ‘substantial’ which modifies ‘damage,’” and how this provides for some “garden-variety contextual judging”).

192. See Symeon Symeonides, *Property, Developments in the Law*, 46 La. L. Rev. 655, 687 (1986) (admitting that a “literal reading of the article strongly suggests that its two paragraphs are closely interdependent, and that the second paragraph is but a guide for applying the first paragraph, and more particularly for defining the meaning of the phrase ‘permanently attached’”); Amy Allums, *Prytania Park Hotel, Ltd. v. General Star Indemnity Co., How a Small Hotel Made a Big Difference in the Component Part Concept*, 74 Tul. L. Rev. 1543, 1552 (2000) (acknowledging that on “on its face Article 466 creates a ‘bright line permanent attachment test’”); Taylor S. Carroll, *Prytania Park Hotel, Ltd. v. General Star Indemnity Company: A Misapplication of Civil Code Article 466*, 60 La. L. Rev. 947, 947 (2000) (“Read literally, the second paragraph of Article 466 requires that in order for a movable to be considered permanently attached, removal would have to cause substantial damage to either the movable or the immovable to which it is attached.”).

193. Rose, *supra* note 2, at 577–78. The scenario of a residence being literally and legally stripped of every object whose removal does not cause substantial

private *ex ante* arrangements providing for different classifications, ownership rights, and other rights affecting objects in which they have interests.¹⁹⁴ Indeed, the drafters of the revised Civil Code seem to have specifically anticipated that there might even be instances in which one party would like to effect a unilateral change in classification of an otherwise movable object that could not be predictably classified as a component part under Article 466. They did so by providing a mechanism under new Article 467 that allows owners of non-residential immovable property to file declarations of immobilization which effectively convert otherwise movable objects to component parts.¹⁹⁵ Conversely, Article 468 also provides legal recognition of the possibility of deimmobilizing a component part into a movable either based on inevitable damage or deterioration to the object or affirmative acts of an owner.¹⁹⁶ In short, certainty seems to have been the legislative goal of the revision. Parties, it might reasonably be assumed, could be expected to live with the predictable results of Article 466 unless they had specifically contracted for a different classification between themselves or filed declarations of immobilization or deimmobilization under Articles 467 and 468.

damage to the home or the object—for instance, shutters, doors, light fixtures, to name but a few—seems to have caused special alarm to some critics of a plain reading of the bright line rule found in Article 466. See Allums, *supra* note 192, at 1555 (worried about “gutters, shutters, ceiling fans, ad infinitum”); Taylor, *supra* note 192, at 947–48, 955, 964 (expressing concern about ordinary purchasers and doors, water heaters, and light fixtures).

194. See Title, *supra* note 164, § 1.13, at 1–8 (suggesting that common place disputes between buyers and sellers in real estate transactions regarding component part status should be avoided by “delineat[ing] specifically in the purchase agreement the particular items attached to or located on the real estate . . . that will, or will not, be transferred in the sale”); Rose *supra* note 2, at 577–80, 582–83 (describing private parties efforts to establish “crystalline” waivers of warranties in real estate transfers in response to evolution of legal rules on warranty in direction of muddiness); *id.* at 584 (same for private parties attempting to “bargain their way out of uncertainties” in area of mortgage defaults). Indeed, Lee Hargrave suggested years ago that expectations and actual practices were different in residential as opposed to commercial building situations and that component part classification probably needed to develop further to reflect those social differences. Lee Hargrave, *Property, Developments in the Law*, 50 La. L. Rev. 353, 362 (1989).

195. See La. Civ. Code art. 467 (2003). In *City of New Orleans v. Baumer Foods*, 532 So. 2d 1381, 1384 (La. 1988), the Louisiana Supreme Court held that all four requirements for immobilization under Article 467 must be satisfied before immobilization will be declared effective. As at least one critic has noted, however, this holding produced practical problems—especially parties’ inability to rely solely on a recorded declaration of immobilization. Hargrave, *supra* note 194, at 360–61.

196. See La. Civ. Code art. 468 (2003) (providing for deimmobilization when component parts are “so damaged or deteriorated they can no longer serve the use of lands or buildings,” when an owner transfers ownership by “act translatif of ownership and delivery to acquirers in good faith,” or by detachment and removal in the absence of third party rights).

During the first few years after the 1978 revision of Title I of Book II of the Civil Code, it seems as if the intended simplification of the Civil Code's component part classification scheme was having its intended effect. Courts began interpreting Article 466 as if it had effected a clear break from the prior articles and jurisprudence and focused on the simplified substantial damage test found in the article's second paragraph.¹⁹⁷ However, within a half a decade, the situation changed dramatically and courts and doctrinal writers began to interpret Article 466's seemingly "crystalline" rule for the classification of component parts in a more complex way that afforded courts more interpretative leeway and created the opportunity for the exercise of substantial judicial flexibility.

