VNIVERSITAT DE VALÈNCIA
FACULTAD DE DERECHO

Departamento de Filosofía del Derecho y Política

Programa de Doctorado en Sostenibilidad y Paz en la Era Posglobal

THE CODIFICATION OF CIVIL LAW IN THE 19TH-CENTURY UNITED STATES

TESIS DOCTORAL
(para la obtención del grado de Doctor en Derecho por la Universitat de València)

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Valencia, Enero 2021

À mes doudous,

To all of you who got me through hell and back for a moment, often, or forever, yesterday, or today, with a simple smile or anything else,

Merci

Agradecimientos – Acknowledgement

I wanted to express my deep gratitude to Professor Aniceto Masferrer without whom all of this would not be possible, without who I would have given up. Thank you for making this possible, for taking the time and energy to guide me through this dissertation.

I also wanted to thank the University of Valencia for welcoming me to their doctoral program. Thank you to the University of Michigan Law School for granting me the opportunity to conduct my research. Thank you for the French university that allowed me to teach in their rank and grow so much through the years.

Thank you to all the academics who took the time to counsel me and guide me through this research. Thank you to all of my proofreaders for reading this work.

Thank you all of you, I would not have made it without you

List of Abbreviations

C. Nap	Code civil des Français (Code Napoléon), 1804
LA. Digest (1808)	A Digest of the Civil Laws in Force in the Territory of Orleans
LA C.CIV. (1825)	Code civil de l'état de la Louisiane, 1825
LA R. C.CIV (1870)	The Revised Civil Code of the state of Louisiana, 1870
N.Y. Civ. Code (1865)	Civil Code of the State of New York, 1865
GA Code (1861) (1863)	The code of the State of Georgia
Ca. Civ. Code (1872)	The Code of the State of California, 1872
DT Code (1877)	The civil code of the Territory of Dakota
DTR Code (1877)	The Revised Codes of the Territory of Dakota, 1877
NDR Code (1895)	The Revised code of the state of North Dakota, 1895
MO. Code (1895)	Montana Code Annotated,1895
SDR Code (1903)	The Revised codes State of South Dakota

THE CODIFICATION OF CIVIL LAW IN THE UNITED STATES DURING THE 19TH CENTURY

Introduction

Codification

A code, or not a code – that is the question!
Wheter 'tis better in the law to suffer
The flaws and defects of numerous practices,
Or to take arms against a sea of troubles,
And, by revising, end them! – To prune – To change –
No more! And by a code to say we end
Abuses, and the thousand natural pests
The law is heir to: 'tis a consummation
Devoutly to be wished. – To prune – To change –
To change, and perhaps destroy! Ay, there's the rub!
For in that sleep of law what ills may come,
When we have shuffled off the dreadful plague, Must give us a pause...
[T]hat the dread of something after change –
(Those undiscovered evils, from whose ruin No government returns) – puzzles we will,
And makes us rather bear those ills we have
Than fly to others that we know not of.
Thus Wisdom does make cowards of us all.[1]

"A code, or not a code—that is the question!". Many countries asked themselves that very question. Whether it was because of inherent issues in the law or a drive to enter rationalized times, every country asked itself this question at some point. To this question the answers differ from one place to another, from one tradition to another, from one state to another, and from one legal matter to another. Some answered the call; some rejected it. That's the beauty of codification, it has called upon every place to talk and decide about it.

As much as codification is famous, its definition remains a mystery in that it is a constant evolving notion. The word code come from the Latin *codex* which is, in antic Rome, a new way of presenting a text. Before that a document was contained in a roll.

[1] Unknow lawyer, "Codification", United States Law Intelligencer and Review 2 (1830): 268.

Now it is made of is different pieces of paper joined on the left side. In short, a *codex* was what nowadays we know as a book. Hence, during century a *codex* was a formal way to present a document, legal or not, and had no link with the law.

With Justinian Code[2] the vocabulary entered the legal field. This code is the first legal document called code that regroups different legal pieces of information and laws on a subject. The evolution of the word continues and during the middle ages the word *codex* switch to compilation or *collectio*, those are a gathering of different canon laws organized alphabetically. It is only in the 16th century that the word code will regain its roman meaning as an arrangement of law and will be used outside of canon law in the different continental European countries. Back then, the states were using the vocabulary of code instead of compilation but they both correspond to the same idea. Code will gain the sense we now use, only with the Napoleon Code in the 19th century[3].

It is clear that the notion of code has evolved and changed a lot throughout the centuries up to a point that even nowadays there is not one internationally accepted definition of it. Accordingly, the definition of codification and code vary depending on chosen criteria and what it is supposed to cover. In his book "*Le concept de code en Europe Occidentale du XIIe au XIXe siècle*"[4], Jacques Venderlinden explains that the definition of codification differs from one state or time to another and concludes that the definition of codification is consequently more historical than generic. While in Rome a code is just a document with no particular legal organizational system, in Napoleonic France a code means a rationalization of the law and is the sole source of

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[2] Reimann M., "The school against codification: Savigny, Carter, and the defeat of the New York Civil Code", *American Journal of Comparative Law*, 37 (1989), p. 95-119.

[3] Herman S., "From philosophers to legislators and legislators to gods: the French civil code as Secular Scripture", *Illinois Law Review,* 1984, p. 612.

[4] Vanderlinden J., *Le concept de code en Europe occidentale du XIIIe au XIXe siècle, Essai de définition*, Editions de l'institut de sociologie, Bruxelles, 1967.

law on a legal field. It is not our purpose here to list all the existing definitions of civil code and codification, firstly because it has already been done by some scholars[5] and secondly because every timeframe adds its specificities onto the concept.

However, it is crucial for this work to decide upon a definition of codification and code in order to clarify the research and what is meant every time the vocabulary is used. One of the frequent definitions of code is: "A code is a gathering a legal rule on a particular legal field enforceable by the state". Some researchers add to this definition the fact that the code is composed of articles written with brief formula, whereas some other would emphasize the idea of rationalization of the law through the code or the exhaustivity of it. For the purpose of this work, it was decided to select a larger definition.

The selected definition is the one Pr Vanderlinden deduced in his book from the different criteria used to define this concept. Making a codification is the creation of a code hence a code is a document that regroups legislation, it must contain most or all the law about one legal field and allow a better understanding of the law[6]. In consequence, a code must have a purpose: creating a better understanding of the law. Indeed, it seems essential to this work to have an emphasis on the purpose of codification, or at least on one purpose of codification. Then the second criteria of the definition is its form as it has to be one single document that regroups the law. The idea of those criteria is to show the gathering of the enforceable laws whereas it arose from statutes, common law, legislation or general legal principles. The third criterion is the scope of the code which has to be all or most of the official legal rules existing about a legal field. That criterion allows one to distinguish a code from a revised statute. Indeed, a code is designed to be a comprehensive and coherent presentation of

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[5] On this matter see Cabrillac R., *Les codifications*, Presse Universitaires de France, Paris, 2002; Vanderlinden, *Le concept de code en Europe occidentale du XIIIe au XIXe siècle.*

[6] Vanderlinden, *Le concept de code en Europe occidentale du XIIIe au XIXe siècle,* p. 15-16.

the law. A revised statute does not qualify as a code or a codification because, even though it is created to allow a better understanding of a legal field, it does not regroup all the existing law about one legal field as it only regroups legislation and not common law dispositions. This definition was chosen because it seems as objective as possible as it is not attached to a state or time but the result of the gathering of the most used criteria used to define a code through time and space.

Codification is often used as one of the main elements to distinguish the common law system from the civil law one as it usually qualifies as the corner stone of the civil law system. Indeed, if we had to find symbol for those two systems one would be a code when for the other one it would be the judge. When the civil law tradition is defined, it is as a legal system where the law mainly originates from the legislation and is organized in different codes[7] the civil law tradition is usually presented as the opposite of the common law system. In the common law system, the law originates mainly from oral tradition meaning jurisprudence.

The term common law has several meanings, but its original one is the law of the English royal court in Westminster. This common law called also common ley in the middle age appears to distinguish the royal legislation from the different legal system existing within the territory, especially in the north where baron could still create law and were rendering the justice[8]. Then it is with time that it will become an expression that will correspond to the law of the court in general and will then became the name of a legal system[9]. One of the distinctiveness of the common law system is

[7] Pejovic C., "Civil law and common law: two different paths leading to the same goal", *Poredbeno Pomorsko Pravo,* 40 (2000), p. 7-32.

[8] Bullier A., *La common law,* Paris, Connaissance du droit, Dalloz, 4eme edition, 2016, p. 1.

[9] Skinner C., "Codification and the common law", *European Journal of Law*, 11 (2009), p. 227.

the importance of fact, law is not big principles but derived from factual elements and the importance of procedural law; it is a very practical law[10]. With the common law,

> "Judges make decisions by analogizing from previous cases, and legal norms and principles emerge slowly from an accumulation of decisions."[11]

Common law is also a legal system characterized by the use of common law meaning judge-made law. In fact, the common law arose from England, this 131 000 square kilometer territory with time influence more than two billion people and now this system can be found all over the world from New Zealand, to England, from Australia to the United States, from southern Asia to southern Africa[12].

Law in the United States start at the colonial era, in the English colonies law has to be in accordance with the English law. Indeed, in most of the charter it is said that the law of England – or of the colonizing countries – are applied within the new territory[13], those kind of formula are found in most of the charter and founding documents of the colonies in America. Hence, during colonial time in the English colonies if there were a decision to be appealed then the case had to travel to England[14]. After the declaration of independence of the thirteen colonies some states will go as far as to forbid the citation of English decision while keeping the previous law in force within the territory. All the former English colonies after the independence kept the same legal system, meaning the common law. They did not go

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[10] Bullier, *La common law*, p. 15.

[11] Skinner, "Codification and the common law", p. 227.

[12] Bullier, *La common law*, p. 146.

[13] Friedman L., *A History of American law,* New York, Third Edition, Broche, 2005, p. 54; *Law in America a Short History*, Modern Library, 2004, p. 128.

[14] Bullier, *La common law*, p. 20.

for a change however most of them with time will repeal English law from their legal corpus in favor of state and federal law. Hence, the common law and common law system are founding element of the American cultural identity.

The civil law and common law traditions are seen as representing two opposite views of the law, and as much as they are presented as antinomic they have more similarities than differences [15] and this work like many other emphasize the similarities of the systems. Indeed, the main difference between them is the chosen creator of the law. In the civil law system, it is the legislator that has the power to create the law whereas in the common law system it is the judge that has this power. The distinction goes even further because usually in the civil law system there is some limitation given to the judge to ensure he would not be able to create law. This conceptual difference regarding the law has for consequence that its source is quite opposite in the two system. In the common law system, it arose for the common law which are the sum of the decision of the court of law whereas in the civil law system the law arose from the legislator usually gathering his legislations into codes of law. That is why it is said that the Roman or civil tradition is constructed around the concept of code and legislation and consider law more as a science when the common law tradition is constructed around facts[16]. These are two very different systems and ways of seeing the law. One relies on general theory prior to events and the other relies on experiments or factual events[17]. That also explain why the legal education is more theoretical in the civil law

[15] Masferrer A, "French codification and "Codiphobia" in common law traditions", *Tulane European & Civil law forum,* 34 (2019), p. 1.

[16] Bercea R., "Le paradoxe de la codification européenne", *SUBB Jurisprudentia*, 2008, p. 66-68.

[17] Wagner W., "Codification of Law in Europe and the Codification movement in the Middle of the Nineteenth Century in the United States", *St. Louis University Law Journal*, 2 (1952-1953), p. 335.

system than in the common law system. Those two different legal systems represent different ideologies that are often represented as opposite and excluding the other[18].

However, the reality is that in both traditions there are elements of the other as they influenced and borrowed from the other legal culture, especially today in a globalized economy. Within the civil law system, jurisprudence can be a source of law as much as legislation can be a source of law in the common law system even if they are not the main source of law or have the same strength. The common law, in a civil law country, work as a statute[19] within a common law country. Statutes are different from civil law legislation because they do not involve the same things. Statutes must be as detailed and precise as possible. They only exist to supplement common law, consequently the judge has barely any interpretation leniency as they apply them only in some extremely specific cases[20], at least in theory. Statutes are usually seen as only enforceable after the first implementation by the court of laws[21]. Statutes are important in the United States during the 19th century to the point where this century is called by scholars "the golden age of statutes"[22]. Statutes even applied differently from civil law legislation are enforceable legislation and transposed a form of influence of the civil law to the common law system.

As far as transposition goes codification also went to the American common law system and the question and subject of codification in the United States is a forgotten one or at least a half forgotten one.

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[18] Reimann M., *The reception of continental ideas in a Common Law World 1820-1920*, p. 9.

[19] Servidio Delabre E., *The legal system of a common law country*, Paris, Dalloz, Hypercours, 2de edition, 2014, p. 220.

[20] Castellucci I., "Law v. Lex: An analysis of a critical relation in Roman and Civil Law", *Global Jurist Advances*, 8-1 (2008), p.1-31, p. 15-16.

[21] Servidio Delabre, *The legal system of a common law country*, p. 221.

[22] Servidio Delabre, *The legal system of a common law country,* p. 221.

> "The subject of a reform in the law is likely to attract the notice of those who are opposed, as well as those who approve it. The subject is in a fair way of being placed fully before the public; it already begins to excite that attention which is importance claims; and a few years will decide the fate of proposed alteration in this country"[23].

Upon its transition from colonial status to fully-fledged state, the United States decided to keep the existing legal system in place, that is, the common law. As colonies, the different states had accepted the system of their colonizers without asking any questions, but with independence comes absolute freedom. If at the time the need for a directly applicable system of law pushed them to maintain the pre-existing system, in the early nineteenth century the country had reached a level of relative stability which allowed the new country to wonder if they should retain the common law system or whether it would make more sense to move to a comprehensive system of code like Louisiana or France. The ramifications of that kind of legal change are huge and have to be carefully considered. Moving to a code system would involve a change in the law but also in the teaching of it, as much for the experienced lawyers as for the junior ones, it is a vast undertaking to switch legal systems.

Called by the American doctrine The American Codification Movement, this debate on the possibility of the codification of the law which took place in the 19th century comes from a simple question: Which legal system would fit best to the special conditions of the newly conceived United States? This question was discussed by people who intimately know how the law works, either in theory or by daily practice[24].

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[23] Thompson P., *Sampson's Discourse and correspondence with various learned jurist upon the History of the law with the addition of several essays, tracts, and documents relating to the subject*, New York, complied and published by Pishey Thompson, 1826, Letter from Cooper to Sampson, p. 68.

[24] Garoupa N., "The Fable of the Codes: The efficiency of the common law, legal origins, and codification movements", *University of Illinois Law Review*, 2012, p. 1475.

On one side were the supporters of English and American common law, the proponents of legal freedom and flexibility, and on the other side were the civil law system supporters, the advocates of code, rigidity and certainty. This debate on the opportunity of a codification of the law arose in the 19th century at two different moments. During the antebellum period it was especially strong from 1820s to 1830S and during the postbellum period from 1870s to 1880s[25]. However, most of the literature has focused on one of the two periods[26]. In fact, legal historiography has paid more attention to the postbellum codification debate rather than to the antebellum one[27]. One of the peculiarities of this theoretical debate about codification is that, if we

[25] Lang M., *Codification in the British Empire and America*, Amsterdam, H. J. Paris, 1924, p. 114-158; Miller Perry, *The Life of the Mind in America from the revolution to the civil war,* New York, Harcourt, Brace & World inc., 1965, p. 105-109; Charles M. Cook, *The American Codification Movement, A study of Antebellum legal reform*, Contribution in legal studies, Wesport, Connecticut, Greenwood Press, 1981, p. 96-120; Weiss G., "The Enchantment of Codification in the Common-Law World", *Yale Journal of International law,* 25 (2000), p. 435, 498–532; Gruning D., "Vive la Différence? Why No Codification of Private Law in the United States? ", *Revue Juridique Themis,* 39 (2005), p. 88; Head J., "Codes, Cultures, Chaos, and Champions: Common Features of Legal Codification Experiences in China, Europe, and North America, *Duke Journal of Comparative & International Law*, 13 (2003), p. 52–88.

[26] Masferrer A., "The passionate discussion among common lawyers about postbellum American codification: An approach to its legal argumentation ", *Arizona State Law Journal*, vol.40, 2008, p. 173-256; "Defense of the Common Law against postbellum American Codification: Reasonable and Fallacious Argumentation", *The American Journal of Legal History*, Vol. L-4 (2008–2010), p. 355-430; Grossman L., "Langdell Upside-Down: The Anticlassical Jurisprudence of Anticodification", *Yale Journal of Law & Humanity*, 19 (2007), p. 149-219.

[27] Field DD., *Centenary Essays: Celebrating One Hundred Years Of Legal Reform,* New York, Alison Reppy ed., 1949, p.46 ; Horwitz M., *The transformation of American Law 1780–1860*, Oxford University Press, 1992, p. 16; Friedman, *A History of American Law*, p. 226-235; Grossman L., "Essay Codification and the California Mentality", *Hastings Law Journal*, 45 (1994), p. 635; "James Coolidge Carter and Mugwump Jurisprudence", *Law & History Review*, 20 (2002) p. 577, p. 602–11; "Langdell Upside-Down: The Anticlassical Jurisprudence of Anticodification", p. 149; Morriss A., "Codification and Right Answers", *Chicago-Kent Law Review* 74 (1999); p. 355; "This State Will Soon Have Plenty of Laws—Lessons from One Hundred Years of Codification in Montana", *Montana. Law Review* 56 (1995)359, p. 396–97; "Decius S. Wade's Necessity for Codification, *Montana Law Review*, 61 (2000), p.407, 426–27; Subrin S;, "David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision", *Law & History Review,* 6 (1988), p. 311; "How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective", (1987) 135 *University of Pennsylvania Law Review,* p. 909; Smith M., "The First Codification of the Substantive Common Law", *Tulane Law Review*, 4 (1930), p. 178; Williston S., "Written and Unwritten Law", *American Bar Association Journal,* 17 (1931), p. 39; Reimann M., "The Historical School Against Codification: Savigny, Carter, and the Defeat of the New York Civil Code", *American Journal of Comparative Law*, 37 (1989), p. 95; Wienczyslaw J. Wagner, "Codification of Law in

put it in perspective with the codification endeavor, the realizations did not happen when the subject was discussed but usually codification of the civil law happened after.

This founder debate of American law is nonetheless barely mentioned in the American literature. In fact, only one book deals with the subject fully. This book written by Charles M. Cook is called "*The American codification movement, a study of legal reform Antebellum*"[28]. As for the rest of the literature, some other references on this subject can be found in some chapters of generic books on American law, but they only mention it quickly[29]. One of the main literatures analyzing the question, outside of Cook's work, are two articles that summarize the debate, while highlighting the role of New York, by Professor Aniceto Masferrer[30]. The rest of the available information on this subject is found disparately in some scholarly articles. It is nonetheless feasible to review the debate by drawing on the many sources available on the subject; indeed, the debate took place mainly during speeches at legal events and in newspaper articles in national or local press.

This debate has its primary sources in public discontent toward the state of the law. The United States at that time was facing a crisis regarding the sources of law. This realization is not new, in fact, some politicians had already asked themselves the

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Europe and the Codification Movement in the Middle of the Nineteenth Century in the United States", p. 335, 337.

[28] Cook, *The American Codification Movement, A study of Antebellum legal reform*.

[29] Aumann F., *The changing American legal system: some selected phases*, Graduate school series contributions in history and political science number 16, Columbus, 1940, p. 132; Bloomfield M., *American lawyers in a changing society, 1776–1876*, Harvard University Press, Cambridge, 1976, p. 59-90; Perry Miller, *The Life of the Mind in America from the revolution to the civil war*, p. 105-109;Schwartz B., *Main current in American legal thought*, Carolina Academy Press, Durham, 1993, p. 236; Warren C., *A history of the American bar*, Little Brown and company, Boston, 1911, p. 508-541.

[30] Masferrer A., "The passionate discussion among common lawyers about postbellum American codification: An approach to its legal argumentation ", *Arizona State Law Journal*, vol.40, 2008, p. 173-256; "Defense of the Common Law against postbellum American Codification : Reasonable and Fallacious Argumentation", *The American Journal of Legal History*, Vol. L, 2008–2010, p. 355-430.

question during the years 1783-1815 for the complete abolition of common law due to its inherent flaws[31]:

> "Men, acquainted with the origins, the nature, and the usefulness of the common law, view, with astonishment and serious apprehension, the hostility manifested against it; [...] The moment seems to be approaching when the axe will be laid to its roots, and its spreading honors prostrated in death"[32].

The national debate on the codification of American law brought about the idea that codification could be a solution to the law problem. Indeed, the supporters of codification saw it as the only possible solution to the problems of law, whereas its opponents saw it as a source of increasing the amount of problems while other easier solutions were possible and more efficient.

To add to this paradox it is through the prestige of the civil law codes that codification became an issue in the new world[33] However, the codification of private law, meaning the study of the existing civil code in the United States territory, is not studied as a whole. During the last decade, scholars have offered different approaches on the subject of the American codification debate but only studied the civil codes endeavor in Louisiana or the civil procedure codes in New York and the following states. In fact, speaking about codification in the US during the 19th century is quite often associated with the civil procedure code.

The shadows that have been cast on this part of American legal history are quite surprising as it is a topic that has so many implications and consequences for the

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[31] Bloomfield M., "William Sampson and the Codifiers: the roots of American legal reform, 1820–1830", *The American Journal of Legal history*, 11 (1967), p. 234.

[32] Hopkinson J., *Considerations on the Abolition of the Common Law in the United States*, Philadelphia, William P. Farrand and Co., 1809.

[33] Reimann, *The reception of continental ideas in a Common Law World 1820-1920*, p. 11.

development of American law. This fundamental but shadowed subject shows the diversity of the law in a place considered as an heir of the common law tradition with no ties to civil law. While studying the question of the codification of private law, one of the first things I noticed was how this common law country was so much more than plain common law and is permeated with civil law, but no one spoke about it or even emphasized it. It was quite puzzling to see this big part of the American legal history cast aside. By shedding some light on the civil code, this work is contesting the history of the United States as being a full common law country but it appears that it is more a common law country with a civil law tradition. This research also serves as a reminder that, as everything in life, in the categorization of legal tradition, nothing is black or white but more in different shades of gray. Codification is defined as the representative of civil law and is usually never considered in a common law state however scholars nowadays recognize that,

> "...codification has erroneously been considered a peculiarity of the civil law tradition, and hence somehow incompatible with the common law, this is because Napoleon's codifications have, unfortunately, been presented as the model of civil law codification, a mythical idea and prejudice that have constituted a remarkable obstacle for codification in many common law jurisdictions."[34]

The research chooses to focus on civil law (also called private law). The idea is to study a legal field that is to do with everyday life. Civil law is about marriage, filiation, contract and private property[35]. This area is the foundation of law because it focuses on relations between individuals or organizations and the consequences of these relations. Civil law is the core branch of Private Law. Hence it was even more

[34] Masferrer, "French codification and "Codiphobia" in common law traditions", p. 1.

[35] For a study of the civil procedure code during the same timeframe see Funk K., *The Lawyers' Code: The Transformation of American Legal Practice* (Ph.D. dissertation, Princeton University, August 2018).

surprising to see that they were no comprehensive and comparative study of those so fundamental to life codes.

According to Charles M. Cook in his book "The American codification movement," the history of codification on the American territory is divided into four periods[36]. The first period is the colonial era from 1609 to 1775. It is a period of questioning the law and the choice of a legal system for the new country but also the new different states, hence the question of codification. The thinking and questioning regarding to codification are at this time mainly focused on criminal law. The second period is from 1775 to 1860, the pre-civil war period. It is mainly the time of the national debate regarding the codification and the creation of codification in Louisiana. The third period is from 1861 and 1903, it is the area of codes; the time of codification mainly of private law and civil law procedure codes. Then the fourth period is from 1903 to present, it is a time for common law and a lack of interest in codification. Despite the lack of interest in codification, it is also the time of creation of the uniform commercial code.

The civil codes studied are the ones implemented between the years 1800 and 1903. The 19th century is the formative area in the United States, it is the century after the American independence where state and people were settling but also the century of the American civil war. It is a vibrant and innovative century for the US and the world, it is the century of the first light bulb and telephone among many other innovations. The 19th century is the century of the abolition of slavery, of the industrial revolution and urbanization, it is also worldwide the century of written law. It is the century of the 1804 Napoleon Civil Code and its expansion worldwide. It appears as the perfect century to see how legal innovation and change were implemented within the United-States of America, a country in constant evolution especially at that time.

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[36] On this matter see Cook, *The American Codification Movement, A study of Antebellum legal reform*.

During the research timeframe within the fifty current American states, there is only a few states with documents called civil code, however, not all of them qualify to the chosen definition of civil code: a document that regroups legislation, containing most or all the law regarding private law and allowing a better understanding of the law[37].

Taking this into consideration and the timeframe of 1800 to 1903, some documents called civil codes were rejected after examination. The first code rejected were the one adopted during the timeframe, but the territory was not an American state or territory at the time. It is what happened for the code of Alaska of 1900 - Alaska only became an American state in 1959 - and for the code of Hawaii of 1859, which also only became a state in 1959. Three other codes, the Code of Alabama, Tennessee, and Indiana were put aside because they were cast aside on a content base. Indeed, they were not exclusive as they were only some revised statutes called code with no common law contents inside hence, they did not contain the law on a subject nor tried to allow a better understanding of the law.

In chronological order the American civil codes of the 19th century are the following: The civil codes of Louisiana from 1808, 1825; the Code of Georgia from 1862; the Revised Civil Code of Louisiana of 1870, the Civil Code of California of 1872, the Civil Code of Dakota Territory of 1872, the Revised Code of North Dakota of 1895, the Civil Code of Montana of 1895, and the Revised Code of South Dakota of 1903. One other code studied is the Field Civil Code, also called the 1860 Project of Civil Code for the state of New York. Even though it was never adopted, it had a huge impact on the following civil code. What is very peculiar about all the American civil codes is that they all come from a different background and culture, each one has its own history

[37] Vanderlinden, *Le concept de code en Europe occidentale du XIIIe au XIXe siècle, Essai de définition*, p. 15-16.

and codifier hence each code is different, and they do not all use the same kind of codification.

Codification in the US did not stop with the civil codes and the procedural ones neither did it stop in the 19th century. In fact, it seems that it is quite a requiring concern in the United States. The codification endeavors persisted in the United States for the following centuries even if some author considers that "in the United States, the codification movement was a nineteenth-century phenomenon"[38] the reality is that the 20th century is not without any codification. In particular, there is one code that made some noise during the 20th century, a country-wise code still used in the 21st century, it is the Uniform Commercial Code[39]. Some even consider this code as "one of the finest pieces of lawmaking in the history of the common law world"[40].

Starting in the 1940 the endeavor to unify the commercial law through the country appeared as almost impossible expect if they went for a code. Karl N. Llewellyn, an experience lawyer oversaw this project[41] and was a strong defendant of this idea[42]. The code was drafted under the sponsorship of the American Law Institute

[38] Schlesinger R., *Comparative Law: cases, texts and materials*, 5th edition, Mineola, N.Y. Foundation Press, 1988, p. 291.

[39] Danzig R., "A Comment on the Jurisprudence of the Uniform Commercial Code", *Stanford Law Review,* 27 (1975), p. 621; Franklin M, "On the Legal Method of the Uniform Commercial Code", *Law & comparative problems,* 16 (1951), p. 330.

[40] Good R., *Codification of Commercial Law,* Monash University Law review, 14 (1988), p. 135.

[41] Herman S., "Historique et destinée de la codification américaine", *Revue internationale de droit comparé,* 47-3 (Juillet-Septembre 1995), p. 726.

[42] Llewellyn K., "Why a Commercial code?", *Tennessee Law Review,* 22 (1953), p. 779–780.

and the National Conference of Commissioners of Uniform State Law[43] and was rapidly adopted by the 50 states without any reluctance.

This Uniform Commercial Code manages to fulfill its role as the main source of law and to unify commercial law through the country to point that lawyers dealing with commercial law consult it as often as a lawyer dealing with family law consult the civil code in France[44]. In this case it became the primary source of law on the subject.

The success of this commercial code can be explained because it leaves the door open on a lot of commercial subjects for state adaptation as it mainly concerns federal commercial law and regulation[45].

Nevertheless, theoretically, at least apparently, all those codification efforts, whereas it was the procedural, civil or the uniform code does not seem to intend to codify the whole common law, in the word of Lewis Grossman:

> "The codification impulse lasted into the twentieth century, as reflected in the Uniform Code and Restatement projects. But there were no further major campaigns to abandon the common law wholesale in favor of a code"

This research is a legal history work in a comparative perspective. It is not a simple examination of the civil codes in the United-States, but it is a comparative analysis of history, factors and codes alone and compared to each other. Moreover, it is a study of the translation and acculturation of a legal concept the civil code in a common-law country. The fact that this defining notion of a civil law system exported itself in a country outside and of opposite tradition shows the universality of legal concept. This transposition also allows to see how such strong legal concept can evolve and change to adapt to different circumstances. One of the questions driving this work

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[43] *Skinner, "Codification and the common law", p. 240*

[44] Herman, "Historique et destinée de la codification américaine", p. 732.

[45] Herman, "Historique et destinée de la codification américaine", p. 732–733.

is to see how the 19th-century concept of civil code was implemented in the 'work in progress' that were the United States during the 19th century. The 19th century is known worldwide as the golden age of code and really implemented the opposition between common law and civil law tradition hence it is unique to learn how a new country like the United States navigated those waters. What was the decision process for the states, how did former common-law colonies decide to shift side; how did civil law colonies fight to keep their legal tradition? This study emphasizes the transposition of the civil code concept in a common law country while also showing some inherent American codification patterns.

The methodology of this work is based on a study and analysis of primary sources. Those are the different codes, discourse and American legal scholars' work on or about codification existing during the timeframe. This work was not linear and required different approaches as it is a vast and broad subject. For example, it uses history and sociology to understand the impulse behind the codes but also philosophy and comparative law to understand the evolution of the definition and legal concept.

The research is organized in three chapters. The first one explains the codes history state by state in a chronological order. This part allows knowing the history of each code and the cultural element driving them. It also gives the main information about the state, their law and how they undertake the codification process. The second chapter is a comparative examination of the factors and reasons driving the different codification of the private law endeavor. This allows seeing what they have or do not have in common. It allows growing from history to try to find some explanation to the codification of the private law in those states. The primary idea was to find among all those states a common reason that drove them to codification, the reality was however a bit more entangled. Finally, the third chapter is a comparative study of the inside of the code in order to see if the content of the code is similar, whereas it is a question of source of the codes, shape or legal institutions.

Chapter 1
A history of codification of private law in the United States during the 19th century

"Those who want to gain an accurate knowledge of how it must establish, or repeal laws can draw in history"[46]

Codification was always a controversial subject in the common law world[47], especially in England and its colonies or former colonies. Every codification attempt in England did not succeed, which is incongruous because the word codification was invented by an English man, Jeremy Bentham. However, some British colonies like India succeed at codifying their laws. As for the US codes they are the dark side of the history of American law. Their stories are overshadowed by the one of the common law, to the point of being forgotten. Yet at the time of their appearances in a territory or a state they are seen as a real legal revolution.

Most work, whether by international or American literature does not expose the history of codes. Some articles paint a quick picture of the adoption of codes, but there is currently no comprehensive work dealing with the adoption in each state of the civil codes or a comparative study of them. This work tends to fill this gap by setting out the story of the arrival of the code during the 19th century in some US states.

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[46] Frédéric II De Prusse, *Dissertation sur les raisons d'établir ou d'abroger les lois*, in Œuvres philosophiques de Frédéric II, Roi de Prusse, Berlin, J. D. E. Preuss, [1749] 1848, t. IX, 11.

[47] Lang, *Codification in the British Empire and America*, p.14.

This first chapter is centered on the history and presentation of the code in each state. It is a presentation of their history. The idea is to know what happened before analyzing them and comparing the impulse and content of the code in the following chapter. By knowing the history of the civil codes and their implementation we have the foundations to understand them. Like when we meet someone, we tell our name or where we are from before revealing ourselves, this part is those first world we pronounce.

To allow for the most accurate possible picture of the different Americans civil codes, first is presented the theoretical framework of the idea of codification in the US during the 19th century. This theoretical framework takes the form of a national debate on the opportunity of a codification called the American Codification Movement (I). Then the code presented chronologically successively. The story begins in Louisiana in 1808 (II) to continue with the common law codes and finish in 1903 in South Dakota (III). Each civil code is presented and highlighted in a historical and legal perspective.

I - The theoretical framework of codification in the United States during the 19th century: The American Codification Movement

The examination of this debate led by the American legal population, through the examination of the debate articles, highlighted for two main point : first is the trail of the legal problems within the common law (1) and second is the issue of emancipation from the common law and its meaning (2).

1. The audition of the common law and proposed solutions during the American codification movement

"Are we not as capable of performing a great act of legislation as Romans or Germans, as Frenchmen or Italians?"[48] asked David Dudley Field in his address to the Albany Law School in 1855. Even if going from common law to civil law is a significant change, they can and should do so without question. To add to that, supporters of codification were surprised that it still had not been done[49]. Indeed, this citation of Edmont Kelly in 1886 summarizes perfectly the vision of the common law by its main critics,

> "When Mr. Carter asserted that the common law is reasonably well settled, easily accessible, harmonious and fixed, he fairly took our breath away. Every lawyer at the table knew that it is no such thing, but that it is obscure, contradictory, inconveniently scattered and fluctuating."[50]

[48] Field D.D., *An address to the graduating class of the Law School of the University of Albany*, delivered March 23, Albany, 1856, , W.C. Little & Co, 1855, p. 26.

[49] Horwitz M., *The transformation of American Law 1780–1860*, p. 16

[50] Kelly E., "Codification", *American law review,* 20 (1886), p. 9.

