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Brendan Brown Lecture:

Subjects, Citizens, and Persons: Natural Law and the Drafting of the Digest of the Civil Law of the Territory of Orleans

John W. Cairns*

I. INTRODUCTION

First of all, I should say how honored I am to have been invited to give the Brendan Brown Lecture at the College of Law at Loyola University. Not only am I conscious of the high esteem in which the late Brendan Brown was held, but I am also rather humbled by the list of my predecessors as lecturer. From a veritable *successio prudentium*—just to pick three who talked on matters of direct interest to me—I should mention my own teacher, the late Alan Watson, whose lecture was entitled “Roman Law and English Law: Two Patterns of Legal Development”;¹ Morris Arnold, judge and legal historian, who lectured on “Cultural Imperialism and the Legal System: The Application of European Law to Indians in Colonial Louisiana”;² and Dick Helmholz, a leading authority on medieval canon law, who addressed the topic of “Magna Carta and the Law of Nature.”³ It is also an honor and a delight to give a lecture before so many old friends, such as John Lovett, Vernon Palmer, Markus Puder, Jim Gordley, and Georgia Chadwick.

* Professor of Civil Law, University of Edinburgh. I am grateful to Georgia Chadwick, Paul du Plessis, John Lovett, Hector MacQueen, and Jim Viator for discussion, suggestions, and comments, as well as for the questions and comments of those who attended.

¹ Alan Watson, *Roman Law and English Law: Two Patterns of Legal Development*, 36 LOY. L. REV. 247 (1990).

² Morris S. Arnold, *The Tenth Annual Brendan F. Brown Lecture Loyola University School of Law Cultural Imperialism and the Legal System: The Application of European Law to Indians in Colonial Louisiana*, 42 LOY. L. REV. 727, 727 (1997).

³ R. H. Helmholz, *Magna Carta and the Law of Nature*, 62 LOY. L. REV. 869 (2016).

Dr. Brown, as I gather he was generally known, was obviously a much-loved figure at Loyola, and, judging from the warmth of the tributes one can find in various law journals, an outstanding teacher.⁴ Of course, such tributes do not always give a stranger a sense of their subject, as they are written by individuals close to the person honored or memorialized, and often assume a familiarity the stranger does not enjoy; but it is interesting for me as a legal historian to note that Dr. Brown acted for fifteen years as *scriba*, or secretary, to the famous Riccobono Seminar of Roman Law in Washington, while he had studied at Oxford with Sir William Holdsworth.⁵ One gets the impression that he was indeed a “character.”

Dr. Brown’s interest in scholastic natural law, evident in his publications, was obviously based on his profound Catholic faith.⁶ I have also been interested in natural law and its historical influence in my own country of Scotland, though the Church of Scotland—in which I was brought up—has traditionally been more Augustinian than Thomist in its beliefs, focusing on the sinfulness of man and the possibility of salvation through God’s grace alone. But the natural law of Grotius and Pufendorf definitely influenced the lawyers of Scotland, and probably played a part in the development of moderate theology’s challenge to orthodox Calvinism in the Enlightenment.⁷

II. THE DIGEST OF THE CIVIL LAWS NOW IN FORCE IN THE TERRITORY OF ORLEANS (1808)

⁴ See, e.g., Dennis L. Rousseau, *Brendan Francis Brown*, 16 LOY. L. REV. 273 (1970); A. E. Papale, *A Tribute to Dr. Brendan F. Brown*, 21 LOY. L. REV. 803 (1975); Marcel Garsaud, Jr., *In Memory of Doctor Brendan F. Brown*, 27 LOY. L. REV. 997 (1981); Frank Ruddy, *In Memoriam: Brendan Francis Brown*, 17 INT’L. L. 699 (1983).

⁵ Brendan F. Brown, *In Memoriam: Dr. Salvatore Riccobono, 1864-1958*, 9 LOY. L. REV. 30 (1957-1959); Ruddy, *supra* note 4, at 699. See Salvo Randazzo, *Roman Legal Tradition and American Law: The Riccobono Seminar of Roman Law in Washington*, 1 ROMAN LEGAL TRAD. 123 (2002).

⁶ See Brendan F. Brown, *The Natural Law, the Marriage Bond and Divorce*, 15 JURIST 24 (1955).

⁷ Stewart J. Brown, *Religion in Scotland*, in A COMPANION TO EIGHTEENTH-CENTURY BRITAIN 260 (H. T. Dickinson ed., 2006).

In this lecture, I want to reflect on aspects of the first book of the first Louisiana Civil Code, which is of course entitled *The Digest of the Civil Laws now in Force in the Territory of Orleans, With Alterations and Amendments Adapted to its Present System of Government*. It was enacted by the Territorial Legislature and then promulgated by the Governor in 1808, after printing in New Orleans by Bradford and Anderson.⁸ Two remarkable and learned men had drafted it between 1806 and 1808. The first was Louis Moreau Lislet, a refugee lawyer from St. Domingue, who had studied law in Paris, becoming an “avocat au Parlement.” The second was James Brown, educated at Liberty Hall (later William and Lee University) and the College of William and Mary, who had trained as a lawyer in Kentucky. Both men had careers dependent on patronage, but Brown’s was the more distinguished, reflecting his better political, social, and family connections. Both men were skilled in French, English, and Spanish.⁹

Moreau Lislet and Brown drafted the text and reported to a committee of the Territorial Legislature that consisted of four men from the House of Representatives and two from the Legislative Council.¹⁰ Given the understandable tendency of scholars to focus on Moreau Lislet and Brown, it is important to emphasize that there is clear evidence the two men did in fact work with the committee, and that the committee also reported to the Legislature. Indeed Julien Poydras, President of the Legislative Council, described the “Civil Code” in 1807 as being prepared by “a

⁸ DIGEST OF THE CIVIL LAWS NOW IN FORCE IN THE TERRITORY OF ORLEANS, WITH ALTERATIONS AND AMENDMENTS ADAPTED TO ITS PRESENT SYSTEM OF GOVERNMENT (New Orleans: Published by Authority, Printed by Bradford and Anderson, 1808) [hereinafter DIGEST OF 1808]; Act Providing for the promulgation of the Digest of the Civil Laws now in force in the territory of Orleans, 1808, ch. 29, in ACTS PASSED AT THE FIRST SESSION OF THE SECOND LEGISLATURE OF THE TERRITORY OF ORLEANS 120-29 (New-Orleans: Bradford & Anderson Printers, 1808).

⁹ ALAIN LEVASSEUR, MOREAU LISLET: THE MAN BEHIND THE DIGEST OF 1808, 95-113 (with the assistance of Vicenç Feliú, rev. ed. 2008); Jared William Bradley, *James Brown, in INTERIM APPOINTMENT: W. C. C. CLAIBORNE LETTER BOOK, 1804-1805, WITH BIOGRAPHICAL SKETCHES* 258 (J. W. Bradley ed., 2002). See John W. Cairns, *Spanish Law, The Teatro de la legislación universal de España e Indias, and the Background to the Drafting of the Digest of Orleans of 1808*, in LEGAL TRADITIONS IN LOUISIANA AND THE FLORIDAS, 1763-1848, 149, 154-158 (Seán Patrick Donlan & Vernon Valentine Palmer eds., 2019) [hereinafter Cairns, *Teatro*].

¹⁰ Cairns, *Teatro*, *supra* note 9, 158-159.

committee of the Legislature, aided by two juriconsults,” while alluding to one of its reports.¹¹ Poydras’ focus on the Committee of the Territorial Legislature reminds us of Jean-Louis Halpérin’s comment that, with rare exceptions, codification is a collective activity.¹²

I shall explore how natural law influenced the first Code. Of course, this is a huge topic, and what I can do in this lecture is necessarily rather limited;¹³ but I hope that it will at least raise some questions about the Digest and its successor Codes. I want in particular to focus on issues surrounding subjects, citizens, persons, and natural law; of course, I realize that issues of citizenship and birthright citizenship are currently the subject of considerable debate in the United States, but I shall not directly touch on this.¹⁴

In the relatively recent past, there has been considerable debate over the sources of the first Code—or the Digest of Orleans, as I shall usually here refer to it—a debate focusing on whether or not the Code was “French” or “Spanish.”¹⁵ It is clear that for much of the history of the Digest and the subsequent Civil Codes in Louisiana, no one expressed any doubt that they were “French” codes with a French origin, with the Civil Code symbolically seen as a marker of the continuation of a French culture in the Bayou State. Stanley Kowalski does, after all, refer to it as the Napoleonic code.¹⁶ But it was the growing awareness of the de la Vergne manuscript or volume—

¹¹ Julien Poydras, *Address to Governor W. C. C. Claiborne, Jan. 22, 1807*, in 4 OFFICIAL LETTER BOOKS OF W. C. C. CLAIBORNE (1801-1816) 110, 111 (Dunbar Rowland ed., 1917) [hereinafter Poydras, *Address*].

¹² Jean-Louis Halpérin, *L’Histoire de la fabrication du Code, Le Code: Napoléon?*, 107 POUVOIRS: REVUE D’ÉTUDES CONSTITUTIONNELLES ET POLITIQUES 11, 13 (Nov. 2003) [hereinafter Halpérin, *Fabrication du Code*].

¹³ There are some interesting remarks in Robert A. Pascal, *Of the Civil Code and Us*, 59 LA. L. REV. 301, 307-21 (1998). What we disagree on will be obvious.

¹⁴ See MARTHA S. JONES, *BIRTHRIGHT CITIZENS: A HISTORY OF RACE AND RIGHTS IN ANTEBELLUM AMERICA* (2018).

¹⁵ See John W. Cairns, *The de la Vergne Volume and the Digest of 1808*, 32 TUL. EUR. & CIV. L.F. 31, 35-38 (2009) [hereinafter Cairns, *De la Vergne Volume*]; JOHN W. CAIRNS, *CODIFICATION, TRANSPLANTS AND HISTORY: LAW REFORM IN LOUISIANA (1808) AND QUEBEC (1866)*, xiii-xvii, 433-40 (2015) [hereinafter CAIRNS, *CODIFICATION, TRANSPLANTS AND HISTORY*].