In the seminal case of *Equibank v. United States Internal Revenue Service*,¹⁹⁸ the United States Court of Appeals for the Fifth Circuit, aided by the testimony of a leading property law scholar, A.N. Yiannopoulos, interpreted Article 466 as having created two, essentially disjunctive and separate categories of component parts. The first category consists, according to the court as it understood Professor Yiannopoulos, of items that literally "fit within one of the categories listed in the first paragraph of the article" (*i.e.*, "plumbing, heating, cooling, electrical or other installations") and which are thus considered component parts "as a matter of law."¹⁹⁹ The second category consists of items not covered by the article's first paragraph but which become "component parts" through the objectively determined substantial damage test provided in the article's second paragraph.²⁰⁰ Further, in a key passage in its opinion which followed a detailed review of prior jurisprudence and the *Expose des Motifs* for the 1978 revision to Book II, the *Equibank* court concluded that "*the views of the public on which items are ordinarily regarded as part of a building must be considered in*

197. See *Nat'l Co. v. Bridgewater*, 398 So. 2d 29, 33 (La. App. 4th Cir. 1981) (holding that cotton press was component part because it would be substantially damaged upon removal from immovable to which it was attached); *Simmons v. Board of Comm'rs for Port of New Orleans*, 442 So. 2d 836, 839 (La. App. 4th Cir. 1983) (holding that fence was not a component part of wharf to which it was attached because removal did not cause substantial damage); *Steele v. Helmerich & Payne Int'l Drilling Co.*, 738 F.2d 703, 706 (5th Cir. 1984) (using Article 466 and other authorities to hold that stabbing board was not an appurtenance of an offshore drilling rig). See also Lovett, *supra* note 166, at 674-75 (discussing cases noted above).

198. 749 F.2d 1176 (5th Cir. 1985).

199. *Id.* at 1178.

200. *Id.* This part and the rest of the *Equibank* court's analysis is discussed at length in Lovett, *supra* note 166, at 675-83 and Yiannopoulos, *Zeus*, *supra* note 185, at 1387-90.

defining those items which the legislature meant to include within the term electrical installation."²⁰¹

Following this analysis and the *Equibank* court's repeated references to "the eyes of society," "the societal viewpoint," "the ordinary views of society," and finally "the societal expectation,"²⁰² other courts in subsequent judicial decisions consistently came to hold that "societal expectations"—"the views of the public on which items are ordinarily regarded as part of a building" in the *Equibank* court's terms—must be considered in determining whether an object that fails to satisfy the substantial damage test articulated in Article 466's second paragraph can nevertheless fall into one of the expressly enumerated categories in the article's first paragraph or the analogous catch all "other installations" category in that paragraph, even though such considerations are nowhere mentioned in the text of the article.²⁰³ Further, courts and commentators, including the United States Fifth Circuit, enshrined the essentially disjunctive interpretation of Article 466 first articulated in *Equibank* and thus consistently viewed the two paragraphs of Article 466 as imposing "separate and distinct" tests which "should be applied independently to determine whether a particular object is a component part."²⁰⁴

Finally in 1999, however, another United States Fifth Circuit panel in *Prytania Park Hotel, Ltd v. General Star Indemnity Co.*,²⁰⁵ reexamined this analytical approach and disregarded the apparent *jurisprudence constante* that had transformed this article into a springboard for the exercise of flexible and equitable judicial

201. *Equibank*, 749 F.2d at 1179 (emphasis added).

202. *Id.* at 1179–80.

203. See e.g., *U.S. Evtl. Prot. Agency v. New Orleans Pub. Serv.*, 826 F.2d 361, 368 (5th Cir. 1987) ("However, as a matter of law, certain items are deemed to be attached if they are so classified in the first paragraph of Article 466, regardless of the actual degree of permanent attachment. One of the categories so enumerated is 'electrical installations.' While it might seem that a transformer would certainly be an electrical installation, resort must be made to societal notions of what an electrical installation is.") (emphasis added); *Am. Bank & Trust Co. v. Shel-Boze, Inc.*, 527 So. 2d 1052, 1054–55 (La. App. 1st Cir. 1988) (holding that consideration of "societal expectations" dictated not only that light fixtures and electrical paraphernalia were component parts of residence but that same analysis could be applied to carpeting; thus "a reasonable person buying a residence expects finished flooring to be there when he or she takes possession. The societal expectation is to have finished flooring, such as carpeting"). These first two key decisions and others comprising *Equibank's* progeny are discussed in detail in Lovett, *supra* note 166, at 683–90, and Yiannopoulos, *Zeus*, *supra* note 185, at 1390–93.