Hence, the will for a "legal revolution" came from a simple observation: the common law is uncertain as much in substance (a) as in form (b). However, this so-called uncertainty was praised by the codification opponents as it gave the law some flexibility (C).

1.1. An uncertain common law

> "Among the many subjects, of a general and local nature, that will occupy your deliberations, there are none of such vital importance as the undigested state of our written and unwritten laws"[51].

The law as a tool of knowledge of duties and obligations must be fixed and certain, which does not seem to be the case for the common law in the codification supporters' eyes[52]. Criticism on the content of the common law focuses mainly on three main points.

First, the common law is not a science, composed mainly of archaisms, it is uncertain and highly variable. The national debate about the practicability of a codification of the common law finds its starting point in 1823 with William Sampson. In his anniversary discourse to The Historical Society of New York he is very critical of the common law.

William Sampson (1764-1836) was an Irish lawyer who had, by necessity, emigrated to the United States. He was born in 1764 in Londonderry, from a family of

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[51] Thompson P., *Sampson's Discourse,* address of the South Carolina governor to the chamber on November 24, 1824, p. 95.

[52] Field DD., *David Dudley Field, Speeches, Arguments, And Miscellaneous Papers,* A. P. Sprague ed., 1884, p. 376-377; *An address to the graduating class of the Law School of the University of Albany*, p. 26-27; Fowler R., *Codification In The State Of New York*, 2d ed. 1884, p.8; Morriss, "Codification and Right Answers", p. 380-384.

Anglo-Irish churchmen and landowners, his education and studies were done peacefully. He started to work as a lawyer in Ireland. The country was at that moment in a crisis, which would turn him into a radical. Due to that, he became an advocate of liberty, especially between 1790 and 1798. Then, under suspicions of treason because of his activism, he had to hide as a refugee in Portugal and France for seven years (1799-1806). In May 1805 he left France, not without first having witnessed the reconstruction of France and especially the rise and the creation of the Napoleonic Code; an event which marked his legal opinions forever. Unable to return to Ireland, he arrived in New York in May 1806, then began his legal career in the United States. He became a fervent opponent of the common law, which for him was the obstacle to all the principles in which he believed: civil liberties and their protection[53].

In his *Anniversary Discourse* he denounces the common law, which for him is an evil that erodes American law. One of the central points of his speech is the denunciation of the common law as archaic and too unscientific to be used in such a specific field as law. Indeed, the foundation of the rights and duties of men must be rational in order to allow a better understanding of them. For him, the common law is only understandable thanks to the Blackstone *Commentaries* :

> "In soliciting admission for the common law into the seats of academic learning, where its rival, the civil law, had long been favored inmates, no advocate ever pleaded his cause with more eloquence and grace; but he could not make that a science, which was reducible to no fixed rules, or general principles; and the more he brought it into light, the more the sunny rays of his bright genius fell upon it; the more its grotesque forms became defined, the more they proved to be the wild result of chance and rude convulsions"[54].

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[53] Bloomfield M., "William Sampson and the Codifiers: the roots of American legal reform, 1820–1830", p. 234-252.

[54] Sampson W., *An Anniversary Discourse delivered before The New York Historical Society on the Common law*, William Sampson, Saturday December 6, 1823, New York, published in 1824, p. 3.

His regret is the fact that the law hidden in the common law is not understandable on its own, because it is neither a science nor rational, nor does it arise from logical reasoning. This vision of the common law, as an undefinable mixture of principles and decisions resulting from random circumstances is not unique to its author[55]. Sampson vehemently criticized the fact that the common law cannot be reduced into universal principles and rules understandable by all. This criticism was not new; indeed it was in direct continuity of the nineteenth-twentieth century thinking which praised rationalism and scientific reasoning.[56]

This point—common law is not a science nor rational—was the main argument of the supporters of codification. Indeed, it is mainly with this argument that the codifier David Dudley Field pushed codification in New York[57].

Besides the fact that the common law is not a science in the pure sense of the term, the codification supporters, particularly Sampson, criticized its "holiness". Undeniably, the law cannot be effective on a territory if it is seen as a sacred object which it is forbidden to criticize.

> "These people, long after they had set the great examples of self-government upon the principles of perfect equality, [...] had still one pagan idol to which they daily offered up much smokey incense. They called it by the mystical and cabalistic name of common law. A mysterious essence. Like the Dalai Lama, not to be seen or visited in open day; of most indefinite antiquity; sometimes in the decrepitude of age, and sometimes in the bloom of infancy, yet still the

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[55] Cook, *The American Codification Movement, A study of Antebellum legal reform*, p. 98.

[56] Crystal N., Codification and the Rise of the Restatement Movement, *Washington Law Review*, 54 (1979), p. 248.

[57] Field D.D., *A third of a Century given to law reform*, not published, February 22 1873.

> same that was to be, and evermore to sit cross-legged and motionless upon its antique altar, for no use of purpose but to be praised and worshipped by ignorant and superstitious votaries"[58].

For those who were pro-codification, a drafting of the common law in the form of a code was needed to help make it lose its sanctity. The law should not be considered an unchanging divine entity, it must be seen as a fallible human creation[59]. In drafting the common law, it would lose its divine element that left it unable to be held accountable. On the other side of the spectrum its defenders took the Napoleonic code as a counter argument: this code, the most famous code was considered as more sacred than the common law[60]. Indeed, some goes to say that before the French Revolution the holy scriptures were sacred, and now after the revolution, the code Napoleon replace them[61].

The second main argument is regarding the content of the common law. It is the question of its numerous archaisms. Many authors criticize the fact that common law still contains enforceable principles dating back to the "barbarians" and "Norman invaders" or feudal time that should not be legal provisions in a modern society[62]. For the pro-codification side, the common law is

> "An irregular mass of usage and statutes derived partly from traditions of various and discordant tribes and races, partly from the enactments of

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[58] Sampson, *An Anniversary Discourse delivered before The New York Historical Society on the Common law*, p. 7-8.

[59] Field D.D., *Codification. An address delivered before the Law Academy of Philadelphia*, in the hall of the historical society of Pennsylvania, April 15, 1886, Printed for the Law Academy, Philadelphia, 1886.

[60] Barlow F., *Facts for Mr. David Dudley Field*, Weed, Parsons and company, Albany, 1871.

[61] Gordley J., "Myths of the French Civil Code," *American Journal of Comparative Law,* 42 (1994), p. 459, 488-489.

[62] Sampson, *An Anniversary Discourse delivered before The New York Historical Society on the Common law*, p. 29.

> tyrannical kings and struggling parliaments, and partly, it may be added from interpolations by judges and chancellor from the civil or canon law"[63].

This ancestral component of the common law for its defenders is the fruit of previous generations which gives it its strength. As Joseph Hopkinson, a judge, member of the House of Representatives of Pennsylvania and fervent defender and promoter of the common law, emphasized:

> "The common law of England is "a collection of maxims and customs" which have been preserved in various authentic ways, "and handed down from times of highest antiquity" it is in the truth the common sense of mankind, it is human wisdom, corrected and taught by experience"[64]. "Common law is but another name for common sense, tested and systematically arranged by long experience."[65].

Hence, two visions collide on the origins of the common law during this debate. On one side are the supporters of seniority[66]; on the other are the supporters of detachment from the past and old customs. As much as those in favor of codification want to strip the common law of all archaisms, the common law's supporters consider seniority as a token of truth and wisdom of the principles applied. However, the point on which the common law supporters cannot defend it, is on the question of maintaining feudal dispositions, particularly on private property, which was still enforceable in the US even as ordered society did not apply[67].

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[63] Field D.D., *An address to the graduating class of the Law School of the University of Albany*, p. 19.

[64] Hopkinson, *Considerations on the Abolition of the Common Law in the United States*, p. 16.

[65] Hopkinson, *Considerations on the Abolition of the Common Law in the United States*, p. 21.

[66] Carter, *The proposed codification of our common law*, Kessinger Publishing, 1884, p. 87.

[67] Hand C., Coudert F., Hal E., Beaman C., McClure D., Hornblower W., *Association of the Bar of the city of New York, Report of the committee on the amendment of the law upon the proposed Civil Code, presented March 15th*, evening post stream printers, New York, 1881.

The question of the presence of archaisms and their removal is particularly strong in the area of procedure where the call for codification is forceful and well received[68]. The population and the doctrine deplore maintaining archaic rules and forms that are not adapted to the modern time or jurisdictions. They especially condemn fluctuations of procedural rules as well as uncertainty about which courts to seize in case of disputes[69]. As for opponents of codification, even if they recognized the obsolescence of certain procedural rules, they considered that they would wear out with time, so it was a false problem; they just had to be patient[70].

The third main argument against the common law is the uncertainty of legal rules.

> "The present state of the law, both in theory and in practice, is so complicated that it's best-informed professors are at a loss on very many important questions, to pronounce what is law, and what is not law"[71].

Codification supporters insisted on the fact that the common law and jurisprudence evolved according to the cases before the courts[72].

> "How can there be anything like certainty in the law, while the whole of common law is the mere creature of judicial legalization, changing its character as the bench of judges changes its occupants? "[73].

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[68] Funk, *The Lawyers' Code: The Transformation of American Legal Practice*, p. 83.

[69] On this matter see Lang, *Codification in the British Empire and Americ*.

[70] Cook, *The American Codification Movement, A study of Antebellum legal reform*, p. 13.

[71] Thompson, *Sampson's Discourse,* p. 68-69.

[72] Mathews, *Thoughts On Codification Of The Common Law,* 1827, p. 23.

[73] Thompson, *Sampson's Discourse,* p. 68-69.

In consequence, the law can change from one decision to another and from one judge to another. The undeniable advantage of a code is the rigidity of legal rules. The codification defenders pushed the criticism further by blaming not only the lack of certainty, but also variations in the law according to each judge. A code would bring unity to national level and at the state level,

> "Is the common law the law of the United States? On the first formation of the colonies, the founders brought with them the common law, which every Englishman regards as his birthright; but each colony judge for itself, what parts of it were fit to its new situation, and either by legislative provisions or judicial decisions, or usage and practice, adopted certain parts and rejected the others; so that in no State of the Union was the whole of it received, [...] the common law of one state, is not the common law of another, much less of the United States"[74].

The call for codification as evidence for a geographical federation is, a relatively traditional argument, that can be found in many countries[75]. In the American case, however, this argument of geographical unity takes on new weight because, it is highlighted alongside the common law. One of these legal options comes to represent unity while the other becomes a symbol of division[76].

It is this problem of uncertainty of law and inflexibility that pushes the opponents of the common law to praise the idea of a code because,

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[74] Thompson, *Sampson's Discourse*, Letter Sampson judge Cooper, p. 55-56.

[75] Cabrillac R., *Les codifications,* p. 53.

[76] Lang, *Codification in the British Empire and America,*p. 103; Cabrillac, *Les codifications*, p. 62.

"Our law is in a state of chaos. Nothing will bring it out of chaos but a code. [...] The chaotic state of the law arises, of course, from the vast mass of unarranged, and sometimes discordant, material"[77].

To summarize this indictment of the common law pro-codification main arguments,

"With regards to the advantages to be derived from reducing the law to a written code, [...] it would render law, as a science, more level of understanding of all. To strip it of its unnecessary intricacy, absurd fictions, obsolete and inapplicable maxims, rules, and forms, cannot be doubted"[78].

1.2. A common law of uncertain shape

"One of the distinctions of our scheme of government is the written constitution.
A written law rests upon the same principle"[79].

The content of the common law is not the only element subject to debate and criticism, the form of the latest is also one of the focus points.

The common law is inaccessible as it originates from oral tradition. The question of inaccessibility, however, to the detriment of codification, is quickly solved by drafting revised statutes that will give accessibility to the most complicated part of the law and enlighten them.

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[77] *Codification of the Law*, Correspondence between the California bar and Mr. David Dudley Field, Albany Law Journal, vol. 465; 1870-1871, Letter of David Dudley Field to the California Bar, November 28, 1870, p. 465.

[78] Thompson, *Sampson's Discourse,* letter from Watts to Sampson, p. 87.

[79] Field D.D., *An address to the graduating class of the Law School of the University of Albany*, p. 26.

The common law is a tool of unwritten law, its background is not accessible because its shape does not allow it as a result of the enunciation of a judgment by a judge. It is not fixed, as a decision can come from hundreds of years of previous decisions that can be on opposite ends of the spectrum. David Dudley Field and Sampson, both ardent supporters of codification, consider that this oral origin prevents the creation of legal science accessible to all. Indeed, for most of the supporters of codification, the origin of the common law is its biggest weakness as it prevents it from being accessible in one document. In consequence, in order to know the enforceable law, the lawyer or laymen would have to go through sometimes hundreds of various opposing decisions on the subject.

Some pro-common law authors, such as Joseph Hopkinson, do not understand this criticism of the common law because, "The term unwritten refers to its origin, not to its present form "[80], making the argument obsolete and no longer relevant, at least in his opinion. As a fervent defender of the common law, he also believes that redrafting the law would not necessarily mean certainty as law is always open to interpretation[81].

The defense for common law is also based on the idea that the origin of the common law, arising from oral tradition, is the element that gives it its strength because, "a word inadvertently used or carelessly omitted; a comma misplaced by accident or ignorance shall change the whole meaning of the clause"[82] in written law, which is not possible for the common law owing to the flexibility allowed by oral tradition.

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[80] Hopkinson, *Considerations on the Abolition of the Common Law in the United States,* p. 18.

[81] Hopkinson, *Considerations on the Abolition of the Common Law in the United States*, p. 25-26.

[82] Hopkinson, *Considerations on the Abolition of the Common Law in the United States*, p. 31.

The form of the common law is also considered uncertain because of its material inaccessibility. Indeed, jurisprudential solutions, are only found if the person consults a significant number of documents or has access to specialized libraries. “The yearly reports of decided cases are now so voluminous that our lawyers can neither afford the money to purchase them, not the time to pursue them”[83], as Thompson recognizes.

> "That portion of us, who are to spend our lives in the course of professional employment (lawyers), find that our labors are severely increased, by the multiplication of books, which we are forced to examine. Our duty seems to be comprised rather in distinction making among adjudged cases than in applying general and acknowledged principles, to the case to be decided"[84].
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> “The lawyer’s library had become a collection of books from the old world and the new, reports of all the courts in England and in all our states, and treatises from every legal authority in America or Europe"[85].

This need for certainty and easier access to the law is understandable coming from the legal population. Especially, adding to the numerous decisions the fact that not all of them are published, thus making the law totally inaccessible[86]. Moreover, the problem of accumulation and accessibility of the law does not only concern the common law as the same accessibility issue arose concerning the statutes. Printed in very few copies, late and sometimes changing on a daily basis and accumulating over the years, the statutes are considered as inaccessible as the common law. Supporters of codification on the issue of inaccessibility of the law hence remain pragmatic,

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[83] Thompson, *Sampson's Discourse,* Cooper's letter to Sampson, p. 68.

[84] Sullivan W., *Address to the members of the Bar of Suffolk, Mass at their stated Meeting on the first Tuesday of March 1824*, Boston, Press of the North American Review, 1825, p. 54–55.

[85] Field, *An address to the graduating class of the Law School of the University of Albany*, p. 21.

[86] Cook, *The American Codification Movement, A study of Antebellum legal reform,* p. 8.

> "A code, therefore, would not dispense with such books, but the number necessary would be very small, as the elements of any science are comprised in a short compass"[87].

In the eyes of the legal population, there is therefore an urgent need to reduce the amount of legally enforceable materials. This argument on this subject comes in most speeches about codification or common law[88]. The argument given in the majority of debates to really underline this point is that, in order to defend a case, a lawyer does not refer to legal arguments, but instead chooses from among a list of similar cases, which allows them to argue in favor of their client. In their mind, the day in court ends up being more about a fight between cases than about law and justice. This example supports perfectly the idea of a common law code, as it will make the law accessible and involve some decision-making regarding the previous diverging decisions[89].

The question of the form of law and its inaccessibility is no stranger either to the non-legal population who support the idea of a common law codification in order to

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[87] Thompson, *Sampson's Discourse,* letter from Sampson to Watts, p. 89.

[88] Field, *David Dudley Field, Speeches, Arguments, And Miscellaneous Papers,* p. 377
"There is as much reason why the American people should have their laws in four or five pocket-volumes as there is why the French people should have theirs... But not alone to the people would it be convenient; it would be a greater one to the lawyers and the Judges."

Field, Introduction, The Civil Code for the State of New York, p. xxx

"In the fifth place, the publication of a Code will diffuse among the people a more general and accurate knowledge of their rights and duties, than can be obtained in other manner. This is an object of great importance in all countries, but more specially in ours.".

See also Moriss A., "Decius S. Wade's Necessity for Codification", p. 410, 412; "Codification and Right Answers", p. 371-374; Fisch W., "The Dakota Civil Code: More Notes for an Uncelebrated Centennial", 45 *North Dakota Law Review,* 40. D. L. Rev., p. 13-14.

[89] Brackenridge H., *Considerations on the jurisprudence of the state of Pennsylvania*, No1, Philadelphia, W. Dane, 1808, p. 5–7.

simplify its understandability and applicability[90]. It will also make the law less of an elite tool and give unrestricted access to it[91].

1.3. The flexibility of common law

The spotlight put on the uncertainty and inaccessibility of the common law is counterbalanced by supporters of the common law with its flexibility. Legal rules must be adaptable to changing circumstances while remaining effective[92]. For them, it is the common law's strong suit because it evolves with society. In their opinion, a code is too formal and cannot remain current with time, because it will be a source of interpretation and amendments, which ultimately results in a mass of incomprehensible written law which does not allow certainty of the law.

Cooper, in an article in the Evening Post, explains that

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[90] Cook, *The American Codification Movement, A study of Antebellum legal reform,* p. 12-13.

[91] Field, *The Completion Of The Code*, (1851), Five articles, by David Dudley Field, republished from the New York Evening Post December 1850, New York, WM. C. Bryant, Book & Job Printers, 1851, p. 5
"The people of this State have determined, and in their fundamental law have declared, that they will have a complete code of all their law, and however it may be delayed, it cannot be prevented."
Field, *David Dudley Field, Speeches, Arguments, And Miscellaneous Papers,* p. 349-350, 377, 383
"As an American, speaking to Americans, I venture to predict that the instincts of our people and the inexorable logic of events will hasten the completion of the work here and sooner than in England."
Field, Introduction, *The Civil Code for the State of New York*, p. VIII
"The will of the people is the supreme law; that will is firstly expressed by their written constitution and their written laws. It should indeed have no other fit expression."
See also : Hoadly, *Codification Of The Common Law: Address At The Convention Of The A.B.A*, p. 496
"But the American people are not the English people, or of exclusively English descent. Germans, Celts, Scandinavians, Spaniards, Frenchmen, Italians enter into our midst and become American citizens".

[92] Carter, *The provinces of the written and the unwritten law*, Nabu Press, p. 37; Garoupa, "The Fable of the Codes: The efficiency of the common law, legal origins, and codification movements", p. 1484.

" The code Napoleon itself, the great model of all schemes, is already beginning to be superceded and lost of sight of in the multiplicity of judicial decisions which have arisen under it"[93].

Sampson replied to that in a letter where he explains that,

"as to the Napoleonic Code, so far from being superceded, or lost sight of, as is gratuitously asserted, it is so firmly fixed that, in France, and in most of the extensive territories where it governed, it is still looked to as the North Star"[94].

For the supporters of codification, a code is a permanent and flexible legal tool. Indeed, the use of a broad generic language is there to give a margin of interpretation to judges and the possibility of adapting the articles of the code with the evolution of society.[95] Allowing just the right amount of flexibility and certainty a code thus combines both.

The inherent problems of the common law are not totally ignored by its advocates, however, for them the solution is not its abolition or a change in form, but rather the statutes. Statutes allow the flexibility of the common law to remain while creating legal certainty in particular areas. "What is a statute? It is the express or

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[93] Thompson, *Sampson's Discourse,* Evening post articles, p. 58.
On this idea see also, Field, *An address to the graduating class of the Law School of the University of Albany*, p. 30
"The Code of Justinian performed the same office for the Roman law, which the Code Napoleon performed for the law of France, and following in the steps of France, most of the modern nations of continental Europe have now mature codes of their own. We have now arrived at that stage in our progress, when a code becomes a want. The age is ripe for a code of the whole of our American law.";
Field, *David Dudley Field, Speeches, Arguments, And Miscellaneous Papers*, p. 372
"If in France, and other parts of Continental Europe, where codes prevail, the people are found better acquainted with their laws than our people with ours, it is because they have them in a form accessible.".

[94] Thompson, *Sampson's Discourse*, letter of Sampson to Cooper, p. 66.

[95] Garoupa, "The Fable of the Codes: The efficiency of the common law, legal origins, and codification movements", p. 1488.

written will of the legislature, rendered authentic by certain prescribed forms and solemnities"[96]. For Joseph Hopkinson,[97] the solution was to reduce the common law down to a statute and get rid of its archaisms. This may only be applicable and a good idea, if the common law is maintained in parallel to keep giving it the opportunity to develop and maintain flexibility. James Carter, one of the most ardent defenders of the common law, believes that "while codification of the statutes may be good, codification of the common law is bad"[98] because,

> "Judge-made law, on the whole, tends to conform itself to the principles of common sense, right reason and justice. Statutory law, on the other hand, tends to become technical and arbitrary. [...] There is this much of truth on the side of those who favor elasticity of the common law. Elasticity in itself is not an advantage, but a disadvantage. [...] But the opposite extreme of rigidity and technicality is also a disadvantage, and we are thus left to a choice of evils. My own opinion is that if this were the only objection to codification, the balance of expediency would be in favor of the codifiers. It seems to me that certainty would be a gain, even if the law became more rigid and technical, since it is better in most cases that the law should be certain and ascertainable than it should be theoretically just."[99]

The defenders of codification do not agree with this codification of the common law as a statute while maintaining the common law idea. In the words of David Dudley Field, fervent defender of codification, although the common law reduced to the form

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[96] Kent J., *Commentaries on American Law*, 4 volumes, New York, published by O. Halsted, 1827, Vol I, p. 58.

[97] Hopkinson, *Considerations on the abolition of the common law in the United States*, p. 23.

[98] Field, *A short response to a long discourse, an answer to Mr. James C. Carter's Pamphlet on the proposed codification of our law,* Answer to the report of the New York Bar Association against the Civil Code, New York, John Polhemes, 1881, p. 2.

[99] Hornblower, *Is Codification Of The Law Expedient? : An Address Delivered Before The American Social Science Association*, p. 9.

of a statute would bring some clarity, the common law needed to be removed fully in order to allow a certain understandability and rigidity of the law[100]. This also involved a change of vision of statutory law. In the common law tradition, common law is seen as flexible because there is a form of flexibility in its principle and not in the statutes. In fact, a statute in the common law tradition cannot be interpreted and has to be applied strictly. Hence, the common lawyer thinks that the civil law, and by consequence the code, is rigid because they think that the legislation has the same rigidity than the common law statutes. This idea creates confusion because in the civil law the judge has room to maneuver almost as much as the common law judge have room to apply a common law principle. Therefore, statutes are really different from civil law legislation. Hence, when speaking about civil code the common lawyer does not really take into consideration that the code provisions will be and has to be as flexible as a common law principle. This understanding is lost in translation because they think in their own theoretical framework and tradition[101].

Despite the opinion of the strongest advocates for codification, the first step taken towards certainty of the law is a revision of the statutes, which is to say, a review of legislative acts in force in the territory. The construction and/or revision of a statute is performed according to a defined technique that is characterized by:

> "The construction of a statute indeed, like the operation of a device, depends upon the apparent intention of the maker, to be collected either from particular provision or the general context; acts of parliament and will ought to be alike constructed, according to the intention of the parties that make

[100] Field, *A short response to a long discourse, an answer to Mr. James C. Carter's Pamphlet on the proposed codification of our law,* p. 4.

[101] Zimmermann R., « Statua sunt stricte interpretanda ? Statutes and the common law a continental perspective », *Cambridge Law Journal*, 56 (1997), p. 315-328.

them; [...] In the exposition of a statute, then, the leading clue to the construction to be made, is the intention of the legislator."[102]

"If a statute makes use of a word, the meaning of which is well known, and has a certain definite sense at the common law, the word shall be expounded and received in the same sense in which it is understood at the common law[103].

To understand the power of the statute's revision undertaking it is necessary to look for a moment at the *Revised statutes of New York,* which are considered as the exemplary statutory revision during this debate and timeframe. This revision is so effective, that the revised statutes of New York will be exported and adopted in all the other American states.

Between 1800 and 1820, both New York's population and number of laws almost tripled, creating an incomprehensible mass of statutes without any rational organization. Consequently, in order to know the law on a subject, it was necessary to examine the statutes from one year after another, rendering the law almost impossible to understand.

The request for a revision of statutes was presented to the legislature in January 1823, however, no action was taken. A year later, Governor Yale renewed its appeal, considering the review to be indispensable. It was not until November of that year, just before the elections, that a commission was named. It was composed of three members: Erastus Root,[104] Benjamin Butler,[105] and John Duer,[106] replacing James Kent[107]

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[102] Dwarris F., *A General treatise on statutes and their rules of construction*, John S. Littell, Philadelphia, 1835, p. 39–42.

[103]Dwarris, *A General treatise on statutes and their rules of construction,* p. 44.

[104] Erastus Root was born in 1773, admitted to the New York Bar in 1796. He was elected as a Republican representative several times in various institutions in New York from 1803 to 1844. He died in 1846.

who refused the nomination. Butler and Duer asked the legislature to extend their mandate, considering it inadequate and too restrictive to undertake the task they had to perform. They wanted a mandate that would allow them to codify the statute law and the legislature granted it to them, at just under the qualifying majority. Erastus Root was replaced at that time by Henry Wheaton[108] because he was considered less traditionalist than Root who, indeed, was blocking the most innovative reforms undertaken by his colleagues. Wheaton was then asked to be replaced for personal reasons a year later by John C. Spencer[109].

The first report of the Committee given to the legislature in March 1826, explains that the statutes are classified as follows: 1) internal civil administration and policy of the state, 2) substantial law in terms of private property rights or personal relationships, 3) the judicial system and civil procedure, 4) criminal law, and 5) public law. The new organization takes a similar classification as the Blackstone Commentaries. It allows grouping by subjects of legislation on a subject rather than by years. The Legislature approved this organization and unreservedly supported the commissioners until the completion of their work three years later. The Revised Statutes of New York were published in 1829[110].

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[105] Benjamin Butler is a lawyer and American politician known as one of the most notorious political generals during the Civil War.

[106] John Duer was born in 1782, he first joined the army at 16 and after two years of left the military to start his training at the Faculty of Law. He relocated to New York in 1820 to be a lawyer and died there in 1858 after being elected several times as representative.

[107] James Kent is a famous American jurist and member of the doctrine whose opinions are highly respected.

[108] Henry Wheaton is a lawyer and American diplomat. It will be the third reporter of the US supreme court, then he will be nominated as the first US Minister to Denmark and Prussia.

[109] Young New York lawyer, who would later be cabinet secretary of President John Tyler.

[110] *The Revised Statutes of New York Passed During the years one thousand eight hundred and twenty-seven thousand eight hundred and one and twenty-eight*, Printed and published under the leadership of

Because of the context of the time, this total reclassification of the statutes is considered as the first step towards a comprehensive codification of the law. They are also seen as a partial codification which solved the problem of the incomprehensible mass of statutes. On the one hand, it was seen as an example of how codification can solve different law issues, and, on the other hand, it was seen as the example of what was needed and that the common law should stay as it was. Hence, the New York Revised Statutes worked for both team and just added fuel to the debate while leaving the common law as is.

2. A desire for emancipation from the symbols of the common law & from codification theorist Jeremy Bentham

The legal system stayed the same after independence as how it was before the revolution. Indeed, after the American revolution, all the American states either implicitly or explicitly declared the preservation of the laws in force in the territory. As David Dudley Field stated, "the revolution, of course, brought an immense change in the official machinery; but it made at first very little change in the laws beside"[111]. This decision quickly became the subject of discussion and criticism.

The first call for revision of the law on the grounds of its English content came about in the period 1783-1815[112]. As Benjamin Austin states:

> "Can the monarchical and aristocratical [sic] institutions of England be consistent with the republican principles of our Constitution? We may as well adopt the law of the Medes and Persians". "[113]

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the revisers appointed For That purpose, 3 volumes, printed by Albany and van Benthuysen Packard, New York, 1829.

[111] Field, *An address to the graduating class of the Law School of the University of Albany*, p. 20.

[112] Bloomfield, "William Sampson and the Codifiers: the roots of American legal reform, 1820-1830", p. 234.

However, the practicability of the English common law as an already known and enforceable legal system prevailed over the independence criticisms. Even if the first contestation of the English content of the law appeared in the years before the War of 1812[114], as a result of the war a real need for full independence from England emerged. Hence, during this period, the different state legislation adopted an act prohibiting the reception of new jurisprudence coming from England; the first state to take such an act was New Jersey in 1799 and other states followed such as Kentucky, Delaware and Pennsylvania in the 1820s[115].

Codification is also seen as a way to counteract the English vision of law as in England "the defensive attitude of some common lawyers [act] as if codes were "monsters," savage and nontrainable animals, or constituted a dangerous threat to the spirit of the common law"[116]. Hence, entertaining the idea of codification is a way to act at the end of the spectrum and as opposite to English vision of law as possible. It can be seen as a mockery to England.

Coupled with the desire to move away from English law was a desire to have a national American law. These were the beginnings of the American legal nationalism. Nevertheless, it was difficult to remove years of usage of the English common law,

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[113] Miller, *The life of the mind in America: from the Revolution to the Civil War 164-67,* p. 106.

[114] The War of 1812 is between the United States and the British Empire. It lasted from June 1812 to early 1815. The United States declared war in the UK June 18,1812 and invade the English Canadian territories with which they maintained numerous commercial relationships. The resentment attached to this war are the resentment of Americans facing forced recruitment as sailors, the weakening of trade to Native Americans and of course the resentment against England, former oppressors. The war is taking place on three fronts: the Atlantic Ocean, the southern states and the Great Lakes region. At the beginning of the war, the United States tried to invade the British colonies, but were pushed back (capture of Detroit, Battle of Queenston Heights). Then, the Royal Navy blockaded the coast, weakening the US economy due to the reduction of US agricultural exports. The domination of the seas allowed the British to conduct coastal raids and burn Washington in August 1814. The naval battles on the Great Lakes turned to the US advantage. The war ended February 17 1815, with no boundaries changed.

[115] Cook, *The American Codification Movement, A study of Antebellum legal reform,* p. 33.

[116] Masferrer A, "French codification and "Codiphobia" in common law traditions", p. 3.

which is why codification appeared as the perfect solution as it would allow the law to be stripped of its British content.

William Sampson was also a forerunner on this subject. On his *Anniversary Discourse*[117], he preaches for the abandon of the legal tradition inherited from the United Kingdom[118]:

> "We should have had laws suited to our condition and high destinies; and our lawyers would have been the ornaments of our country … we must either be governed by laws made for us or made by us"[119].

Following this, he develops his argument and criticism of English law on four grounds: men should be equal before the law; the statutes founded by the English create inequalities; and the common law and the statutes should go through the Democratic filter[120]. He did not see the usefulness of maintaining a foreign law that would not correspond to the fundamental principles of the United States, especially laws that do not have democratic approval–English judges who created the common law were appointed by the king[121]. Applying and using laws created by a monarchy went against the foundations of the United States: freedom and democracy.

From 1820, the debate related to the codification became more powerful along with the desire of an American-created law. To give more strength to their argument, lawyers used the French example and how the French code helped to move away from

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[117] Sampson, *An Anniversary Discourse delivered before The New York Historical Society on the Common law*, p. 65.

[118] Cook, *The American Codification Movement, A study of Antebellum legal reform,* p. 58.

[119] Sampson, *An Anniversary Discourse delivered before The New York Historical Society on the Common law*, p. 58-59.

[120] Sampson, *An Anniversary Discourse delivered before The New York Historical Society on the Common law*, p. 59-61.

[121] Cook, *The American Codification Movement, A study of Antebellum legal reform,* p. 58-61.

the former monarchial law. "French jurisprudence has been improved by the substitution of a single and uniform code ... instead of the fifty systems of the former government"[122].

This desire for emancipation created a need for the creation of an American law, although surprisingly this worked at the disadvantage of codification. In fact, the law was made clearer, less technical, and more American through the development of American legal literature such as treatises, digests, and textbooks[123]. This rendered one of the main arguments for codification null and void for the majority of the law population.

The courts also followed this trend of the Americanization of law and gradually detached themselves from the old-established solutions. Judges even started their own law and jurisprudence thanks to the previous system. They created their own American common law, making the common law more efficient, which also worked against codification.

This emancipation need is especially obvious when it comes to Jeremy Bentham and his unsuccessful attempt to codify American law. Jeremy Bentham[124], philosopher, jurist, and English reformer, is considered to be the inventor of the term

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[122] Cook, *The American Codification Movement, A study of Antebellum legal reform,* p. 73.

[123] American legal literature is not without problems. The use of legal treatises only provides access to outlines of set principles on a topic or a branch of a law. Moreover, they are often incomplete and evoking more what the law should be. The book most useful to lawyers is the Digest, because it is a collection of basic legal elements enforceable on the territory.

[124] For a biography of Jeremy Bentham See Bentham J., Life of Jeremy Bentham and his correspondence, Wealthofnation, 2015; Chauvet C., *Jeremy Bentham: life, works, concepts*, Ellipses, coll. "Great theorists", 2010.

"codification"[125]. He is the author of the nineteenth century who dedicated the most numerous works to Codes and Codification, both theoretically and in attempting to codify.

His theory of codification is centered on criticism of the common law and the disadvantages of unwritten law: the instability of the law and its judicial development. Bentham saw codification as the only way to save the law. For him, a code must always be succinctly, clearly and precisely written. It must match the doctrine of utility and should be preserved from the interpretation of the courts. His theory even explains when the code must be revised: every 100 years[126]. If this vision and theory of code seem revolutionary, the problem is that it is very theoretical. Indeed, Bentham was primarily a theoretician, an academic who therefore has no practical vision of codification[127]. Living a reclusive life, to the practitioners of the American codification movement, Bentham and his ideas were utopian.