¹⁶ See Markus G. Puder, *Did You Ever Hear of the Napoleonic Code, Stella? A Mixed Jurisdiction Impact Analysis from Louisiana’s Law Laboratory*, 85 TUL. L. REV. 635, 636 (2011).

and its related manuscripts—that led some scholars to challenge that view.¹⁷ I shall briefly explain why.

Dated 1814, and compiled by Louis Moreau Lislet, this manuscript is an interleaved copy of the printed Digest with a short manuscript preface. To speak in very broad terms, it has at the beginning of each title, on the recto interleaf facing the English text of the Digest, general lists of sources, starting with Roman laws, then Spanish or, more precisely, Castilian laws, followed also by references to relevant titles of some secondary literature, both Spanish and sometimes French. On the verso of the interleaves, facing the French texts and keyed to each individual article of the code, are more precise references to specific Spanish laws and to French and Spanish secondary literature, as well as occasional citations of relevant Territorial statutes. Not every article, of course, has such a reference.¹⁸

Long before the publication in 1967 of the photolithographic reproduction of the de la Vergne volume, the expectation had developed that the manuscript would reveal the “sources” of the Digest. As early as 1941, Professor Mitchell Franklin had written that, in the manuscript, “Moreau Lislet gave, in detail, the exact sources for the various articles of the Louisiana Civil Code of 1808.”¹⁹ In 1958, a further tantalizing glimpse came with the publication of a translation of Moreau Lislet’s “Avant-Propos.”²⁰ It is obvious from Professor Dainow’s comments, which

¹⁷ The de la Vergne Volume or Manuscript is a printed copy of the DIGEST OF 1808, *supra* note 8 [hereinafter DE LA VERGNE VOLUME], bound with interleaves and extensively annotated in manuscript. It was reproduced by photolithography in 1967, and reprinted by Claitor’s Publishing Division, Baton Rouge, in 1971. The original has recently been donated to the Law Library of Tulane University, where it is currently being catalogued as part of the Rare Book Collections at the Law Library, Tulane Law School, New Orleans, LA. All references here will be to the photolithographic reproduction.

¹⁸ Cairns, *De la Vergne Volume*, *supra* note 15, at 38-49.

¹⁹ Mitchell Franklin, *Libraries of Edward Livingston and of Moreau Lislet*, 15 TUL. L. REV. 401, 404 n.10 (1940-1941).

²⁰ Mitchell Franklin, *An Important Document in the History of American Roman and Civil Law: The De La Vergne Manuscript*, 33 TUL. L. REV. 35, 39-42 (1958-1959); Joseph Dainow, *Moreau Lislet’s Notes on Sources of Louisiana Civil Code of 1808*, 19 LA. L. REV. 43, 44-49 (1958-1959).

framed the publication of the preface in the *Louisiana Law Review*, that it was becoming more generally assumed that the references were to “sources” of the Digest, even though the term “sources” is in itself rather ambiguous.

It was in this context that the late Professor Pascal, then of Louisiana State University (LSU), but a distinguished graduate of the Loyola College of Law, made an important discovery.²¹ He noticed that a copy of the Digest of 1808 in the Hill Memorial Library at LSU in Baton Rouge had marginal notes that he accurately identified both as in the hand of Moreau Lislet and as a simpler version of the notes in the de la Vergne volume.²² Professor Pascal correctly observed that these references were to Spanish and Roman laws and books. He used this to argue that, when taken with the de la Vergne volume, it helped “demonstrate that the redactors of the Digest of 1808 did consider it a digest of the Spanish laws then in force in Louisiana even though they cast it in the mold of the then new French *Code Civil*.”²³

But in 1971, Professor Rodolfo Batiza of the Tulane Law School published an extensive study of what he described as the “actual sources” of the Louisiana Civil Code of 1808, demonstrating that the articles were overwhelmingly French in origin.²⁴ Professor Pascal simply could not accept this conclusion, and quoted his published view that the Digest, “though written largely in words copied from, adapted from, or suggested by French language texts, was intended to, and does for the most part, reflect the substance of the Spanish law in force in Louisiana in 1808.”²⁵ Elsewhere he emphatically claimed that Claitor’s publication of a reprint of the volume

²¹ M. ISABEL MEDINA, *LOYOLA UNIVERSITY NEW ORLEANS COLLEGE OF LAW: A HISTORY* 50-51 (2016).

²² Robert A. Pascal, *A Recent Discovery: A Copy of the “Digest of the Civil Laws” of 1808 with Marginal Source References in Moreau Lislet’s Hand*, 26 LA. L. REV. 25, 26 (1965-1966).

²³ Robert A. Pascal, *A Recent Discovery: A Copy of the “Digest of the Civil Laws” of 1808 with Marginal Source References in Moreau Lislet’s Hand*, 26 LA. L. REV. 25, 26 (1965-1966).

²⁴ Rodolfo Batiza, *The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance*, 46 TUL. L. REV. 4 (1971-1972) [hereinafter Batiza, *Louisiana Civil Code of 1808*].

²⁵ Robert A. Pascal, *Sources of the Digest of 1808: A Reply to Professor Batiza*, 46 TUL. L. REV. 603, 604 (1971-1972) (emphasis deleted).

would make more generally known “the radical simplicity and beauty of statement of this essentially Spanish legal document in French Civil Code dress.”²⁶

Professor Pascal never accepted the challenge issued by Professor Batiza to demonstrate his thesis.²⁷ And it is in any case quite incapable of proof. There can, of course, be no doubt that there is Spanish influence on the Digest (one is tempted to suggest that we should reclaim the former, and contemporary, informal usage of first Louisiana Code); but the Digest is most certainly *not* a code of Spanish law expressed in French and English. Furthermore, the de la Vergne volume is a concordance drawn up *after* promulgation of the Digest, based in particular on the *Teatro de la legislación universal de España é Indias*, published in Madrid in twenty-eight volumes between 1791 and 1798.²⁸ The *Teatro* is a work on which we know Moreau Lislet extensively relied, a work that shaped his understanding of the Spanish law.²⁹ There may be some scope to debate what the purpose of the de la Vergne volume exactly was, but it most definitely was not intended as a guide to the substantive sources of the Digest’s articles.

III. THE DRAFTING OF THE DIGEST

The reality is that the Digest is very much more interesting than the heated debate over whether it is “French” or “Spanish” would suggest. It is important as a code drafted by able and talented lawyers, who saw themselves as legal technocrats, who were trying to create a law fit for

²⁶ Robert A. Pascal, *Book Note*, 32 LA. L. REV. 495, 495-96 (1971-1972).

²⁷ Rodolfo Batiza, *Sources of the Civil Code of 1808, Facts and Speculation: A Rejoinder*, 46 TUL. L. REV. 628, 652 (1971-1972).

²⁸ ANONIO XAVIER PÉREZ Y LÓPEZ, *TEATRO DE LA LEGISLACIÓN UNIVERSAL DE ESPAÑA É INDIAS, POR ORDEN CRONOLÓGICO DE SUS CUERPOS, Y DECISIONES NO RECOPIADAS: Y ALFABÉTICO DE SUS TÍTULOS Y PRINCIPALES MATERIAS* (Madrid: imprint varies, 1791-98).

²⁹ John W. Cairns, *Introductory Essay to the Translation of the Discurso Preliminar of Pérez y López’s Teatro*, 11 J. CIV. L. STUD. 433, 434 (2018).

the Territory of Orleans, newly part of the United States.³⁰ They drew on a variety of sources—not just French and Spanish—that included Blackstone’s *Commentaries on the Laws of England* in an edition by Christian.³¹ The most important sources, however, were undoubtedly the French Code civil and its *Projet*.³² Moreau Lislet and Brown were simply not constrained by a narrow view of the law, and they gave a wide interpretation to the brief to “make the civil law by which this territory is now governed, the ground work of said code.”³³ Further, though evidently given great latitude, their work acquired democratic legitimacy through their collaboration with the committee of the Legislature, and the Code’s final enactment by both houses of the Legislature and approval by the governor.

The path-breaking work of Batiza and the references in the de la Vergne volume, arising out of Moreau Lislet’s use of Pérez’s *Teatro*, provide a starting point from which it is possible, with some degree of confidence, to be certain of what the redactors had in front of them when they drafted. It is therefore possible to know not only what they chose, copied, or drew on in producing the Digest, but also what they rejected—which can be just as or even more instructive. This allows us to form some kind of understanding of what motivated their decisions. Thus, in my earlier study of Brown and Moreau Lislet’s work, I was able to demonstrate that, in the provisions on paternal and marital authority, they followed a model ultimately derived from the *droit coutumier* of northern France as embodying their contemporary conception of what it was to be a family,

³⁰ Cairns, *Teatro*, *supra* note 9, at 197-99; CAIRNS, CODIFICATION, TRANSPLANTS AND HISTORY, *supra* note 15, at 193-97, 232-34, 335-39, 385-96, 461-63, 472-75.

³¹ John W. Cairns, *Blackstone in the Bayous: Inscribing Slavery in the Louisiana Digest of 1808*, in RE-INTERPRETING BLACKSTONE’S COMMENTARIES: A SEMINAL TEXT IN NATIONAL AND INTERNATIONAL CONTEXTS, 73, 81-84 (W. Prest ed., 2014) [hereinafter Cairns, *Blackstone in the Bayous*]; Alejandro Guzmán Brito, *Las fuentes de las normas sobre interpretación de las leyes del “Digeste des lois civiles” (“code civil”) de la Luisiana (1808/1825)*, 31 REVISTA DE ESTUDIOS HISTÓRICO-JURÍDICOS, 171, 185 (2009) [hereinafter Guzmán, *Fuentes de las normas sobre interpretación*].

³² Batiza, *Louisiana Civil Code of 1808*, *supra* note 24, at 32-44.