204. Hyman, 643 So. 2d at 258. See also 2 A.N. Yiannopoulos, *Property*, § 142, at 313, in *La. Civil Law Treatise* (3d ed. 1991); Symeonides, *supra* note 192, at 688–89; *Moll v. Brown & Root, Inc.*, 1999 WL 155948, *3–5 (E.D. La. 1999); *Coulter v. Texaco, Inc.*, 117 F.3d 909, 916 (5th Cir. 1997).

205. 179 F.3d 169 (5th Cir. 1999).

decision-making untethered to any positive expression of legislative will,²⁰⁶ rejected the leading doctrinal justifications for the approach,²⁰⁷ and applied a unitary and literal interpretation of Article 466, without any consideration of "societal expectations,"²⁰⁸ to hold that certain fire damaged, custom-built furniture that had been nailed to the floors and walls of a hotel was not a component part of the hotel solely because it could be removed without substantial damage to itself or the building.²⁰⁹ The critical reaction to this decision in academic circles was, to say the least, negative and intense.²¹⁰

Interestingly though, and in a way that is reminiscent of early nineteenth century Louisiana courts' refusal to recognize either the 1808 Digest or the 1825 Civil Code as classic civil codes in the sense of shutting off access to the ancient Spanish law of pre-cession Louisiana,²¹¹ the academic criticism of the *Prytania Park* decision has focused on the Fifth Circuit's failure to acknowledge a pre-revision decision authored by Judge (and later Justice) Albert Tate, Jr.,²¹² which endorsed consideration of "contemporary objective

206. In the words of the Fifth Circuit opinion authored by Judge Jacques L. Wiener, Jr., "[w]e are aware from *Equibank* that the societal expectations canon sprang—or, more accurately, was launched—full-grown from the forehead of an expert witness who testified for the I.R.S. during the trial of that case." *Id.* at 180. Further, the court noted:

The pedigree of the Professor's 'societal expectations' canon is murky at best. First, there is no harbinger of such a supervening theory in either the wording of article 466 or the extensive 1978 official Revision Comments accompanying that article. Neither are there clues elsewhere in the Louisiana Civil Code to suggest such a *penumbral presence*.

Id. at 181 n.34 (emphasis added).

207. *Id.* at 181 n.2 (critiquing Professor Symeonides' views on Article 466).

208. *Id.* at 183 (concluding that "the only objectively reasonable approach to interpretation is the one provided by article 466, under which, as we have demonstrated, permanence of attachment turns solely on the extent of any collateral damage that would occur on removal"). The court in *Prytania Park* also characterized the disjunctive interpretation of Article 466 as having been based on "an imaginative parsing of this article to visualize an otherwise invisible disjunctive between the article's first and second paragraphs." *Id.* at 181.

209. *Id.* at 183; see also *id.* at 180 (noting essentially undisputed fact that only "superficial—insubstantial—wall damage had occurred when the Furniture was actually unbolted from the walls and removed").

210. See Yiannopoulos, *Zeus*, *supra* note 185, at 1394–97 (criticizing *Prytania Park* as "Paroxysmal Jurisprudence"); Carroll, *supra* note 192, (criticizing *Prytania Park* throughout); Allums, *supra* note 192 (same).

211. *Supra* notes 67–71, 119–59 and accompanying text.

212. See Yiannopoulos, *Zeus*, *supra* note 185, at 1397 ("Apparently, neither Judge Wiener nor his clerks carried a thorough search to determine 'the pedigree' of societal expectations. Had they done so, they would have found the phrase 'societal expectations' was first coined by Judge Tate in *Lafleur v. Foret*."); Carroll, *supra* note 192, at 960 (making same point); Allums, *supra* note 192, at 1553–54

standards”—in particular, “contemporary views as to conceptions of components in light of current house construction practices”²¹³—when determining whether items could be considered “immovables by nature” under old Article 467. Curiously, this criticism ignores or minimizes the possibility that the 1978 Revision of Book II could easily be interpreted, especially in light of clear signals in the *Exposé des Motifs* and the Revision Comments, as having suppressed the old articles in this area and thus rendered old jurisprudence based on these articles inconsequential.²¹⁴ In any event, the defenders of the continuing relevance of this pre-revision jurisprudence have, whether wittingly or not, placed themselves in a venerable Louisiana jurisprudential tradition commencing with Justice Derbigny’s decision in *Cottin v. Cottin*.²¹⁵