Bentham's first attempt at codification happened in England, but he quickly realized that it was an impossible task; the mentality was closed and neither ready nor willing to go along that road, so he decided to turn his efforts and ambitions to other countries[128]. In awe of the fledgling American democracy—even if he had not and would never set foot on American soil—he had a desire to give this new nation a code that he would have written based on their common law[129].

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[125] Bentham J., *De la codification*, in Œuvres complètes, Bruxelles, éd. L. Hauman et cie, t. III, 1830, p. 87126.

[126] Bentham J., *Treaty of civil and criminal legislation*, Paris, Bossange, Masson et Besson, 1802.

[127] *Ibid*., p. 75-78.

[128] Lang, *Codification in the British Empire and America,* p. 33-39.

[129] Bentham J., *Papers relative to codification and public instruction: including correspondence with the Russian Emperor, and divers constituted authorities in the American United States*, 1817, in *The works of Jeremy Bentham*, Part IV, Edinburgh, W. Tait, 1838, p. 451–533.

Accordingly, he first wrote to President Madison in October 1811[130], offering to write for the United States a set of codes, called Pannomion. In his letter, he develops all the pro-codification arguments that would be used a few years later during the national debate. His letter continues with a request of a letter of endorsement so that he can carry and continue this endeavor that he has already begun, and so he asked the President for a prompt response … an answer that he would get five years later! In fact, the letter was received on the eve of the 1812 War. The president's position was clear that at that time he had neither the time nor the interest for it, especially because they were on the verge of being at war with Bentham's country[131]. The response, written May 5, 1816, is brief and negative[132]. Even if he recognized that Bentham was more competent than an American lawyer to undertake such work, this work seemed unnecessary to him as he was a strong believer in the common law. The English man response was immediate and refutes all the arguments advanced by the American[133]. In parallel, Bentham wrote a circular letter to all the governors of the different US states, offering the writing a Pannomion[134] for their respective states[135]. Once again, he only receives negative responses except from the state of Pennsylvania, but after several attempts to make it a reality, this endeavor failed due to inadequate support[136].

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[130] Bentham J, *Papers relating to codification and public instruction*, in *The works of Jeremy Bentham*, p. 433-467.

[131] Morriss A., Burnham S., Nelson J., "Debating the Field Civil Code 105 Years late", *Montana Law Review*, 61 (2000), p. 372.

[132] *Ibid*., p. 467-468.

[133] Gérard P., Ost F., Van de Kerchove M., *Actualité de la pensée juridique de Jeremy Bentham*, publications des facultés universitaires, Saint-Louis Bruxelles, 1987, p. 192-197.

[134] That is to say, a complete set of code.

[135] Borwing, The Work of Jeremy Bentham, Vol. IV. XI vols. Edinburgh: William Tait, 1843, p. 476–478.

[136] Cook, *The American Codification Movement, A study of Antebellum legal reform*, p. 98-101.

Besides these letters to the governors, Bentham wrote and sent an open letter to US citizens. The letter consists of eight parts and summarizes Bentham's thought on codification. The main argument he develops, is that the Americans freed themselves from the English colonizer but,

> "Yes, my friends, if you love each other, if you value your safety, close the door to the common law as you would the plague. Let us with the sad privilege to be governed by this tissue of imposture by this gang of lawmakers (...). Never forget this lesson: wherever the common law landed, security has disappeared"[137].

To Bentham's dismay, these public letters, were to have few readers in America and no influence. Hence, he never wrote a code, let alone a Pannomion, for America. Nevertheless, it is undeniable that he had an influence on codification theory, at the least.

Bentham's main problem was not his lack of pragmatism, but the fact that he is English and therefore the enemy[138], to the point that very few authors recognize Bentham as an influence. Only Edward Livingston, one of the codifiers of the Louisiana Civil Code, and Thomas Cooper, a lawyer and defender of codification in South Carolina, recognized themselves as successors of the English philosopher, although Thomas Cooper only admitted his affiliation with Bentham after the failure of codification in his state[139]. Still, it is undeniable that many authors were influenced by his ideas even if they do not recognize themselves as heirs.

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[137] Bentham J., *Papers relating to codification and public instruction,* in *The works of Jeremy Bentham*, p. 478-507.

[138] Hezel, "The Influence of Bentham's Philosophy of law on the early nineteenth century codification movement in the United States", *Buffalo Law Review*, vol.22, 1972-1973, p. 253–268.

[139] Cook, *The American Codification Movement, A study of Antebellum legal reform,* p. 74-75.

Why did so few lawyers confess or admit Bentham's influence on them? Charles Cook in his book on codification explains that it might be due to the animosity towards the English, who were former oppressors.

However, some other explanations are possible. First it must be considered that Bentham's theses on codification are very theoretical and practically unenforceable, which is at the opposite end of the spectrum of the US debate which is very pragmatic and centered on the application[140]. Bentham's theses on codification therefore can only diminish and handicap the debate, which is why they are mainly used by critics of codification as an example of its inapplicability and unrealness[141].

This rejection of the Bentham codification theory is also reflected in the examination of the source of the debates, such as in articles and speeches. All defenders of codification up to 1830 refused to use the term codification in their advocacy of it, the latter being too attached to the notion of Bentham codification as he was the one that "invented" the vocabulary. They preferred the term "codified law"[142]. However, the Bentham approach to codification as a means of development of

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[140] Williston, "Written and Unwritten Law", p. 39

"Field did not take the absurd view of Jeremy Bentham that a Code would do everything, but he did say, in Carter's words, that whatever was clearly understood could be clearly stated, and if that was true, it was possible to enact a Code which should cover everything that was clearly known. It would not be possible to cover all possible cases that might arise in the future; but the answer to that was that the Code should not attempt to do so, and that as to such matters, you would be not worse off than you would be if there were no Code, and as to other matters you would be better off.".

See also Fowler, *Codification In The State Of New York*, p. 52; Grossman, "Langdell Upside-Down: The Anticlassical Jurisprudence of Anticodification", p. 17.

[141] Williston, "Written and Unwritten Law", p.39.

[142] *Ibid*, p.165.

law and better administration of justice is found later in the New York codification theory by the leading supporter of codification, David Dudley Field.[143]

Even if Bentham was not recognized as an influence on codification by the Americans, his ideas and work had a huge influence especially in other countries like Russia where his writings were the starting point of a codification movement in the country[144].

Most of the non-legal population were defenders of codification. They saw it as a way to access the law without needing any legal expertise. A code would tell them their rights and obligations and it would make the law more understandable while giving easier and less expensive access to judges. It would help predict a judge's ruling and placed limits on judges' power. Furthermore, the law would be the result of the democratic process instead of the common law vision that "The law is lifeless without a sanction and a magistracy to enforce it"[145]. The central questions this argument gives rise to are quite simple: who is competent to create law, the judge or the legislature? Who has the capacity and especially the mandate to create the legal reality: the judge or legislator?

Common law decisions are usually very detailed in terms of facts and include a long analysis of previous applicable cases. The judge bases his decision on a case based on previous decisions under the principle of *stare decisis*. The requirement to have precedents, which are numerous and often contradictory, gives liberty to the judge to adapt his decision and sometimes forget or ignore a troublesome one. In 1886, a pro-

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[143] Haskins G., "De la codification du droit en Amérique du nord au XVIIe siècle. Une étude de droit comparé", *Tijdschrift voor Rechtsgeschiedenis*, vol.23, 1955, p. 312.

[144] Lang, *Codification in the British Empire and America*, p. 31.

[145] Field D.D, *The magnitude and importance of legal science*, address of David Dudley Field at the opening of the law school of the University of Chicago, September 21, 1830, p. 17.

codification editorial of the New York Times summarized the common law with the following tale: “An earnest debate over a decision occurred between two Judges, one of whom said to the other, “I tell you this is the law”, and the other replied, “it may be the law now, but it will not be the law after this case is decided”[146]. It is exactly this kind of behavior and judicial freedom that is strongly contested by the codification defenders but praised by the common law supporters.

Moreover, changes in the common law from one state to another and from one judge to another are charged directly to the magistrates. It is considered that the lack of continuity in the law is directly their fault. Codification here seems for most of its supporters and the laymen the simplest solution. By making the law fixed, the power of judicial interpretation would be limited, and litigants would no longer be dependent on the good will of a judge[147]. This argument against codification is here again an example of the difference of vision of legislation according to the legal tradition[148].

For the common law defenders, the possibility for a judge to create the law allows the law to develop along with society and to create solutions when there are none, to which the codification advocates respond that:

> "if it be asked upon what principles a chancellor or a judge would decide a case for which the common law has made no provision, experience shows that to prevent a failure of justice, as it is called, he resorts to the English act of parliament, the civil, or his own idea of convenience, and borrows, or makes a rule, which he thinks will answer the purpose. This is afterwards precedent and law—judges become legislators, and a law is imposed to the community

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[146] *Common law fetichism,* New York Times editorial, 19 Avril 1886, p. 4.

[147] Cook, *The American Codification Movement, A study of Antebellum legal reform,* p. 113.

[148] Zimmermann, “Statua sunt stricte interpretanda ? Statutes and the common law a continental perspective”, p. 315-328

without their knowledge or consent, and frequently with slender deliberation and with little wisdom"[149].

These criticisms are emphasized by the fact that judges, contrary to legislature members, are not from the democratic process. The US judiciary is a prize for a long career in the legal field. Appointment as a judge is linked to legal, political or academic success[150]. During the nineteenth century, access to the judiciary was quite different from one state to another; a judge could be appointed by the legislature or the governor, and only in rare cases elected. A judge not chosen by the people, hence, has the great power of creating law without any democratic or popular sanction. They have the power to define rights and duties, but no legitimacy to do it. Codification would allow them to have rights and duties defined and decided by more legitimate actors. That is, for the people, one of the main advantages of codification. It is the development of an elective procedure for judges across the states that will quash this argument and make codification less appealing as it loses its main interest, giving legitimacy and democratic approval to the law.

Judges are not the only section of the legal population from which the laymen want to be freed, the bench is also on trial. During the nineteenth century, law school was not yet generalized. In order to become a lawyer, the student had to become an apprentice in a law firm and be trained by experienced lawyers. The lawyer-in-training kept the records of his boss and undertook jurisprudence research. It was a very concrete and practical training that allowed the future lawyer to become used to the law and its ways[151], because "Justice is attainable only through lawyers. […] The science of the law is so vast in its extent that they alone can master it they who make it their

[149] Thompson, *Sampson's Discourse*, letter to Sampson Watts, p. 90.

[150] Blondel J., "La Common Law et le droit civil", *Revue internationale de droit comparé*, Vol. 3 N° 4, Octobre-décembre 1951, p. 587.

[151] Blondel, "La Common Law et le droit civil", p. 588.

principal study"[152]. Although, this quote from Mr. Field implies that the law is complicated, it highlights the importance of the lawyer as he is the only one qualified to understand the law; he is the guardian of family secrets, and only he could understand the ramifications of the law. David Dudley Field goes even further,

> "The importance of the lawyer is always in proportion to the importance of the law. [...] Tell me the freedom of a state, and I will tell you the strength of its bar. [...] In our country the legal profession has every element of strength and preeminence. Our only sovereign is the law, and lawyers are its only ministers and interpreters."[153]

This preponderant place of the lawyer was not criticized a lot by the main architects of the debate—either for or against codification—as most of them were lawyers. However, this criticism appears with the development of the Jacksonian democratic movement. In the 1830s, a wind of change worked its way through the United States. Andrew Jackson, a man from a popular uprising, succeeded John Quincy Adams in 1829 as President of the United States, creating Jacksonism, a political movement built around the figure of Andrew Jackson, his conception of popular government and his presidency. This movement, primarily focused on his democratic doctrine: the extension of the vote to all white men, the extension of American influence on the continent which should extend to the Pacific. He also defended the idea of a federal government with limited powers, economic laissez-faire and was against the monopoly of banks, in particular a central bank[154]. Through this movement appeared a new criticism of the legal population as their monopoly was disputed. It was considered undemocratic[155] and seemed to make the exercise of justice slow and

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[152] Field, *An address to the graduating class of the Law School of the University of Albany,* p. 11.

[153] Field, *An address to the graduating class of the Law School of the University of Albany,* p. 7.

[154] Cook, *The American Codification Movement, A study of Antebellum legal reform,* p. 158-166.

[155] *Ibid*, p. 158-166.

unaffordable[156]. This monopoly and the need for a lawyer and a judge therefore had to disappear to free the population.

A code would first limit the need for representation in litigation, but also enable everyone, particularly non-lawyers, to understand the law; in some extreme case there would no longer even be a need for a legal representative to face the courts, but,

> "the reduction of law to a code can dispense with the necessity of the profession, and enable every man to be his own lawyer, is an idea which everyone who understands the organization of society will pronounce weakly theoretical, and if practicable, would never be practiced. The subdivision of labor, which is found so advantageous to all classes, forbids it"[157].

This quote from a defender of the common law indicates that in reality, this utopia will never be achieved. The Jacksonian presidency and anti-elitist movement would not bring codification to the US, but it would result in lower admission standards to the bar and allow those who were less educated to be able to access the profession. By making the profession more accessible, the people felt like they finally had realistic and easier access to the law, making the argument of emancipation from lawyers in favor of codification irrelevant.

On this, it is possible to conclude that we have to keep in mind that the American codification movement as an organized debate is actually an invention of American Historians. Codification was indeed one of the interests of the legal profession during the first half of the nineteenth century and has therefore produced a rich literature, the peak of which was reached with the adoption of the Code of Civil

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[156] Cook, *The American Codification Movement, A study of Antebellum legal reform,* p.13.

[157] Thompson, *Sampson's Discourse,* letter to Sampson Watts, p. 87.

Procedure drafted by Field. However, as Cook demonstrated in his book [158], the literature has never taken the form of a specific and organized movement. Thus, the various actors of the "movement" had no common denominator, neither political leaning, nor training, nor location. They therefore have objectively nothing to connect them, except, an interest in codification, which explains the various forms in which the debate takes place[159]. Historians have therefore collected these speeches, opinions and views on the subject to make them into a movement, when in fact no organization has proven to be dedicated to the defense and implementation of codification or common law. The only figures during the pre-civil war period that have undertaken concrete actions are David Dudley Field, Father of the New York Codes, and the Louisiana codifiers. Then after the war the codifications endeavors happened in the lineage of Field in one part and on the other part in Georgia. The Georgia code will stay an island among the other civil codes.

The arguments against the common law can be resumed in one: a need for a more understandable law, whereas it was because of its form, origins or content, the starting point is a strong need for a cleared law.

With the appearance of more traditional legal remedies such as the growth of legal literature, clarification of the law, the detachment of the law from English law and the development of US-based sources—law, doctrine, statutes and common law—codification lost its appeal, and could no longer play the role of panacea that was assigned to it.

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[158] Cook, *The American Codification Movement, A study of Antebellum legal reform*, p. 201-210.

[159] Gordon R., "The American Codification Movement*", Book Review*, Faculty Scholarship Series, Paper 1370, Yale, 1983, p. 432.

Some other reasons can also be presented to explain this lack and change of legal interest. Besides the changing nature of human concerns, an event can be advanced to explain this loss of interest in codification. In the 1860s, the United States were on the eve of the Civil War[160]. Debate therefore revolved mainly around the question of the rights of black people and slavery rather than drafting the law, and the concerns of citizens were no longer whether they could access the law but rather if they could defend their opinions or state in case of war.

[160] April 12, 1861, to April 9, 1865.

II – The most famous American civil codes: the Louisiana civil codes

Whenever the subject of civil codification in the United States is mentioned, the first response is usually "Louisiana of course". Considered as the only state to have a civil code those codes are the public image of codification in the US. As much as they are not the only one, they are the famous and fist one chronologically.

The 19th century is the century of codification in Louisiana, between the post-national independence period and the Civil War, the question of the codification of the law was key and three civil codes were implemented. The first one appeared before statehood was granted to the territory (1), then first revision happened, and finally the last 19th-century code was created to implement the civil was changes (2).

1. The survival of civil law in Louisiana

Civil law is a fundamental part of Louisiana culture[161]; indeed, it has been brought to the rank of symbol of their colonial legacy (1). That is this first fight for the conservation of their roots that brought the 1808 Digest to completion (2).

1.1. Louisiana, the civil law state

After Ponce de Léon, Hernandez de Sotho[162] decided in 1537 to embark upon the quest of the "fountain of youth". According to the Native American legend, this miraculous fountain which could give eternal life to the drinker was situated on a territory that we now know as Florida. This quest, for fame and eternal life did not come to fruition, but it did secure him a place in history. By finding the entrance of the

[161] To see an overview of the civil code history in Louisiana, in French, see Moreteau Olivier, "Les codes civils de louisiane dans leurs ordre naturel", Les Cahiers Portalis, 7-2020, p.209-223.

[162] Appointed by Charles Ier governor of the Cuba island and all the lands he could discover.

Mississippi, he was the first European to discover what was to become Louisiana[163]. In 1677, Robert Cavalier de LaSalle, from the French town of Rouen, explored the Mississippi from its source to its end up north. Upon arriving at its southern mouth in 1681, he decided to name the territory he founded in honor of King Louis XIV and his mother Anne of Austria, hence Louisiana[164].

This French colony was ruled by the "*coutume de Paris*" and the king decree[165]. The "*coutume de Paris*", is a collection of laws that contains the laws enforceable in Paris and the court decisions related to them, the first collection date of 1510. The one that was enforceable in the colonies date from 1579 and contain 362 articles. Louisiana was mostly peaceful and flourishing during the first years and in 1712 it even becomes administered separately from the other French colonies[166].

After the defeat of France during the 7-year war, Louisiana was ceded to Spain by the Fontainebleau treaty of 1762, also called the Paris Treaty. Spain took possession of the territory on November 25, 1769[167]. This change of dominion was not well received by the inhabitants. In fact, it took seven years for Spain to take possession of the

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[163] Debonchel V., *Histoire de la Louisiane depuis les premières découvertes jusqu'en 1810*, Nouvelle Orléans, Librairie de J. f Lelievre, 1841, p. 17 à 24.

[164] For a history of colonial Louisiana see Denuziere M., *La dix-huitième étoile : Histoire de la Louisiane américaine,* Fayard, 2013 ; Denuziére M., *Lousiane Tome 1,* Fayard, 2004 ; Gayaree C., *Histoire de la Louisiane, Nouvelle Orléans*, Magne & Weisse, 1846 ; Harpe B., *Journal historique de l'établissement des Français à la Louisiane*, Nouvelle-Orléans, Paul Renouard, 1831 ; Martin F.X., *The History of Louisiana from the earliest period*, vol I & II, New Orleans, Lyman and Beardslee, 1827; Wall B., *Louisiana : A History,* 6th edition, Willey-Blackwell, 2013.

[165] Debonchel, *Histoire de la Louisiane depuis les premières découvertes jusqu'en 1810 s,* p. 36, Levasseur A.*, Louis Casimir Élisabeth Moreau-Lislet Foster Father of Louisiana Civil Law*, Baton Rouge, The Louisiana State University Law Center Publications Institute, 1996, p. 3., Yiannopoulos A.N., "The Civil Codes of Louisiana", *civil law commentaries*, 1 Winter 2008, p. 2.

[166] Fontenot H., "The Louisiana Judicial System and the Fusion of cultures", *Louisiana Law Review*, 63 (2002–2003), p. 1149.

[167] Vanderlinden J., "Origins of the French legal culture in North America"*, LSU Law Center Journal of Civil Law Studies*, 2 (2008), p. 9, Levasseur A., "The Major Periods of Louisiana Legal History", *Loyola Law Review*, vol. 41, 1995-1996, p. 590.

territory, which during this time left it under French dominion and rule[168]. It was only in 1769 with the arrival of Don Alejandro O'Reilly that the inhabitants realized the place was no longer French. Spain underwent dominion over this territory for thirty-four years. However, a study of the legal documents during those years produced by Professor Jacques Vanderlinden shows that the inhabitant of the state still stayed attached to French law as most cases were settled out of court using the former French customs[169].

On the 1st of September 1800, the territory of Louisiana was retroceded to France under the treaty of Saint Ildephonsus, Article 3, between the Court of Madrid and the Republic of France. The state was given in exchange for the Duchies of Tuscany and Parma, which Napoleon gave to the Spanish king's son-in-law[170]. In fact, Napoleon was convinced that having a stronghold in the United States territory gave him a strategical advantage to develop his commercial relation with the new republic.

The treaty between France and Spain, included a confidentiality clause: as long as the war against England was active, the cession of the territory had to remain a secret. However, in June 1801, the American ambassador in England informed his country about this secret clause in the treaty, which is how the negotiation to cede the Louisiana to the United States began. These negotiations took two years and were carried out by Robert Livingston[171] on the American side. Robert Livingston is the brother of Edward Livingston who became in the following years one of Louisiana's champions for codification. Consequently, France would only govern the territory for twenty days. In this short time, some major changes were undertaken: the creation of a

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[168] Fontenot, "The Louisiana Judicial System and the Fusion of cultures", p. 1151-1155.

[169] Vanderlinden, "Origins of the French legal culture in North America", p. 7.

[170] Fontenot, "The Louisiana Judicial System and the Fusion of cultures", p. 1155–1157; Levasseur, *Louis Casimir Elisabeth Moreau-Lislet Foster Father of Louisiana Civil Law*, p. 13.

[171] Levasseur, *Louis Casimir Elisabeth Moreau-Lislet Foster Father of Louisiana Civil Law,* p. 13–14.

municipal council[172], a remodeling of the judicial system, and the adoption of the *Code Noir*, a code on slavery[173]. However, the enforceable law was still that of Spain,[174] in parallel with the return of the old and new French law.

The United States took possession of 25,1769 square meters on December 20, 1803[175], eight months after it was purchased to France for 15 million dollars[176] under the Paris Treaty of May 20 1803[177]:

> « Article 1. §2 — [...] The First Consul of the French Republic, desiring to give to the United States a strong proof of his friendship doth hereby cede to the United States in the name of the French Republic forever and in full sovereignty the said territory with all its rights and appurtenances as fully and in the Same manner as they have been acquired by the French Republic [...] »[178].

Napoleon's intentions are very clear with this treaty as he explains that "the ceding of this territory strengthens indefinitely the power of the United States, and I

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[172] *Décret du 30 novembre 1803 pour l'établissement de l'autorité municipale à la Nouvelle Orleans,* Louisiana Historical Quarterly, Vol.20, p. 170.

[173] Fontenot, "The Louisiana Judicial System and the Fusion of cultures", p. 1156.

[174] Fontenot, "The Louisiana Judicial System and the Fusion of cultures", p. 1155.

[175] Parise A. "Codification of the law in Louisiana: Early Nineteenth-Century Oscillation between continental European system and common law systems", *Tulane European & Civil Law Forum*, 27 (2012), p. 138.

[176] To give an equivalence it would correspond to 233 million of current US dollars. Even if the amount sounds small in fact it corresponds to 1,5 time the GDP of the USA at that time.

[177] Levasseur, *Louis Casimir Elisabeth Moreau-Lislet Foster Father of Louisiana Civil Law*, p. 28.

[178] Traité de Paris du 20 mai 1803, article 1,
« Article 1. §2 — [...] le Premier Consul de la République, désirant donner un témoignage remarquable de son amitié auxdits États-Unis, il leur fait, au nom de la République française, cession, à toujours et en pleine souveraineté, dudit territoire, avec tous ses droits, appartenances, ainsi et de la même manière qu'ils ont été acquis par la République française »

have just given England a maritime enemy that sooner or later will make them lose their pride"[179].

The American congressional act that allowed the possession of the territory established a provisory government and nominated two commissioners in charge of undertaking possession of the place and signing the treaty with the French commissioners. One of the American commissioners is William C. Claiborne, who would later be named the first governor of Louisiana and thus in charge of the administration of the territory.

Claiborne's first act as governor, was to "maintain the law in force thus far"[180]. Concretely, he was maintaining the former French and Spanish laws. This act can be justified as being the most practical decision possible as he did not had the time to set down the foundations of the law and every possible detail. It also gave him some time to get his bearings and learn about this new territory and its culture. In his mind, once he was settled, the inhabitants would become accustomed to the American dominion and then they would have to adopt the common law.

However, Claiborne quickly realized that he had made a mistake because the law he maintained was quite chaotic and different from what he was used to. In fact, at this point in history, the Spanish and French legislation were in force in Louisiana which involved more than eleven different codes, like the Spanish *Ordenanzas e Instrucciones*, the *Coutume de Paris* and more than twenty thousand laws. All of it,

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[179] Debonchel, *Histoire de la Louisiane depuis les premières découvertes jusqu'en 1810,* p. 93 ; Barbé-Marbois, *Histoire la Louisiane et de la cession de cette colonie par la France aux États-Unis d'Amérique septentrionale*, p. 317
« Cette cession de territoire affermit pour toujours la puissance des États-Unis, et je viens de donner à l'Angleterre une ennemie maritime qui tôt ou tard abaissera son orgueil ».

[180] *Proclamation on surrender of Louisiana*, 20 December 1803, Louisiana Legal Archives, 1937.

being sometimes obsolete and/or contradictory[181]. In his first report to the American president he explains his disbelief,

> "Louisiana, like most other countries which have undergone a change of Masters, is directed by many Municipal Customs and regulations from different sources; by what kinds of laws the French formally govern the province is unknown to me"[182].

As a result, he quickly tried to introduce common law on the territory. Born in Virginia, this lawyer trained in common law was in strong support of it. He was deeply convinced that by adopting common law in Louisiana it could bring more ease and certainty in the law of the territory. Common law also had the advantage of providing the territory with a directly enforceable and understandable legal system. However, his plans did not work out as he encountered a lot of resistance from the inhabitants[183]. In a letter to President Madison on October 29, 1804, he explains,

> " In the course of my efforts to introduce the American System of Jurisprudence into the ceded territory, I experienced many difficulties, and excited some dissatisfaction among the people—I sincerely wish, that Judges may find their duties agreeable; and that the happiest result may attend their exertions for the public good… "[184].

The leaders of the opposition to common law were two lawyers: Edward Livingston and Daniel Clark, they had the support of the inhabitants in the fight for

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[181] Parise A., "Codification of the law in Louisiana: Early Nineteenth-Century Oscillation between continental European system and common law systems", p. 137–138.

[182] US Territorial Papers, vol. IX—Orleans Territory, 1937.
Levasseur, *Louis Casimir Elisabeth Moreau-Lislet Foster Father of Louisiana Civil Law*, p. 19.

[183] Dargo G., *Jefferson's Louisiana, Politics and Clash of legal tradition*, Harvard University Press, 1975, p. 219.

[184] *US Territorial Papers*, vol. IX — Orleans Territory, 1937, Lettre de Claiborne à James Madison, 29 octobre 1804, p. 317.

the conservation of their tradition. This difference of opinion would make those three men enemies for life. This dispute between the three men escalated to a duel between Claiborne and Clark in 1805. After a conspiracy charge brought against Claiborne by Clark, the latter provoked a duel and Claiborne was shot in the thigh, an injury that would cause him to limp for the rest of his life[185].

Aware of these tensions in Louisiana, in a gesture of peace, on March 26, 1804, the US Congress took an act with two major consequences. First, it divides the territory of Louisiana in two parts, the District of Louisiana who later became the District of Missouri, called the Territory of Orleans now known as Louisiana. This redefinition allowed the division of the territory's administration whilst also reducing the amount of land that needed to be governed.

The territory of Orleans was directed by a governing authority, meaning a legislative council of thirteen members governed by a governor, in this case, Claiborne.

The second consequence of this act of Congress trying to ease tensions concerns the question of law. Section 11 states that,

> "The laws in strength in said territory, at the beginning of this act, and not inconsistent with the provisions thereof, shall continue in force up to altered, modified, or repealed by the legislature."

This attempt at appeasement by safeguarding the law would not work for long. Indeed, the first governor of Louisiana, Claiborne, was waiting impatiently for the meeting of the Legislative Council, in order to address the issue of law which, in his eyes, was urgent. His hope was to impose the common law. To this end, he sought out the major political figures of the region. The meeting, however, was repeatedly postponed, not only as a result of various events (slave revolt, hurricanes or yellow

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[185] Hood J., "The History and Development of the Louisiana Civil Code", *Louisiana Law Review*, 19 (1958), p. 21.

fever epidemic), but also because of the refusal of those great figures to sit down and implement Claiborne's vision[186].

Meanwhile, the opposition to the common law continues with, at its head, Edward Livingston, with the support of some of the state's inhabitants, including the major landowners. All together they were preparing a "Memorial". With this document adopted in public session in New Orleans in October 1804, signatories complained about having a foreign governor of their laws, customs and languages. They also disputed the introduction of the English language in the courts and the fragmentation of Louisiana[187]. In consequence, they asked the federal government in Washington for statehood to be granted, in order to have an elected government and have control over the law of the territory. The hope is that by electing people acquainted and accustomed to civil law and Louisiana's culture, they can avoid the introduction of common law. The petition is addressed to the US Congress, but it arrived after the meeting of the first Legislative Council of December 5, 1804.

The US Congress, despite understanding the tension in the territory, only granted half of what they requested. In early 1805, the federal government refused to grant statehood to Louisiana. However, they removed the legislative council and replaced it with an elected legislature[188], which is the traditional system of any US state. This act can be considered the first success of the civil law proponents in Louisiana. Although this success may seem limited because only a portion of their requests was accepted, it is the politically most important one which is granted: the ability to hold elections and

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[186] Hood, "The History and Development of the Louisiana Civil Code*",* p. 19-20; Parise A., "Codification of the Law in Louisiana: Early Nineteenth-Century oscillation between Continental European and Common Law Systems", p. 133-164.

[187] Debonchel, *Histoire de la Louisiane depuis les premières découvertes jusqu'en 1810,* p. 95.

[188] The legislature is the two houses elected by the local population: house of representatives and senate. They are in charge of the legislative power hence to take the different legislations/statutes in the state.

to get a form of control over decision-making in the state. This success of civil law supporters is, however, tainted by Claiborne who refused to yield.

Supporting the cause of civil law, the legislature[189], met for the first time in 1806. Its first decision was to make an act stating that the law in force prior to the Louisiana Purchase by the United States—meaning the French and Spanish law—was to remain in force. Governor Claiborne vetoed this decision. He justified his decision with pragmatic reasons: the current law appeared to him as confusing and unworkable, but the truth was that he was vetoing it mostly for political reasons as he still hoped to establish common law in the territory.

In reaction to the veto against an act held as founding for the territory the Legislature adjourned its session and published a manifesto claiming the dissolution of the General Assembly. In this manifesto, they developed several arguments in favor of civil law and against the implementation of the common law:

> "Now, what are the laws that Congress intended to preserve to us by this provision? What are the laws that must be subject to review and correction by the legislature of this territory? [...] Now, since we have the power to keep our old laws in so far as they do not conflict with the Constitution of the United States and the special acts passed for our provisional government, no one can deny the advantage to us of remaining under a system we are accustomed to and who can say anything contrary to the affection we owe to our Government. [...] What difference does it make here that such an act should be governed by civil law while in the other States of the Union They are governed by common law?
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> Certainly we do not attempt to draw any parallels between civil law and the common law; but the wisdom of the civil law is recognized by the whole of Europe; and this law is the one that nineteen twentieths of the population of

[189] The legislature is the reunion of the chamber of representatives and the senate in one assembly.

> Louisiana are accustomed to since childhood, one of which could not be deprived without falling into despair. [...]
> The debate in the Chamber of Representatives and even the veto of the Governor can only increase the suspicion that there is a hidden intention, in spite of us, to plunge us into the frightful chaos of common law"[190].

This manifesto is important because it brings to light the arguments and the strength of the supporters of civil law in Louisiana.

The first argument used is of political legitimacy. They remind the governor that it is they—the legislature—who hold the power as they are the ones who have been elected, especially, compared to the governor who is nominated and hence imposed.

Secondly, they use the argument of tradition. The manifesto reminds the governor that he rejects this system because he does not know it. It is the one to which they are accustomed and that the whole population knows.

Thirdly, it reminds everybody of the wisdom of civil law and stresses that this system is a model for Europe.

The fourth point is the pure and harsh criticism of common law which is to them an uncertain and chaotic legal tool.

Finally, they finish by explaining that it is not because they adhere to civil law they are no less American.

Bolstered by these arguments and aware of their powers, the legislature met again on June 7, 1806, and adopted an act providing for the drafting of a civil code[191].

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[190] *US Territorial Papers*, vol. IX Orleans Territory, 193, *The Telegraph*, June 3, 1806, extracts of minutes of Legislative Council, Department of State, p. 643-657 - Manifesto signed by Sauvé, President of the Legislative Council.

[191] *US Territorial Papers*, vol. IX Orleans Territory, 1937, Louisiana Act 214 - June 7, 1806.

1.2. The 1808 Digest, the first American civil code.

Under the act of June 7 1806, authorizing the drafting of a civil code, the legislature also appointed the commission. The committee[192] consisted of James Brown, Moreau Lislet, assisted by Villars, Boré, Watkins, Arnaud and Mahon, as legal advisors. They were appointed to "write and organize an adequate civil code for this territory"[193]. Moreau Lislet who played a major role in drafting the Civil Code was not initially one of the drafters of the code. He was appointed instead of Livingston because Claiborne used his influence as governor to prevent the latter's appointment[194].

Louis Casimir Elizabeth Moreau Lislet is considered nowadays as the father of the Civil Code in Louisiana. "My name is Louis Casimir Moreau. I was given the name Lislet to distinguish me from my older brother Benjamin Moreau who died."[195]. He was born in 1767, 1768 or 1769 at St. Martin of Dondon, in Santo Domingo[196]. He completed secondary education in France or in Cape Town and received the title of "lawyer in Parliament" in 1788. He married Anne Elizabeth Peters Filipina in Paris on September 10, 1789, he was then 23 years old and returned to Santo Domingo with his wife, and they then moved to the French Cape. They stayed in Santo Domingo until 1803 when Moreau Lislet worked in several functions, always in the legal field. He then spent

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[192] See Appendix 5.