³³ Resolutions of June 7, 1806, in ACTS PASSED AT THE FIRST SESSION OF THE FIRST LEGISLATURE OF THE TERRITORY OF ORLEANS 214-19 (New Orleans: Bradford and Anderson, 1807).

even if they incorporated some ideas from the Castilian law.³⁴ Similarly, they adopted a nuanced, if contractual, approach to free servants while recognizing the socioeconomic realities of the Territory.³⁵ What one has, then, is a code reflecting contemporary views of what the Territory needed, even if decisions were constrained both by the sources consulted and by the traditions within which the redactors worked.³⁶

It is clear that the redactors started their work with the Code civil des français and its draft, the Projet de l'an VIII.³⁷ In a sense, these two documents provided a default position, from which Moreau Lislet and Brown departed when they thought it necessary. The obvious and convincing assumption is that the redactors used the Code civil and its Projet to establish the structure of the first Louisiana code; they then also drew much of the actual detail from these two sources, varying and changing what they found in these models when they thought it important to do so.

It is appropriate here to refer to the research of the late Professor André-Jean Arnaud, who pointed to a significant difference between the Code civil and its Projet. The latter had an extensive *Livre préliminaire* that was not adopted by the Code civil because, according to Portalis, of its didactic nature.³⁸ The implications of this for the Digest will be considered in a later section.³⁹

³⁴ CAIRNS, CODIFICATION, TRANSPLANTS AND HISTORY, *supra* note 15, at 193-97, 232-34, and 336.

³⁵ CAIRNS, CODIFICATION, TRANSPLANTS AND HISTORY, *supra* note 15, at 385-96.

³⁶ On the development of codification in France, see JEAN-LOUIS HALPÉRIN, *L'IMPOSSIBLE CODE CIVIL* (1992).

³⁷ CODE CIVIL DES FRANÇAIS présentée par Jean-Denis Bredin (éd. Bicentenaire, présentée par Jean-Denis Bredin, 2004) [hereinafter CODE CIVIL]; PROJET DE L'AN VIII, in 2 P. A. FENET, RECUEIL COMPLET DES TRAVAUX PRÉPARATOIRES DU CODE CIVIL (réimpression de l'édition de 1827 (1968)) [hereinafter PROJET DE L'AN VIII]. Halpérin has pointed out that the draft was in fact printed in the Year IX (1801), but Fenet's ascription of it to the an VIII has become canonical. See Jean-Louis Halpérin, *Le projet de l'an IX, matrice du code civil?* 42 DROITS 19 (2005); JEAN-LOUIS HALPÉRIN, THE FRENCH CIVIL CODE 11 (Tony Weir trans. 2006) [hereinafter HALPÉRIN, FRENCH CIVIL CODE].

³⁸ ANDRE-JEAN ARNAUD, ESSAI D'ANALYSE STRUCTURALE DU CODE CIVIL FRANÇAIS: LA RÈGLE DU JEU DANS LA PAIX BOURGEOISE 44 (1973) [hereinafter ARNAUD, ESSAI D'ANALYSE STRUCTURALE]; Jean-Étienne-Marie Portalis, *Discours de présentation du Code civil prononcé le 3 frimaire an X*, in JEAN-ÉTIENNE-MARIE PORTALIS, DISCOURS ET RAPPORTS SUR LE CODE CIVIL, PRÉCÉDÉS DE L'ESSAI SUR L'UTILITÉ DE LA CODIFICATION DE FRÉDÉRIC PORTALIS 90, 99-100 (2010) [hereinafter Portalis, *Discours du 3 frimaire an X*].

³⁹ See *infra* section V.

But Arnaud also points to something else that is rather significant: the change of tenses between the *Projet* and the *Code civil*. The latter, where appropriate (and this depends on the dispositive nature of the individual article), may be drafted in the future tense; the former is not. Arnaud argues that this makes the *Code civil* more legislative and less didactic in style; more subtly, it also changes the “feel” of the *Code*, making it appear more “de conception positiviste,” as he puts it, with a typically legislative use of the future tense.⁴⁰ This has interesting consequences for the *Digest*. When it follows the *Code*, it certainly sometimes copies its use of the future tenses that have there replaced the present tenses of the *Projet de l’an VIII*; but the English version sometimes uses the present tense, and sometimes not.⁴¹ Though this raises questions on which one would need to carry out more work, it is important to bear in mind in what follows that sometimes the French text appears to prescribe using the future tense, while the English text describes a state of affairs. Sometimes both become typical legislative commands with the English text using the verb “to be” in the future as the auxiliary or modal verb. It may simply be the product of careless translation or reflect questions of expression or style in some circumstances, but it affects the appearance of the *Louisiana Digest*.⁴²

⁴⁰ ARNAUD, *ESSAI D’ANALYSE STRUCTURALE*, *supra* note 38, at 44.

⁴¹ I shall give here a few examples of what becomes a very complicated matter. *PROJET DE L’AN VIII*, *supra* note 37, at 95, bk. 1, tit. 10, art. 32 (following the *Projet*, states “Lorsqu’il est question du mariage”); *CODE CIVIL*, *supra* note 37, art. 511 has: “lorsqu’il sera question du mariage”; *DIGEST OF 1808*, *supra* note 8, at 83, Bk. 1, tit. 11, art. 23, follows the *Projet*: “Lorsqu’il est question . . .” *CODE CIVIL*, *supra* note 37, art. 420: “Dans toute tutelle il y aura un subrogé tuteur nommé par le conseil de famille”; *PROJET DE L’AN VIII*, *supra* note 37, at 76, Bk. 1, tit. 9, art. 36): “Le conseil de famille nomme toujours au mineur un subrogé tuteur”; *DIGEST OF 1808*, *supra* note 8, at 65, bk. 1, tit. 8, art. 32: “Dans toute tutelle il y aura un subrogé tuteur nommé par le juge.” In English text: “there shall be.” *CODE CIVIL*, *supra* note 37, art. 103: “Le changement de domicile s’opérera par le fait . . .”; *DIGEST OF 1808*, *supra* note 8, at 13, bk. 1, tit. 2, art. 2: “Le changement de résidence s’opérera par le fait . . .”; in English text: “A change of domicile is produced . . .”

⁴² I discussed this further in a paper entitled “Transplants and Translations: Louisiana and France in the Early Nineteenth Century” delivered at the British Legal History Conference in St Andrews in July 2019. The matter actually becomes quite complicated.

IV. THE STRUCTURE OF THE DIGEST AND THE STRUCTURES OF THE CODE CIVIL AND ITS PROJET

The Digest, following its two main models, has three books (preceded by a preliminary title): persons, things, and acquisition of ownership of things. The structure and titles of the second book of the Digest are identical to those of the French Code civil (of course, there are variations in details, but we need not concern ourselves with these). One can also say much the same for the third book, though here there is some variation in the titles and greater variation in detail. But it is the first book in which there is very great difference from the models followed. The remainder of this lecture will be substantially devoted to an exploration of these differences. An overview of these differences is best understood through a simple table:⁴³

Projet de l'an VIII	Code civil des français	Digest of 1808
Des personnes qui jouissent des droits civils, et de celles qui n'en jouissent pas	De la jouissance et de la privation des droits civils	De la distinction des Personnes, et de la Privation des Droits civils en de certains cas
Des actes destinées à constater l'état civil	Des actes de l'état civil	
Du domicile	Du domicile	Du Domicile, et de la manière d'en changer
Des absens	Des absens	Des absens
Du mariage	Du mariage	Du mari et de la femme
Du divorce	Du divorce	De la séparation de corps
		Du maître et du serviteur
De la paternité et de la filiation	De la paternité et de la filiation	Des pères et des enfans
	De l'adoption et de la tutelle officieuse	
De la puissance paternelle	De la puissance paternelle	

⁴³ I have taken the French versions of the Digest's titles from the Index at the beginning. The way the titles are set out there suggests, at first sight, that the preliminary title was considered part of the book on persons, but careful study of the index pages, as well as of the layout of the *Digest* itself, demonstrates this is not the case. Some of this derives from issues arising out of the printing.

De la minorité, de la tutelle et de l'émancipation	De la minorité, de la tutelle et de l'émancipation	Des mineurs, de leur curatelle, et de leur émancipation
De la majorité et de l'interdiction	De la majorité, de l'interdiction, et du conseil judiciaire	Des foux, des insensés, et des autres personnes incapables d'administrer leurs affaires
		Des Communautés ou Corporations

In fact, the first books of the Digest and the French Code are even more different than this simple table might suggest.

I shall start with a brief discussion of the two titles found in the Digest with no equivalent found in its models: those on master and servant and corporations, that is, titles six and ten respectively. Why have these been included? The first of these starts with an article: “There are in this territory two classes of servants, to wit: Free servants and slaves.”⁴⁴ Batiza provides no “source” for this article, which in any case is perhaps more descriptive rather than regulatory, certainly in its expression. But it echoes the drafting of the first title, “Of the distinction of persons and the privation of certain civil rights in certain cases,” which, following Jean Domat, in the *Livre préliminaire* to his *Lois civiles*, explains that there are distinctions between persons established by nature and distinctions established by law.⁴⁵ The distinction between the enslaved and the free is a distinction, according to Domat, established by law, not nature. In that title, the thirteenth article is directly copied from Domat, “verbatim” as Batiza puts it.⁴⁶

⁴⁴ DIGEST OF 1808, *supra* note 8, at 36-37, bk. 1, tit. 6, art. 1.

⁴⁵ DIGEST OF 1808, *supra* note 8, at 8-11, bk. 1, tit. 1, art. 1-14; 1 JEAN DOMAT, LES LOIX CIVILES DANS LEUR ORDRE NATUREL, LE DROIT PUBLIC ET LEGUM DELECTUS 10-15 (Louis d’Héritier du Vatier ed., Paris: Theodore le Gras, 1723) [hereinafter DOMAT, LOIX CIVILES].

⁴⁶ 1 DOMAT, LOIX CIVILES, *supra* note 44, at 14 (Liv. prélim. tit. II, sect. II, n.1); DIGEST OF 1808, *supra* note 8, at 11, bk. 1, tit. 1, art. 13; Batiza, *Louisiana Civil Code of 1808*, *supra* note 24, at 46.