What is particularly striking in all this debate over Article 466 is the overt and dueling concern once again for both certainty and flexibility. In the conclusion of his critique of the *Prytania Park* decision, Professor Yiannopoulos argues that “Articles 465 through 467 of the Louisiana Civil Code, as revised in 1978, are sufficiently broad to provide certainty in the law and resolve most disputes in and out of court.”²¹⁶ On one hand, legal certainty, for Professor Yiannopoulos, seems to be a pragmatic and utilitarian goal that is served by clear and precise legal rules. At the same time, however, this “certainty in the law” with respect to “an ever-recurring problem that involves significant consequences in many fields of law” will be achieved, he advises, at least “at the fringes of the law,” through “interpretation, civilian methodology, doctrine, and notions prevailing in society.”²¹⁷ In other words, certainty will be achieved in hard cases by granting judges plenty of discretion to make determinations about the status of would-be component parts under the first paragraph of Article 466 with “no need of proof, lay or expert testimony, concerning the mode, scope, and purpose of attachment of a movable to a building or other structure.”²¹⁸ Under both paragraphs of Article 466, he predicts, judges in such doubtful cases will be influenced by “prevailing notions in society,”²¹⁹ something not mentioned in the positive law. Despite the questions raised by *Prytania Park* and in spite of the admitted need for ample

(same).

213. *LaFleur v. Foret*, 213 So. 2d 141, 148 (La. App. 3d Cir. 1968).

214. Lovett, *supra* note 166, at 666–74.

215. 5 Mart. (o.s.) 93 (La. 1817); see also *supra* notes 67–71 and accompanying text.

216. Yiannopoulos, *Zeus*, *supra* note 185, at 1398 (emphasis added).

217. *Id.*

218. *Id.*

219. *Id.*

judicial discretion, Yiannopoulos concludes that we have not witnessed the dawn of “an era of chaos and uncertainty.”²²⁰

Curiously, judicial reactions to the *Prytania Park* decision have been mixed. One Louisiana court was hesitant to declare its allegiance to either the *Equibank* approach or the *Prytania Park* approach.²²¹ A little later, the Louisiana Supreme Court seemed to subtly endorse the disjunctive, societal expectations-based approach to Article 466 founded in *Equibank* but did not completely close the door on the more formalistic approach favored by the Fifth Circuit in *Prytania Park*.²²² And finally, in a third decision, one judge explicitly complained that Article 466, as construed by *Equibank* and now seemingly endorsed by the Louisiana Supreme Court, “lacks predictability for lawyers and litigants.”²²³ In short, it seems that legal certainty has not yet been achieved by the legislature and courts in this particular area of property law, leaving it to private parties to try to reestablish certainty to the extent they find such certainty to be desirable.²²⁴

III. CONCLUSION

As the controversy surrounding Article 466 demonstrates, judges and scholars in Louisiana still have allegiances to two sometimes seemingly inconsistent goals respecting legal certainty. On one hand, judges in some cases seem devoted to a positivistic understanding of certainty which requires plainly written code articles to be interpreted as creating clear, bright-line rules.²²⁵ On the other hand, despite the

220. *Id.* at 1399.

221. *See In re Exxon Coker Fire*, 108 F. Supp.2d 628, 636–40 (M.D. La. 2000) (electing not to choose between competing analytical approaches and holding that, regardless of approach used, elbow piping was component part of industrial coker facility).

222. *Showboat Star P’ship v. Slaughter*, 789 So. 2d 554, 558–61 (2001). *See Lovett, supra* note 166, at 707–09 (demonstrating ambivalence at heart of Louisiana Supreme Court’s opinion in *Showboat Star*).

223. *Exxon Corp. v. Foster-Wheeler Corp.*, 805 So. 2d 432, 438 (La. App. 1st Cir. 2001) (Fitzsimmons, J. concurring); *but see id.* at 436–37 (majority opinion following *Equibank* approach as “validated” by the Louisiana Supreme Court).

224. *See Rose, supra* note 2, at 602 (explaining how in some cases individuals may actually prefer uncertainty because just as crystalline rules “seem to perform the service of creating a context in which strangers can deal with each other in confidence, . . . mud rules, too, attempt to recreate an underlying non-legal trading community in which confidence is possible [*i.e.*, they] mimic a pattern of post hoc readjustments that people *would* make if they were in an ongoing relationship with each other”).