[193] Session Laws of American States and Territories, Territory of Orleans 1804, 1811.

[194] Hood, "The History and Development of the Louisiana Civil Code", p. 20.

[195] Levasseur, *Louis Casimir Elisabeth Moreau-Lislet Foster Father of Louisiana Civil Law*, annexes, Moreau Lislet will
"My name is Louis Casimir Moreau. I Was Given the name Lislet to Distinguish me from my older brother Benjamin Moreau Who died.".

[196] Levasseur, *Louis Casimir Elisabeth Moreau-Lislet Foster Father of Louisiana Civil Law*, p. 80-82. Generally, it is accepted that he was born in 1767 as indicated on his tombstone, however, other documents such as his marriage address him as born in 1768 or 1769.

about a year in Santiago, Cuba, before emigrating to Louisiana[197]. Settling into Louisiana was facilitated by his knowledge of the laws within the territory as well as his language skills; speaking French, Spanish and English he could integrate himself in all circles of the new American territory. He built a reputation as a translator for legal documents and then resumed his work in the legal profession. Known as a virtuous man, that's why he was appointed as one of the draftsmen of the Civil Code. He was then, in May 1807, appointed judge to the Parish of Orleans[198].

For drafting the civil code, the draftsmen were expected to be paid eight hundred dollars each year for five years after the completion of their work. However, a payment was authorized by the Legislature in 1807 giving everyone the sum of two thousand dollars in full compensation for their service[199].

The code was written in two years. It was then adopted on March 31, 1808, by an "act that provides for the enactment of the Digest of civil laws currently in force in the territory of Orleans"[200]. This code is called *Digest of the Civil Law now in force in the Territory of Orleans, with Alterations and Amendments Adapted to its Present System of Government*[201]. The choice of the term Digest rather than Code is surprising, especially as the legislature and commissioners of the code spoke in their work of the 'Civil Code'[202]. One explanation could be that the term 'Digest' is used to pay tribute to the

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[197] Levasseur, *Louis Casimir Elisabeth Moreau-Lislet Foster Father of Louisiana Civil Law*, p. 95-113.

[198] Levasseur, *Louis Casimir Elisabeth Moreau-Lislet Foster Father of Louisiana Civil Law*, p. 114-118.

[199] Hood, "The history and development of the Louisiana Civil Code", p. 26.

[200] Moreau Lislet, *Digeste général des actes de la législature de la Louisiane passés depuis l'année 1804 jusqu'en 1827, inclusivement, et en force de loi à cette dernière époque : suivi d'un appendix et d'une table de matières*, Vol. I, Nouvelle-Orléans, Moreau Lislet, 1828, p. 207-208.

[201] *A Digest of the Civil Laws in Force in the Territory of Orleans* (Louisiana Civil Code of 1808), LSU Website, 1808. (LA. Digest [1808]).

[202] Vernon Palmer V., "The Quest to implant the Civilian Method in Louisiana. Tracing the Origins of Judicial Methodology", *Louisiana Law Review,* 73- 3 (2013), p. 804-805.

Roman code while allowing to this code to be distinguished from the Napoleonic Code. However, looking at the definition of the term digest: a compilation of existing laws; and of codification which entails more of a change and creation within the law, if we putt those definition in perspective with the project behind the codification project, meaning an arrangement of the existing enforceable laws then the usage of the term digest seems quite appropriate. Indeed, the term digest might have been chosen to emphasize the project behind the document.

The Governor Claiborne is not opposed to the Civil Code: although for him it is a political failure, it at least had the merit of clarifying the law of the state. Indeed, in the words of the legislature:

> "Given the state of confusion in which the civil laws of this territory were plunged by the effect of the changes that took place in its government, it had become essential to know which of these laws are conserved after the repeal of all those that were contrary to the US constitution; or incompatible with its principles, and to collect, in one book, which can offer the courts and lawyers, a sure guide to inform their decisions, without resorting to the multitude of volumes, mostly written in foreign languages who have their interpretations, inexhaustible resources at chicane"[203].

The Digest of 1808, the first existing civil code in the US, consists of three books, divided into titles, chapters, articles (2121). It essentially reproduces the Napoleonic

[203] Moreau Lislet, *Digest general acts of the legislature*, p. 207-208.

Code and Spanish law in force in the territory[204]. It is a hybrid containing the two colonial legal traditions in the territory[205].

Since its adoption, it acquired a great reputation within the state[206]. Indeed, the Digest seems to fit perfectly with the political and cultural demands of the inhabitants of the territory. By making the civil law system official and preserving the Louisiana culture and therefore adopting a code of Romanist tradition, it fulfilled the request that they had already expressed in the manifesto of 1804. However, this code remained a strange tool for new lawyers from other US states who emigrated to the territory and were not educated in this tradition[207]. The legislature, recognizing the importance of the code and the innovation it created, decided to explain the usage of the code and what it means,

> "Section 2. All that in ancient civil laws of that territory or in the territorial statutes contrary to the provisions contained in the digest, or incompatible with it, are and remains repealed by this"[208].

This choice is clear the code had one goal which was to repeal former laws in order to clarify the law. With this, the legislature follows one of the main criteria of a code according the 19th-century theory: it has to be the primary source of law.

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[204] *A Digest of the Civil Laws in Force in the Territory of Orleans* (Louisiana Civil Code of 1808), LSU Website 1808.

[205] Moreteau O., "De revolutionibus, The Place of the Civil Code in Louisiana and in the Legal Universe", *Journal of Civil Law Studies*, 5 (2012), p. 31-66.

[206] Billing, *Louisiana Legal History and its Sources: Needs, Opportunities and Approaches in louisiana's legal heritage*, Edward F. Haas ed., 1983, p. 199.

[207] Barham M., "La méthodologie du droit civil de l'État de Louisiane", *Revue internationale de droit comparé*, 27-4 (Octobre-décembre 1975), p. 800.

[208] Moreau Lislet, *Digeste général des actes de la législature,* p. 207-208.

However, what the section does not specify is what to do with the provisions that are not contrary nor included in the code. Practice will show that they remain enforceable.

2. The evolution of the Louisiana Civil Code during the 19th century

The 1808 Digest did not stay frozen after its adoption and it evolved throughout the nineteenth century to become first the Civil Code of Louisiana in 1825 and then the Revised Civil Code of Louisiana in 1870.

Following the adoption of the Digest, in 1811 opened in Louisiana the constitutional convention to establish the first state constitution. The constitution came into force in January 1812 which at last granted statehood to Louisiana[209].

In parallel, the legal provisions not contrary to the code remained in force despite the digest, which continued to create legal confusion. To try to make the law more understandable, the legislature authorized a translation of the Spanish *Partidas* in force in Louisiana. *Las Partidas* are a legislative compendium written in Castile in the thirteenth century, imported into the territories colonized by the Spaniards with other legal texts. The idea behind the translation was to have a document containing the applicable Spanish law outside of the code and to have a global vision of Louisiana law[210]. Moreau Lislet, who at that point no longer held the position of judge, began the translation into French of the Spanish *Las Siete Partidas*. The translation was published in 1820 after authorization of the legislature[211].

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[209] Levasseur., *Louis Casimir Elizabeth Moreau Lislet Foster Father of Louisiana Civil Law,* p. 127.

[210] Moreau Lislet & Carleton, *The laws of las siete partidas which are still in force in the state of Louisiana, translated from Spanis*h, Baton Rouge, Claitor"s publishing division, 2 volumes, 1820; Gruning D., "Bayou state bijuralism: common law and civil law in Louisiana", *University of Detroit Mercy Law Review*, 81 (2003–2004), p. 493.

[211] Levasseur, *Louis Casimir Elizabeth Moreau Lislet Foster Father of Louisiana Civil Law,* p. 130.

The confusion and the extent of law enforceable outside the code pushed the Louisiana Legislature on March 14, 1822, to adopt a resolution to appoint Livingston, Moreau Lislet and Pierre Derbigny[212] to

> "revise the Civil Code [of 1808] by amending in such manner as they will deem it advisable, and by adding unto ... [it] ... such of the laws that are still in force and not included therein..."[213].

They were also working to create a comprehensive system of trade laws and to draft a judicial code of practice that would become the Civil Procedure code.

Pierre Derbigny was a noble lawyer, born in France who emigrated to the United States during the French Revolution. Arriving in Louisiana at the age of thirty, he was a strong advocate for codification alongside Livingston. Moreau Lislet meanwhile had seen his reputation grow as a lawyer up to being appointed attorney general of the state of Louisiana, a position he held for two years. Subsequently, he was elected in 1818 and 1820 as a representative in the House of Representatives[214].

On March 22 1823, one year after their appointment, the commissioners sent their report explaining the plan of the complete revision of the Code as well as the main sources. They explain that their main source is the Napoleonic Code, because,

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[212] Among those offering their service for the writing of the code the votes are distributed as follows: 43 votes for Lislet Moreau, 25 for Livingston, and Derbigny, 23 for Workman, 22 for Mazureau, 3 for Smith, 2 for Morel and Carleton; Levasseur, *Louis Casimir Elizabeth Moreau Lislet Foster Father of Louisiana Civil Law,* p. 140.

[213] *Preliminary reports of the code commissioners, project of the civil code of 1825, 13 Février 1823*, Louisiana legal archives LXXXV LXXXIV, 1937, p. 29.

[214] Levasseur, *Louis Casimir Elizabeth Moreau Lislet Foster Father of Louisiana Civil Law,* p. 133-141.

> "The Napoleonic Code, that rich legacy that the expiring Republic gave to France and to the world, we have a system approaching nearer to perfection than any that preceded it"[215].

Their report also exposes their method to render the Civil Code as exhaustive as possible: adding to the digest the new measures taken by the legislature since the adoption of the Code, and the Spanish law that had not been integrated into the Digest. Their plan was adopted by the legislature requesting that the Code be prepared and printed as soon as possible. This is also the same year they proposed their project entitled *Additions and Amendments to the Civil Code of the State of Louisiana, in Obedience to the Proposed Resolution of the Legislature of the 14th of March, 1822 by the Jurists Commissioned for That Purpose.* This project included the articles of the code they wished to amend or add.

As for the other work, the commercial code is rejected. Indeed, according to a federal directive aimed to simplify interstate commerce, commercial law should be uniform on the territory of the United States thus preventing the adoption of a Louisiana Commercial Code. The Judicial Code of Practice meanwhile was adopted on 12 April 1824. It consists of 1161 articles and divided into 2 parts: Of Civil Action and rules to be observed in the prosecution of civil action. The Civil Code was adopted the same day as the code of judicial practice. For the writing and distribution of tasks of the civil code, Moreau Lislet was the main author of Book I, probably of Book II and the first three chapters of Book III[216], while Livingston was responsible for the

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[215] *Preliminary reports of the code commissioners, project of the civil code of 1825, 13 Février 1823*, Louisiana legal archives LXXXV LXXXIV, 1937, p. 28, Moreau Lislet, Livingston.
« The Napoleon Code, that rich Legacy which the expiring Republic gave to France and to the world, we have a system approaching nearer to perfection than any which preceded it».

[216] Parise A., "Translator's toolbox: The law, Moreau-Lislet's library, and the presence of multilingual dictionaries in the Ninetheenth-Century Louisiana", *Louisiana Law Review,* 76, p. 1163-1184.

remainder of Book III[217]. As for the printing of the code it took time, and delays were granted in February 1825. The printing ended on May 20, 1825, three years after the appointment of the revision board.

The code was published under the title 'Civil Code of the State of Louisiana', to be issued a month later, on June 20, 1825. It consists of 3522 articles, and thus 1401 more than the 1808 Digest. The amendments and changes to the code aimed to render the content of the code more Spanish[218], even though the editors say that they used the Napoleonic Code as inspiration. The 1825 Civil Code of Louisiana emulated, in fact, the legislature of Lower Canada—that is, Quebec—in 1857 ordered the drafting of a civil code modeled on the 1825 Civil Code. It ends up mainly as a repeat of the code but freed it of its Spanish provisions[219].

The Civil Code of 1825 would have stayed in force, but the Civil War changed everything, and the law could not remain unchanged. This major event was to forever change the morals and society in the American states who had to adapt, particularly the southern states such as Louisiana. Changes due to the civil war mandated a revision of the Civil Code of 1825 during the period of reconstruction. Indeed, Louisiana before the Civil War had a state economy mainly based on cotton plantations operated by slaves. The adoption of the 13th Amendment to the Constitution of the United States, who abolished slavery, in 1865 means that the

[217] Vernon Palmer V., "The French Connection and The Spanish Perception: Historical and Contemporary Debates Evaluation of French influence in Louisiana Civil law", *Louisiana Law Review*, 63 (2003), p. 1067-1126.

[218] Batiza R., "Origin of modern codification of the civil law: the French experiences and its implications for Louisiana Law", *Tulane Law Review*, vol. 56, 1981–1982, p. 477–601; Moreteau O., "Recodification in Louisiana and Latin America" (with Agustín Parise), *Tulane Law Review*, 83 (2009), p. 1103-1162.

[219] E. Fabre-Surveyer, "Civil Law in Quebec and Louisiana", *Louisiana Law Review,* 1-4 (1938), p. 649–657.

Southern states must review their law[220]. Louisiana after the war was under federal occupation and had to establish new legislation and a new order in the state. The first step was constitutional work. In 1868, a new constitution was adopted in accordance with the principles of the Union. The legislature then appointed a legislative committee including Senator John Ray to complete the revision of statutes in order to continue the revision the law. The act states that,

> "Some suitable person or persons, whose duty it shall be, under the supervision and leadership of said committee, to revise the statutes of the State in a general sense, to simplify their language, to make proper their incongruities, to make up for their deficiencies, to arrange them into a clear order, and to reduce them down to one text, with the view to adopting them as the Revised Statutes of the State"[221].

The order of priority for the revision of the law is quite surprising in this civil law territory before the civil code. Indeed, after the constitutional amendment, priority was given to the statutes over the code of the state, which is surprising because codes are above statutes in the hierarchy of norms in Louisiana. This legislative review order demonstrates the growing influence of the US government, meaning of a common law government, which does not consider the local and legal specifics of this unique state. Being a southern state that has to be "mold" to the image of the northern state by this revision, the military government hence seems to have decided to go with a total ignorance over the civil law particularity of Louisiana state and treated it like any other common law state.

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[220] For an overview of the history of American law, see Friedman L., *A History of American Law*, p. 226-235.

[221] *US Territorial Papers*, vol. IX—Orleans Territory, 1937, Louisiana Acts n° 31, 1868.

The revision of the law continues on October 21, 1868, when the Legislature takes an act to revise the Civil Code and the code of judicial practice[222] because it was necessary to remove the provisions on slavery[223] from the codes. The commissioners took advantage of the revision to introduce new provisions in the code, such as divorce.

John Ray was again appointed for this revision. John Ray, a native of Missouri, became a member of the Louisiana Bar in 1839. He was elected to the House of Representatives in 1844, remaining until 1850 and in the Senate until 1854. From 1854 to 1864, he left politics to take care of his plantation, and it was not until the emancipation of slaves in 1854 that he became a full-time politician. In 1867 he became a member of the *Executive Committee of the National Reconstruction Party of Louisiana*, an organization composed only of radical Republicans. The following year, he gained a Senate seat and was nominated for various endeavors to revise the legislation, such as the revision of the Civil Code.

To assist in the Civil Code revision, John Ray appointed three lawyers. Isaiah Garrett was responsible for assisting in the establishment of the Civil Code revision plan, while Franklin was Garrett's assistant for reviewing the content of the provisions and Colonel FA Hall was nominated to work mainly as a proofreader[224].

The project was printed, submitted, and accepted at the general meeting of December 27, 1869. The salary of John Ray was defined by the adoption act. He was

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[222] Called Code of Practice.

[223] In Louisiana, the provisions on slavery are found in the Civil Code, but also in the Black Code adopted on June 7, 1806.
For more information on the Black Code and Louisiana see Ingersoll T.N., "Slaves Codes and Judicial Practice in New Orleans 1718–1807", *Law and History Review*, 23 (1995), p. 13-26, Vernon Palmer V., "The Origins and Authors of the Code Noir", *Louisiana Law Review*, 363 (1996), p. 56-81.

[224] Ray J., *Report to the joint committee on the revision of the civil code*, 27 December 1869.

paid 25,000 dollars for the Revised Statutes, 15,000 dollars for the civil code, and 10 000 for the Code of Practice[225].

The report proposing the revision of the Civil Code, a rather brief document is representative of the various problems encountered in this revision:

> "this work has required much labor and thorough acquaintances with the Civil Code, the Statutes of the state, and the decisions of the supreme court. It was found impossible to preserve the numbers of the Articles of the Code as they now exist. Since the adoption of the Code of 1825, the Legislature has from time to time not only amended, but also repealed many articles of the Code. The abolition of slavery also repealed many more. The provision of the constitution requiring the registry of all privileges and legal mortgages, before they can affect third persons, also introduced important changes. All articles which had been repealed, have been suppressed. It becomes necessary also to correct the translation of many articles derived from the Code Napoleon. Many new articles have been introduced, drawn from the Legislative enactments since the adoption of the Code of 1825"[226].

The first thing the commissioners exposed was their sources, used in order to perform the revision of the requested code. In this civil law state, it is very innovative to see that one of the sources is the jurisprudence of the Supreme Court. This demonstrates a gradual implementation of the hybrid system of common and civil law in Louisiana. Gradually, habits and common law elements made their way into the law of this state, probably due to the growing influence of non-civil law population coming from other states and the arising of a new Louisiana generation creating a distance with the state colonial culture.

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[225] Yiannopoulos A.N., "Two Critical Years in the Life of the Louisiana Civil Code: 1870 and 1913", *Louisiana Law Review*, 53 (1992), p. 9.

[226] Ray J., *Report to the joint committee on the revision of the civil code*.

The second important point of this report was the presentation of the work performed on the code. They recognized that it was impossible to keep certain articles, in particular those relating to slavery, as these were not constitutionally authorized; and the code was now up-to-date as it included the amendments passed since 1825. No major legal innovation was announced; the revision of 1870 is generally regarded as a "technical revision"[227]. *The Revised Civil Code of Louisiana* was adopted without discussion or amendments on March 14, 1870, and yet this major change in the state law did not make it to the headlines of the day[228].

To understand this peculiar revision, it is important to take into consideration the changes between the Digest and the Code of 1870. In more than sixty years, the French culture and heritage withered. Indeed, from 1865, the vast majority of the population now spoke English and not French. To this must be added the influence of common law, which gradually found its way into Louisiana land. It is for this reason that 1275 of the 3556 articles of 1870 are found neither in the Napoleonic Code nor in the French doctrine[229].

The development of law from this code remained stable in the territory without major innovation thereafter. The only major change took place in 1879 with the introduction of the Louisiana Courts of Appeal, inspired this time by the common law system and not by French organization[230].

The Civil Code appeared as the first source of private law in the state. In the words of Mark Barham, despite a growing Americanization of the law,

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[227] Yiannopoulos, "Two Critical Years in the Life of the Louisiana Civil Code: 1870 and 1913", p. 9-10.

[228] Yiannopoulos, "Two Critical Years in the Life of the Louisiana Civil Code: 1870 and 1913", p. 17.

[229] Yiannopoulos, "Requiem for a Civil Code: A Commemorative Essay", *Tulane Law Review*, vol. 78, 2003–2004, p. 394.

[230] Hood J., "History of Courts of Appeal in Louisiana", *Louisiana Law Review*, vol. 21, n° 3, 1961, p. 531–552.

> "Louisiana is proud of its tradition of Roman law not merely by historical loyalty, but because it believes sincerely that the Roman law tradition serves the interests of the people of Louisiana. We also believe that our Romanist system had an influence on the development of US law as a whole"[231].

After the Louisiana code, during the second half of the nineteenth century, five of six states undertook a codification and drafted a code: New York (1860 to 1890), Georgia (1860), Dakota Territory (1865), California (1872), Montana and North Dakota (1895), and South Dakota

[231] Barham, "La méthodologie du droit civil de l'État de Louisiane", p. 815-816.
See also Moreteau O, "The Future of Civil Codes in France and Louisiana", *Journal of Civil Law Studies,* 2 (2009), p. 39-60.

III - The common law civil code during the 19th century in the United States

On the eve of the civil war, the discussion on the possibility of codification went from a national level to a federal one. Across America, several states decided to go for codification of their civil laws with a civil code.

At the beginnings of the Civil War in 1860, two states—Georgia and New York—undertook this adventure (1). Then, after the Civil War, other states—California, Dakota Territory, North Dakota, Montana and South Dakota—joined the civil code venture (2).

1. The states of Georgia and New York: one year, two civil codes, two models

Georgia and New York are two very different states, whether it be geographically, or ideologically, they both stand for two different traditions. However, a point of convergence between the two can be found: they went for a civil code at the same time without any connection nor communication with each other.

The implementation in the 1860s of those projects was very different from one state to the other, because they did not opt for the same type of codification. In Georgia, the code was more of a complication of the law and passed unhindered by the legislature (§1), whereas in the state of New York, the civil code was a purely innovative codification which was never adopted, despite numerous attempts (§2).

1.1 A successful codification compilation: the Civil Code for the state of Georgia

Georgia territory was discovered by Sir Walter Raleigh and became an English royal province in 1752. The largest state in the south was supposed to block the Spaniards' expansion[232]. During the colonial period, the legislation in the state did not greatly expand as this was not a priority. Indeed, between 1732 and 1752 only three statutes were adopted on the territory. To go even further, before 1752, only one resident of the state was a lawyer, and it was the state Governor[233]. The law was also handwritten, as Georgia had no public printers before 1762. Georgia was one of the first US states to obtain statehood on January 2, 1788, hence becoming the fourth state of the union.

The peculiarity of Georgia was a constant concern for harmonization of the law. Indeed, starting in 1799, the legislature requested that all judges of the state should meet yearly to homogenize the enforceable law in the territory[234]. This exceptional initiative created great stability of the law. Therefore, statutes and common law were applied in the same way from the north to the south, which was quite innovative for a young American state[235].

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[232] Captain M'Call H., *History of Georgia containing brief sketches of the most remarkable events, up to present day*, Vol. I & II, Savannah, Seymour & William, 1811.
For a complete history of the state of Georgia see Coleman K., *A history of Georgia*, University of Georgia Press, 2de Édition, July 1982; Richard R., *Colonial Georgia: a study in British imperial policy in the eighteenth century*, Athens, University of Georgia, 2010; Sullivan B., *Georgia: A State History*, The Making of America, Arcadia Publishing.

[233] GA Code (1861), p.7.

[234] Jefferson J., "The Georgia Code of 1863: America's First Comprehensive Code", *Journal of southern legal history*, 4 (1995–1996), p. 8.

[235] Billing W., "Law in colonial America: the reassessment of early American legal history", *Michigan Law Review,* 81 (1983), p. 953-962.

The early stages of the idea of codification appeared in 1832. Probably, influenced in part by the American codification movement and by the homogenization efforts of the state's law for decades, Judge Lumpkin proposed a general review of the statutes in force in the territory, but he did not obtain the majority[236]. This request for harmonization of the law was repeated many times during the following years by different legal figures in the territory but was never adopted by the legislature. Despite legislative deadlocks, some authors, including Thomas Cobb, the future editor of the Civil Code, composed and prepared a digest of statutes, listing the legislation enforceable in the state. These endeavors, were a valuable aid for the legal professions, but they did not solve the problem in depth.[237]

The path to codification continued in 1847. The legislature asked the superior judges to send a report on the various defects of the law, to suggest solutions and give their views on a possible codification of the law[238]. The judges of the Supreme Court responded with the following proposition: the appointment of a commission to undertake a revision of the law in order to clarify and reduce it[239]. This call was not answered until November 9, 1858, when the General Assembly of Georgia, 11 years later, under the leadership of a member of the legislature George A. Gordon, passed an act for the drafting of:

> "a code, which shall as near as practicable, embrace in a condensed form, the Laws of Georgia, whether derived from the Common Law, the Constitution of the State, the Statutes of the State, the Decisions of the Supreme Court, or the

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[236] Lumpkin J., "Report to the Legislature of Georgia", *Western Legal Journal*, 7 (December 1850).

[237] Jefferson, "The Georgia Code of 1863: America's First Comprehensive Code", p. 11.

[238] *Georgia Laws* No. 312, Resolution of December 20, 1847.

[239] Surrency E., "The Georgia Code of 1863 and its place in the codification movement", *Journal of Southern legal history*, 11 (2003), p. 81.

> Statutes of England of force in this State; and shall be modeled, if practicable, upon the present Code of Alabama.
> Said Code shall be completed within twenty months from the passage of this Act; and shall be reported to the General Assembly at its session in eighteen hundred and sixty, in order that when ratified and adopted by them, it may supercede all other laws and decisions and establish fixed and uniform law in the State of Georgia."[240].

The Georgian project was quite ambitious, as it was the first time that a common law code was ordered. This initiative was not an easy exercise for the drafters of the code because they were not used to civil law legislative functioning.

The act commanding for the drafting of the code also dictated on which model the Georgia code had to be based. The chosen model was the Code of Alabama of 1852[241]. Why this model? An early response is found in the report to the bar association of Richard A. Clarke, one of the draftsmen:

> "the law required the commissioners to adopt as a model the Alabama Code of 1852. Alabama is the daughter of Georgia. All her territory was derived from Georgia. Georgia furnished much of her early population, and among them some of the leading statesmen."[242].

In addition to the historical connection, this choice is explained by the fact that the Alabama Code is a document that editors knew. Even if it has the title of 'code', the Alabama code is a collection of statutes, a kind of revised statutes, and thus a type of work they were used to consulting, implementing, and using.

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[240] *Georgia Laws*, No. 95, 29 November 1858.

[241] *Code of Alabama*, Prepared by John J. Ormond, Arthur P. Bagby, George Goldthwaite, with head Notes and Index by Henry C. Semple, Britain and Wolf State Printers, 1852.

[242] *Report of the seventh annual meeting of the Georgia Bar Association*, Jas P. Harrison & Co, May 15th and 16th1890, Atlanta; Richard H. Clark, *The History of the first Georgia Code,* 15 May 1890, p. 154.

The innovation seen in the Georgia Code, distinguishing it from the Alabama Code, is that in Georgia the project was pushed further[243]. This means that not only like in Alabama the statutes had to be organized, rationalized, and selected to be part of the code, but in addition and in contrast to the Alabama code, all the other sources of law had to find a place in the code. The first source of law hence is the common law, along with the doctrine, the different law binding elements, and, of course, all the legally enforceable theory.

The advantage of building on the Alabama code is that it was an improved and more exhaustive version of a model code, without having to refer to Louisiana or Europe and therefore the Napoleonic code or civilian tradition. It also gave the Georgia code its main particularity: its shape. The innovation of the Georgia Code lay precisely in the creation of the four-code component of this unique code. Indeed, what is known as the code of Georgia is actually one document divided into four codes: political and public organization; civil code; practice code; and criminal code.

The act of 1858 appointed three commissioners to draft the code with a compensation of a maximum of four thousand dollars. Finding three competent men to volunteer for this project was not easy. In fact, several eminent jurists refused the appointment because they did not believe in the project[244]. Ultimately, the three men who were appointed were Richard H. Clark, Thomas RR Cobb, and David Irwin.

David Irwin[245] was a 52-year-old lawyer, who had been a judge until 1855. This autodidact spent only six months of his life at school. Coming from a poor family, he

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[243] Surrency, "The Georgia Code of 1863 and its place in the codification movement", p. 81.

[244] In this case Judge Iverson L. Harris, J. Herschel W. Johnson former governor, and John C. Nicoll judge *Report of the seventh annual meeting of the Georgia Bar Association,* p. 152.

[245] GA Code (1861), Introduction, p. XI.

was first a shoemaker before being elected as court clerk, allowing him to pass the bar. Then, he was elected senator and judge in 1835.

Richard A. Clark[246] meanwhile was 35 years old and a county judge at the time of his appointment. He was a recognized lawyer and admired by the legal profession despite his young age.

Thomas Cobb was a brilliant 35 years old young intellectual. He was from a wealthy family and grew up on the family plantation. He had graduated in French and Latin, but after the financial setback of his family, he turned to law and opened his office while being a legal journalist. Alongside his legal activities, he is also a rich plantation owner. In 1859, he opened the doors of his own law school that he founded with his father-in-law in Athens, Georgia.[247]

The commissioners appeared to be pragmatic men with a great practical sense and able to undertake such an innovative project, the creation of the first common law code.

The draftsmen due to their day job only worked part-time on the code, refusing to abandon all of their obligations. They met first in Atlanta in 1858 to divide the work [248]and decided to work separately on the different parts of the Code of Georgia so they could cover all aspects of the law: civil law; civil procedure; criminal law; and administrative organization.

The section on Government Organization was written by Clark and the one on civil procedure by Irwin. Cobb meanwhile, drafted not only the Civil Code, but also the

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[246] *Ibid,* p. X.

[247] Jefferson, "The Georgia Code of 1863: America's First Comprehensive Code", p. 15-17.

[248] Surrency, "The Georgia Code of 1863 and its place in the codification movement", p. 89.

preliminary remarks and the penal code[249]. After the division of the work, they decided on the type of codification they planned to use for the project. Regarding that choice, Richard H. Clark, set out a few years later the different forms of codification they had identified before embarking on the drafting of the code[250]. The first is the simple classification codification, which they chose. This codification involves a regrouping of the different sources of law and laws regarding one legal field and their classification under one document being as exhaustive as possible without changing any of the law's content. It is more of a formal codification. The second type of codification is "the same as the first in form but going further and making such amendments as are deemed necessary to harmonize and perfect the existing system"[251]. The third type of codification allows them

> "to take a yet greater latitude, and without changing the existing system of laws to add new laws, and to repeal old laws, both in harmony with it, so that the Code will meet present exigencies, and so far as possible provide for the future; and this is a real codification"[252].

Then the last form:

> "To these three may be added a fourth, which has been proposed by many Solons of modern times. This is to disregard at will the existing laws, and make a system substantially new, evolved from the brain and conscience of the author, being such as he thinks will be best and wisest for the State"[253].

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[249] Jefferson, "The Georgia Code of 1863: America's First Comprehensive Code", p. 19; Green T., "Georgia's next code", *Georgia Bar Association Journal*, Vol. 2, 1939-1940, p. 16.

[250] *Report of the seventh annual meeting of the Georgia Bar Association,* p. 149.

[251] *Ibid.*

[252] *Ibid.*

[253] *Ibid.*

The Georgia code draftsmen went for the most relevant to them, which was the first one: a simple classification with the least change possible in the law as the enabling act requested. Therefore, the Georgia Code is not seen as a real or full codification, as is the case for some of the other codes such as that of New York or Louisiana. Indeed, one other specificity of this code is that despite all the others, it does not reject the common law or try to break away from it, but rather the opposite; it is a tool to celebrate the law. For all these reasons there is an ideological gap between the Georgia Code and the other US ones, because to use Clark's words, "A code is essentially an organized collection of legal rules"[254], nothing more, nothing less. Somehow this vision of a code as a digest can link the Georgia Code to the first Louisiana Code, the 1808 Digest.

The change brought in the law by the Civil Code does not address the content, but the form. The idea was to go further than any other common law states regarding the strength of the written law while barely altering the existing law[255]. The drafters of the Code of Georgia and hence of the civil, criminal, political and procedural code therefore remained cautious when it came to content and legal change. Indeed, the Civil Code is the part of the code which includes most of the legal innovation: changes that remain minimal and concern mostly the removal of obsolete legislation in light of new and more current legal rules. [256].

At the same meeting in Atlanta in 1858, they also decided on the following working methodology:

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[254] Jefferson, "The Georgia Code of 1863: America's First Comprehensive Code", p. 1
" A year is Essentially code Organized collection of legal rules".

[255] Jefferson, "The Georgia Code of 1863: America's First Comprehensive Code", p. 22-25.

[256] Surrency, "The Georgia Code of 1863 and its place in the codification movement", p. 92.

> "As each commissioner finished a title, he had two copies sent to each other, so each could examine the work of each, to be prepared with suggestions of changes when we met to pass upon the whole work."[257]

This method of operation, although effective, was exhausting and difficult to do; in the words of Richard H. Clark:

> "This making of the first draft, and then two copies, was very laborious, and I had to employ an assistant to make the copies as I proceeded, so that when I was done the original the copies would also be done. We had no shorthand or typewriting then, and every word had to be written in full and with a pen"[258].

It was in August 1860, that the commissioners met for a second time in Atlanta to review the code in whole, section by section, working from early morning to late evening[259]. They then presented their work in October to Milledgeville, the state capital, to the legislative oversight committee. The oversight committee was so pleased by the commissioners work that they made a report unanimously asking the legislature to adopt the code and advising for a global vote rather than one section by section. Hence, the legislature in 1861, following these recommendations, adopted the code on November 29 for the House of Representatives, and December 18 for the Senate. It was decided that the Georgia Code would be put into force on January 1, 1862, and a public offer opened in January 1861 for its printing.

However, with the Civil War, a revision of the code was required so that it would still be in line with the new constitution of the Confederation as Georgia seceded from

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[257] *Report of the seventh annual meeting of the Georgia Bar Association,* p. 153.

[258] *Report of the seventh annual meeting of the Georgia Bar Association,* p. 153.

[259] Surrency, "The Georgia Code of 1863 and its place in the codification movement", p. 90.

the Union in January 1861. These events, moved the entry in force of the code to January 1863.[260]

The Code of the State of Georgia is a complete set of codes, together making a single document divided into four codes: The Political and Public Organizations of the State; The Civil Code; The Code of Practice; and The Penal Laws. The Civil Code itself consists of 1575 articles and is divided into nine titles: of people, domestic relations, relations from other contracts, ownership and tenure, property and rights attached thereto, title and transfer mode, offenses or insults to the person or property, equity[261].