Given that, in theory, there were no slaves in France, the two main inspirations for the structure of the Digest offered no guidance.⁴⁷ Both dealt with service as an aspect of lease (as indeed the Digest also did).⁴⁸ The Digest, however, required some general provisions on enslavement and slavery, even though, as a field of law, it had recently been the subject of a major statute.⁴⁹ Here I think we can see the influence of the structure of the first book of Blackstone's *Commentaries*, where the author inserted a title on master and servant before that on husband and wife.⁵⁰ Blackstone obviously considered servants as part of the household; indeed, the redactors drew from his work much of the specific regulation of free servants in this title of the Digest.⁵¹ In the Territory, it was necessary to insert slavery as a status here in the book on persons. It is probable that the redactors' reading of the relevant section of Domat—where he links slavery with Roman *patriapotestas*—reinforced their decision to place the title here.⁵²

The same influence of Blackstone, again probably supported by a reading of Domat, led to the inclusion of the tenth title—that on corporations—placed at the end of his account of persons.⁵³ Both Blackstone and Domat, along with Pothier, have influenced the content of the articles in this

⁴⁷ SUE PEABODY, "THERE ARE NO SLAVES IN FRANCE:" THE POLITICAL CULTURE OF RACE AND SLAVERY IN THE ANCIEN RÉGIME (1997); Jean-François Niort, *Les chantiers de l'histoire du droit français de l'esclavage*, 4 CLIO@THÉMIS 1 (2011).

⁴⁸ CAIRNS, CODIFICATION, TRANSPLANTS AND HISTORY, *supra* note 15, at 355-96; Thomas W. Tucker, *Sources of Louisiana's Law of Persons: Blackstone, Domat, and the French Codes*, 44 TUL. L. REV. 264, 268-80 (1969-1970).

⁴⁹ *Black Code. An Act Prescribing the rules and conduct to be observed with respect to Negroes and other Slaves of this Territory, June 7, 1806, ch. 33*, in ACTS PASSED AT THE FIRST SESSION OF THE FIRST LEGISLATURE OF THE TERRITORY OF ORLEANS 150 (New-Orleans: Bradford & Anderson Printers, 1807); Crimes and Offences, June 7, 1807, *in id.* at 190 (this latter is obviously considered as subsumed under "Black Code" and has no separate chapter number). See also *An Act to regulate the conditions and forms of the emancipation of slaves, Mar. 9, 1807, ch. 10*, in ACTS PASSED AT THE SECOND SESSION OF THE FIRST LEGISLATURE OF THE TERRITORY OF ORLEANS 82 (New-Orleans: Bradford & Anderson Printers to the Territory, 1807); *An Act to amend the Act entitled "An Act Prescribing the rules and conduct to be observed with respect to Negroes and other Slaves of this Territory," Apr. 14, 1807, ch. 30*, *in id.* at 186. See VERNON VALENTINE PALMER, THROUGH THE CODES DARKLY: SLAVE LAW AND CIVIL LAW IN LOUISIANA 103-61 (2012).

⁵⁰ Cairns, *Blackstone in the Bayous*, *supra* note 31, at 88-91.

⁵¹ Batiza, *Louisiana Civil Code of 1808*, *supra* note 24, at 51; Tucker, *Sources of Louisiana's Law of Persons*, *supra* note 47, at 280 n.84.

⁵² 1 DOMAT, LOIX CIVILES, *supra* note 44, at 14-15 (Liv. prélim. tit. II, sect. II, n.1-7).

⁵³ Cairns, *Blackstone in the Bayous*, *supra* note 31, at 90-91; 1 DOMAT, LOIX CIVILES, *supra* note 44, at 15 (Liv. prélim. tit. II, sect. II, n.15).

title.⁵⁴ Neither the Code civil nor its Projet could have here included a title on such artificial persons. This reflected their approach to “persons” as a legal category, even if the idea of an artificial person, “*personne morale*,” was familiar in French law.

This discussion of structures in fact reveals the core difference between the Digest and its two French models: the latter two focus on *les français* and the citizens, with their “droit civils,” as the organizing principle in their respective books on persons. In other words, the Code civil and the Projet were concerned with “natural persons.” Jean-Louis Halpérin has commented that one should not allow oneself to be misled by the title “Persons” in the Code civil; it is not the same as persons in earlier codes, such as that of Prussia.⁵⁵ He correctly stresses that central to the book is “civil” as distinct from “political” rights. One can also see that the focus is in fact on “family,” not on “persons,” and on what some authors, such as Gautier, have called the “constitution civile”; that is, the civil rights (not in the modern political sense) of the members of the family.⁵⁶ The constitution fixed citizenship; but its consequences and rights—and their loss—were the subject of the book *Des personnes*.⁵⁷

If, however, one starts from the Digest and looks at the sources of its individual articles, and identifies articles taken from the Code civil and its Projet, as Batiza did, one rather misses the way in which the Digest differs from its models, and one does not grasp the full significance of what the redactors have done in this book.

A first and very important distinction that is not always obvious lies in the differing titles of the two codes. I say this is not always obvious because of the tendency to describe the French

⁵⁴ Batiza, *Louisiana Civil Code of 1808*, *supra* note 24, at 61-62.

⁵⁵ HALPÉRIN, FRENCH CIVIL CODE, *supra* note 37, at 17.

⁵⁶ HALPÉRIN, FRENCH CIVIL CODE, *supra* note 37, at 17-18; Pierre-Yves Gautier, *Pour le rétablissement du livre préliminaire du Code civil*, 41 DROITS 37, 37 (2005) [hereinafter Gautier, *Livre préliminaire*].

⁵⁷ Des Personnes. Titre Second. Des actes de l'état civil in 8 P. A. FENET, RECUEIL COMPLET DES TRAVAUX PRÉPARATOIRES DU CODE CIVIL 3-80 (réimpression de l'édition de 1827 (1968)).

Code civil as the Code Napoléon. In fact, its original title, and the title still used for the contemporary version, was the Code civil des français, probably best translated as the “Civil Code of Frenchmen,” or, perhaps less appropriately, as the “Civil Code of the French.”⁵⁸ This title is very important. The first book is focused on the rights of the *French*, whether citizens or not. Professor Halpérin described it as “une législation pour pères de famille.”⁵⁹ In contrast, the Louisiana Code was entitled Digest of the Civil Laws of the Territory of Orleans—a rather different approach that is of greater significance than one might at first think.

To sum up, the first book of the Code civil focuses on the rights of *the French*. The rights given in the code are those given to the individual considered primarily as a Frenchman or sometimes as a citizen. The Digest has different concerns. It is necessary to take into account both the different histories of Louisiana and France in the period immediately preceding their codifications, while also reflecting on some issues of natural law. We shall consider this further below.⁶⁰

V. PRELIMINARY TITLES

It is now important to return to the Preliminary Title of the Digest and compare it with that of the Code civil and the preliminary book of the *Projet de l’an VIII*, always remembering, as mentioned earlier, Professor Arnaud’s argument that the changes between the *Projet* and the Code civil reflect a move from a natural-law orientation towards legal positivism.

While the Code civil des français has a preliminary title of only six articles, the *Projet* has forty-one in its preliminary book. The Digest, however, has twenty-four articles in its Preliminary

⁵⁸ See, e.g., XAVIER MARTIN, MYTHOLOGIE DU CODE NAPOLÉON: AU SOUBASSEMENTS DE LA FRANCE MODERNE 270-86 (2003).

⁵⁹ JEAN-LOUIS HALPÉRIN, LE CODE CIVIL 27 (2nd ed. 2003). I give it in French as having more resonance.

⁶⁰ See *infra* section VI.

Title. Though the Preliminary Title of the Digest definitely draws on the Projet, just the arithmetic alone shows—if crudely—that it cannot be identical, while it also varies significantly from the Code civil.⁶¹ Thus, in the Projet, the preliminary book is entitled “Of Law and Statutes,” or “Du droit et des lois.” The Code civil is even more prosaic: “De la publication, des effets et de l’application des lois en général.” The Digest draws on both: “Of the General Definitions of Law [Rights] and of Promulgation of Laws.” This is a compromise between the two models, as indeed is the content.⁶²

The first title of the Projet’s book has the rubric “General Definitions,” and it contains three articles that were to be the source of the Digest’s first three articles on statutes, their scope, and custom, in a section entitled “De la loi et des coutumes.”⁶³ But this title in the Projet also starts with a series of articles on the law of nature and nations, as well as on the nature of the law of a specific people (“le droit intérieur ou particulier de chaque people”).⁶⁴ This locates that law within the context of the *ius naturale* and the *ius gentium*, as well as providing the background to the three provisions copied by the Digest, which are in a different order. It confirms the strongly didactic nature of this part of the Projet, and the significance of natural law in its drafting.⁶⁵ Again, when reflecting on the Digest, one has to remember that what was omitted is as significant as what was copied and adapted.

The Projet next has a title (the second) headed “Division des lois” that contains three articles. There is no equivalent in the Digest, probably because of the content of this section. It

⁶¹ Batiza, *Louisiana Civil Code of 1808*, *supra* note 24, at 45-46.

⁶² Guzmán, *Fuentes de las normas sobre interpretación*, *supra* note 31; Thomas W. Tucker, *Interpretations of the Louisiana Civil Codes, 1808-1840: The Failure of the Preliminary Title*, 19 TUL. EUR. & CIV. L.F. 57 (2004) (this is based on his LLM dissertation of 1972 at the University of Glasgow).

⁶³ PROJET DE L’AN VIII, *supra* note 37, at 3-4; Batiza, *Louisiana Civil Code of 1808*, *supra* note 24, at 45. I am not convinced by Batiza’s attribution of influence from the first article of the Projet on the first article of the Digest. This has no implications for the general argument.

⁶⁴ PROJET DE L’AN VIII, *supra* note 37, at 3-4.

⁶⁵ Gautier, *Livre préliminaire*, *supra* note 5, at 40-42.

starts with a division of types of laws into those that regulate the relationship between those who govern and those who are governed, namely constitutional and political laws. The “lois civiles” regulated the relationships of citizens with each other. The procedural, regulatory, and criminal laws governed the relationships of “l’homme” with “la loi.” A fourth division of laws was into fiscal, commercial, military, and rural. Law was further divisible into public law and private law. All types of laws concerned the public and individuals at the same time. Those that most immediately concerned the public were the public laws of a nation; those that most concerned the individuals constituted the “droit privé.” Laws (statutes) were to be distinguished from “règlements,” which were changeable, while the aim of statutes was to be perpetual.⁶⁶ These proposed provisions reflected the constitution of the Consulate under Napoleon, while also anticipating the later codes, as well as more miscellaneous productions such as the *code rural*. These articles are indeed simply didactic and analytic. One can easily understand why, given the constitutional position of the Territory of Orleans as a territory of the United States, this title offered nothing to the redactors, nor did it directly influence any of the articles of the Code civil.