225. *Prytania Park Hotel v. Gen. Star Indem. Co.*, 179 F.3d 169, 180–83 (5th Cir. 1999) (Wiener, J.); *Exxon Corp. v. Foster-Wheeler Corp.*, 805 So. 2d 432, 438 (La. App. 1st Cir. 2001) (Fitzsimmons, J. concurring).

revision of the Civil Code, or perhaps because of the arguably unequivocal nature of the revision process,²²⁶ others seem devoted to promoting the continuity of older legal rules and reluctant to turn their backs on the numerous accumulated judicial decisions that, with the help of doctrinal writing, have created a rich jurisprudential gloss on the Code.²²⁷ At the same time, by emphasizing the need for *ex-poste* equitable adjustments, broad and flexible considerations of societal attitudes and values, these same judges and scholars could be said to be deliberately smudging “hard edged,” “crystalline” rules that the legislature established for the purpose of simplifying and clarifying the law. In the end, perhaps this movement towards flexibility and uncertainty simply represents the same oscillation between crystals and mud—between certainty and flexibility—that is endemic to any legal system.²²⁸

We can now see that even as the problems confronted by the proponents of legal certainty in the Louisiana civil law tradition have evolved over time, there remains an underlying continuity to the discourse about this all important principle. Although the Manifesto demonstrates that legal certainty in the early nineteenth century

226. See Palmer, *Death of a Code*, *supra* note 66, at 224–27, 253–54 (arguing that equivocal nature of revision of Civil Code and its incomplete repeal of prior articles and jurisprudence has transformed the Code into a mere digest and will spawn a crisis over sources), discussed in Lovett, *supra* note 166, at 639–45.

227. See, e.g., *Showboat Star P'ship*, 789 So. 2d at 558–59 n.4 (La. 2001), (relying on pre-revision jurisprudence to interpret Article 466 of the Civil Code); Yiannopoulos, *Zeus*, *supra* note 185, at 1399 (“The well settled jurisprudence may be regarded as *jurisprudence constante*, indisputably a part of Louisiana property law that all courts must respect”); A.N. Yiannopoulos, *Jurisprudence and Doctrine as Sources of Law in Louisiana and in France*, in *The Role of Judicial Decisions in Civil Law and in Mixed Jurisdictions* 69, 71–77 (Joseph Dainow ed., 1974) (discussing theoretical and practical advantages of recognizing heightened role of jurisprudence as source of law in providing for more flexibility and responsiveness to social change and in promoting continuity and stability of the law); Tate, *Techniques*, *supra* note 1, at 746–48 (explaining reasons for judicial attachment to prior precedents as source of law); Tate, *Role of the Judge*, *supra* note 161, at 33 (“After all, the code is like an iceberg in the ocean of the [civil law] tradition. The 10 percent that has been legislated rests its weight on the hidden 90 percent.”); Lovett, *supra* note 166, at 631–38 (discussing pragmatic views of Tate, Yiannopoulos and others about role of judicial precedent).

228. Rose, *supra* note 2, at 604:

If things *matter* to us, we try to place clear bounds around them when we make up rules for our dealings with strangers so that we can invest in the things or trade them. The overloading of clear systems, however, may lead to forfeitures—dramatic losses that we can only see post hoc, and whose post hoc avoidance makes us (as judges) muddy the boundaries we have drawn. Then, at some point we may become so stymied by muddiness that as rulemakers we will start over with new boundaries, followed by new muddiness, and so on.

Id.

seems to have been primarily, but not exclusively, associated with the continued preservation of "ancient laws,"²²⁹ in the twenty-first century, as the Article 466 controversy shows, in a world in which legislative positivism would seem to be taken for granted, some jurists and judges analyzing Louisiana's private law still display a remarkable attachment to jurisprudence and laws that preceded our most recent revisions of the Civil Code.²³⁰ Similarly, although we can now appreciate the extent to which early nineteenth century Louisiana legal decision making was dominated by confident, common law oriented judges like Justices Martin and Porter much more than by positivistic thinking legislatures,²³¹ today our jurisprudence and doctrine still sometimes favors granting broad discretionary power to judges to solve legal problems in key areas even when our legislature seems to have given us sharply edged, bright line rules.²³²

In short, it seems that the profound concern for "certainty" expressed by proponents of the civil law in Louisiana as far back as 1806 is still with us. However, the civil law's "brooding anxiety about certainty"²³³ may be more important as a rhetorical construct than as an actual organizing principle. In other words, although we continue to pay homage to this concern about certainty, that concern can have multiple and at times conflicting valences and can often be subordinated to the competing values of flexibility and equity.

229. *Supra* notes 31–62 and accompanying text.

230. *Supra* notes 211–22 and accompanying text.

231. *Supra* notes 93–99, 129–58, and accompanying text.

232. *Supra* notes 198–224 and accompanying text.

233. Merryman, *supra* note 1, at 82.