During the nineteenth century the 1863 code was revised following the Civil War, first in 1867, and again in 1873. These versions are known by the name of Irwin's code because they were made by David Irwin, a lawyer and Georgian judge. The code was then revised in 1882[262].

1.2. An attempt of codification innovation: the state of New York

During the colonial period, the state of New York quickly became a British colony. The New York Bay was discovered in 1524 by the explorer Giovanni da Verrazzano, accompanied by Jacques Cartier, both sent by the king of France to explore the Americas. It was, however, only in 1624 that the Dutch settled on the island of Manhattan and founded the New Netherland colony two years later. The administration of the colony was established with the creation of a government

[260] Jefferson, "The Georgia Code of 1863: America's First Comprehensive Code", p. 21-22.

[261] GA Code (1861).

[262] Davis, *An Analysis of the law of Georgia since the code of 1882*, Constitution publishing company, Atlanta, 1888.

council. As for the administration of justice, the judges were the member of the council plus the captains of the ships present in the harbor when the court was in session.

It was only in 1664 that the British conquered the New York area. They took the territory from the Dutch and renamed the colony New York in honor of the Duke of York. By winning the territory, the English also removed Dutch law to apply The Duke of York's Laws—a legal compilation prepared for the colony of New York—the English common law and statutes. However, for ten years, the battle for dominion over New York continued and the territory passed from the hands of the Dutch to the English according to military victories. It was not until 1674, that New York, permanently became a British colony, at least until the war of independence.

England's colonial administration of this territory did not differ particularly from other colonies. From 1685, New York was governed as a Royal Colony, which meant that at its head was a governor and a council, both appointed by the British crown. It also had a representative assembly elected by the people. As for the courts, since 1735 they all applied the English common law and legal principles[263].

After independence and the creation of the United States, the city of New York became in the blink of an eye the first American city in 1788. The place became so prominent that it is on the steps of Federal Hall on Wall Street New York, that George Washington, was sworn in as president of the United States. The city remained the American capital until 1790[264].

Despite the repeal in 1788 of the English statutes from the New York state legal corpus, the English common law remains in force as the 1822 constitution confirmed,

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[263] For a complete history of colonial New York see Kammen M., *Colonial New York*, Oxford University Press, 1996.

[264] For a complete history of the state of New York see Klein, *The Empire State A History of New York*, Cornell University Press, 2005.

"such parts of the common law and the acts of the legislature of the colony of New York would continue unless altered or repealed or found unconstitutional"[265]. Despite this conscious choice to keep the English law, a growing dissatisfaction with the law appeared[266], thus making New York lawyers and New York city the epicenter of the American codification movement. During the last years of the debate, while interest in it was decreasing in the US, in New York it persisted and thrived. This probably happened because the two main participants of the debate, the two leaders, were New Yorkers keeping the debate alive and relevant[267].

Thus, after years of discussion on the subject, the constitutional convention of 1846 decided to include provisions on codification in the 1846 constitution of the state of New York Article 1, Section 17. The article initially contained the provisions of the constitution of 1822, on the law enforceable in the territory and added that in the next meeting of the legislature they were to appoint a committee of three people assigned the task

> "to reduce into a written and systematic code the whole body of the law of this state, or so much and such parts thereof as to the said commissioners shall seem practicable and expedient"[268].

The need for reform of the law and the call for codification, was defended by a portion of the constitutional commission members, so strongly, that they managed to have it included in the part devoted to the judiciary. The vote for this section of the

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[265] Constitution of the State of New York, 1822
"such shares of the key and the acts of the legislature of the colony of New York continues Would UNLESS altered gold Repealed gold found unconstitutional."

[266] Lincoln C, *The constitutional history of New York from the beginning of the colonial period to the year 1905: showing the origin, development, and judicial construction of the constitution*, vol I à V, Rochester, N.Y.: The Lawyers Cooperative Pub. Co., 1906.

[267] Masferrer A., *"The passionate discussion among common lawyers about postbellum American codification: An approach to its legal argumentation"*, p. 173-256.

[268] *Constitution of the state of New York*, 1846, Article 1 Section 17.

constitution was far from unanimous. It was adopted with 60 voted in favor and 45 votes against[269]. This division from the start on the issue, shows that on the codification process New Yorkers were very divided, which was also demonstrated by the numerous blockades that appeared later on the road. The literature, produced in the context of the debate about the Field Civil Code, is extensive[270] as the subject created a lot of impetus.

By an act on April 8 1847, the Committee for the Codification of New York State law was nominated. Two commissions were formed: the *Commissioners on Practice and Pleadings* working from 1847 to 1850; and the *State Commissioners of the Code* working from 1847 to 1865. Priority was given to the first commission, which was the

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[269] Lincoln, *The constitutional history of New York from the beginning of the colonial period to the year 1905: showing the origin, development, and judicial construction of the constitution,* p. 164.

[270] James C. Carter wrote an emotionally charged pamphlet against the Civil Code, *The proposed codification of our common law* (1884). In 1884, David Dudley Field answered with a pamphlet entitled *A short response to a long discourse: an answer to Mr. James C. Carter's pamphlet on the proposed codification of our common law (1884).* Field devoted himself intensively to the codification enterprise: *Codification: an address delivered before the law academy of Philadelphia* (1886); *Civil Code Of The State Of New York* (1865); Codification, *20 American Law Review*, 20 (1886), *David Dudley Field, Speeches, Arguments, And Miscellaneous Papers,* A. P. Sprague ed., 1884; "Codification in the United States", *Jurid. Review*, 1 (1889*);* Codification: Mr. Field's Answer to Mr. Carter, *American Law Review,* 24 (1890)
Scholars joined the debate on both sides: Albert Mathews on Carter's behalf: horn; Ludlow Fowler on Field's behalf: Ludlow Fowler R., *Codification In The State Of New York*, 2d ed. 1884. Five years after Field's Short Response, Carter delivered an address, *The Provinces Of The Written And The Unwritten Law* (1889) at the annual meeting of the Virginia State Bar Association; in 1890, Carter set forth a detailed portrait of the common law in anticode polemics in another address to the American Bar Association called *the ideal and the actual in the law* and in a posthumously published work titled *Law: Its Origin, Growth And Function* (1907). See also Carter J., *Argument Of James C. Carter In Opposition To The Bill To Establish A Civil Code Before The Senate Judiciary Committee* (1887); *The Ideal And The Actual In The Law: Address At The Thirteenth Ann. Meeting A.B.A*. (Aug. 21, 1890).
Many commentators also took part in the discussion: Hoadly G., *Codification In The United States: An Address Delivered Before The Graduating Classes At The Sixtieth Anniversary Of The Yale Law School* (June 24, 1884); Miller S., "Codification", *American Law Review*, 20 (1886); Dillon J., "Codification", *American Law Review*, 20 (1886); Hoadly G., *Codification Of The Common Law: Address At The Convention Of The A.B.A.* (Aug. 16, 1888); Hornblower W., *Is Codification Of The Law Expedient? : An Address Delivered Before The American Social Science Association* (Sept. 6, 1888); Jones L., "Uniformity Of Laws Through National And Interstate Codification", 28 *American Law Review*, 28 (1894); R. Floyd Clarke R., *The Science Of Law And Lawmaking* (1898).

one in charge of drafting a code of civil procedure[271]. The leading member of this commission was David Dudley Field, who is considered as the father of the New York Codes.

David Dudley Field was the oldest son of a pastor living in Massachusetts since 1819. He began his apprenticeship as a lawyer in 1825 in his hometown before continuing his training six months later in New York. He was admitted to the New York Bar in 1828. In 1829, he married Lucinda Jane Hopkins, with whom he had two children. In 1836, shortly after the birth of his third child, the newborn and mother died. Affected by this tragedy, Field left his children with some friends close to the family and left for a year to tour Europe. At this time, he was living in the capitals of Europe and developing his cultural knowledge and opinions. In January 1837, he left Paris to return to New York, marked by his time in France. Soon after, he opened a law practice that he ran with his brother, Stephen, until his brother departed for California. The firm was mainly specialized in commercial law. Fortified by his travel and the European civil law culture he discovered there; Field quickly became a supporter of codification. In 1841, advocating for codification he tried unsuccessfully to be elected to the House of Representatives of the State of New York[272]. He never stopped practicing law while dedicating his entire life to codification, as evidenced by the epitaph on his grave:

> "He devoted his life to the reform of the law:
> To codify the common law;

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[271] This commission has her very own section to in the constitution of 1846.
Constitution of the State of New York, Article VI Section 24,
"§ 24. [Commissioners to revise procedures.] - The Legislature, at its first session partner after the adoption of this Constitution, `shall Provide for the appointment of three commissioners, Whose duty it` shall be to revise, reform, simplify, and abridge the rules of practice, pleadings, forms and proceedings of the courts of record of this state, and to report thereon to the legislature, subject to Their adoption and modification from time to time.".

[272] Bergan P., Fiss O., MacCurdy C., *The Fields and the Law*, United States District Court for the Northern District of California Historical Society San Francisco and Federal Bar Counci,l New York, 1986, p. 21–28.

To simplify legal procedure;

To substitute arbitration for war;

To bring justice within the reach of all men"[273].

Following his nomination in the commission for drafting the Civil Procedure Code in 1846, it took him only two years to propose a code to the legislature on February 29, 1848, which was approved on April 12, 1848, and entered in force on July 1 of the same year. The Code of Civil Procedure became the emblem of the movement in favor of codification of law, to the point that, by 1900, half of the US states had adopted this Code of Civil Procedure Code, also known as the Field code[274].

The State Commissioners of the code in New York state were responsible for drafting the substantive law. A legislative act adopted on April 8, 1847, nominated Reuben H. Walworth, Alvah Worden and John A. Collier as commissioners to the code and allocated them two thousand dollars a year for the duration of the drafting process. They had to accomplish the drafting of the codes in the following two years[275]. Reuben H. Walworth refused the position and Antony L. Robertson replaced him on May 13, 1847[276]. John A. Collier resigned in January 1848 and was replaced by Seth C. Hawley[277]. All members of the commission were lawyers and were fully aware of the law and its shortcomings.

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[273] Lang, *Codification in the British Empire and America,* p. 114

[274] For a comprehensive study on the Code of Civil Procedure, its history, its impact and its application see Funk K., The Lawyers' Code: The Transformation of American Legal Practice.

[275] *Laws of the State of New York Passed at the seventieth session of the Legislature*, Albany, NY, 1847, p. 66.

[276] *Laws of the State of New York Passed at the seventieth session of the Legislature*, chapter 289, May 13, 1847, p. 354.

[277] *Laws of the State of New York Passed at the sessions of the Legislature*, Albany, NY, 1848, p. 579.

The mission entrusted to this commission, however, caused them some problem. Indeed, in their report to the Legislature on April 8, 1849, they explained that the common law and statutes "are distinct in their character and cannot really be assimilated in their general and leading features"[278]. Accordingly, they decided to focus only on statutes. This had the effect of creating a revision of the first six chapters of the Revised Statutes. The initiative was certainly useful up to a point, as it allowed the statutes to be updated. However, it did not fulfill the mission statement. When trying to reduce all the laws into a code, the commissioners not trained in civil law or civil tradition and not having any codification experience found themselves at an impasse and therefore decided to depart from what they felt was an impossible task[279].

Accordingly, on April 10, 1849, the legislature took it upon themselves to appoint a new commission. This time, Seth C. Hawley, Alvah Worden and John C. Spencer were appointed. Again, they had to do their work in two years at the most, that is, by April 8, 1851[280]. This commission would also fail, as all of the members resigned. The explanations for this failure are given by the Governor Hamilton Fish in 1850 during his annual inaugural message to the legislature. Being realistic about the difficulties of the task and about his personal responsibility to find suitable replacements for the men he initially nominated[281], he " offered the appointments to a number of the most eminent

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[278] *First report of the Commissioners of the Code*, Weed, Parsons & Co, Albany, 1849, p. 3.

[279] Lang, *Codification in the British Empire and America,* p. 135.

[280] *Laws of the State of New York Passed at the sessions of the Legislature*, Albany, NY, 1849, p. 453-454.

[281] Lincoln C., *Messages from the governors, comprising executive communications tot the Legislature and other papers relating to legislation from the organization of the first colonial Assembly in 1683 to and including the year 1906, with notes*, Vol IV, Albany: J.B. Lyon company, State printers, 1909, p. 488–489,
" A law Passed last winter, appointed three commissioners of the code to perform the duties specified in the 17th section of Article 1 of the Constitution [...] Two of These Commissioners-have Resigned. The resignation of Mr. Spencer Was on the 25th of June last; That of Mr. Worden Took effect on the 1st day of November. Under the power conferred by the law, I have endeavored to fill the vacancies".

jurists of the state. The vacancies, however, still exist"[282]. Indeed, he found himself in an impossible situation,

> "The principal difficulty in filling the existing vacancies, arises from the inadequacy of the compensation allowed, and the limitation of time compared with the magnitude of the labor to be accomplished. The restriction of time imposed by the existing law is fatal to the accomplishment of the work. The undertaking 'to reduce into a written and systematic code the whole body of the law of this State,' is too vast to be accomplished under the pendency of such a pressure, or to be completed by the labors of three men within two years"[283].

Therefore, the operation and composition of the commission had to be reworked in order to grant the commissioner more time. Additionally, better financial compensation was required to allow the members to work full time on the project. In reaction to this speech on April 10, 1850, a law passed to remove the commission appointed in 1849[284].

The project remained on hold until April 1855 when the Senate tried to vote for the appointment of a new commission but failed[285]. After this, for two years, Field repeatedly tried to push through the appointment of a new commission for a civil code

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[282] Lincoln, *Messages from the governors, comprising executive communications tot the Legislature and other papers relating to legislation from the organization of the first colonial Assembly in 1683 to and including the year 1906, with notes,* p. 489.

[283] Lincoln, *Messages from the governors, comprising executive communications tot the Legislature and other papers relating to legislation from the organization of the first colonial Assembly in 1683 to and including the year 1906, with notes*, p. 488-489.

[284] *Laws of the State of New York Passed at the sessions of the Legislature*, Albany, NY, 1850, p. 618.

[285] Coe M., Morse L., "Chronology of the development of the David Dudley Field Code", *Cornell Law Quarterly*, 27 (1941–1942), p. 244.

but did not succeed until 1857[286]. On April 6, a law passed appointing him, William Curtis Noyes and Alexander W. Bradford as commissioners to the code. Having learned from the previous failures, the legislature this time, gave them five years, but with no remuneration, and requested an annual report to the legislature. The legislature also planned the organization of the commissioners' work. They had to divide their work into three parts in order to establish a political code, a criminal code and a civil code, and their work was not to contain any provisions found in the codes of procedure[287]. This time, the codification venture moved forward and on April 10, 1860, the political code[288] was presented to the legislature, which did not adopt it and requested changes because some of the articles of the code were not to their liking.

The arrival of the Civil War did not stop codification, although New York was one of the founding states of the union and one of the first US states to abolish slavery. Indeed, during the annual address to the legislature in 1861, Governor Reuben E. Fenton reminded them that,

> "The codification of the laws of the State, which was initiated under the State Constitution of 1846, and pursued under various acts of the Legislature since that time, has been in charge of two boards of commissioners, who have co-operated in the task. I am informed that all the codes, as prepared by the commissioners, will be ready for examination and adoption during your present session"[289].

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[286] Lang, *Codification in the British Empire and America,* p. 136.

[287] *Laws of the State of New York Passed at the sessions of the Legislature*, Albany, NY, 1857, p. 62.

[288] *The Political Code of the state of New York full Reported*, Albany, 1860.

[289] Lincoln., *Messages from the governors, comprising executive communications tot the Legislature and other papers relating to legislation from the organization of the first colonial Assembly in 1683 to and including the year 1906, with notes*, p. 596-597.

In 1861, fourteen years after the appointment of the first commission, the first project of the codes was presented to the legislature, including a civil code[290]. The legislature after examination decided, via an act of April 23 1862, to extend the Commission until April 1, 1865, to allow them the necessary time to adapt and rewrite the codes. The Penal Code was presented on February 13, 1865, but only adopted in 1881[291] in parallel with the Criminal Procedure Code.

As for the Civil Code, the first project was completed by April 5, 1862, and the full version was presented to the legislature on February 13, 1865[292]. It consisted of 2034 sections and was adopted the same day. However, the governor vetoed it. The reason given by researchers to explain this veto is that he was under pressure from the Bar Association of New York, who was under to influence of Carter, the main figure against codification and Field in New York. Field, however, did not give up. Field never stopped to fight for the adoption of the civil code as show his address to the before the Judiciary Committee of the Legislature, delivered on the February 19, 1873, he encouraged New York representatives to lead the path towards a modern legal reform through codification as a matter

> "of public benefit and State pride. We boast justly that we have inherited from our fathers that English law which proclaims and enforces the rights of men. Let us give ourselves cause to boast also that we have enriched the great inheritance"[293]

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[290] Herman S., "The fate and the future of coding in America", *The American Journal of Legal History*, Vol.40, 1996, p. 422.

[291] *Laws of the State of New York Passed at the sessions of the Legislature,* Vol. II, Albany, NY, 1881, p. 98.

[292] *Civil Code of the State of New York full Reported,* Albany, 1865.

[293] Field, *David Dudley Field, Speeches, Arguments, And Miscellaneous Papers,* p. 374.

It is in 1878 that he managed to convince again the legislature to vote again on the adoption of his Civil Code, but the same scenario happened again: the governor vetoed it apparently for the same reasons[294]. In 1879 he continued to believe that, "despite all [...] obstacles, [...] a codification of our law is not far off"[295]. The code was then re-proposed to the legislature in 1882, but then again, the same thing: it passed the legislature but was blocked by the Governor. Then the civil code was again presented until the last unsuccessful attempt and repetition of the pattern in 1887 when it was definitely rejected. In consequence, the Civil Code for the state of New York was never adopted. It is at this point, after years of battle to try to have his civil code implemented that Field optimism diminished, causing him to become disenchanted to a point where he warned in 1890 that if his "Codes are not accepted, there will be none enacted within this generation"[296] but the civil code was never presented again to the legislature.

The cause of this "failure" of the civil code is still uncertain as there is no "official" reason. Indeed, "the precise cause of the substantial failure of the 19th century codification has been much speculated over"[297]. The same pattern occurred every time: the Civil Code was adopted by the legislature, but each time the veto of the Governor blocked its implementation and final adoption and no governor clearly explained the reasons for the veto[298].

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[294] Lang, *Codification in the British Empire and America,* p. 147-148.

[295] Field, *David Dudley Field, Speeches, Arguments, And Miscellaneous Papers,* p. 383.

[296] Field, "Codification: Mr. Field's Answer to Mr. Carter", p. 266.

[297] Fisch W., "The Civil Code Dakota: Notes for more uncelebrated centennial year", *North Dakota Law Review*, 45 (1967), p. 53.

[298] Hoy H., David Dudley Field, in V *Great American Lawyers,* 1908, William D. Lewis ed., p. 125.

> "Different explanations have been given to explain why Field's proposed Civil Code failed: the historical reluctance in American law to enact civil-style codification with the dichotomous structure of the common law; the insufficient methods of developing legislative texts and interpretation; lack of the historical and political circumstances typical of European countries; no need to clarify and to systematize the common law at that moment, since the writings of James Kent and Joseph Story had provided a more stable basis for the common law in the mid-nineteenth century; and, finally, the conservatism of the legal profession."[299]

The best-known and most accepted explanation for this repeated veto was the hostility and actions of the New York bar and its association[300]. The leaders of the bar association and most prominent members of the New York bar were anti-codification and common law lovers; hence, it seems that they used all of their influence and leverage to ensure the non-adoption of the Civil Code[301]. Therefore, this supposed failure of the code is usually putt on the shoulder of Field most famous opponent

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[299] *Masferrer A., "Defense of the Common Law against postbellum American Codification: Reasonable and Fallacious Argumentation", p. 416-418,* Weiss G., "The Enchantment of Codification in the Common-Law World", p. 103.

[300] As demonstrated by this citation of Hornblower W., *Association of the Bar of the city of New York, Report of the committee on the amendment of the law upon the proposed Civil Code, presented March 15th*, p. 17-18
"This work [the civil code] is a good example of what a code ought not to be and illustrates on every page the defects and dangers of codification. Thus far our State has been spared the disaster of its enactment into law, for disaster it would be. Defective in arrangement, crude and inconsistent in its statement of principles, glaringly deficient in its definitions, ambiguous and often unintelligible in its language, revolutionary in its changes of existing law, grossly incomplete in some branches, absurdly minute in others, it has all the vices of a code with none of its virtues. These are severe words, but they are not used lightly or without due consideration. Every one of these criticisms could be abundantly justified by quotations and references to the proposed code had I time to give them, or had you patience to hear them".

[301] Lang, *Codification in the British Empire and America,* p. 146.

James Carter[302]. Especially, when he already use his power to previously implement a code, the code of civil procedure.

Another and more theoretical hypothesis is that for the adoption of a code to be successful it needed to be part of a bigger political agenda. The civil code of New York was carried by a prominent lawyer but was not part of any political agenda in the state. Hence, Field did not have enough political influence and weight to carry his code to the finish line. This is why, in his book, Charles M. Cook[303], states that codification in New York is carried only by Field, and one man alone cannot carry a code.

Another explanation may be the length of the codification process. The code is presented to the legislature eighteen years after the constitution of the first commission. In almost twenty years, the codification lost some of its appeal and was less of a burning subject[304] than it was in 1846. The loss of appeal seems to come mainly from the adoption of the civil procedure code who dealt with the main procedural and practical issues of the civil law hence the civil law was for sure more usable and ruled by clear rules even if the content of the civil law stays somehow chaotic it appears that fixing the form problem made the content one a less appealing or less necessary on.

Realistically, even in 1846 codification was a controversial subject; things went downhill from there to a point where for years upon years, codification lost most of its

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[302] See Chapter 2-II for a detail examination of the opposition between Field and Carter.
See also Grossman L., "James Coolidge Carter and Mugwump Jurisprudence", p. 595-598, 614-626; Reimann M., The Historical School Against Codification: Savigny, Carter, and the Defeat of the New York Civil Code, p. 103.

[303] Cook, *The American Codification Movement, A study of Antebellum legal reform*, p. 197.

[304] "Mr. Justice Brown on Codification", 28 *American Law. Review*, 28 (1894), p. 258.

supporters. Whatever the real reason behind the governor's veto is, it does not change the fact that due to it, there never was a civil code in New York.

One other and different argument and explanation of this failure is developed by Professor Masferrer, for him,

> "the defeat of Field's Civil Code was due most directly to Carter's ability to persuade the inexpediency of such legal reform in the context of the examined legal debate. [...] the codification debate was more passionate than scientific. The essence of the matter is that Carter was more persuasive than Field."[305]

Whatever the true reason for this blockage of the New York civil code in the New York state was, what is remarkable with the Civil Code of New York is its exportation. Because of how innovative and groundbreaking it was, this code is the bridge between common law and civil law, between traditions while making law clear and accessible. Even though this code was rejected multiple times in his home state, it was adopted in multiple other states, with some modifications to suit local characteristics.

2. The out-of-state adoption of the New York Civil Code, a common law codification model

The innovation brought by the New York Civil Code is that it created a common law code, which incited interest. Contrary to the Georgia civil code, the New York codification process was very vocal and was followed by the other states, especially after the success of the civil procedure code. This code is the crossword of the common law and statute law and was available for adoption for whoever wanted it. It was a popular document admired by the new states under construction and some of them did not hesitate to adopt it. Thus, in California, the code was adopted while being

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[305] Masferrer, *"Defense of the Common Law against postbellum American Codification: Reasonable and Fallacious Argumentation",* p. 419.

amended (1) while in Dakota and the states that would result from its division, the code was sometimes adopted either without change or from one of tis already enforced version (2).

2.1. The unanimous adoption in California of a revised version of the New York state civil code

California is a region that was only belatedly colonized. Considered a vast and arid territory, it was only in 1765, under the leadership of Charles III of Spain, that the Spanish colonized it. They assigned these new lands first to the Jesuits then to Franciscan monks after the expulsion of the Jesuits because they were becoming "too political"[306]. In addition to their spiritual mission of conversion, the Spaniards brought with them the Spanish and Canon law[307]. Then the Alta California[308] passed in 1821 under Mexican ruling who applied their own law - an adaptation of Spanish law[309]. During this period, trade developed, resulting in conflict between the Anglo-American population who were doing business and the local population attached to the Mexican civil law. To illustrate the difference in traditions between the new tradesmen and the locals we only have to look at how they were expecting to have conflicts resolved: for the locals, conflicts were resolved by conciliation with meditation by a village elder, while residents of other states, the tradesmen, expected a professional judge[310].

California became an American territory as a result of the US war against Mexico. The Treaty of Guadeloupe Hidalgo of February 2, 1848, transferred a vast territory of

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[306] Tuthill F., *History of California*, San Francisco, H. H. Bancroft and company, 1866, p. 68–69.

[307] *Ibid*.

[308] The high California is the territory corresponding to the southwest coast of California between San Diego and Los Angeles.

[309] Frost J., *History of the state of California, from the period of the conquest, by Spain, to her occupation by the United States of America*, New York, Auburn Derby and Miller, 1850, p. 11.

[310] Rolston A., "An Uncommon Common Law: Codification and the Development of California Law 1849-1874", *California Legal History Journal*, 143 (2007), p. 150.

the American southwest to the United States-including California, New Mexico and Arizona[311]. California has therefore never been under British rule. It is a territory with a strong civilian tradition that has never experienced the common law.

In 1849, a committee was appointed by the Legislature to study the issue of the choice between the two systems of law—common law or civil law—and in 1850 while obtaining state status California decided to adopt the common law and its provisions as they were in agreement with the constitution of the state and legislative decisions:

> "An act adopting the common law. The people of the state of California, represented in Senate and Assembly, do enact as follows:
> The common law of England, so far as it is not repugnant to or inconsistent with the constitution of the United States, or the Constitution or laws of the State of California, shall be the rule of decision in all the Courts of this State"[312].

The common law was chosen because of convenience: it was not feasible in a single year to draft a complete set of codes, and at this time no code making the link between civil tradition and common law was available. Having an urgent need for a definitive and enforceable legislation to obtain state status, common law appeared at this time to be the easier choice[313]. Some authors also explain the reasoning behind the Constitutional Convention's decision as using the common law as a way to be recognized as Americans by choosing a law applied by almost all American states[314].

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[311] Friedman L., *A History of American Law*, p. 236.

[312] *Statutes of California*, chapter 95, An act Adopting the common law, April 13, 1850, p. 219.

[313] Klepsc R., "The Revision and Codification of California Statutes," *California Law Review*, 42-766 (1849 to 1953.1954), p. 766.

[314] Grossman, "Essay Codification and the California Mentality", p. 635.

The common law thus became evidence of a desire to integrate this new county. However, the adoption of the common law did not remove the previous law, and some Mexican civil law provisions continued to apply within the State of California. Indeed, no action or act was taken to explicitly remove provisions already in force in the territory[315]. This situation appears to be really similar as of what took place in Louisiana at the time of its purchase by the United States. It was similar to a point where they both went for the same solution: a civil code.

In this state accustomed to civil law, adjusting to the common law was relatively difficult and the traditional problems of the common law system were quickly identified: uncertainty, lack of certainty, in term of content and form lack of accessibility … adding to this is the increasing state inhabitant especially the forty-niners—people searching for gold settling in California—it made California the home receptacle of a heterogeneous American population. Indeed, more than 300,000 people decided to emigrate to California after the discovery of the first gold nugget[316]. Therefore, no legal tradition was predominant in the area as the population is so large and diverse that no pre-existing law could be established[317].

Cultural diversity, added to the civil law tradition, coupled with the problems inherent to the common law, worked towards the implementation of a new legal system: codification. In this case, it is the experimentation of the common law that creates one of the foundations of the call for the codification of the law.

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[315] *A Digest of the Civil Laws in Force in the Territory of Orleans* (Louisiana Civil Code of 1808), LSU Website 1808.

[316] Friedman, *A History of American Law*, p. 236-237.

[317] *Ibid*.

The need for a code was not only convenient, but it also reflects some intellectual ambition from California's inhabitants. California was looking for recognition, as it wanted to reinvent as an intellectual place and to be considered as more than just a wild region with the arrival of the gold seekers. The population was considered to be ruthless and California was perceived by other US states as a land populated by uncivilized savages and without culture. The American philosopher Josiah Royce who at the time was a professor at Berkeley, even considered that there was "no philosophy" in California,

> "From Siskiyou to Ft. Yuma, and from the Golden Gate to the summit of the Sierras there could not be found brains enough [to] accomplish the formation of a single respectable idea that was not a manifest plagiarism"[318].

This vision may seem extreme, but it is one shared by other intellectuals in and out of the state, who even went as far as to say, that the intellectual poverty of this state was due to its arid climate[319]. Despite these criticisms towards California and the forty-niners, the first structures and organizations that aimed to protect the population were taken up on their initiatives. Indeed, they created some local "vigilance committees" which were responsible for safety and punished behaviors that were harmful to society[320].

Despite these initiatives, California was in need of an intellectual product to prove that it was not a barbaric place, but a state that could influence its neighbors and the world. What better proof of their cultures and intellectual skills than a common law code that demonstrated a mastery of scientific understanding, rationality, and literary art? Codification appeared as the best way to demonstrate their

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[318] Royce J, *The letters of Josiah Royce*, John Clendenning edition, University of Chicago Press, 1970, Letter of Josiah Royce to William James, 14 january 1879, p. 135.

[319] Friedman, *A History of American Law,* p. 624.

[320] Friedman, *A History of American Law,* p. 237-240; Tuthill, *History of California*, p. 432-454.

sophistication[321]. The vow was made, and it only remained to put into place the necessary elements to draft the ambitious project.

Everything began on March 28, 1868, when the legislature appointed a commission to revise the statutes. It consisted of JB Harmon, John Currey, and Henry P. Barber[322],

> " Whose duty it shall be to meet in the city of San Francisco within three months after the approval of this act and proceed to revise and compile all the law of this State now in force or which may be passed at the seventeenth session of the Legislature"[323].

If this section 1 of chapter 365 seems only to involve a compilation of statutes, the rest of the act shows a real desire to codify. Indeed, section 2 states that

> "said commission shall continue its session from day to day and from time to time until a complete and thorough revision and compilation of said law have been effected and a comprehensive and concise system is prepared and arranged"[324].

In consequence, the commissioners had not only the ability to repeal all provisions they considered inadequate, but also the power to adapt the law. Sections 7 to 9[325] set out the practical details of the initiative, giving them up to July 1 of the

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[321] *Ibid*, p. 629.

[322] See Appendix 5.

[323] *The Statutes of California Passed at the Seventeenth Session of the Legislature*, 1867-1868, DW Gelwicks, Sacramento, p. 435.

[324] *Ibid.*

[325] *Ibid*
"Sect. 7 Said commissioners shall receive for their service compensation at the rate of four hundred dollars per month for the time actually engaged in the revision and compilation of the laws as

following years to perform their work, for which they were to receive the sum of 400 dollars per month of work, up to a limit of 3000 dollars.

The report of the commissioners is without any appeal, given the time available and having worked from April 1868 to December 1869 it was impossible for them to complete the task they had been assigned. However, they proposed some amendments to the constitution and an alphabetical arrangement of statutes of about thirty topics[326].

Following this, in 1870 the legislature appointed a specific commission in charge of the drafting a code[327]. The man behind this resolution was none other than Stephen J. Field, the brother of the New York codifier David Dudley Field. Led by Charles Lindley[328], this commission wrote several drafts attempting to reconcile the diverse legacy of California's territory. Two years after the first project, in 1872, after several

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hereinbefore directed; provided, no compensation whatsoever shall be allowed to the Commissioners exceeding the sum of three thousand dollars each- until the duties devolving upon them under the provisions of this Act shall have been fully performed and completed by them and reported to the Legislature.
Sect.8 On the sworn certificate of all of the Commissioners that the services have been performed, office rent or stationery furnished, the Controller is hereby directed to draw his warrant on the Treasurer at the end of each month for the amount of. said certificate so appearing to be due to the parties as above provided, and the Treasurer is directed to pay the same out of any money in the Treasury not otherwise appropriated.
Sec. 9. The said work of revision and compilation shall be completed by said Commissioners prior to the first day of July, eighteen hundred and sixty-nine, and the Secretary shall deliver the manuscript copy to the State Printer as soon as practicable thereafter. The State Printer shall furnish and deliver four hundred and eighty copies thereof, in bill form, to the Secretary of State, and the Secretary of State shall be and is hereby required to forward one copy thereof to each member of the Senate holder over and each member elect of the Legislature, to each Justice of the Supreme Court, District Judge. County Judge and District Attorney of this State, prior to the first day of November, eighteen hundred and sixty-nine."

[326] Klepsc, "The revision and Codification of California Statutes", p. 768.

[327] *The Statutes of California Passed at the eighteenth session of the legislature*, 1869-1870, Sacramento, DW Gelwicks, p. 774-776.

[328] Charles Lindley was a judge of Yuba County in 1860. His appointment by governor Haight as code commissioner will be supported by a list of California distinguished lawyers North, see Klepsc, "The revision and Codification of California Statutes", p. 773.

revisions of the various Civil Code projects, the latest version was adopted by both houses without discussion and with a unanimous vote[329]. It was adopted on March 21[330], on the same date as the Napoleonic Code, but 68 years later. It is unlikely that this date is a coincidence. Indeed, looking to California's desire to prove itself with an international intellectual project, it seems unlikely that they adopted the code on the anniversary date of the Napoleonic code by coincidence.