The *Projet de l’an VIII* follows this with four further titles in its preliminary book: “De la publication des lois,” “Des effets de la loi,” “De l’application et de l’interprétation des lois,” and “De l’abrogation des lois.” Between them, these titles possessed twenty-nine articles, dealing with the matter the Code civil covered in six, and the Digest in eighteen, in its titles “De la promulgation des lois,” “Des effets de la loi,” “De l’applications det de l’interprétation de la loi,” and “De l’abrogation des lois.”⁶⁷ But not all of the Digest’s articles are based on those of the *Projet*, as Batiza has pointed out. I shall just note here that those on interpretation that he identified as originating in Blackstone’s *Commentaries* are passages that Blackstone adopted from writers on

⁶⁶ PROJET DE L’AN VIII, *supra* note 37, at 4-5.

⁶⁷ PROJET DE L’AN VIII, *supra* note 37, at 5-8.

natural law, such as Pufendorf, as Guzmán has recently demonstrated.⁶⁸ This, of course, indicates what one would expect, that many of the general provisions reflect typical thinking of the period, drawing on the literature of natural law.

Though most of the material in this title of the *Projet de l'an VIII* did not make it into the enacted Code civil, it nonetheless helps explain aspects of the approach of that code, even if it has a more overtly “positivist” appearance.⁶⁹ The Code civil sets out the “droits civils” of the French people, including, above all, the citizens, following some of the analysis found in the second title of the *Projet's Livre préliminaire*.

VI. CITIZENS AND “DROITS CIVILS”

The first title of the Code civil is accordingly devoted to who enjoys such “droits civils,” and the circumstances under which they can be deprived of them. Its first chapter stresses that enjoyment of such rights is independent of the quality of “citizen.” Each Frenchman can enjoy such civil rights. This then requires a decision as to who is French. The Code considers issues such as birth in France to a foreigner and the position of children born abroad to a Frenchman, even one who has lost the “quality” of being French.⁷⁰ A foreigner, allowed by the government to establish his domicile in France, enjoys such rights so long as he continues to reside there.⁷¹ One of these articles regulates litigation in France by a non-resident foreigner, and another the liability to suit of a Frenchman for obligations contracted abroad even with a foreigner.⁷²

⁶⁸ Batiza, *Louisiana Civil Code of 1808*, *supra* note 25, at 45; Guzmán, *Fuentes de las normas sobre interpretación*, *supra* note 31, at 178-88.

⁶⁹ For interesting speculations on the substitution of the short preliminary title for the lengthy preliminary book, see Gautier, *Livre préliminaire*, *supra* note 56, at 37-40. The details are also discussed in Witold Wolodkiewicz, “*Livre préliminaire*” “*titre préliminaire*” dans le projet et dans le texte définitif du Code Napoléon, 83 *REVUE HISTORIQUE DE DROIT FRANÇAIS ET ÉTRANGER* 441 (2005).

⁷⁰ CODE CIVIL, *supra* note 37, arts. 7-16.

⁷¹ CODE CIVIL, *supra* note 37, art. 13.

⁷² CODE CIVIL, *supra* note 37, arts. 14-15.

The second chapter, on loss of “civil rights,” is much longer and is divided into two sections. The second of these describes loss of “civil rights” through “mort civile” subsequent to a criminal conviction, leading to total legal inability to own or dispose of property by will or otherwise transact or acquire. Condemnation to “mort naturelle” has the same effects.⁷³ The first, shorter section is more interesting here—loss of civil rights through loss of the quality of being French. This occurred through taking service in a foreign government or army, or becoming naturalized in a foreign country.⁷⁴ Here it is important always to remember the position of the *émigrés* who had fled France during the Revolutionary period, had been expropriated, and who had fought in foreign armies against Revolutionary France (and also those who had fled Bonaparte’s government).⁷⁵ A number of such individuals came, of course, to Louisiana.⁷⁶ These were the type of people who were not to enjoy the civil rights of a Frenchman, but their children were not necessarily to be deprived of the status of being French.

Though the first title of the Digest does include in its heading “privation des droits civils en de certains cas,” it cannot use any of the new French material on *droits civils*, which simply does not suit the situation of the Territory. This results in the title being fundamentally different. As in France, the redactors cannot use “citizenship” as a test for the possession of civil rights, but for quite different reasons. Here it is necessary to discuss the Louisiana Purchase. The third article of the Treaty of Paris made between the United States and France for the Purchase of Louisiana stated that:

The inhabitants of the ceded territory shall be incorporated in the Union of the United States and admitted as soon as possible according to the principles of the federal Constitution to the enjoyment of all these rights, advantages and immunities of citizens of the United States, and in the mean time they shall be maintained and

⁷³ CODE CIVIL, *supra* note 37, arts. 22-23.

⁷⁴ CODE CIVIL, *supra* note 37, arts. 17-21.

⁷⁵ HALPÉRIN, FRENCH CIVIL CODE, *supra* note 37, at 18-19.

⁷⁶ See HENRY CLEMENT PITOT, JAMES PITOT (1761-1831) 25-45 (2nd prtq. 1988).

protected in the free enjoyment of their liberty, property and the Religion which they profess.⁷⁷

But what did this mean? Here, if we just focus on the issue of citizenship, did those who lived in Louisiana, but were not already citizens, not become citizens until where they lived became a state of the Union? Did they need to take an oath of allegiance to become U.S. citizens? Or were they simply to be citizens by operation of the Treaty? Each of these views can be found expressed in contemporary discussion both before and after the Treaty took effect.⁷⁸

In 1803, when the United States took possession, the vast area of Louisiana was mainly inhabited by Native Americans.⁷⁹ The inhabitants of European background were concentrated in what was soon to be the Territory of Orleans, particularly around New Orleans, together with enslaved Africans and a relatively large number of “free people of color.”⁸⁰ Those of European descent were of varied origin. The majority had presumably recently shifted their allegiance, at least in theory, from being subjects of Spain to citizens of France. Some had no doubt continued to consider themselves as Spanish subjects.⁸¹ There was also to be significant continuing immigration, not just from the United States, but also from Europe and the Caribbean, notably St. Domingue.⁸² All present in the Territory will have owed some level of allegiance to the United

⁷⁷ *Treaty between the United States of America and the French Republic*, in *Documents: Section I: The Louisiana Purchase*, in THE LOUISIANA PURCHASE: EMERGENCE OF AN AMERICAN NATION 143, 143-44 (Peter J. Kastor ed., 2002).

⁷⁸ EVERETT SOMERVILLE BROWN, THE CONSTITUTIONAL HISTORY OF THE LOUISIANA PURCHASE 1803-1812, 18-19, 26, 52, 58, 65-74, 132-38, 151-52 (repr. 2000) [hereinafter BROWN, LOUISIANA PURCHASE].

⁷⁹ Cécile Vidal, *From Incorporation to Exclusion: Indians, Europeans, and Americans in the Mississippi Valley from 1699 to 1830*, in EMPIRES OF THE IMAGINATION: TRANSATLANTIC HISTORIES OF THE LOUISIANA PURCHASE 62, 63 (Peter J. Kastor & François Weil eds., 2009).

⁸⁰ EBERHARD L. FABER, BUILDING THE LAND OF DREAMS: NEW ORLEANS AND THE TRANSFORMATION OF EARLY AMERICA 66-72 (2016) [hereinafter FABER, LAND OF DREAMS]; Paul Lachance, *The Louisiana Purchase in the Demographic Perspective of its Time*, in EMPIRES OF THE IMAGINATION: TRANSATLANTIC HISTORIES OF THE LOUISIANA PURCHASE 143 (Peter J. Kastor & François Weil eds., 2009).

⁸¹ FABER, LAND OF DREAMS, *supra* note 80, at 72-76; Peter J. Kastor, “*They are all Frenchmen*”: *Background and Nation in an Age of Transformation*, in EMPIRES OF THE IMAGINATION: TRANSATLANTIC HISTORIES OF THE LOUISIANA PURCHASE 239 (Peter J. Kastor & François Weil eds., 2009).

⁸² NATHALIE DESSENS, FROM SAINT-DOMINGUE TO NEW ORLEANS: MIGRATION AND INFLUENCES, 24-28 (2007); Paul F. Lachance, *The 1809 Immigration of Saint-Domingue Refugees to New Orleans: Reception, Integration and Impact*, 29 LA. HIST. 109 (1988).

States as their new sovereign, while some in the Territory were undoubtedly already citizens of the United States. It was the male inhabitants of European origin, the “white” inhabitants, who alone were actual or potential full citizens.

It is clear that the new Governor, W. C. C. Claiborne, was quite uncertain of the status of the individuals in the Territory, and the authority he had to issue passports and letters of protection to them if they were traveling by sea to Europe or the United States.⁸³ He would only issue these to individuals who had lived in the province before it was formally transferred to the United States on December 20, 1803.⁸⁴ He designated the recipients as “Citizens of the Province of Louisiana” under the government and protection of the United States.⁸⁵ In 1804, one Congressional legislator declared that the inhabitants of Louisiana were not U.S. citizens.⁸⁶

In 1806, Claiborne was anxious about the intentions of Spain, and the actions of the local Spanish authorities seemed hostile.⁸⁷ In April of that year, he was worried that those in the Territory who had not taken the oath of allegiance to the United States (“much the greater number”) might not be liable to trial for treason if they took up arms on behalf of Spain against the United States. This meant that he was suspicious of the fact that the French consul in New Orleans would not give him a list of those inhabitants who considered themselves to be French citizens.⁸⁸ At the end of April, Claiborne would only give certificates of citizenship to men who had sworn the oath

⁸³ BROWN, LOUISIANA PURCHASE, *supra* note 78, at 96.