The California Civil Code[331] fulfills its role on one point: it was the first legal intellectual product of the state. Californian contemporary authors on the code even say that California is the first common law state to adopt a comprehensive set of codes. This claim is, however, questionable in particular because of the Code of Georgia, which includes a set of codes and therefore a civil code, adopted in 1860. Georgia actually preceded California by twelve years. Nevertheless, it was certainly not in the interest of this state that was in search of recognition to recall former codes. However, it was indeed the first state to adopt a civil code that arose from the New York civil code.

As for the code itself, the Californian commissioners had not created a code based only on the Californian common law and statutes, but they also adapted the New York Civil Code to their local particularities. Specifically, the California code contains 3543 provisions which is an increase of 1509 articles compared to the Field Code. Among those, 385 articles focus directly on issues inherent to California such as

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[329] Grossman, "Essay Codification and the California Mentality", p. 625-626.

[330] *Code civil des Français* (Code Napoléon), édition originale et seule officielle, Paris, Imprimerie Impériale, 1804. The Code of the State of California, San Francisco edited by R.M. SIMS, San Francisco, Bender-Moss Company Law book publishers, 1906.

[331] On codification in California, see Pomeroy J, The True Method Of Interpreting The Civil Code, *West Coast Republic,* 3 & 4 (1884); *The Code Of Remedial Justice, Reviewed And Criticised* (1877); "Civil Code", *California,* 50 (1885); W. H. H. Russell, California System Of Codes, *Michigan Law Review*, 2 (1893).

the issue of civil and commercial companies, water rights and hydraulic drilling law[332]. It is through these changes, associated with the need of a concrete code that the code was adopted unanimously by both Houses[333].

The fervor for the code, however, decreased quickly after its first use. Its "death" was signed by a series of articles by Professor John Norton Pomeroy, on the application of the Civil Code. This series focuses specifically on the rules of interpretation of the Civil Code[334] and states that the continental vision of a code is inapplicable to this code and the state to which it applies. Consequently, it must be treated as a mere supplement of the common law system. This rule of interpretation of the Code was then discussed and expressly adopted by the California Supreme Court in 1888.

Immediately after the adoption of the code, a commission was appointed in June 1872 to revise it, and it was amended in 1874[335]. The California Civil Code was revised again in 1895 following the adoption of the new California constitution of 1879, but the rule of its interpretation never changed.

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[332] California Civil Code Division First Part IV-Corporations, California Civil Code Division Third Part IV Title VIII Water Rights & Title IX Hydraulic Mining.

[333] Grossman, "Essay Codification and the California Mentality", p.628.

[334] *Ibid*
The question of the rule of interpretation of the code defined by Pomeroy is studied fully in Part 2 Chapter 3.

[335] *The Statutes of California Passed twentieth at the session of the legislature*, 1873-1874, GH Springer Sacramento, p. 516.

2.2. The New York Civil Code model in Dakota Territory

The study of Dakota Territory and its following subdivisions is quite difficult due to the lack of available sources on this period. Indeed, the "report" of cases defended before the courts of Dakota Territory are not available before 1867[336] and only a few sources such as the board of the Journal of the legislature is available, and even then, not for all year[337].

Dakota Territory[338] is at the northern reaches of American soil, it is a sparsely populated vast area of land that was colonized by France[339]. The French colony remained precarious due to the Sioux opposition. This territory became American by way of the Treaty of Paris, also known as the Louisiana Purchase, in 1803. In fact, the sale of Louisiana is not just the Louisiana Territory, but all French possessions on the US territory. This comprises 2,144,476 km2, corresponding to 529,911,680 acres at a price of 3 cents per acre, for more than 15 million dollars, or 80 million French francs, in total[340]. The first legislature of Dakota Territory met in 1862[341]. Although the form corresponded to the traditional organization of a US state, the few residents of the territory were accustomed to civil law, the territory being a former French colony.

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[336] Dakota Territory Supreme Court, *Reports of cases argued and determined in the Supreme court of the territory of Dakota*, to October 1889, (1867/1877), 1894.

[337] *Council Journal of the Legislative Assembly of the Dakota Territory*, Yankton, Dakota Territory. Available Years: 1862 to 1874 in 1887 and 1889.

[338] For a complete history of the Dakota, see Lamar H., *Dakota Territory*, Institute for Regional Studies, 2001.

[339] Blackburn W., *A History of Dakota*, Vol I., Aberdeen, South Dakota Historical Collections, 1902, p. 44.

[340] Treaty of Paris of May 20, 1803, between France and the United States.

[341] *The Revised Code of State of South Dakota*, official state edition, 1903, p. 2.

It was during the eleventh session of the Legislature, after a quick discussion on whether to adopt the common law, that they decided to adopt a code system[342]. The Civil Code was adopted in 1865 and its application began on January 12, 1866. The Legislature of the Dakota Territory adopted the first version of the Field Civil Code[343], presented a few months earlier at the New York Legislature:

> "A printed copy of the report of the commission containing the civil and penal codes, and also the maritime code, came into the possession of the Supreme Court of the Territory of Dakota, [...] all favorably impressed by the codes prepared by Mr. Field. [...] the Legislature of Dakota being the first legislative body to enact and put in operation these excellent laws"[344].

The peculiarity of the codification in the Dakota Territory is that the impetus for codification came from judges, especially the Supreme Court, one which is the opposite of what happened in New York, where a part of the bar association worked against it. The French heritage, a need for clear legislation and the availability of a legal tool working as a bridge between both traditions, seems to have prompted the legislature to adopt the Code without even bringing in any changes. Indeed, the new American territory showed its emancipation from France by adopting the common law code instead of the Napoleonic code as in Louisiana.

However, the problem with the code is precisely that the code was adopted without change and was therefore difficult to apply. Thus in 1870, Governor John Burbank requested the creation of a board of review because,

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[342] Lang, *Codification in the British Empire and America,* p. 153.

[343] *Dakota Laws*, 1865-1866, p. 361.

[344] Kingsbury, *History of Dakota Territory*, SJ Clarke Publishing Company, 1915, p. 430.

> "Revision and codification has become a matter of greatest importance, and the difficulty and uncertainty growing out of the present systematic arrangement is well known to all who have occasion to refer to the statutes[345].

Still undergoing a period of construction, the Dakota Territory legislature in the years following the adoption of the code multiplied the legislation without integrating them into the code. This legislative effervescence created confusion in the law. The call of the governor remained unanswered and the situation worsened. It was not until 1885 that a commission was appointed for the revision of the civil code.

The committee worked from 1885 to 1887. It was composed of Chief Justice Peter Shannon, Associate Justice Granville Bennett and lawyer Bartlett Tripp, assisted by a non-lawyer secretary WHH Beadle. The civil code was almost entirely the responsibility of the judge Shannon[346]. The secretary of the commission confirms in his memoirs the procedure followed by the commission,

> "We had the report of the New York (Field) code commission upon the entire subject. There was much study and discussion towards a clear understanding of the whole subject, and upon some points, such as corporations, some differences, but all sessions and all final acts where harmonious ... thus from the former incomplete code of Dakota, from the Field report in New York, California code and original work, grew the full civil code... Judge Shannon had nearly full charge of the civil code."[347].

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[345] Kingsbury, *History of Dakota Territory,* p. 560.

[346] Ficsh W., "The Civil Code Dakota: Notes for more uncelebrated centennial year", *North Dakota Law Review*, 45 (1967), p. 37.

[347] *Ibid.*

Accordingly, the revision of the code switched it from the New York version to its Californian adaptation. This new version consisted of 2133 articles: 99 more articles than in the New York code and 1410 fewer than in California.

This revised code also adopted a line of action regarding the application of the code. In short, the code had to be understood and interpreted in light of existing law at the time of its adoption. Therefore, this rule of interpretation did not completely remove case law or its strength and thus was closer to the Californian rule of application than the European one.

2.3. The continuity of civil code with the Dakota division

In 1889 the federal government decided to create new states from the Dakota Territory. The Enabling Act of 2 February 1889 states:

> "an act to provide for the division of Dakota into two States [...] Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the inhabitants of the area of the United States now constituting the territories of Dakota, Montana, and Washington, as to the present described may become the states of North Dakota, South Dakota, Montana, and Washington, respectively, as hereinafter provided"[348].

More precisely, the Dakota Territory was divided at the seventh parallel creating two states, North and South Dakota, and adding land to one other state, Montana. The creation of these new states could have provoked the discussion of a change in the law and the legal system used. However, the new states[349], decided to maintain the law of

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[348] *The Enabling Act,* February 2, 1889.

[349] Expect from the Washington state, who was mentioned and included in the act but had no link territoriality with the Dakota Territory, they just had their statehood with the same act at the same moment.

the Dakota Territory and it even took several years for them to acquire their own civil codes.

Regarding North Dakota, a first commission was appointed in 1891 to review the statutes. On March 1, 1893, Burke Corbet, Geo. W. Newton and Charles F. Starch were appointed, "to codify the laws adopted and revise excluding securities available and other formalities unnecessary the various parts of statutes"[350].

The committee in question therefore undertook a general revision of codes inherited from Dakota Territory. The preface of the North Dakota Code also provided that the commission members acknowledged themselves as heirs of Jeremy Bentham; [351]and it is the only American commission to have done so. The preface also outlines the originality and importance of his work:

> "In preparing this revision the commission has undertaken a task of great magnitude and difficulty. It involved much more than a mere compilation or rearrangement of pre-existing statutes. Not only have many changes been made in the form of existing law, but in each of the new codes a large number of provisions wholly new in this jurisdiction has been added"[352].

The commission went a little beyond its powers and did not hesitate to create new provisions while suppressing others. The commission's main work was to adapt

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[350] *The Revised code of the state of North Dakota,* Act Authorizing Revision, Chapter 74 Session Laws of 1893 Bismarck Tribune Company, 1895
"To codify the laws so adopted and revised by excluding the titles, enacting clauses, and other formal and unnecessary parts of the several statutes".

[351] *The Revised code of the state of North Dakota*, 1895 p. iii.

[352] *The Revised code of the state of North Dakota,* p. vii.
"In preparing this revision the commission has undertaken a task of great magnitude and difficulty. It involved much more than a mere compilation or rearrangement of pre-existing statutes. Not only have many changes been made in the form of existing law, but in each of the new codes a large number of provisions wholly new in this jurisdiction has been added."

the code to the peculiarities of the territory. The work was presented to the legislature in 1895 who adopted the Revised Code of the state of North Dakota. It consisted of 2476 sections, 343 more than in the revised code of the Dakota Territory on which they based their work.

For South Dakota, the procedure for revising the code of Dakota Territory was longer. However, in the meantime, they adopted the Revised Code of the Dakota Territory. Then in 1887, after the adoption by North Dakota of its "revised" code, the latter was included in the legislation of the state of South Dakota as a replacement of the Dakota Territory code.

It was only in 1901 that a commission was appointed for the revision of the civil code in order to take into consideration the changes brought by the North Dakota code and the new South Dakota common law. The committee worked for 2 years, and in 1903 the Revised Code of the state of South Dakota was adopted. It consists of 2477 sections, only one more than the civil code of North Dakota.

If the North and South Dakota states are the result of the Dakota Territory Division in 1889, the case of Montana is a bit more complex.

Montana Territory was created in 1864. Its first lands came from Idaho and until it became a state in 1889[353], the borders of the future state evolved to include the northeastern part of Dakota Territory in 1872. Montana was governed by the common law. However, in bearing witness to its neighbor that codified its law, the question of codification quickly rose. The successive incorporation of parts of Dakota Territory into Montana encouraged this initiative. The idea of codification grows up to a point

[353] *The Enabling Act*, February 2, 1889.

that in the last meeting of the territorial legislature in 1889 they voted for a codification of the law[354]. Indeed, at this time codification appeared as a good idea for two reasons, first the state of the law was chaotic, and second Montana was long overdue to be granted statehood hence, they thought that codification was their chance to show how modern they were, like in California, they hoped they could impress the other state with the code[355].

In February 1892 the commission reported four codes—civil code, civil procedure code, political code, and penal code—and the next legislature did not adopt them because they were having some other priority[356]. In 1894 a new commission was appointed to amend and improve the code that was adopted but the bar and legal population rose up to ask for an adoption of the codes prior to the amendment because they were in need of the codes. They succeed in their request as the code were adopted prior to the amendments the new committee might propose. One journal called this passage of the codes by the legislature before the changes as the codes having been bolted like a "dose of castor oil"[357].

Unlike what happened in New York, but following what happened in Dakota Territory, the bar supported and promoted the codification. They saw it as a way to have a single source of law and as a way to give this young state a place in modernity[358].

The codification process was implemented after obtaining state status in 1889. The same year, the governor in his inaugural message called for the codification of the

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354 Morriss, Burnham, Hon. Nelson, "Debating the Field Code 105 years late", p. 376.
355 *Ibid.*

356 Morriss, Burnham, Hon. Nelson, "Debating the Field Code 105 years late", p. 377.

357 *Code Bills Passes*, Daily Independent, January 26, 1895, p. 5.

358 Morriss, "This state will soon have plenty of Laws—Lessons from one hundred years of codification in Montana", p. 362–363.

law. His call was received positively to a point where a commission was appointed and would complete all its work in only two and a half years.

The commission based its work on the Californian model and not on that of New York. This choice can be explained by several hypotheses. The most convincing is that it remains in line with the evolution of the codification endeavor, like its neighbor Dakota Territory a few years previously. Montana used as a starting point the most recent code and the one that was considered to be an improved version of the Field Civil Code. What is certain is that the choice of the model used was not officially justified by the commissioners.

The codes were presented for the first time at the legislature in 1892 and were rejected. Indeed, the legislature did not find them to be complete enough to supplant the common law[359]. The idea of codification was nevertheless not abandoned. After a revision, the codes were adopted three years later at the 4th state legislature in 1895. The code of Montana[360] consists of 4673 articles. It has 1130 more articles than the California Civil code, justified by the addition needed from the state specificities.

As this brief history of the all the 19th-century US code shows, each of them seems to have its own factors and motifs driving the codification. All of them are representative of their states and seems to be the conclusion of the long history. They are legal tools in place to enforce the state reality at that special moment in their history; they all exist for diverse reasons that work differently but they all have one goal: to help and fix the law.

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[359] Morriss, "This state will soon have plenty of Laws—Lessons from one hundred years of codification in Montana,", p. 384.

[360] *Montana Code Annotated,* The Code and Statutes of Montana, in-force July 1st, 1895, vol1, Political Code, Civil Code, Constitutions Inter Mountain Publishing Co, Butte, 1895.

As for the why of this history summary of the codes, it is because knowing that is quite fundamental to understand them and to understand how they work with each other. From a code's history arises its influences, its factors and motifs, its impact, its tradition, its circulation, and its legal choice. It also allows to compare them, to learn from them.

Chapter 2
The external element influencing the civil law codification endeavors in the US during the 19th century

As a culmination of the codification process, a code is the result of a will, and a story. All codes are the result of various influences, named or unnamed. An examination of factors, patterns, and theoretical foundations of the codes allow a better understanding of them while extracting factors or patterns common or specific to the codes.

It should be noted that the study 'behind the curtains' of the American codifications showed that there is several elements explaining codification in the US within those particular states. Fist some common motives can be found; like the need for a reformation of the law and its revision, or the fact that all the codifying states arose from former civil law colonies. There is also one strong common ground between the different civil codes it is how they were implemented; the institutional and practical mechanisms are indeed the same in all the states. However, most of the codes being cultural products; being a bridge between law, society and its cultural elements, creates a disparity of factors influencing them who cannot be found in all the other codifying states. It is those differences and similarities that makes the strength of the 19th century American civil codes.

In France, home of the most famous 19th-century civil code, the codification process began with the revolution and Article 1[361] of the Declaration of human rights. The spirit of enlightenment coupled with dissatisfaction with the law of the former

[361] Declaration of Human Rights of 1789,
Article 1 Men are born and remain free and equal in rights. Social distinctions may be based only on considerations of the common good.

regime and a rejection of the figure of the judge added to the multiplication of regional customs to create a situation where codification was called upon. The law of 16-24 August 1790 states that "civil laws will be reviewed and reformed by the legislatures it will be made a general code with simple clear law appropriate to the constitution"[362]. Despite the strong desire for codification, the revolutionaries did not manage to implement a code, probably because of the lack of political stability in the period[363]. They were not a powerful figure or political party in power long enough or powerful enough to implement a code. The 18 Brumaire an VIII[364] Napoleon coup succeeded in taking power. With a strong political power and authoritarian regime, he created territorial unity and had enough strength to implement a national project: the creation of a complete code system[365]. The draft of the civil code was implemented eight months after his coup. The code was written by four men: François Denis Tronchet, Felix Julien Jean Bigot Préameneu, Jean-Etienne-Marie Portalis and Jacques Maleville. The civil code has its own ideology: putting rationality at the forefront, the idea of continuity, perpetual will, and the unity of various local traditions, while being a tool of exclusivity and universality[366]. In summary, it can be said that in France the civil code is a long-standing project rooted in strong political power and territorial unity. After the adoption of the code, Napoleon created a new vision of codification and legal device. The civil code is characterized by the fact that it is the only source of law; it has

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[362] Loi du 16 et 24 août 1790
« les lois civiles seront revues et reformées par les législatures il sera fait un code général de loi simple claire et appropriée à la constitution ».

[363] For a history of revolutionary codification projects see Van Kan E., *Les Efforts de codification en France. Étude historique et psychologique,* Paris, 1929 ; Martin X., *Nature Humaine et Révolution Française : du siècle des Lumières au Code Napoléon,* Dominique Martin Morin, 2004.

[364] November 9 1799.

[365] For a history of the Napoleonic Code see Savatier R., *L'Art de faire les lois. Bonaparte et le Code civil*, Paris, 1927 ; Halperin JL*., Le code civil*, Paris, Dalloz, Connaissances du droit, 2003.

[366] For a history of the factors influencing the Napoleonic codifications see Demolombe C., *Cours de Code Napoléon*, Paris, A. Durand et L. Hachette, 3e éd., T.1.

no competition. It is an exclusive and exhaustive document at the higher rank of the norms hierarchy.

The theory on codification usually defines several external factors and motives as traditional in order to create the adequate circumstances for a codification and drive it until completion. For example, John Head, in his article *Code, Culture, Chaos, and Champion*[367], considers that in order for a codification to be implemented, the country needs to have a high regard for written law, a high concentration of political power and a champion for codification[368]; for Remi Cabrillac, in *les codifications*[369], codification can only be implemented when there is a socioeconomic rise coupled with discontent toward the law and a strong political power; for Bruno Oppetit[370], codification only arises and is implemented after a societal crisis. These are just a few examples of the numerous codifications factors and motives that researchers throughout the centuries have identified as being necessary and driving codification.

All of this begs the question of what about the US cases? Can the elements that led to the code in France be found in the case of the US civil codes? What about the different ones identified by researchers; do they apply in these cases? Or are there other motives for those codes? If so, what are the external factors driving codification in America? Are they the same from one state to another?

The various elements related to the codification of private law are all representative of economic or social policy working to promote the establishment of change. The elements of economic and social development faced by the states tend to

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[367] Head J., "Codes, cultures, chaos and champions: common features of legal codification experiences in China, Europe, and North America", p. 1-93.

[368] *Ibid* p. 7.

[369] Cabrillac, *Les codifications*, p. 63.

[370] Oppetit B., *Essai sur la codification*, Paris, PUF, 1998.

increase the need for legal certainty and thus positively influence codification. Most of the codes were implemented after the Civil War, in other words, after society had been transformed to its core, after the country was split between North and South. It was a time of upheaval and people had to adapt to a new social reality: the abolition of slavery. Given this fundamental change, states felt the need to ratify and for some this meant a civil code. The arrival of a code in a society "which could seem necessary to establish the rules of the social game" [371]is not exclusively American. This social component is found from the ancient times to nowadays and especially with the French Civil Code that "after the extreme upheavals and confrontations of the revolutionary period, promote a new social order"[372].

The codification process in the United States during the 19th century is also affected by other factors such as the arrival of a new population, or the railway in certain territories which caused unparalleled commercial development and increased conflicts pushing for stability in the law. On the other hand, some innovative elements like the development of law schools worked against codification by creating a new legal elite trained only in common law who was less interested in other systems. To these must be added the political factor in support of codification and powerful men who circulated the common law codes. The combination of these factors made some US states the perfect space for codification of civil law and created different codes according to the different state factors driving the codification choice. Hence, codification is here studied first from the state (I), then according the human (II). Then codification in the US during 19th century is examined from a theoretical point of view including concept and circulation of it (III).

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[371] Oppetit, *Essai sur la codification.,* p. 11.
« [...] laquelle il a pu paraitre nécessaire de fixer de nouvelles règles du jeu sociales ».

[372] *Ibid* p. 12
"après les bouleversements et affrontements extrêmes de la période révolutionnaire, a entendu promouvoir un nouvel ordre social".

I - In Search of codification factors related to the state institutions

"The Civil Code is under the supervision of political laws, they must match. "

Portalis[373]

It is generally accepted among researchers that there is a connection between state institutions and codification[374]. Indeed, the laws established by the legislature are an expression of the political authority imperium which, at some point, required new laws in order to reinforce its power[375]. Hence, one of the first steps is to look at the link between the 19th century American civil codes, the politics and the state institutions.

For the codification project, three elements were considered at the institutional level. First was the question of the age of the states; were codifying states young or "old?" (1). The second political element was the possible influence of one of two American traditional political parties (2). Indeed, the various examples of codification throughout the world showed that generally a code is an element of the agenda of a political party. Then the last element is the codification process and how the code was adopted (3).

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[373] J-M Portalis, *Discours préliminaire du Premier Projet de Code civil. Titre original : Motifs et Discours prononcés lors de La Publication du Code civil*, 1801.
« Le Code civil est sous la tutelle des lois politiques, il doit leur être assorti ».

[374] Cabrillac, *Les codifications*, p. 160-189 ; Zaradny A., *Codification et Etat de droit*, Université Panthéon-Assas Paris 2, 2011.

[375] Castellucci I., "Law v. Lex: An analysis of a critical relation in Roman and Civil Law", p. 1-31.

1. The direct link between codification and the age of the state.

	Civil Code	Statehood
Louisiana	1808	1812
New York	1860	1788
Georgia	1860	1788
California	1872	1850
Dakota Territory	1865 1877	Territory so never
North Dakota	1895	1889
Montana	1895	1889
South Dakota	1903	1889

The analysis of the date of statehood[376], and the adoption of codes allows us to determine whether the codification is the prerogative of long-established or young states. Depending on the result, in the first case, the code would be the conclusion of a process of discontent toward the law, while in the second case codification becomes a choice among others during this formative period and thus a fundamental element of the state[377].

The analysis of statehood of the codifying states shows that most states were young and did not have any long legal tradition, or any proper non-colonial territorial legal tradition. To go into detail, all states adopting a code were relatively new states except for Georgia. This seems to be explained by the fact that young states were in search of a state identity, or at least did not have a strong state identity that could block the code, especially in common law states codifications appears as a fundamental choice taken as a stand. Indeed, only three places had a strong state identity. For two of them it worked for the codes; in Louisiana it was the colonial identity and in Georgia it was the concerns for unity and accessibility of the law. As for the third state, the New York, one the old common law state identity worked against the code.

The detailed examination also shows that two of the eight states codifying their private law, Louisiana, and Dakota Territory, adopted their codes even before they

[376] For the statehood date see Grisberg M., Tomlins C., *The Cambridge history of law in America,* 3 Volumes, Cambridge University Press, 2008.

[377] Cabrillac, *Les codifications*, p.169-171.

were granted statehood. In these cases, the code was therefore a fundamental element of the territorial identity. A territory could indeed operate without a final status however, it could not function without law. Among these two locations, one of the first battles fought by its inhabitants thus concerns the choice of legal system. In the case of Louisiana, the result was more turbulent than in Dakota Territory where the adoption of the code went smoothly. Then, looking at the adoption of the civil code in light of other codes such as procedural code or criminal code it is really interesting to see that in those two states the civil code was adopted even before the procedural ones, making it a fundamental part of the state identity.

As for the remaining six states, four of them—California, Montana, North Dakota, and South Dakota—were young states, under fifteen years old, and still in construction. California adopted its code twelve years after obtaining statehood; for Montana and North Dakota the code came after six years. Finally, in South Dakota, a state code was adopted fourteen years after obtaining statehood, although we have to keep in mind that from the beginning, they had a civil code; firstly, the one of the Dakota Territory and then that of North Dakota.

In these states, the civil code—whether it arrived before or after statehood—became a seminal decision of the state. They were adopted during the creation phase of each state's institution and law, hence at a time where the legal system was flexible enough to adopt them while making them representative of the state's unique identity. The creative outpouring of a young state seems to facilitate the implementation of a new legal tool. This explains why some states turned to the civil law and therefore to a code rather than or in addition to the common law. This choice is helped by the fact that these states had no stable and ancient institutions that may block the choice of codification as it happened in New York with the New York bar association. Unsurprisingly, the state of New York, even though it created the most replicated civil code, was never able to adopt it. This old state, one of the first in the US, was blocked by its very own tradition and institution.

However, with every rule there is an exception and one "old" state adopted a civil code. The choice of Georgia for a code does not seem consistent with the other codes in terms of the age of the state. Georgia adopted its code after 72 years of existence, making it one of the oldest states with a civil code. This decision surprised many, as stated by one of the code's editors:

> "When the Legislature of 1858 made provision for a Code, and a Code that would be such an innovation, the whole state was surprised. Indeed, the legislature was itself taken by surprise"[378].

Despite this apparent surprise, the Georgia code is the culmination of the state concerns toward law since its creation. Georgia's desire for a defined and clear state law takes precedence over the age of the state and appears in this case as being enough to justify the adoption of the code. As it was seen in the section on Georgia's history[379] from the start, the state institutions had a strong concern for unity and consistency in the law. The law had to be the same all over the state to ensure the best justice possible. Hence, the choice for codification, the tool of law unification. It can also be assumed for them that the code can be interpreted as a premise of separation with the federal state and tradition of the common law. Indeed, the code of Georgia was adopted at the dawn of the Civil War and so at a time of tension and separation between the northern and southern states.

Nevertheless, not all new states went for codification; if they had then all-American states or most of them would have a civil code but being a young state was undeniably a facilitating factor toward the implementation of a codification even if alone it was not enough. It needed to be alongside other external factors and motives.

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[378] Clark R., "The history of the first Georgia Code", *Report of the Seventh Annual Meeting of the bar association,* Atlanta, 1890, p. 1.

[379] Chapter I – II.

2. Civil codes and political parties

The history of codification in the world shows that, to be implemented, a code needs a strong political power to impose it[380]. The drafts of codes and their contents have an inherently political function[381], as legislation is often seen as a means to implement a political agenda[382]. Therefore, by looking at which political party was in power at the time of the adoption of the codes and at the moment of appointment and composition of the commission it can show a picture of the impact of politics on the civil codification. Was the code the result of the will of one of the two major US political parties? Are Civil Codes tools of one of the mains American political party, of the Republicans or the Democrats?

Before diving into it, it is essential to look at the general political views of both parties in the nineteenth century. The Democratic Party, created in 1792, saw the United States as a union of communities of citizens, and was a strong advocate for equal rights. Indeed, the Jacksonian movement, codification defenders, came from this political party. From 1860 to 1880, it was mainly the party of the Southern states. Then, since the mid-twentieth century, it has become more progressive and populist[383].

As for the Republican Party, it was created in 1854 by dissidents of the Whig party[384] and democrats hostile to the party's status quo on slavery and in favor of federal state protectionism. It is a predominantly conservative party, considered

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[380] Halperin JL., *L'impossible Code Civil*, Paris, University Press of France, 1992.

[381] Cabrillac R., "Les enjeux de la codification en France ", *Les cahiers du droit*, 46-162 (2005), p. 541.

[382] Skinner C., "Codification and the common law", *European Journal of Law*, 11 (2009), p. 232.

[383] Brown B., *L'état et la politique aux États-Unis*, Paris, Presse universitaire de France, 1994 ; Fontana A., « Le Parti démocrate », *Encyclopédie de la culture politique contemporaine*, Paris, éd. Hermann, p. 216.

[384] The Whigs are right hand liberal.

nowadays as right-wing. Regarding the law, they are unfavorable to the interpretation of the constitution by a judge[385].

A rapid examination of the doctrines of these two political parties shows that the codification can enter in the agenda of either one of them. For the Democrats, because it allows the law to be subject to democratic approval through the legislature while for the Republicans because it limits the powers of the court by withdrawing its legal creative role.

In order to understand the impact of the political party on the code, data has been pooled. First, the choice was made to examine the political orientation of the three institutions that can hold influence over the code, meaning the governor, the House of Representatives, and the Senate. The survey data reveals that the chambers always worked on this subject as one in a form of congress and had the same political orientation, so they were grouped under the term 'legislature.'

First, were examined the political orientation of the selected institutions for each state at the time the commission was appointed— which is also the moment they decided to opt for a codification of the civil law. For Louisiana this was in 1806, 1822 and 1868[386]; for Georgia it was 1858[387]; for New York it was 1847, 1849 and 1857[388]; for

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[385] Brown B., *L'état et la politique aux États*-Unis ; Gottfried P., *Le conservatisme en Amérique : comprendre la droite américaine*, Paris, L'œuvre édition, 2012.

[386] Poynter D., *Membership in the Louisiana House of representatives 1812–2020*, Legislative Research Library; Louisiana House of Representatives, house.louisiana.gouv; Mc Enamy, *Membership in the Louisiana Senate 1818–2020*, Louisiana State Senate, senate.la.gouv; list of Louisiana state governors, sos.la.gov.

[387] Membership in the Georgia House of Representatives, House.ga.gov; Membership in the Georgia Senate, senate.ga.org, Georgia Past Governors Bios nga.org.

[388] New York State Assembly members, nyassembly.gov; New York State Senate members, nysenate.gov; New York Past Governors Bios nga.org.

California it was 1870[389]; for Montana[390] it was 1889, for North Dakota it was 1893[391]; and for South Dakota it was 1901[392]. No data was collected for the appointment of a commission in the Dakota Territory since they directly adopted the New York Civil Code in 1865[393]. The only commission that existed in Dakota was in 1877 and it worked toward the revision of the code.

Then, the composition of the same institutions was examined, again but this time at the time of the adoption of the codes; that is to say in Louisiana in 1808, 1825 and 1870[394]; in New York in 1860 and 1865[395]; in Georgia in 1860[396]; in California in 1872[397];

[389] California Assembly members, assembly.ca.gouv; California State Senate members, senate.ca.gov; California Past Governors Bios nga.org.

[390] Past members of the Montana Legislature, leg.mt.gov; Montana Past Governors Bios nga.org.

[391] Past members of the North Dakota legislature, Legis.nd.gov; North Dakota Past Governors Bios nga.org.

[392] Past members of the South Dakota legislature, sdlegislature.gov; South Dakota Past Governors Bios nga.org.

[393] Dakota Laws, 1865-1866, p. 361.

[394] Poynter, *Membership in the Louisiana House of representatives 1812–2020*; Louisiana House of Representatives, house.louisiana.gouv; Mc Enamy, *Membership in the Louisiana Senate 1818–2020*, Louisiana State Senate, senate.la.gouv; list of Louisiana state governors, sos.la.gov.

[395] New York State Assembly members, nyassembly.gov; New York State Senate members, nysenate.gov; New York Past Governors Bios nga.org.

[396] Membership in the Georgia House of Representatives, House.ga.gov; Membership in the Georgia Senate, senate.ga.org, Georgia Past Governors Bios nga.org.

[397] California Assembly members, assembly.ca.gouv; California State Senate members, senate.ca.gov; California Past Governors Bio,s nga.org.

in Dakota Territory in 1877; in North Dakota[398] and Montana[399] in 1895; and in South Dakota in 1903[400].

The last studied data was the political orientation of the commission, meaning the political orientation of the code commissioners. The study on this point revealed that the commissions had neither a predominant political orientation nor a concordance between the political orientation of the commissioner and the political orientation of the institutions[401]. Indeed, a Republican majority does not necessarily designate Republicans for drafting the code and vice versa. Only the Louisiana commissions of 1808 and 1825 were perfectly in line with the institution's orientation. However, this can be easily explained by the situation at the time in Louisiana. When the Louisiana code was adopted it was a real battle to implement it, thus the code commissioners needed to be in line with the orientation and ideology of the legislature as it was a strong political, cultural and state endeavor.

On the other end of the spectrum, sometimes the members of the committee were of the opposing political party like in California, North Dakota, or Montana. In other states, Georgia, New York, Louisiana in 1870, and South Dakota commissions were representative of the various political orientations of the territory and varied between members. Commissioners were therefore selected for competence, not political opinion.

This lack of political harmony between commissions and institutions can be explained by the restricted number of competent and available persons able to draft a

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[398] Past members of the North Dakota legislature, Legis.nd.gov; North Dakota Past Governors Bios, nga.org.

[399] Past members of the Montana Legislature, leg.mt.gov; Montana Past Governors Bios, nga.org.

[400] Past members of the South Dakota legislature, sdlegislature.gov; South Dakota Past Governors Bios, nga.org.

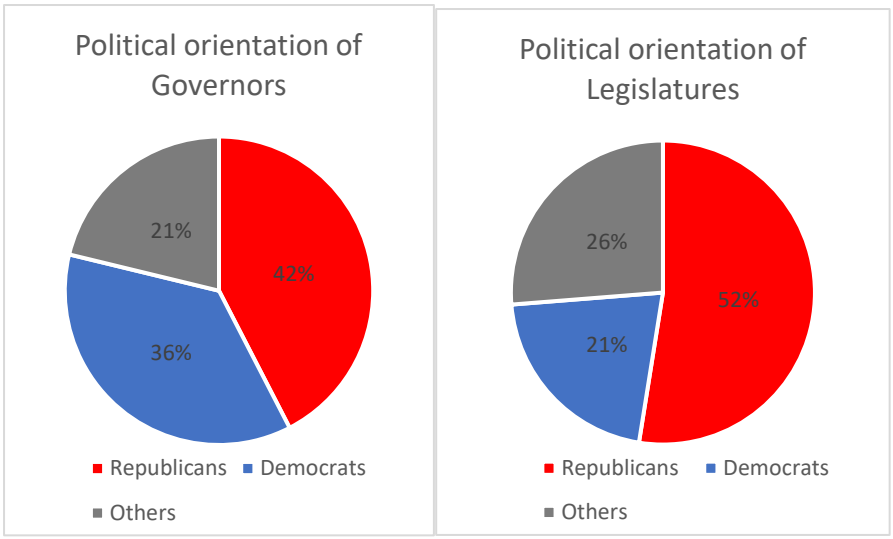
[401] See Appendix 7.

code. The drafting of a civil code requires a broad knowledge of the law within the territory as well as of the civil law tradition and how a code works in order to transfer the common law solutions in a code. Even among the 19th century cultured legal population, the number of persons with all this knowledge in a state is not huge, hence the choice in abilities rather than according to their political orientation.

In addition, this mix of political affiliation of commissioners allows them to detach the code from a specific political party and thus gives it some independence from the political institutions in force. This detachment between code and politics is not common and is one of the paradoxes of the codification of civil law in the United States during the nineteenth century.

This detachment of the codes form politics is also seen while looking at the code's momentum and the political orientation of the different institutions. A comprehensive review involving all the data, regardless of the code or period demonstrates that the same political orientation is not found in all states[402] when the codification choice was made. The period of the review involves all the codes, even when the republican party was not yet strong, as for the Wigh Party it is placed in other as it did not appear every time.

[402] See Annex 6.



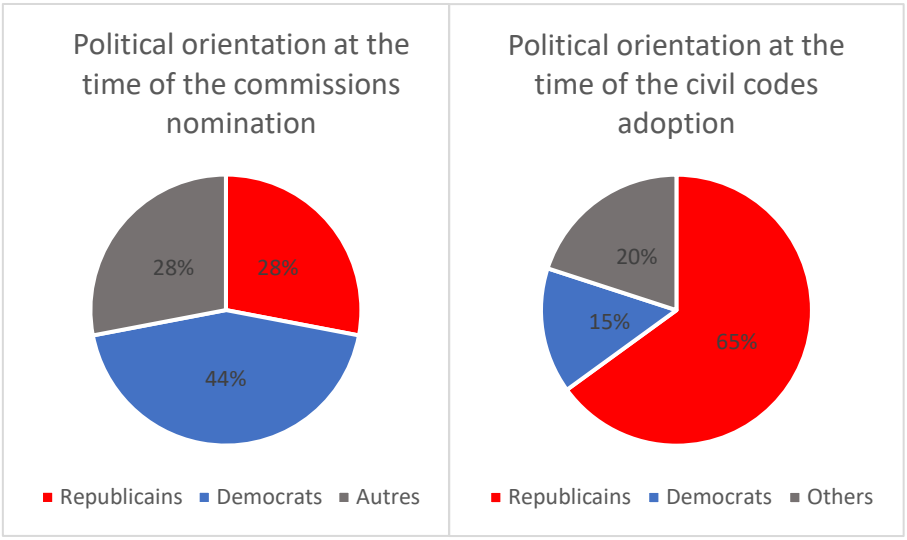
The grouping shows that all codes momentum gather 42% of governor were Republicans, 36% were Democrats and 21% belonged to another political party[403]. Regarding the legislatures, 52% were composed of Republicans, 21% were Democrats and 26% had a different political orientation[404]. Admittedly, 52% of the legislatures had a Republican majority. However, it remains a small percentage, and cannot make codification a Republican agenda, as the numbers are low and not sufficiently conclusive.

Based on this repartition of the institutions' political parties does not seem to have any consequence on the codification process. On this subject, the case of New York is really interesting as the code was adopted and blocked multiple times by Republican and Democrat legislatures and governors, hence it was rejected by the two main political parties.

[403] Democratic-Republican in Louisiana until 1825.

[404] In Louisiana democratic republican and in Montana there is a coalition between republican and democrats.

The examination of the political orientation, this time, according to the moments of codification, with both institutions regroup seems to confirm the preliminary conclusions.



At the time of adoption of the codes, there was a majority of Republican institutions, indeed 65% were republican. As for the appointment of commissions, the trend seems to be reversing. Even though here there seems to be a slight majority of Republican Institutions, the numbers remain quite low and are not conclusive enough to make codification a Republican agenda. According to the different states, there is a variety of political orientations.

As for the Civil Code of Georgia, which differs from other codes in many ways, it is the only one whose commission was appointed and adopted by a Democratic majority in institutions. This could perhaps explain why it did not export to the other states or why it was such a different code compared to the other common law civil codes. It might even be possible to conclude that the Georgia Code became representative of the democrat doctrine and will toward codification.

To summarize the three main moments, of the codification process 53% of the legislature were Republican when adding the chosen code momentum, 65% of the

institution were Republican at the point of the code's adoption and 44% were Democrat when making the choice for codification. Therefore, despite a slight Republican majority, the numbers are here again inconclusive.

The result of the study appears to show that none of the two main US political parties was a codifier one in the US during the 19th century. While statutes are considered the endorsement of the political will of the moment and should thus be interpreted and applied as strictly as possible[405], codes in America seem to escape this rule of being the tool of politics to only be a tool for the improvement of the law. This is what makes the American codes so peculiar, as they are the result of desire, not of any agency. However, they are all justified by legal reasons for their adoption.

3. The legal reasons behind codification

In addition to factors that influenced the civil law codification initiatives, the code commissioners and the legislature recognized specific legal reasons or justifications for the codification undertaking. These patterns are generally affirmed in the preliminary reports and in the prefaces of the codes. The codes were then officially listed as legal tools to provide a solution to the legal problems previously identified. Problems, that usually already had been identified during the American codification movement.

The first thing the code commissioners stated clearly is that they wrote a code[406], which meant they all clearly identified their choice to put common law into the field of

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[405] Zimmermann R., "Statua sunt stricte interpretanda ? Statutes and the common law a continental perspective", *Cambridge Law Journal*, 56 (1997), p. 318.

[406] *Louisiana 1808 Acte de promulgation*, p. I, *The code of the state of Georgia*, prepared by R. H. Clark, T R. R. Cobb and D. Irwin, Published by John H. Seals, Atlant, 1861, p. IV; *The Civil Code for the State of New York reported complete by the Commissioners of the Code*, Albany: Weed, Parsons & Co Printers, 1865, p. II; *California Code Commission 1868–1874*, p. 25; *The Revised Codes of the Territory of Dakota*, authority of legislative assembly, 1877, p. III; *The Revised Codes of the state of North Dakota*, Bismarck, Tribune company, 1895, p. XI*; Montana Code Annotated*, The codes and Statutes of Montana, in force

written law. However, and surprisingly, no sources tried to define the concept of code or codification as if the term itself was not worth a definition or already had a prior accepted definition and known by all. Indeed, they even went further by avoiding the term codification as much as possible preferring “written law” or “put into writing the law” in the majority of cases[407]. Too attached to Bentham or too theoretical to be defined, it seemed easier for the common law lawyers to speak about written law and the process of writing the law than to speak about codification when explaining their work. To qualify the codification, endeavor the commissioners did not all use the same vocabulary, but some terms are definable in most codifying states as they called their codes "indispensable"[408] or justified them as a “remedy"[409] to the legal issues.

One justification for civil code found explicitly in all documents prior to them, regardless of the state. It is the word "organization"[410]. This means that the common goal of all States was to structure and harmoniously combine the law as a coherent whole. Hence, to the commissioner the primary purpose of the civil codes was more for formal rather than content based. This codification pattern was not new and has been found for centuries whether Justinian or Napoleon, they both wanted to organize the law[411].

July 1st, 1895, vol1, Political Code, Civil Code, Constitutions, Inter Mountain Publishing Co, Butte, 1895, p. XVIII; *The Revised codes State of South Dakota*, official state edition, 1903, p. I.

[407] *A Digest of the Civil Laws in Force in the Territory of Orleans*, edition de La Vergne,1808, p. 12*; Report of the Code Commissioners of the code for the state of Georgia*, in *The code of the state of Georgia*, p. 29; *The Civil Code for the State of New York reported complete by the Commissioners of the Code*, p. 24.

[408] *A Digest of the Civil Laws in Force in the Territory of Orleans*, edition de La Vergne,1808, p. 13; *Promulgation act for the New York Code Commission in The Civil Code for the State of New York*, p. XV.

[409] *Code civil de l’état de la Louisiane*, traité de cession de cet état par la France, constitution de cet état ; constitution des États-Unis, publié par un citoyen de la Louisiane, 1825, p. 9.

[410] *Code civil de l’état de la Louisiane*, 1825, p. 10 ; *The code of the state of Georgia*, p. 12, *The Civil Code for the State of New York* reported complete by the Commissioners of the Code, p. XV; *The code civil of the state of California* as enacted in 1872, p. V; *The Revised Codes of the Territory of Dakota*, p. III; *The Revised Codes of the state of North Dakota*, op. cit., p. X.

[411] Vanderlinden, *Le concept de code en Europe occidentale du XIIIe au XIXe siècle* , p.22, 44.

As an excellent organizational tool, a code allows for the rearranging of the law according to a scientific method, also known as rationalization of law, especially since the French Civil Code of 1804. By combining the legislation, common law and various existing legal sources in one place it is systemized and therefore provides a form of legal certainty, as each provision is part of a coherent whole that is comprehensive and explanatory[412]. The organizational purpose of the code is one of the undeniable advantages of codification. Thus, the law becomes consistent, as the texts are physically and intellectually closer to each other and no longer dispersed among multiple books[413]. This need for systematization and organization of law finds its roots in the many criticisms of the common law, as the codification movement demonstrates.

As for how, this new organization of the law takes a rather traditional form. "The commissioners have endeavored to bring together and arrange in order, all the general rules known to our law upon the subjects contained within the scope of such a code."[414] It is almost a compilation work that seems to be asked: to organize the mass of law in a coherent and logical form[415]. The task at hand was also recognized as creating "considerable difficulty in placing the various subjects under their appropriate relative positions"[416].

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[412] Cabrillac, *Les codifications,* p. 138.

[413] Gaudemet J., Basdevant-Gaudemet B., *Introduction Historique au Droit XIIIe - XXe siècle,* Paris, 3eme édition, L.G.D.J, 2010, p. 373.

[414] *New York report of the code commissioners, The Civil Code for the State of New York*, p. III.

[415] *A Digest of the Civil Laws in Force in the Territory of Orleans*, p. 2; *Code civil de l'état de la Louisiane*, p. VI ; *The code of the state of Georgia*, p. VII; *The Civil Code for the State of New York reported complete by the Commissioners of the Code*, p. X; *The code civil of the state of California*, p.22, *The Revised Codes of the state of North Dakota*, p. 3.

[416] *California Code commission reports, The Civil Code of the state of California*, p. 2.

Nevertheless, Louisiana, Georgia, New York, California, and North Dakota did not only provide for an organization of the law as requested. The code was also used as a way to "reduce" the law, aiming only to retain the essentials and therefore go further than a simple compilation of laws as they "reduce the legislation in a document"[417]. By reducing the law, they could suppress the irrelevant legislation or law still enforceable in the ste and hence, increase the legal efficiency of the law.

Some states attempted to go even further with the reduction of the law. In New York, California and Dakota Territory, the "removal of the common law"[418] was attempted. The hope for these states was to replace the common law by writing and selecting the appropriate legislation to put into a code. This question of the abolition of the common law is not found in other states. In Louisiana it cannot be mentioned because there was never any common law in the state. As for Dakota's subdivision, it was a recodification of the law, so the common law was not in question there. However, in Georgia, they made it clear from the start that they never intended to suppress the common law but to supplement it.

Aside from the organizational justification, the codes were seen as a way to modernize the law. Indeed, the second strong argument used by the commissioners in favor of their codifications was the fact that the code, by selecting the law and adapting it, made it more modern, current and relevant. The codes were there to implement the new realities of the 19th century whether it was independence, culture or the abolition of slavery. To use the words of Portalis, "there is no need for unnecessary laws, they

[417] *The Revised Civil Code of the state of Louisiana*, printed at the office of the Republican, 94 Camp Street, 1870, p. II; *The code of the state of Georgia*, p.VI; *The code civil of the state of California*, p. 12.

[418] *The Civil Code for the State of New York*, p.III, *The Revised Codes of the Territory of Dakota*, authority of legislative assembly, 1877, p. II.

weakened the necessary ones, they compromised the certainty and the majesty of the law"[419].

The different codification endeavors did not intend to achieve this goal in the same way. First, some saw the modernization of the law as a way to "settle legal disputes"[420]. This means deciding between various contradictory decisions on one subject and choosing which one would be enforceable and would become a part of the code and stay part of the law. The idea was to fix legal solutions in the most perennial way. The other way used to modernize the law was to "remove old laws"[421], the legal rules that were no longer used or obsolete. In Louisiana and North Dakota, this modernization goal was also a way to create "new rules"[422] more adapted to society and the principles that governed it. The only code that rejects the idea of making a change to the content of the law is the Code of Georgia who had the opposite philosophy:

> "Attempt no change or alteration in any defined rule of law which had received legislative sanctions or judicial exposition, and to add no principle or policy."[423].

In Georgia, the idea of change is therefore expressly rejected. However, there is a nuance in that a change in the laws could be enacted. The commissioners could not

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[419] Portalis, *Discours Préliminaire Du Premier Projet de Code Civil*, p. 15
« Il ne faut point de lois inutiles ; elles affaibliraient les lois nécessaires ; elles compromettraient la certitude et la majesté de la législation ».

[420] "Settle law conflict" : *The Revised Civil Code of the state of Louisiana*, 1870, p. II; *The code of the state of Georgia*, p. V; *The Civil Code for the State of New York*, p. IV, *The code civil of the state of California*, p. 15.

[421] *A Digest of the Civil Laws in Force in the Territory of Orleans*, 1808, p. VII; *Code civil de l'état de la Louisiane*, 1825, p. 7 ; *The Civil Code for the State of New York*, p. XI; *The code civil of the state of California*, p. 6; *The Revised Codes of the Territory of Dakota*, p. V; *The Revised Codes of the state of North Dakota*, p. XII, *Montana Code*, p. 15; *The Revised codes State of South Dakota*, p. 8.

[422] *Code civil de l'état de la Louisiane*, 1825, p. 4 ; *The Revised Codes of the state of North Dakota*, p. X.

[423] *Georgia commissioners repot, The code of the state of Georgia*, p. V.

change rules that had received some form of official sanction. Hence, it can be assumed that the obsolete rules could still be removed as no details were given on the seniority of the official sanction.

The codes are therefore an instrument of transformation of the legal reality, either by adding new modern rules or by removing obsolete legal provisions.

The development of codification has always been inseparable from technical considerations, and since ancient times, codification has thus emerged as a way through the ages to "stay still very relevant throughout the centuries - to remedy the dispersal and the fragmentation of sources of law and to ensure access to the users to the knowledge of the law"[424].

4. The codification process within the states, a legal revolution

It is undeniable that the history of codes is different from one state to another as each civil code is the result of unique factors. However, there is an institutional point of convergence between all the codes, which is the use of legislation for codification. The creation of a civil code allows the assertion of a central power which is the opposite of the common law, which strengthens local power[425]. All codes institutional origin story have the same beginnings and institutional mechanisms (1), the commissions are similar (2) and the adoption procedure are equivalent (3).

4.2. The institutional mechanics of codification

Whether driven by the judiciary, the bar or the population, all the codes come from a decision of the legislature who takes an act authorizing the codification or

[424] Oppetit, *Essai sur la codification,* p. 12.

[425] Cabrillac, *Les codifications*, p. 72.

revision of the law. This is one of the main innovations of the codes, a real legal revolution. US law is a predominantly pretorian creation, the judge with the common law system is the law creator; with the code the legislature and therefore its elected members become the source of law and the law enters the democratic sphere.

To make such an important decision as to attempt to change the system of law and put it in the hands of the elected, the legislature appears as the only competent body to make this decision, not another institution. Indeed, in theory this type of act could have been made by the Governor, holder of the state executive power or by constitutional decisions, but they all chose the legislature. However, some states and constitutional path regarding codification to the institutional one, whether to give it strength or for some other reasons.

The question of a constitutional provision concerning the legal system was not totally absent from American minds. The constitutional assembly of some states felt the need to insert information on codes and codification in the first legal document of the state. This is the case for three of the eight code states—Louisiana, Georgia and New York—constitutionally each one acted upon this issue in its own way. This idea of a constitutional provision for a code is not new and is found throughout history for the establishment of a code. For example, in France, constitutional disposition upon codification can be found in different constitutions throughout history, in particular in the revolutionary ones[426].

In Louisiana, the constitution of 1845 and the subsequent ones refer to codes in their titles on the General Provisions:

[426] Constitution de 1791 du 3 et 4 septembre 1791
Titre 1 — « Il sera fait un Code de lois civiles communes à tout le Royaume »
Constitution de l'An I — Première république du 24 Juin 1793
« Article 85. - Le code des lois civiles et criminelles est uniforme pour toute la République. ».

> "The Legislature shall never adopt any system or code of laws by general reference to such system or code of laws, but in all cases shall specify the several provisions of the laws it may enact."[427].

Even if it does not expressly set out the path to take to codify, or even the legal system in force, the concept of code is mentioned. It seemed necessary for the constitution to explain and limit the powers of the legislature in the legislative field. Accordingly, a comprehensive system of code cannot be adopted without specifying the scope. Nevertheless, by mentioning the code in its constitutions, Louisiana recognized codes as an integral and major part of their law.

In Georgia, the Constitution refers to codes in terms of the state's hierarchy of norms, and the place the code must take within the various legal components of the law of the state. The constitution of 1865 thus post-civil war, in its Article V, Section 5 states that the laws in force in the state are organized according to the following hierarchy: 1. Constitution of the United States, federal law, treaties; 2. the constitution of the state of Georgia; 3. the Code of Georgia with its amendments, the English common law and statutes in force in the territory and the common law of state "as is not expressly superseded, by, nor inconsistent with said Code, though not embodied therein"[428]. The hierarchy of norms in Georgia therefore expressly states that the code and the common law are equal in strength. However, the date of the constitution is quite important, as it was written post and not prior to the adoption of the code. Fortified by the first two years of application of the code, this article only confirms a fact without trying to innovate. This provision demonstrates, nevertheless, a concern to ensure the proper implementation of the law and a certain fixity in its application.

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[427] Louisiana State Constitution of 1845 art 120, Louisiana State Constitution of 1852 art 117, Louisiana State Constitution of 1864 art 116, Louisiana State Constitution of 1868 art 116, Louisiana State Constitution of 1879 art 31, Louisiana State Constitution of 1898 art 33.

[428] Georgia State Constitution of 1865.

For New York State, it is the 1846 constitution which endorses a real innovation. Indeed, paragraph 17 of Article 1 states clearly that the common law is maintained, but that it must be appointed at the first session following the adoption of the constitution, a commission composed of three commissioners whose duties will be,

> "to reduce into a written and systematic code the whole body of the law of this state, or so much and such parts thereof as to the said commissioners shall seem practicable and expedient. "[429].

This committee was specifically tasked with codifying the law of the state by the highest legal document that may exist within a state. In the constitution, there is also another disposition on codification to implement a codification of procedural law[430]. However, if the constitution mandated the appointment of a commission to carry out a codification of the law, it did not commit to its adoption. In fact, it left the choice of the Commissioners, the extent of their powers, the work timeframe and the adoption of the code in the hands of the legislature. This constitutional provision that would not result in a code recalls one other in another country, which also did not carry a code to its adoption. It is the disposition of the Title I of the French Constitution of September 3, 1791, "It shall be a made code of civil laws common of all the Kingdom '[431]. Doom or fate, those two examples of constitutional obligation toward the creation of a code had the same consequence: its non-implementation.

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[429] Constitution of the state of New York, 1846, article 1 section 17
« to reduce into a written and systematic code the whole body of the law of this state, or so much and such parts thereof as to the said commissioners shall seem practicable and expedient. ».

[430] Constitution of the state of New York, 1846, art 5
« § 24. The legislature, at its first session after the adoption of this Constitution, shall provide for the appointment of three commissioners, whose duty it shall be to revise, reform, simplify, and abridge the rules of practice, pleadings, forms and proceedings of the courts of record of this state, and to report thereon to the legislature, subject to their adoption and modification from time to time. ».

[431] Constitution française du 3 septembre 1791
« Il sera fait un code des lois civiles communes à tout le Royaume ».

As for the other states with a civil code—California, Dakota Territory, North Dakota, South Dakota, Montana—the examination of their constitutions demonstrates that codification, codes or the question of the legal system in force in the territory is not addressed. We can only hypothesize why they chose not to address those concerns. It might be the fact that the code happened after the constitution, or that while revising the constitution they did not think it was relevant to give this kind of permanency to a code.

The constitutional confirmation of a codification of civil law is a strong element showing that the codification endeavor is part of an overall policy perspective on the law of the state. It also gives greater legitimacy to the code that comes from above as it is confirmed by the first and more fundamental legal document. Especially, taking into consideration the high regard for constitution in common law state.

To go back to the codification procedure now, the formal proceedings of codification would start during a legislative session. An act was proposed to vote for the undertaking of a codification of the law, the legislature in those cases had three options: first, they could accept the motion; second, they could reject the motion; and in some rare cases there was a third option, they could appoint a commission to decide on the feasibility and enforceability of a codification of the law. In this third case usually the codification never happened, which was indeed the case in Massachusetts and South Carolina, where codification died while the commission thought about it[432].

Then, the codification act defines the field of action of the commission. Usually the commission had a clear and limited scope defined by the legislature which gave the commissioners a clear framework to follow regarding their work. For example, in

[432] Cook, The American codification movement, *A study of Antebellum legal reform*, p. 121-131 for South Carolina and p. 173-181 for Massachusetts.

drafting the 1808 Digest in Louisiana, after appointing James Brown and Moreau Lislet to codify the law, the legislative act of June 7, 1806, told them to "base the codification on the civil law which governs the territory"[433]; which means in this case that the framework was defined precisely, and the commissioners could not draw upon another source of law. In addition to having a limited framework, the act also set a maximum timeframe to undertake the work. It could vary between one to three years initially and could go up to five more years if the Commissioners called for it.

4.3. The code commission and commissioners

The commissions were composed of different persons[434]. First, all code commissioners were not elected, they were appointed by the legislature based on their legal abilities. In addition, in none of the studied code commissions was a member part of the legislature. This decision helped once again to detach the code from political groups or any from political pressure or lobbyists. The downside of this choice is that it also put commissioners outside of the democratic process. The codes may appear as a law written by men who have no popular support.

All the commissions were appointed by the legislature apart from the one in Montana which was appointed by the state governor[435].

For the form of the commissions, each state decided to go with a collegial commission. Teamwork was therefore preferred to encourage the exchange of ideas and avoid despotism of one man. Collegiality in code commission is also in the

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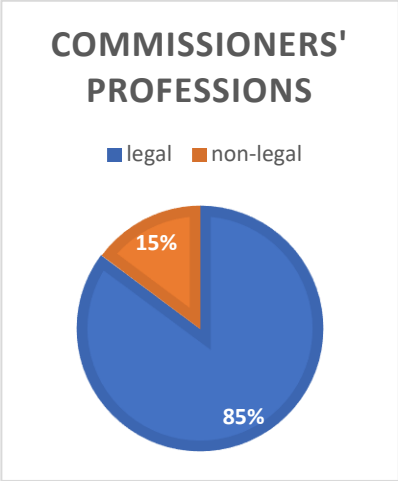
[433] Yiannopoulos AN., "The Civil Codes of Louisiana", *Civil law commentaries*, 1-I (Winter 2008), p. 1-23.

[434] For a review in detail the different committee members see Annex 7.

[435] See Appendix 7.

tradition of the great codifications such as the Roman Corpus Juris Civilis[436] or the French Napoleonic Code[437]. However, despite collegiality, history generally only remembers one named per code [438]like Moreau Lislet in Louisiana or David Dudley Field in New York. The examination of the various legislative acts appointing the commissions provides valuable information on their compositions. In consequence, all commissions were therefore analyzed; except that of South Dakota because information was not available[439]. In New York, only one commission was examined, which is the one that drafted the civil code in 1860.

Most of the commissions were composed of three members, except in Louisiana in 1808 where there were two and in New York where there were four. It can be safely assumed that the limited number of members is due to a desire to avoid discordant opinions. Moreover, apart from New York and Louisiana, the commissions were composed of an odd number of people, probably to avoid blockages in case of disagreement between the men on a legal point.



Regarding the men in question, in terms of who they were, and what their jobs were, most of them were from the legal profession. Therefore, most commissioners were lawyers or judges hence, the codes were written by practitioners and not by academics as was the case, for example, in Germany with the committee for the BGB.[440]

[436] Cabrillac, *Les codifications*, p. 212.

[437] On this matter see Halperin, *L'impossible Code Civil*.

[438] Cabrillac, *Les codifications*, p. 211.

[439] Appendix 7.

[440] Wagner W., "Codification of the law in Europe and the codification movement in the middle of the nineteenth century in the United States", *St. Louis University Law Journal*, 1952–1953, p. 337.

The training of those lawyers was relatively traditional for the nineteenth century. Among the twenty-three lawyers, seventeen of them were trained through apprenticeship in a law firm, which was at the time the most traditional way to become a member of a legal profession. Six of them therefore did not have that form of legal training. Four of them were trained in law schools, including three in the Faculty of Law of Paris, one at Yale Law School and one at Albany Law School. The last one was Mr. Cole, a member of the Montana commission who was a self-taught lawyer.

Over nine commissions composed of twenty-seven members, only four were not lawyers. The first was a commissioner in Louisiana in 1808, Mr. Brown. He was the former governor of Virginia and former US ambassador to France. However, even though he did not practice law, he had legal training as he served his apprenticeship in a law office in Kentucky[441]. The second was also in Louisiana but this time in 1870–one of the assistants to the revision was Colonel Hall who only had military training. The third was in the Dakota Territory, Mr. Bennett, who worked on the revision of the code in 1877. He was a soldier and then a senator from Iowa. Finally, the last was in North Dakota, Mr. Withcomb. He was a businessman and a poet. Even though these men did not practice law, they interacted with it regularly within the course of their work. Hence, including a non-lawyer accustomed to the law seemed quite a logical choice for legislatures, as they knew the law but were not conditioned by it. The states wanted to write a more accessible and understandable law through a code. In particular they hoped for a code that would allow non-lawyers to better understand the law–who was better than a non-lawyer to attest to the intelligibility of its provisions?

The professions of the commissioners are not surprising and appear in line with the traditional composition of a code commission. Indeed, to take the example of the Napoleonic Code, the members of the code's commissions were "Mr. Tronchet, president of the *Tribunal de Cassation*, Bigot-Préameneu, government commissioner of

[441] Hood J., "The History and Development of the Louisiana Civil Code", p. 8.

that court, and Portalis, commissioner of the *conseil des prises*"[442], all lawyers, trained in law who practiced it, and wrote about it regularly. On this point, the American legislatures followed the guidelines established by the former codification.

As for the commissioner's salary, it varied from one state to another and varied between $800 and $4000 for the entire job. There was no typical remuneration for these works. Nonetheless, being a code commissioner was never a main job, more like a moonlight post as all of them continued with their main professions during the drafting period.

The commissions usually worked over a period of 24 months (1808 and 1870 in Louisiana, Georgia, California, Dakota Territory, and Montana). However, the duration could be up to three years as it was in Louisiana in 1825 or five years like in New York, but the average duration for drafting a code was two years. This is a relatively reasonable time taking into consideration the amount of work to carry out and the fact that the members continued their civilian jobs in parallel and were not trained in civil law.

4.4. The submission of code and their possible adoption

The adoption procedure of the civil codes was done in several steps. First, the commissioners wrote a report to send to the legislature to let them know more about what they accomplished, how they did it and so forth. The purpose of the reports was to expose the working method of the Commission as well as to present the changes they made in the law. In some cases, such as New York or California, the commission made annual reports of progress.

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[442] Arrêté du 24 Thermidor VIII (August 12, 1800).
Monsieur Tronchet, président du tribunal de cassation, Bigot-Préameneu, commissaire du gouvernement près de ce tribunal, et Portalis, commissaire au conseil des prises.

The code was then subject to the approval of the legislature who met in congress or separately. The goal was to pass the code drafted with a majority vote. If the code was adopted by the legislature then a legislative act was taken to implement it.

It contained information such as the printing procedure, the distribution process, the date of effect, its final name, or its effect on the existing law and the common law. All of this is the easy case, meaning if everything went as smoothly as for the Dakota Territory or California, for example. Nevertheless, roadblocks could arise.

The first roadblock could be that one member of the chamber voted for the code, but the others did not, or that the code did not reach the required majority in both chambers. In these cases, several options were possible.

The project could be postponed to be voted on again later. If there was discontent toward the code, a new commission could be appointed to rework the draft code; they could also ask the same commission to rework the draft code. Then the last option was the total abandonment of codification and of the code. All these roadblocks are not only conjecture as indeed all of them emerged and happened at some point during the codification efforts with the Civil Code of the State of New York.

Another difficulty, in the procedure could appear and this is what also happened in the state of New York. The code could be adopted by the legislature, but the project could be blocked by the Governor who exercised his right to veto the legislative act of adoption of the code. This scenario occurred three times in New York in 1878, 1879 and also in 1882. Each time, the code was adopted by the legislature, yet it could not enter into force. In this case, the only option was to try to have the code readopted with the next legislature or to appoint a new commission to rework the code. In the absence of a veto, then the Code could enter into force and the procedure would follow its ordinary course.

A quick parenthesis can be made here to mention the procedure codes in New York or the other states. They followed the exact same legal institutional patterns than

the civil code in all states, which seems to indicate that this civil law institutional codification process is the one adopted and considered as traditional within the American states.

It is undeniable that the codes are in themselves a major innovation within the states that adopted them and yet another major innovation appears in their wake, the change of source for the law. Although some form of legislation existed prior to this with the statutes, it did not have the same strength that was expected to be given with the code. As a reminder, the statutes are only very specific laws under limited application and clearly defined[443] while the codes are supposedly generic as they cover a full legal field and are under broad interpretation. Indeed, the use of legislation fully switched the conception of the law within the states; before the codes, only judges could make this type of change. This change was a real legal revolution. The law was then no longer set by the judge, but instead by the legislature. The judge thus became an enforcer and was not supposed to be creator.

[443] Castellucci, "Law v. Lex : An analysis of a critical relation in Roman and Civil Law", p.12.

II - The human element and the American civil codes

The implementation of a civil code is a way to bring about a new social reality and implement change. After looking at the institutional factors, the next step was to look at the human elements or factors that might have influenced the codification process.

The codes are a social unifying element, a balance between the past, present and future, meaning that people have an influence on them. 'Human factors' is intended to include all elements that relate to people; in the case of codification in the US during the 19th century it seems that there are three main human influences. The first is the colonial tradition (Preliminary); then the population movement and impact of legal education (1); and finally, the people behind the codes (2).

Preliminary section - The secret influence of the colonial legacy

In researching the elements that influence codification in the US, the first that was examined chronologically is the legacy of colonial states. Indeed, are the states colonized by civil law countries more likely than those colonized by common law countries to codify their law? Is there a correlation between the colonial legacy and codification of civil law? Without any surprise a link between both seems to appear with examination of the states' history. The codes appeared in most cases to be the result of deep historical foundations that found their roots through the colonial heritage of the state. By colonizing the territory, the pioneers brought with them a system of law which left traces, even after they left[444].

[444] *Colloque du bicentenaire de l'indépendance américaine, De l'Armorique à l'Amérique de l'Indépendance*, Annales de Bretagne et des pays de l'Ouest, Rennes, 1977 ; De Bolla P., *The fourth of July and the founding of America*, London, Profile Books, 2007.

The territory of the United States was mainly colonized by three European countries: England, France and Spain[445], that is to say, one common law and two civil law countries. Even though the thirteen original colonies of the United States were of common law tradition, Roman law tradition was also found in the territory. Indeed, Spain and France had between them a huge portion of American soil at the time[446]. Looking at the different codifying states, most of them arose from civil law tradition.

First are Louisiana[447] and Dakota Territory,[448] and consequently, North Dakota, South Dakota and Eastern Montana, which are former French colonies. Indeed, they all became American in 1803 by the Treaty of Paris[449], known as the Louisiana Purchase. These are territories that experienced French law, namely the custom of Paris and royal legislation and therefore the civil law system. Among the territories of the American continent colonized by France, another large settlement outside the framework of the study also took on a Civil Code, which is Quebec[450]. It seems that there is therefore a facility or a preference for the former French colonies to implement codification. Overall, five of the eight US codes came from a French colonial heritage territory.

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[445] Lintvelt Jaap D., *Culture et colonisation en Amérique du Nord : Canada, États-Unis, Mexique,* Québec, Septention, 1994, p. 4.

[446] See Annex 3.

[447] For a full history of colonial Louisiana See Denuziere M.,, *La dix-huitiéme étoile: Histoire de la Louisiane americaine*; *Lousiane Tome 1,* Fayard, 2004; Gayaree C., *Histoire de la Louisiane* ; Harpe B., *Journal historique de l'établissement des Français à la Louisiane* ; Martin FX., *The history of Louisiana from the earliest period*.

[448] Blackburn W., *A history of Dakota*, Vol I., Aberdeen, South Dakota Historical collections, 1902; Lamar H., *Dakota Territory*, Institute for regional studies, 2001.

[449] Traité de Paris 1803, Weil F., *Empires of the imagination: transatlantic histories of the Louisiana Purchase*, Charlottesville, University of Virginia Press, 2009.

[450] *Code civil du Bas-Canada,* C.O Beauchemin & Valois, Montréal, 1866 ; Crépeau P., "Réflexions sur la codification du droit privé", *Osgoode Hall Law Journal*, 38 (2000), p. 267–295, Young B., *The politics of codification: the lower Canadian civil code of 1866*, Montreal, McGill-Queen's University Press, 1994.