⁸⁴ *W. C. C. Claiborne to James Madison, Feb. 4, 1804*, in 1 WILLIAM C. C. CLAIBORNE, OFFICIAL LETTER BOOKS OF W. C. C. CLAIBORNE, 1801-1816 377-78 (Dunbar Rowland ed., 1917) [hereinafter CLAIBORNE, LETTER BOOKS]; BROWN, LOUISIANA PURCHASE, *supra* note 78, at 96.

⁸⁵ *Form of Passport*, in 1 CLAIBORNE, LETTER BOOKS, *supra* note 83, at 379.

⁸⁶ BROWN, LOUISIANA PURCHASE, *supra* note 78, at 107.

⁸⁷ J. C. A. STAGG, BORDERLINES IN BORDERLANDS: JAMES MADISON AND THE SPANISH-AMERICAN FRONTIER, 1776-1821 54-56 (2009); Jared W. Bradley, *W.C.C. Claiborne and Spain: Foreign Affairs Under Jefferson and Madison, 1801-1811*, 12 LA. HIST. 297, 300-302, 312-14 (1971).

⁸⁸ *W. C. C. Claiborne to James Madison, Apr. 2, 1806*, in 3 CLAIBORNE, LETTER BOOKS, *supra* note 84, at 283.

of allegiance, supported by the oaths of two citizens of the Territory.⁸⁹ It may be noted that the Spanish Commandant at Baton Rouge (part of the Spanish colony of West Florida) was requiring passports from all individuals travelling from the Territory of Orleans into Spanish territory.⁹⁰

Claiborne's worries about treason trials were to some extent allayed by the attitude of the Superior Court of the Territory during the jury trial in June of a "Spaniard" for murder.⁹¹ The accused had claimed he was entitled to trial by a jury of his "countrymen," which the Court had rejected.⁹² Claiborne informed the Secretary of State, James Madison, that this meant that the Superior Court had decided that those who resided in the Territory at the cession—and had not withdrawn with the Spanish and French authorities—were citizens of the United States.⁹³ One may wonder at the value of this decision as a precedent, given the court did not give reasons for rejecting the argument of the accused.⁹⁴ During the political frenzy arising out of the activities of Aaron Burr, Julien Poydras, as President of the Legislative Council, assured Governor Claiborne in January 1807 that the "ancient Inhabitants" of the Territory were loyal, even if they did "not yet possess all the privileges enjoyed by the American citizen."⁹⁵

Thus, it was only after the Territory joined the Union as the State of Louisiana in 1812 that the issue of citizenship was finally resolved. It is worth noting that the second section of the act enabling the people of Louisiana to form a constitution set out the electorate to choose the

⁸⁹ *Circular to Notaries Public and to Clerk of Superior Council, Apr. 30, in 3 CLAIBORNE, LETTER BOOKS, supra note 84, at 295.*

⁹⁰ *W. C. C. Claiborne to Carlos de Grand Pré, Apr. 8, 1806, in 3 CLAIBORNE, LETTER BOOKS, supra note 84, at 287.* On some of the complexities of this situation, see Seán Patrick Donlan, *Entangled up in Red, White and Blue: Spanish West Florida and the American Territory of Orleans, 1803-1810, in ENTANGLEMENTS IN LEGAL HISTORY: CONCEPTUAL APPROACHES 213* (Thomas Duve ed., 2014).

⁹¹ BROWN, *LOUISIANA PURCHASE, supra note 77, at 166-67.*

⁹² *W. C. C. Claiborne to James Madison, June 25, 1806, in 3 CLAIBORNE, LETTER BOOKS, supra note 84, at 345-46.*

⁹³ *W. C. C. Claiborne to James Madison, June 25, 1806, in 3 CLAIBORNE, LETTER BOOKS, supra note 84, at 345-46.*

⁹⁴ *W. C. C. Claiborne to James Madison, June 25, 1806, in 3 CLAIBORNE, LETTER BOOKS, supra note 84, at 345-46.*

⁹⁵ Poydras, *Address, supra note 11, at 111. See, e.g.,* GEORGE DARGO, *JEFFERSON'S LOUISIANA: POLITICS AND THE CLASH OF LEGAL TRADITIONS 89-131* (rev. ed. 2009).

representatives to form a convention.⁹⁶ This was to consist of all free white male citizens of the United States who had resided within the Territory for at least a year, and who had paid taxes, and all other persons qualified to vote for representatives in the General Assembly of the Territory.⁹⁷ *Desbois's Case* in 1812 provided that an immigrant to the territory before statehood acquired a right of naturalization or Territorial citizenship, which became U.S. citizenship when the territory was admitted as a state of the Union.⁹⁸

Citizenship was thus a very lively issue in the Territory of Orleans at the time that Moreau Lislet and Brown were drafting the Digest. It must have been very clear that the French conception of *droits civils*, their acquisition and loss, with their relationship to citizenship and possession of the quality of being “French” offered little guidance in the situation of the Territory. Despite mentioning “deprivation of civil rights,” the first title of the Digest instead focuses on the type of material found in Domat, and the limitations on “rights” according to nature and according to law, such as enslavement and the arbitrary restrictions due to age, even if age is at natural law a reason for restricting exercise of rights.⁹⁹ It is really quite different from the Code civil, reflecting a more traditional, even natural-law, approach.

VII. ACTS OF CIVIL STATUS, DOMICILE, AND ABSENCE

The second title of the French Code and its *Projet* both deal with acts of civil status, *des actes de l'état civil*. At a practical level, this concerns the registration of births, marriages, and deaths, with their various formalities; but at a deeper level “l'état civil” is the situation of an

⁹⁶ BROWN, LOUISIANA PURCHASE, *supra* note 78, at 188.

⁹⁷ BROWN, LOUISIANA PURCHASE, *supra* note 78, at 188.

⁹⁸ *In re Desbois (Desbois' Case)*, 2 Mart. (o.s.) 185 (La. 1812). See JAMES H. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870 251-53 (1978).

⁹⁹ DIGEST OF 1808, *supra* note 8, at 8-9 (bk. 1, tit. 1, arts. 1-12).

individual in the family and wider society as determined by this documentation of given name, family name, sex, date and place of birth, parentage, nationality, domicile, matrimonial status, and finally death.¹⁰⁰ There is no equivalent in the Digest.

Amos and Walton explained the idea very well in English:

A person's *état civil* is the group or complex of qualities or attributes by which he is principally characterized as a subject of capacities and rights—his nationality, age, parentage, adoption, emancipation, status in respect of marriage, subjection to interdiction, and so forth.¹⁰¹

Works on French legal history tend to date the concept back to the activities of the church requiring parish priests to keep registers of baptisms and marriages, as well as various royal ordinances.¹⁰² Modern studies tend to link it with ideas of identity.¹⁰³ The connection of the system of registration with the Roman Catholic church created problems with and for those who were Jewish or Protestant. In the eighteenth century, the Bourbon monarchy started to create a more laicized regime that allowed for more general, better identification of its subjects and groups that caused anxiety such as deserting soldiers, migrants, and foreigners, through mechanisms such as registers and passports.¹⁰⁴ In short, the French monarchy was progressively creating a system of identifying individuals through written modes of proof rather than through witness testimony.¹⁰⁵ One modern study notes that “*état civil*” is a notion akin to that of persons, before commenting that an individual “without an *état civil* is not recognized by the law” and is unable to exercise the rights possessed.¹⁰⁶

¹⁰⁰ CODE CIVIL, *supra* note 36, arts. 10-28. See, e.g., HALPÉRIN, FRENCH CIVIL CODE, *supra* note 37, at 19-20, 105 (appendix added by Tony Weir).

¹⁰¹ MAURICE SHELDON AMOS & FREDERICK PARKER WALTON, INTRODUCTION TO FRENCH LAW 31 (1935).

¹⁰² JEAN-PHILIPPE LÉVY & ANDRÉ CASTALDO, HISTOIRE DU DROIT CIVIL 33-36 (2nd ed. 2010).

¹⁰³ JEAN-PIERRE GUTTON, ÉTABLIR L'IDENTITÉ: L'IDENTIFICATION DES FRANÇAIS DU MOYEN ÂGE À NOS JOURS 9-53 (2010) [hereinafter GUTTON, ÉTABLIR L'IDENTITÉ].

¹⁰⁴ VINCENT DENIS, UNE HISTOIRE DE L'IDENTITÉ: FRANCE, 1715-1815 (2008).

¹⁰⁵ Gérard Noiriel, *L'Identification des citoyens: naissance de l'état civil républicain*, 13 GENÈSES 3, 4 (1993) [hereinafter Noiriel, *L'Identification des citoyens*].

¹⁰⁶ Maryline Bruggeman, *Le rôle de l'état civil*, in ÉTAT CIVIL DANS TOUS CES ÉTATS 23, 23, 25 (Claire Neirinck ed., 2008).

Lacking juridical identity, such individuals in theory cannot take advantage of their legal personalities.¹⁰⁷

The system found in the French Code originates in a *décret* of 1792 that secularized the existing parochial system.¹⁰⁸ A contemporary discussion described *état civil* under the *décret* as “the position which the natural order of birth assigns to an individual.” It provided the “precise position of the rank that the individual must occupy one day.” It was, “in one word, the link which will exist between this individual and the other members of society.”¹⁰⁹ Further legislation led to a system of registers that were to be kept by municipalities.¹¹⁰ It was a system whereby it was possible to know the *identité civile des personnes*, and to know whether they were French citizens and could become active citizens.¹¹¹ When established, the system of registers initially encountered problems resulting from the literacy of those charged with the task of keeping the registers and the varied languages found within the new Empire.¹¹²

Portalis explained the thinking in his *Discours de 3 frimaire*:

What one calls the *état civil* of a man is nothing other than the ability to exercise the rights that the civil laws guarantee to the members of the society. This *état* being the most sacrosanct of all property, the legislator has pronounced himself its guardian, by establishing registers intended to record the most important deeds of private life.¹¹³

¹⁰⁷ Maryline Bruggeman, *Le rôle de l'état civil*, in *ÉTAT CIVIL DANS TOUS CES ÉTATS* 23, 25 (Claire Neirinck ed., 2008).

¹⁰⁸ *Décret qui détermine le mode de constater l'état civil des citoyens*, Sept. 20, 1792, in 4 *COLLECTION COMPLÈTE DES LOIS, DÉCRETS, ORDONNANCES, RÉGLEMENTS, AVIS AU CONSEIL-D'ÉTAT, PUBLIÉE SUR LES ÉDITIONS OFFICIELLES DU LOUVRE; DE L'IMPRIMERIE NATIONALE; PAR BAUDOIN; ET DU BULLETIN DES LOIS* 482-88 (J. B. Duvergier ed., 2nd ed. 1834).

¹⁰⁹ *État civil des citoyens, ou analyse sommaire du décret du 20 Septembre 1792, et celui du 21 Janvier dernier* 1 (Paris: Knapen, 1793) (“On appelle état civil, la place que l'ordre naturel de la naissance assigne à un individu, dans la société. C'est la fixation précise du rang qu'il doit y occuper un jour; c'est, en un mot, le rapport qui existera entre cet individu, et les autres membres du corps social.”).

¹¹⁰ GUTTON, *ÉTABLIR L'IDENTITÉ*, *supra* note 103, at 108-11; Noiriél, *L'Identification des citoyens*, *supra* note 104, at 3, 5-7.

¹¹¹ Noiriél, *L'Identification des citoyens*, *supra* note 105, at 3, 5-7.

¹¹² Noiriél, *L'Identification des citoyens*, *supra* note 105, at 7-17.

¹¹³ Portalis, *Discours du 3 frimaire an X*, *supra* note 38, at 102 (“Ce qu'on appelle l'état civil d'un homme n'est autre chose que l'aptitude à exercer les droits que les lois civiles garantissent aux membres de la société. Cet état

The Code civil accordingly set out what was required for an “acte de l’état civil” and the duties of the “officiers de l’état civil.”¹¹⁴ The draft articles had been subject to significant and detailed discussion before the Conseil d’État.¹¹⁵ While all modern legal systems have methods of registration and keep records for proof, there was no direct equivalent to the elaborate French system in the Territory, other than the traditional registers and the registers of the notaries. The French legal concept that it was an individual’s possession and demonstration of his or her *état civil* that provided entitlement to the rights set out in the *Code civil* was rather alien to the Digest, which, after all, had to provide for a fluid and mobile society with regular and continuous immigration.

The concept of *état civil* also has an impact on the French Projet’s and Code’s treatments of domicile. This means that although the title on domicile in the Digest is similar, there are subtle differences—though Batiza has rightly pointed to the influence of the Code civil on the Digest’s articles.¹¹⁶

The Projet’s articles on domicile draw on some of the thinking about types of law found in its preliminary book. This leads to its provisions being expressed in a complex way, emphasizing that domicile is considered under two aspects: first as regards the “droits et obligations politiques du citoyen” and secondly as regards his “droits” and “actes purement civils.”¹¹⁷ The citizen’s domicile is at the place where he exercises his “droits politiques”; the domicile of others, such as unmarried women or widows and persons who do not enjoy the rights of a citizen, is at the place

étant la plus sacrée de toutes les propriétés, le législateur s’en est rendu le gardien, en établissant des registres destinés à constater les actes les plus importants de la vie civile.”)

¹¹⁴ HALPÉRIN, FRENCH CIVIL CODE, *supra* note 37, at 19.

¹¹⁵ Discussions, motifs, rapports et discours. Livre Premier. Des Personnes. Titre Second. Des actes de l’état civil in P. A. FENET, RECUEIL COMPLET DES TRAVAUX PRÉPARATOIRES DU CODE CIVIL 3-80 (réimpression de l’édition de 1827 (1968)).

¹¹⁶ Batiza, *Louisiana Civil Code of 1808*, *supra* note 24, at 47.

¹¹⁷ PROJET DE L’AN VIII, *supra* note 37, at 29 (Liv. 1, tit. 3, art. 2).

where those individuals have fixed their principal establishment.¹¹⁸ The Code civil eventually settled on the rule that the domicile of each Frenchman, as regards his exercise of his “droits civils,” was to be the place where he had his principal establishment.¹¹⁹ In both the Projet and Code civil, wives followed the domicile of their husbands, and minors of their father and mother or tutor, while servants were domiciled with those whom they served if they lived in the same house.¹²⁰

The Digest’s key article is very similar to that of the Code civil, but, like the *Projet de l’an VIII*, draws on the concept of “citizen” to express its rule, and uses the term “parish” instead of place.¹²¹ All three codes use the term “citizens” in connection with acceptance of a “public office” or “function publique.”¹²² There is no reference in the Digest, however, to the concept of “droits civils,” with its allusion to the concept of “état civil.” But the Digest’s use of the term “citizen” is notable. One assumes it has to mean citizen of the Territory; but one does wonder how much thought was put into the choice of the term.

The title “Des absents” in the Digest is also closely related to its models. It requires a relatively complicated, if short, discussion. The Digest devotes five chapters to the topic. The last four of these are very clearly drawn from the French Code civil and, to a more limited extent, its *Projet*.¹²³ We know from Maleville that this title in the Code civil went through at least five

¹¹⁸ *Id.* at 29 (Liv. 1, tit. 3, arts. 3-4).

¹¹⁹ CODE CIVIL, *supra* note 37, art. 102 (“Le domicile de tout Français, quant à l’exercice de ses droits civils, est au lieu où il a son principal établissement.”)

¹²⁰ PROJET DE L’AN VIII, *supra* note 37, at 29-30 (Liv. 1, tit. 3, arts. 5-8); CODE CIVIL, *supra* note 37, arts. 108-10.

¹²¹ DIGEST OF 1808, *supra* note 8, at 12-13 (bk 1, tit. 2, art. 1): (“Le domicile de chaque citoyen est dans la paroisse où il a son principal établissement.”) For an exploration of the historical and modern idea of domicile with a Louisiana perspective, see Nikolaos A. Davrados, *Louisiana, My Home Sweet Home: Decodifying Domicile*, 64 LOY. L. REV. 287 (2018).

¹²² PROJET DE L’AN VIII, *supra* note 37, at 30 (Liv. 1, tit. 3, art. 9); CODE CIVIL, *supra* note 37, art. 106; DIGEST OF 1808, *supra* note 8, at 12-13 (bk. 1, tit. 2, art. 5).

¹²³ Batiza, *Louisiana Civil Code of 1808*, *supra* note 24, at 47-48.

drafts.¹²⁴ Like that on domicile, this title of the French Code has a close relationship to that on *état civil*. This was an area of law potentially very important both in a France involved in extensive wars and in the frontier society of the Territory of Orleans. Individuals could readily vanish or go missing, and the absent was “he who had disappeared from his domicile, without anyone having since had any news of his existence.”¹²⁵

The Digest’s first chapter, however, differs quite sharply from the equivalent sections of the Code civil. It sets out a system for the appointment of a curator to administer the property, “either moveable or immovable” (as it states in the English text, the French simply states the “biens”), of an absent person.¹²⁶ The Digest provided that the judge of the parish should appoint a curator to manage the property of someone who is absent from the Territory either without having appointed someone to manage it or should the person nominated have died.¹²⁷ It also deals with the appointment of a curator *ad litem* to an absent without property.¹²⁸ The Code civil provided that in these circumstances the tribunal of first instance should appoint a notary to act in the interest of absents at the request of those with an interest; at the same time, the public ministry was charged specially to look after the interests of absent persons.¹²⁹ After four years’ absence without any news, the tribunal could order an inquiry involving the “commissaire du Gouvernement.”¹³⁰ The decisions were to be reported to the Minister of Justice, who was to make them public.¹³¹ In both

¹²⁴ 1 JACQUES DE MALEVILLE, ANALYSE RAISONNÉE DU CODE CIVIL AU CONSEIL D’ÉTAT 126-27 (Paris: Veuve Nyon etc., 1805) [hereinafter MALEVILLE, ANALYSE RAISONNÉE].

¹²⁵ 1 MALEVILLE, ANALYSE RAISONNÉE, *supra* note 124, at 127 (“l’absent est celui qui a disparu de son domicile, sans qu’on ait eu depuis aucune nouvelle de son existence.”).

¹²⁶ DIGEST OF 1808, *supra* note 8, at 14-15, bk. 1, tit. 3, art. 1.

¹²⁷ DIGEST OF 1808, *supra* note 8, at 14-15, bk. 1, tit. 3, art. 1.

¹²⁸ DIGEST OF 1808, *supra* note 8, at 14-17, bk. 1, tit. 3, art. 8.

¹²⁹ CODE CIVIL, *supra* note 37, arts. 112-14.

¹³⁰ CODE CIVIL, *supra* note 37, arts. 115-17.

¹³¹ CODE CIVIL, *supra* note 37, arts. 118-19.

codes, the formal decision of absence led to heirs being given provisional possession of the property of the absent person.¹³²

The difference in procedures reflects the Digest's preservation of the existing practice, found in the Spanish law, ultimately going back to the Roman, of appointing a curator to deal with the property of absent persons.¹³³ It is also found in Domat;¹³⁴ but the practice of appointing curators *ad litem*, and then of curators *bonis* to absent persons, had apparently ceased in France, as a result of the Ordonnance of 1667 on civil procedure, concerning the citation of absent persons.¹³⁵ In contrast to the Digest, the Code civil, with its more formal and elaborate governmental procedures, is continuing its focus on *état civil*. The Digest however, draws much of the detail of its subsequent articles in the second to fifth chapters from the system set out in the provisions of the French code.¹³⁶ Indeed, if one looks at the particular references on the verso interleaves of the de la Vergne volume for these chapters, one finds a near complete lack of references to any sources, except a single citation of Pothier's treatise on successions and a note that one article is a derogation from the *Fuero real*.¹³⁷ It is an interesting and telling example of the phenomenon of "omissions" pointed out by Vernon Palmer.¹³⁸

VIII. CONCLUSION

¹³² CODE CIVIL, *supra* note 37, arts. 123-26. ; DIGEST OF 1808, *supra* note 8, at 16-21 (bk. 1, tit. 3, arts. 9-24).

¹³³ See THE LAWS OF LAS SIETE PARTIDAS WHICH ARE STILL IN FORCE IN THE STATE OF LOUISIANA, Title 2, Law 2 (L. Moreau Lislet & Henry Carleton trans. & eds., 1820; repr. 1978).

¹³⁴ 1 DOMAT, LOIX CIVILES, *supra* note 45, at 160 (Part. 1, bk. 2, tit. 2, sect. 1, art. 13).

¹³⁵ L'ORDONNANCE DE 1667, MISE EN PRATIQUE, CONFORMÉMENT À LA JURISPRUDENCE ET À L'USAGE DU PARLEMENT DE TOULOUSE 49 (Toulouse: Dalles & Moulas, 1759) (citing Ordonnance tit. 2, art. 8). See Remarks of Regnier & Tronchet, in DISCUSSIONS, MOTIFS, RAPPORTS ET DISCOURS. LIVRE PREMIER. DES PERSONNES. TITRE QUATRIÈME. DES ABSENS, in 8 P.A. Fenet, RECUEIL COMPLET DES TRAVAUX PRÉPARATOIRES DU CODE CIVIL, at 365-66 (réimpression de l'édition de 1827 (1968)).

¹³⁶ Batiza, *Louisiana Civil Code of 1808*, *supra* note 24, at 47-48.

¹³⁷ DE LA VERGNE VOLUME, *supra* note 17, at 17 and 21 (interleaves facing Article 9 and Article 29).

¹³⁸ VERNON VALENTINE PALMER, THE LOUISIANA CIVILIAN EXPERIENCE: CRITIQUES OF CODIFICATION IN A MIXED JURISDICTION 19-49 (2005).

At a very general level, of course, the Code civil, and through it the Digest, are both following a variation of the trichotomy of persons, things, and actions, developed, or perhaps perfected, by Gaius and used in Justinian's *Institutes*. The redactors have divided "things" into property and how it is acquired, while discarding "actions." It is a structure also found in Blackstone, of course. But this traditional institutional structure, though it generally allows room for variation, does not include titles in the book "persons" on "état civil," domicile, and absents.¹³⁹ Earlier French works, and indeed institutional works found in other countries, had discussed questions arising out of these legal categories and issues in differing places when relevant in dealing with specific issues, such as the succession to an absent person, though Domat does have a specific section on "domicile."¹⁴⁰ None of the three draft codes produced by Cambacérès possessed a title on domicile, nor did the *Projet* of Jacqueminot.¹⁴¹ One first appears in the *Projet* de l'an VIII.¹⁴² Cambacérès's first *Projet* of 1793 introduces an account of absents as the final title to the book on persons, the latter significantly entitled "De l'État des personnes."¹⁴³ And it is presumably under the influence of Cambacérès' drafts that the title appears in the *Projet*.¹⁴⁴ But all of this could bear further research.¹⁴⁵

¹³⁹ Jakob Fortunat Stagl, *Law, Roman, Institutional Scheme of*, in OXFORD CLASSICAL DICTIONARY (Sander Goldberg ed. online ed. 2016); Klaus Luig, *The Institutes of National Law in the Seventeenth and Eighteenth Centuries*, 17 JUR. REV. 193 (1972); Donald R. Kelley, *Gaius Noster: Substructures of Western Social Thought*, 84 AM. HIST. REV. 619 (1979); John W. Cairns, *Institutional Writings in Scotland Reconsidered*, 4(3) J. LEGAL HIST. 76 (1984); John W. Cairns, *Blackstone, an English Institutist: Legal Literature and the Rise of the Nation State*, 4 OXF. J. LEGAL STUD. 318 (1984).

¹⁴⁰ CLAUDE SERRES, *LES INSTITUTIONS DU DROIT FRANÇOIS, SUIVANT L'ORDRE DE CELLES DE JUSTINIEN* 414-18 (Paris: Veuve Cavelier & Fils, 1753) (discussing issues of succession arising out of absence); 1 DOMAT, *LOIX CIVILES*, *supra* note 45, at 109-11 (Part. 1, bk. 1, tit. 16, sect. 3).

¹⁴¹ PROJETS DE CAMBACÉRÈS ET DE JACQUEMINOT, *DISCOURS PRELIMINAIRES*, in 1 P. A. FENET, *RECUEIL COMPLET DES TRAVAUX PRÉPARATOIRES DU CODE CIVIL* 1, 99, 140, 327 (réimpression de l'édition de 1827 (1968)) [hereinafter PROJETS DE CAMBACÉRÈS ET DE JACQUEMINOT].

¹⁴² PROJET DE L'AN VIII, *supra* note 37, at 29-30.

¹⁴³ PROJETS DE CAMBACÉRÈS ET DE JACQUEMINOT, *supra* note 140, at 13, 34-36.

¹⁴⁴ PROJETS DE CAMBACÉRÈS ET DE JACQUEMINOT, *supra* note 140, at 115-16, 237-40; PROJET DE L'AN VIII, *supra* note 37, at 30-37.

¹⁴⁵ I have not had access to a copy of STEFANO SOLIMANO, *VERSO IL CODE NAPOLÉON. IL PROGETTO DI CODICE CIVILE* DI GUY JEAN-BAPTISTE TARGET (1798-1799) (1998), though I have no reason to believe it would change the

I could continue. But I hope I have said enough to indicate that there is an important difference between the Digest and its two French models in its account of persons. That difference lies in how the respective drafters have conceived of the legal category of persons. Drawing on a traditional approach, as manifested in, for example, Blackstone and Domat, Brown and Moreau Lislet have carried on a traditional understanding of persons as legal actors, whether natural (including slaves) or artificial, such as corporations. Their two main structural models had a different approach. In the famous *Discours Préliminaire*, as Professor Halpérin has pointed out, Portalis explained that their ambition was to “bring law and social behavior into harmony and to promote family feeling, which . . . conduces so greatly to the sense of citizenship.”¹⁴⁶ The French Code and its *Projet* emphasized ideas of being French, of citizenship, and, above all, of *état civil*. This means that it was in their approaches to the private rights of citizens or inhabitants that the French and Louisiana codes differed in their respective accounts of persons, as the Digest has remained much closer to the traditional idea of persons, even if it has copied from its French models the inclusion of titles on absence and domicile. It is also tempting to see these provisions of the Code civil reflecting a more authoritarian state than those of the Digest, one where the legislating state—not the law of nature—defines one’s *état civil* and consequent *droits civils*.¹⁴⁷ The French Code’s focus on the conception of *état civil* may also explain the differences between the Code civil and the Digest in the specific naming of some of the titles of their first books. The

discussion here. See XAVIER MARTIN, MYTHOLOGIE DU CODE NAPOLÉON: AUX SOUBASSEMENTS DE LA FRANCE MODERNE 301-2 (2003).

¹⁴⁶ HALPÉRIN, FRENCH CIVIL CODE, *supra* note 37, at 17; Jean-Etienne-Marie Portalis, *Discours préliminaire sur le projet de Code civil présenté le 1^{er} pluviôse an IX par la commission nommée par le gouvernement consulaire*, in JEAN ÉTIENNE-MARIE PORTALIS, DISCOURS ET RAPPORTS SUR LE CODE CIVIL, PRÉCÉDÉS DE L’ESSAI SUR L’UTILITÉ DE LA CODIFICATION DE FRÉDÉRIC PORTALIS 1, 61-62 (2010).

¹⁴⁷ See, e.g., Halpérin, *Fabrication du Code* *supra* note 12, at 13; HALPÉRIN, FRENCH CIVIL CODE, *supra* note 37, at 58, 72-73. The authoritarian and patriarchal focus of the Code civil des français has been emphasized since the first publication in 1994 of the work of XAVIER MARTIN, NATURE HUMAINE ET RÉVOLUTION FRANÇAISE: DU SIÈCLE DES LUMIÈRES AU CODE NAPOLÉON (3rd ed. 2015 (1994)), who focuses on the revolutionaries’ materialist understanding of what it is to be human.

French Code employs more abstract forms—“Du mariage,” “De la paternité et de la filiation,” “De la puissance paternelle”—while the Digest, almost certainly following Blackstone’s *Commentaries*, is more concrete: “Du mari et de la femme,” “Des pères et des enfants.”¹⁴⁸ But I should add that I would not claim to have here completely resolved the problems around these issues.

I shall finish by returning to natural law, to which, after all, lawyers in Louisiana were directed, along with received usages, to turn when statute was silent.¹⁴⁹ The Digest certainly seems more overtly influenced by natural law than does the Code civil des français. This influence lies at the heart of some of the differences, at least in expression, between the two, and the Digest’s apparently rather less authoritarian approach. But I am not sure that one could say that the Digest is in any significant way more of a product of the modern natural-law school than is the Code civil. One gets the impression that the Digest’s two redactors were pragmatic in their approach. This is not to say that they were unprincipled, but rather that their aim was to provide a working codification to resolve problems with the state of the laws in the Territory. This they clearly did, and in 1823, the *Preliminary Report* of those producing the new Louisiana Code considered the Digest, if imperfect, to have been a success.¹⁵⁰ One of Brendan Brown’s last articles was on the constitutional system of the United States and Puerto Rico. He stressed the natural-law foundations of the U.S. Constitution.¹⁵¹ In discussing issues of citizenship and the law of persons, I have here touched on some of his typical themes. I only hope to have been worthy of the honor of the opportunity to deliver this lecture in honor of his memory.

¹⁴⁸ Cairns, *Blackstone in the Bayous*, *supra* note 31, at 88-89.

¹⁴⁹ DIGEST OF 1808, *supra* note 8, at 6-7 (prel. tit. art. 21). In the French text, “loi primitive” is an evident typesetting error for “loi positive.”

¹⁵⁰ Edward Livingston, Louis Moreau Lislet & Pierre Derbigny, Preliminary Report of the Code Commissioners (February 13, 1823), in LOUISIANA LEGAL ARCHIVES. VOLUME 1. A REPUBLICATION OF THE PROJET OF THE CIVIL CODE OF LOUISIANA OF 1825, LXXXV, XCIII (1937).

¹⁵¹ Brendan F. Brown, *The United States Constitutional System and Puerto Rico*, 11 REV. DER. P.R. 11 (1971).