As for the other territories who adopted a code, the legacy of the civil law is also found but this time through Spain[451]. Whilst being an English colony, Georgia[452] during the colonial period was a disputed territory between Spain and England and in consequence, during the Spanish occupation from 1742 to 1748, the territory was under Spanish written civil law tradition. Although it did not last long, for 6 years the Georgia inhabitants experienced civil law. California[453] meanwhile was first a Spanish colony before becoming Mexican. Finally, Louisiana had been under Spanish dominion from 1763 to 1800. Consequently, in these cases the colonies are accustomed to the civil law and its mechanisms due to the influence of Spanish law[454], which seems to facilitate the implementation of codification. Therefore, three of the eight codifying states were familiar with civil law through Spain.

It goes without saying that all the territories that were colonized by France or Spain did not opt for code, in that in some states the tradition of the colonizer was rejected. The civil tradition does not necessarily mean civil codes, but it seems that codes were synonymous with civil law colonial legacies. Indeed, out of eight states with a civil code, seven are former civil law colonies and it would be naive to deny the influence of the colonial tradition, especially taking into consideration that those states willingly chose codification.

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[451] Gonzalez Roa F.*, El carácter de la legislacioń colonial espańola en Ameŕica, Imprenta de la secretaria de relaciones exteriores*, Mexico, 1933; Kossok M., Markov W., David M., Minguet C.*, L'Espagne et son empire d'Amérique : structure politiques, économiques et sociales, 1320-1824*, Paris, Ediciones hispano americanas, 1972.

[452] Coleman K., *A history of Georgia*, University of Georgia Press; Reese T., *Colonial Georgia: a study in British imperial policy in the eighteenth century*, p. 172; Sullivan B., *Georgia: A State History*.

[453] Frost J., *History of the state of California, from the period of the conquest, by Spain, to her occupation by the United States of America*, New York, Auburn Derby and Miller,1850, p. 102.

[454] Castàn Vasquez JM., "Reciprocal influences between the laws of Spain and Louisiana", *Louisiana Law Review*, 42 (1981–1982), p. 1473–1484, Masferrer A., "Plurality of Laws, Legal Traditions and Codification in Spain", *Journal of Civil Law Studies*, 4-2 (2011), p. 419–448.

However, these conclusions must be drawn with caution as, this colonial heritage is not recognized in any of the documents relating to codes, except in Louisiana. Consequently, the colonial influence remains discreet and somehow hidden.

The link between code and colonial tradition is also reflected in New York. Indeed, it is the only common law state; the only one that never experienced civil law and the only one that drafted a code and never adopted it. The state of New York[455] was an English colony, accustomed from the start to the common law and had never been subject to the written law. If at first this system opposed to the common law seemed appealing, its implementation seemed too complex and required too much change. This might partly be why the code was blocked. Moreover, over the nineteenth century two other common law states, two of the original thirteen British colonies studied the possibility of a codification but refused it. These were the states of Massachusetts and of South Carolina[456]. The possibilities of codification of the law did not pass the stage of the commission examining the issue. The link between colonial tradition and codification of civil law therefore seems evident as no states that only used entirely common law implemented a codification of their civil law.

Even if it is not recognized, the colonial tradition had to have an influence on the codification endeavors. When the idea initially came about, the states had not embarked on codification completely by chance or without having some notion of it. The written law was somehow part of their culture. They already knew and had lived under the civil law system, thus making it a less mysterious system than it was in the eyes of those who only knew the common law. This knowledge of civil law also allowed them to be more aware of the "defects" of the common law and the arguments in favor of the implementation of a rational system of written law.

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[455] Kammen M., *Colonial New York*, p.142.

[456] Cook, The American codification movement, *A study of Antebellum legal reform*, p. 173–181; Haskins G., "Codification of the law in colonial Massachusetts: A study in comparative law", p. 1–17.

This colonial tradition also makes it possible to distinguish the codes and to classify them. Indeed, the legal legacies of the codes create some particularities within them, both in terms of content and in form.

In the first group are found the civil law tradition civil codes. In fact, the only full civil law civil codes in the US during the 19th century were in Louisiana. It is indeed the only territory that, at the time of the adoption of its code, had never experienced any other system other than the civil law, either during the French or the Spanish colonial period. The civil law civil codes are characterized by an application of the code as the sole or main source of law and primary civil law tradition content of the code. This group mostly contains codes that are in the direct tradition and line from the Napoleonic civil code.

In the second group are the common law tradition codes. This is the case for the Civil Code of New York as it is the only state in this study that never experienced any other traditions. It could be argued that the code of Georgia could be included because it is meant to be a code of common law; however, this state was at some point under Spanish dominion, hence it fits better in the third group.

The third possible group has the mixed tradition codes which are states that have experienced both civil and common law traditions. These are the states of Georgia, California, and the Dakota Territory and its subdivisions. The peculiarity of these states is that the codes are a hybrid between the two influences. Some parts are from the civil law tradition while most of the content was intended to be common law.

Even if this classification seems useful, the colonial tradition of the state does not seem strong enough, as the colonial tradition is only one factor among many others pushing the codification of civil law–it is not sufficient on its own to impose a codification.

1. The influence of the circulation of people within the US and the legal education over the codification of civil law

People moved through the US all over the 19th century. The growth of the population, in particular thanks to new modes of transport, also made injustice and conflict grow exponentially within a state, which explains how the flow of population had worked in favor of codification (1). Another human related factor influencing codification was the development of law schools, which in turn worked against civil codes (2). It was a tricky balance whereby everything worked together for the law.

1.1. The impact of population flows on civil law codifying states

The comprehensive history of the codes shows that the moment at which it was decided to codify the civil law coincided generally with an arrival of people[457] within the territory. This migratory flow seemed to be calling for a code because it allowed these new populations to connect under the aegis of the same law[458], creating a geographical unit.

This massive influx of people in a state is the result of several elements, and seems to unfold in a similar way, whatever the state. Laussat[459], a Frenchman in Louisiana explains in his memoirs how the arrival of a population flux impacted an already existing territory,

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[457] Forstall R., *Population of states and counties of the United States: 1790–1990, Department of commerce US Bureau of census population division*, March 1996.

[458] Cabrillac, *Les codifications*, p. 156.

[459] Pierre-Clément de Laussat in Adolphe Robert et Gaston Cougny, *Dictionnaire des parlementaires français, Bourloton*, 1889-1891, tome III, p. 635-636
Pierre Clément de Laussat is a French man who was nominated « préfêt de Louisiane » in 1802 and moved to Louisiana at the time of its cession to Spain. He also was the French representative for its cession to the United States.

"Wherever the Anglo-American touch, the earth is fertilized and progress is fast. There is a class of them working ceaselessly to be 50 miles ahead, in the American deserts, those populations: they immigrate first, clear it, populate it and yet still push forward with no other goal or job than to open the road to new settlers. Those who start well in unfamiliar places are called blacks-settlers. They plant their barracks, cut and burn trees, kill wild or killed savages, and disappear from this earth either by death or by selling it soon as a more stable farmer arrived and beginning to clear it. When twenty new settlers agglomerated at one point, two printers occur, one federal, the other anti-confederate; then doctors; and lawyers; and adventurers; they drink; they call a speaker; they erect a city; they conceive children at will. Finally, vast territories are displayed for sale: they attract and wrong anyone that can buy. It swells the population tables so that they arrive promptly at number sixty thousand, which then acquired them the right to form an independent state and to be represented at the Congress ... and that's one more star in the flag of the United States".[460]

If the nineteenth century was certainly a period of strong movement of people within the US territory, data of the states' population censuses allow us to notice a major increase in population in the twenty years preceding the adoption of the code. Indeed, the population in California between 1850 and 1860 increased by 75.6%, then

[460] Laussat P., *Mémoires sur ma vie, à mon fils*, Pau, E. Vignancour, 1831, p. 40.
« Partout où les Anglo-américains touchent, la terre se fertilise et les progrès sont rapides. Il est une classe d'entre eux qui fait métier de devancer sans cesse de 50 lieues, dans les déserts de l'Amérique, la population : ils y immigrent les premiers, y défrichent, y peuplent et d'encore en encore poussent en avant sans autre but ni professions que d'ouvrir la route de nouveaux colons. Ceux qui débutent ainsi dans des lieux inconnus s'appellent *blacks-settlers*. Ils plantent leurs baraques, coupent et brulent des arbres, tuent des sauvages ou en sont tués, et disparaissent de cette terre soit par le mort, soit en y cédant bientôt à un cultivateur plus stable celle qui commençait à être éclaircie. Quand une vingtaine de nouveaux colons se sont ainsi agglomérés sur un point, deux imprimeurs surviennent, l'un fédéraliste, l'autre antifédéraliste ; puis les médecins ; puis les avocats ; puis les aventuriers ; on boit des toasts ; on nomme un speaker ; on s'érige en cité ; on engendre des enfans à l'envi. On affiche enfin de vastes territoires à vendre : on attire et on trompe tant qu'on peut les acheteurs. On enfle les tableaux de population pour qu'ils arrivent promptement au nombre de soixante mille âmes, auquel est acquis le droit de former un état indépendant et de se faire représenter au congrès... et voilà une étoile de plus dans le pavillon des États-Unis ».

between 1860 and 1870 by 32%; in Georgia between 1840 and 1850 it increased by 23.7%, and between 1850 and 1860 by 14%; between 1880 and 1890 it increased in Montana by 72%; in North Dakota by 40% and between 1890 and 1900 in South Dakota by 13%. As for New York, the population increased for the years 1820 to 1890 every ten years between 21% and 15% depending on the year[461]. The review and analysis of the population data show that after the adoption of the code, immigration stabilized. Those numbers seem to show that one of the impulses driving codification is the arrival of a new population, which entailed increased conflict and different traditions on the territory.

This increase of the population may be the result of various elements such as the admission of a territory within the United States, like with Louisiana, or it could also occur as a result of a discovery such as the first gold nugget in California. It could also be the result of development of transport, as was the case with the railway extension in Dakota whatever the reason for the increase of the state inhabitant end up being a call for a clarification of the law.

The examination in detail of each state's population evolution shows that each drive comes from a specific element. Whatever the reason for the arrival of people within the territory, the wave of immigration meant the introduction of new ideas, new cultures, and thus a diverse intellectual frame was created within the state. This was sometimes praised, and sometimes denounced[462]. The population increase also led to new conflicts that required quick and expedient judicial resolution; with a code a newcomer could not claim not to know the law as it was available and fixed in an easily accessible document.

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[461] Data calculated according to in Forstall, *Population of states and counties of the United States: 1790-1990,* p. 3-4, see appendix n°4.

[462] Haines M., *A Population History of North America*, Cambridge University Press, 2000, p. 228.

In Louisiana, the population at the beginning of the United States possession was about 72,000 inhabitants, half of which were slaves. The white population consisted mostly of French and Spanish descendants. The population of New Orleans alone was more than 10,000 inhabitants[463]. The acquisition of this territory by the United States is accompanied by a flow of immigration of not only Americans, but also foreigners. Among the new people, many were lawyers and traders who came for fortune. The majority of them did not master neither French nor Spanish, and the civilian tradition even less so.[464] This meant that they were not appreciated by the locals. The code was adopted as a means of resistance to this new US population which, by 1820, brought the population of the state to 153,407 inhabitants[465], which meant an increase of 46% of the state population. The original inhabitants therefore intended to protect their law and tradition against the new invaders. From the perspective of newcomers, this resistance is seen as a whim because,

> "The Colonists in Louisiana had been for a century the spoiled children of France and Spain. Petted, protected, fed, paid, flattered, and given every liberty except the right of self-government, they liked Spain, and they loved France, but they did not love the English or the Americans."[466]

The obtention of statehood in 1812 once again increased exponentially the state's inhabitants, which deepened the gap between the original and the new population. The civil code was then seen and appreciated as a tool that saved Louisiana's original culture and independence from the other American states.

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[463] Hood, "The History and Development of the Louisiana Civil Code", p. 19.

[464] Hood, "The History and Development of the Louisiana Civil Code", p. 19-20.

[465] Forstall R., *Population of states and counties of the United States: 1790–1990*, p. 70–73.

[466] Adams J., *History of the United States of America*, Charles Scriner's Sons, New York, 1890, p. 298-299.

It was the opposite for North Dakota, South Dakota and Montana. In these young states, the code was a way to strengthen them and to manage the consequent conflicts that arose with the arrival of a new population which accompanied statehood. However, even if the codes were not adopted as a tool of resistance by the population, they remained, like in Louisiana, a way to keep the previous law. In fact, they even performed a re-codification of law by tailoring the Dakota or California civil code to the new states.

In California, the population saw an increase of at least 200,000 new residents every ten years starting in 1850. This steady growth was due to the gold rush and the search for fortune. The arrival of the Forty-Niners, the name given to the American gold miners in California, made California a melting pot for the US population. Indeed, more than 300,000 people decided to immigrate to California after the discovery of the first gold nugget[467]. Therefore, no legal tradition was predominant in the territory. The population was so large and diverse that no pre-existing law could become predominant because each person arrived with their own legal baggage, so California law could in consequence only be a hybrid law state[468]. A legal adaptation to the particular situation of the state was essential and the implementation of a civil code seemed to be the perfect solution.

The case of Georgia and New York are different from other states, because, as old states, they had a slower population increase with a steady growth every decade. However, their peculiarity was that their population increases were primarily due to the arrival of immigrants from outside of the country instead of the movement of Americans within the country. Surprisingly, these foreign populations did not appear to influence codification or the idea of codification.

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[467] Friedman L., *A History of American law*, p. 113.

[468] *Ibid*.

Aside from the population increases, the common element was that these new people come from diverse American states. Hence, they expected to see, especially at a legal level, the same law or at least very similar law. These expectations worked in favor of the codes. These states needed a way to find a middle ground between all the new legal material inhabitants brought with them and already existing laws. The codes then allowed a liaison between before and after to be created.

The adoption of civil codes also seems to be in all the states the way to answer the state's specificities, whether it was for the conservation of a long tradition or to implement a diverse reality, it is with the population overload that the code became more and more necessary.

Another element that also plays a role on these population flows is the development of transportation. Most of the population influx, in a state, is due first to the obtention of statehood and in parallel to the arrival of the train. The railroad expansions allowed better movement across the US. With the expansion of the rail network, people and ideas could travel further and more rapidly between states. The nineteenth century is considered the golden age of railroad in the United States[469]. It is thanks to railway lines connecting the major cities that the US territory acquired a certain prosperity[470]. It was only after 1920 that the railway monopoly started to have competition from other modes of transport such as the car or plane[471].

[469] Railroads history https://www.american-rails.com .

[470] Railroads history : Frey R., *Railroads of the Nineteenth Century*, in Encyclopedia of American Business History and Biography, Vol. 2, New York: Facts on File; Hubbard F., *Encyclopedia of North American railroading: 150 years of railroading in the United States and Canada*, New York: McGraw-Hill, 1981; Hayes D., *Historical atlas of the North American railroad*, University of California Press, 2010; Grant R., *Railroads and the American People*, Indiana University Press, 2012.

[471] On this matter see Del Vechio M., *Railroads Across America*, Lowe & B. Hould Publishers, 1999.

The creation of rail lines to the west brought the Field Code from New York to California, and the line between California and Dakota or New York and Dakota also allowed the code to arrive by train to the territory.

The creation of the transcontinental railroad, a transcontinental railway between New York, Chicago and San Francisco[472] was built in just six years by the workers of the Central Pacific and Union Pacific and stretched for more than 2000 miles. This project started in 1853, but the tensions within the Congress and the American Civil War delayed it and the Pacific Railroad Act[473] was only adopted by the government on July 1, 1862, almost 10 years after it was first presented. The project began in 1863 and ended on May 10, 1869, by the junction in Omaha (Utah) of the west and east teams[474]. By consequence, this project increased the California population massively because it created a wide offer of employment prior to its finalization and also reduced the lengthy journey between New York and California from a few months to a few days.

Another railway line essential for the codes is the train line between Chicago, Nebraska, Wyoming and South Dakota. This line started in the late 1860s and allowed the Dakota Territory to be connected with the eastern US territory[475]. The line started in Nebraska to reach the far east of Dakota in 1879. This line, called the Cowboy Line, allowed the agriculture in the territory to develop thanks to the increased immigrant flows within the state. Once this project was done, it developed into subsidiary roads

[472] See Appendix 5.

[473] Available on https://www.ourdocuments.gov/.

[474] Deverell W., *Railroad Crossing: Californians and the Railroad, 1850–1910*, Berkeley, CA: University of California Press, 1994.

[475] https://www.american-rails.com/chicago-and-north-western.html .

that extended through the Dakotas and Montana, providing an easier circulation of the population in these lands[476].

The development of transport thus allowed a greater flow of ideas, projects and different endeavors that took place in the territory. Even before the completion of the lines, many people invested in the territory, for example by mapping them, or simply by settling before the population influx in order to make a fortune. What is also striking is the fact the that the adoption of the codes in those territories – California and Dakota – seems to coincide with the surroundings time of the arrival of the train.

It is undeniable that this circulation of peoples would have influenced the implementation of an innovative idea like codification, within the different territories as well as allowing the codes themselves to circulate. Indeed, if we look at the supposed date of arrival of the codes in the different places, it is really interesting to see that they arrived alongside the train, an progress brough innovation.

1.2. The legal instruction and codes

The development of academic legal education within universities offered a greater exposure to the law, its theories and expansion compared to apprenticeship, at least in theory. However, what has been its impact on the idea of codification?

According to Tocqueville, in his book Democracy in America, the United States has no old aristocracy as in the European sense, its noblest members, those with the most power are the legal population.

> "In America, there is no noble or letters, and the people defy the rich. So the legal population form the top political class, and the most intellectual part of society. [...] If I were asked where I place the American aristocracy, I would

[476] *Ibid*.

answer without hesitation that it is not among the rich, who have no common link to put them together. The American aristocracy are the lawyers and the judges. "[477]

With the knowledge, intellectual skills and institutions, the legal population was its own class and had a lot of influence on the state, politics and the law. In consequence, from an outside perspective they appeared to be the ones who had control over the country and who had the power to bring change. This was a point of view from not only a foreigner's perspective looking at the American society, but also from the everyday 19th century American people.

Most of the lawyers of the 18th and 19th centuries did not studied in law school at least until the second half of the 19th and the beginning of the 20th. The legal training most often took the form of personal study of doctrine and of the great legal thinkers such as Blackstone and Coke conducted in parallel with an apprenticeship in a law firm. The judges, lawyers and future law professors did not belong to separate spheres as they did in France or Europe. They all belonged to the same community and associations and were registered to the same bar.[478]

The apprenticeship worked in the following way. The apprentice had to pay for his apprenticeship, and therefore this was generally reserved for a wealthy elite. His training included an access provided by the law firm to all the legal books and legal materials they required him to study. Traditionally, the apprentice started his training by copying legal documents, then he would watch and listen to his instructor plead

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[477] Tocqueville, *De la démocratie en Amérique*, Editions Flammarion, 2010, p. 267.
« En Amérique, il n'y a point de nobles ni de littérateurs, et le peuple se défie des riches. Les légistes forment donc la classe politique supérieure, et la portion la plus intellectuelle de la société. [...] Si l'on me demandait où je place l'aristocratie américaine, je répondrais sans hésiter que ce n'est point parmi les riches, qui n'ont aucun lien commun qui les rassemble. L'aristocratie américaine est au banc des avocats et sur le siège des juges. ».

[478] Barham M., "La méthodologie du droit civil de l'État de Louisiane", *Revue internationale de droit comparé*, 27-4 (Octobre-décembre 1975), p. 806.

and manage his cases. In addition, he had to perform an increasing number of readings. Then his referent lawyer would give him more and more responsibility, like drafting contracts or preparing court documents until he deemed him capable of passing the bar[479]. It is by admission to the bar that the apprentice would become a lawyer and could take on his own legal cases.

Due to the changing nature of the apprenticeship, learning varied widely from one firm to another and from one instructor to another. The readings, also provided to the apprentice, were not set in stone. "Legal education in this extraordinary era had developed into an ordered system. The education of most lawyers at that time was pathetically superficial"[480]. It covered the basics of law and the field of specialization, while giving access to legal thinkers—generally those whose opinion is consistent with the one of the trainers—in order to train the apprentice in his image,

> "What is noteworthy is that a few lawyers were remarkably well-educated and enlightened, and they became the professional and public leaders of their time. These men took for granted that the study of law, government and society formed one seamless web. To them, law, economics, politics and sociology were parts of a synthesis. Here was a group of exceptional men who in their schooling had come under the influence of great minds and whose thinking was stimulated and shaped by these experiences."[481]

Thus, the young and experienced lawyer kept educating himself throughout his career. For example, in Louisiana, judges met annually for a two-day seminar conducted by law professors or professionals[482] to help them to stay legally updated

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[479] Ritchie J., "Legal education in the United States", *The John Randolph Tucker Lectures Delivered Before the School of Law Library of Washington and Lee University*, Wilfred H. Ritz, 1949-1967, p. 3.

[480] Horne A., *Legal Education in the United States,* San Francisco, Brancroft-Whitney, 1953, p. 22.

[481] *Ibid.*

[482] Barham, "La méthodologie du droit civil de l'État de Louisiane", p. 806.

and to try to make the law more understandable and equal all over the state. Even if the training was mainly based on the common law, civil law was not forgotten: "every lawyer who reaches middle life has acquainted himself with the civil law will be thankful, and every lawyer who has not, will learn enough to regret that he has not"[483]. Clark, a prominent Georgian lawyer, explains clearly in this phrase that all lawyers needed to be trained or at least needed to understand the civil law system in order to be competent in their work. Indeed, the knowledge of civil law allows for the acquisition of legal theories and to learn about law as a science and differently from the common law. The French thinkers also had a strong hold in the reflection and the study of law. For example, the spirit of the laws of Montesquieu is translated into English in 1730[484] and is used by the US founding fathers[485]. American lawyers are also acquainted with French legal writers such as Pothier or Domat[486].

In the second part of the 19th century law schools were booming. The first law school in the United States opened in 1779 is called the Marshall-Wythe School of Law and followed by the University of Maryland School of Law in 1816 and Harvard in 1817. The excitement lasted throughout the century until the number of law schools reached nineteen by 1851[487]. The main teaching method was based on case law without a focus on legal theories. The legal training was coupled to moot courts, which were mock trials given by a professor and defended by students before a moot court. All of this could be supplemented by voluntary reading from the students. Only Louisiana

[483] *Report of the seventh annual meeting of the Georgia Bar Association,* 15 may 1890, p. 148.

[484] Soleil S., *Le modèle juridique français dans le monde. Une ambition, une expansion (XVIe-XIXe siècle)*, Paris, IRJS, Les voies du droit, 2014, p. 99.

[485] *Ibid,* p.100.

[486] *Ibid*, p. 151, Pound R., "The influence of French law in America", *Illinois Law Review*, 3 51908-1909), p. 354-363.

[487] Horne, Legal Education in the United States, p.56.

Universities[488] were among the few American universities who from the start taught a hybrid curriculum combining civil and common law to specialize in both[489]. As for the other law schools, only Harvard had a course on civil law starting in 1829 which was optional[490]. It was not until 1900 with the creation of the *American Association of Law School* that the curriculum in law schools was standardized to become a three-year degree[491], but even after civil law class were not common and only elective.

By learning through law school, future lawyers were removed from learning legal theories that were not directly applicable in practice. Legal theories and civil law became more than optional and sometimes were not studied at all. In consequence, the development of law school was a threat to codification and its development as more and more it became a subject that was neither mastered nor seen as interesting because, it was not directly related to the majority of the laws in the state or the lawyer daily practice, hence the subject was deemed not practical enough and in consequence not worth studying. The new lawyers, or at least the lawyers trained in the second half of the nineteenth century, therefore, seemed not to be trained at all in civil law and legal theory. Their training was mainly based on future practical usage of the law. This had for consequence, to make the revision of the law under a different form a forgotten subject. It also made codification a rejected project as it would contradict the law school legal training.

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[488] Louisiana State University, Loyola University, Southern University and Tulane University.

[489] Carbonneau T., "The Survival of Civil Law in North America: The Case of Louisiana", *Law Libraries Journal*, 84 (1992), p. 171–172; Pascal R., "Louisiana Civil Law and its Study", *Louisiana Law Review*, 60-1 (1999), p. 1–12.

[490]Ritchie J., "Legal education in the United States", *The American lawyer,* 3, p. 65–66.

[491] www.aals.com .

All of these human factors, colonial influence, circulation of the population, development of railroads or law school has to be understood with nuance. The main issue with human factors is that no single one is strong enough for the state or meaningful enough to be the reason, or really working on its own to be the reason for codification. They for sure influence but are not the decisive element. This is especially taking into consideration that the adequacy of these factors is not found only in states that had their law codified. Indeed, it is also found in other US states such as Florida or Texas, for example, and they did not have the same effect. Hence, there is only one human element among many others that made these states codify their civil law.

The main human factor is that as each state had a promoter of the idea of code as a component to a population merge; the code appeared as a way to bring a form of geographical unity. While the need to implement a new reality is reflected in the various factors and answers the question of the code, implementation is answered with a strong man advocating for the code. This additional factor should not be neglected as it is the final push each code to needed to be implemented.

2. Civil codes and their codification champions

The history of codification worldwide shows that a code is often known in the service of a man, which is evidenced by the names given to the code[492]. In the US, it was especially the case for Field and his code, the civil code and procedural code for the state of New York. In addition to being their editor, David Dudley Field was their promoter and acquires a notoriety as a codifier who takes over his law practice. By attaching the code to a man, the champion became the representative who used his power to glorify the code.

[492] Cabrillac, *Les codifications*, p. 160-161.

With men and civil codes in the US there were usually two cases. The first was the usage of the codification as a way to fight between strong influential men with political power (1). The second possibility is the fact that the code is championed by a man who did so without much or any resistance (2). One thing is certain is that on American soil codification was not pushed by an institution, association, or policy, but rather the work of a strong man arriving to implement his ideas.

2.1. The civil codes a fuel for dispute between influential men

The subject of the codification of civil law is an issue that became burning when it appears in some states. In two states, codification was used as an excuse to emphasize previous resentment among a group of men. Codification and civil codes were the perfect way to awaken or reveal disputes publicly, because it emphasized two opposite ways of seeing the law and society. This situation is particularly the case in two states where lawyers came into open conflict: in Louisiana it happened between Livingston, Clark and Claiborne and in New York between James C. Carter and David Dudley Field. The story of the two quarrels is filled with virulence and shows the importance of the subject.

In Louisiana, the debate over whether the legal system must be of civil law or common law begins with the possession of the territory by the Governor Claiborne, a lawyer educated in the common law and supporter of it. Meanwhile, the opposition quickly manifested in the persons of Livingston and Clark, who were strong supporters of the civil law system and Louisiana natives. At a time where Louisiana had to decide on which legal system it would choose, the quarrel between the men quickly escalated to a point where it became personal and even the adoption of the code could not bring it to an end. There are several examples demonstrating the strength of disagreement between these men defending two visions of the law who did not hesitate to attack each other on private matters as much as on legal matters.

Indeed, Governor Claiborne speaks about Clark and Livingston in his letters to the US President as men "without principles" and hostile to the US government[493] because of their opposition to the introduction of the common law. Claiborne goes as far as to disapprove how Livingston practiced his legal profession. By getting paid in land, not money, for exercising his legal functions, he considered that Livingston abused his position and only takes business that would be financially advantageous for him[494]. As for Clark, a document entitled *Characterization of New Orleans Residents*, written for President Jefferson by Wilkinson, a friend of Claiborne, described him as someone who "possesses capacities to do more good or harm than any other individual in the province—He pants for power, and is mortified by disappointment"[495]. Despite his strong position within the territory, Governor Claiborne depends to his dismay on Livingston and Clark for their knowledge of the territory, language and local figures, even though they stood poles apart on the issue of the law.

The situation escalated rapidly and in 1805 a duel was held between Governor Claiborne and Clark. Claiborne accused Clark of being part of the Burr conspiracy[496]. Clark defended his honor by requesting a duel with his accuser, duel during which Claiborne is shot in the thigh, an injury that would make him limp for the rest of his life[497]. The dispute between all those men does not end there. At the time of the drafting committee for the code, Governor Claiborne blocked by veto the appointment

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[493] Claiborne C., *Letters from Claiborne, United State Department of State*, Territorial paper of the United States, 9, (1940), Carter comp & ed, p. 242, 245, 320, 385.

[494] Rodriguez J., *The Louisiana Purchase: A Historical and Geographical Encyclopedia*, ABC-CLIO, 2002, p. 193–194.

[495] *Characterization of New Orleans Residents*, July 1,1804, The Territory of Orleans, p. 255.

[496] The Burr conspiracy is a conspiracy or Burr, former vice president, is accused of having wanted to create an independent nation in central America. Burr was arrested in 1807 and acquitted for lack of evidence. For full story see Lewis J.Jr., *The Burr Conspiracy: uncovering the story of an Early American crisis,* Princeton University Press, 2017.

[497] Hood, "The History and Development of the Louisiana Civil Code", p. 21.

of Livingston in the latter because he does not appreciate him and feels like he is at war with him[498]. The arrival of the code in 1808 does not calm the tensions and the three men fought until to the death of Clark in 1813.

The debates on the Louisiana Civil Code were therefore taking place amid personal tensions between the major political local figures. Claiborne had to accept the code by the force of circumstances, as demonstrated by the history of the Digest of civil laws in force in Louisiana Territory in 1808. After being the perfect issue to fight about for those three men and being asked for by the legislature, the Louisiana civil code became the code of Louis Moreau Lislet, its main writer. Hence, in this state, the code was the work of three champions, two prior to its publication, and one during.

The New York quarrel, between James Coolidge Carter and David Dudley Field[499] is as virulent as the one in Louisiana. This disagreement went to a point that researchers on this subject consider that it is Carter's efforts as the leader of the anti-codification movement that, managed to prevent the adoption of the Civil Code for the State of New York[500]. The dispute on the subject is also summarized by Lawrence M. Friedman, as follows:

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[498] Hood, "The History and Development of the Louisiana Civil Code", p. 20.

[499] For a detailed discussion on the conflict Field Vs Carter see Masferrer, "The passionate discussion among common lawyers about postbellum American codification: An approach to its legal argumentation", p. 173-256.

[500] Masferrer, "The passionate discussion among common lawyers about postbellum American codification: An approach to its legal argumentation", p. 176; Martin G., *Causes and conflicts: the centennial history of the association of the bar of the city of New York*, Fordham University Press, 2d Edition 1970, p. 173; Rogers J., *American bar leaders: biographies of the presidents of the American bar association, 1878–1928*, published in the commemoration of its semi-centennial by the American Bar Association, 1932, p. 80–85.

> "the codification movement is one of the set pieces of American legal history. It has its hero, Field; its villain is James C. Carter of New York, who fought the idea of codification with as much vigor as Field fought for it"[501].

James Coolidge Carter was a preeminent legal figure, president of the American Bar Association, of the New York State Bar Association, and of the Association of the Bar of the City of New York. As for David Dudley Field, he was a prominent New York lawyer and the defender of codification.

The conflict between the two men takes the form of written published articles answering one another. The codification dispute began in 1884 with Carter's pamphlet against the Civil Code: *The Proposed Consolidation of Our Common Law*, followed by a pamphlet in 1889: *The Provinces of the Written and the Unwritten Law*, and an article called *The ideal and actual in the law* presented before the American Bar Association in 1890[502]. Field responded to each of them directly, for example in 1884 when he published a pamphlet entitled *A Short Response To Long Discourse*[503].

Even if the dispute over the issue of codification appears virulent, it did not create tensions on its own. In fact, the tension between the two lawyers arose before codification was a burning subject. They had indeed found themselves in opposing camps beforehand, creating the foundations for the tension between these two legal figures. The confrontation really started in the *Erie Railroad* case[504] which pushes Carter, following his confrontation with Field, to organize in 1869 *The Association of*

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[501] Friedman, *A History of American law*, p. 302.

[502] Lang, *Codification in the British Empire and America*, p. 147; Masferrer, "The passionate discussion among common lawyers about postbellum American codification: An approach to its legal argumentation", p. 176.

[503] Field, *A short response to a long discourse, an answer to Mr. James C. Carter's Pamphlet on the proposed codification of our law*, p. 6.

[504] Miller G., *James Coolidge Carter*, dans Great American Lawyers, Vol. VIII, William D. Lewis ed., 1908, p. 9–11.

the Bar of the City of New York in order to moralize the profession within the state as he was shocked by Field's behavior. Matters then escalated when they represented opposing counsel during the famous *Tweed* case–a corruption case that took place in 1870 when Carter was counsel for the city of New York, while Field defended Tweed who was facing criminal and civil prosecution by the city[505].

The conflict between the two men is publicly known, as evidenced by an article in the New York Times about this trial where Carter accused Field of using "every device of technicality for the purpose of obstructing the progress of justice and leading to an erroneous result" while associating him with "the great frauds which have disgraced the civilization of our time," and being "the person mainly and chiefly responsible for them"[506]. Carter's words are harsh on Field and his reputation, and they show a great level of disrespect between the men. In consequence, it was not surprising that when Field began to pose as a defender of codification, Carter decided from the start to make himself his opposition and block his way.

The review of speeches and articles between these men concerning the codification[507] is revealing of a conflict where both parties are not listening to each other. One of the most glaring examples of bad faith that these leading figures used

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[505] *David Dudley Field* in Hoy H., *Great American Lawyers*, Vol. V, William D. Lewis ed., 1908, p. 125-138.

[506] The Suit Against Tweed, NY TIMES, Mar. 8, 1876.

[507] D. D. Field: *Codification. An address delivered before the Law Academy of Philadelphia, in the hall of the historical society of Pennsylvania*, April 15, 1886, *A short response to a long discourse, an answer to Mr. James C. Carter's Pamphlet on the proposed codification of our law, Answer to the report of the New York Bar Association against the Civil Code*, New York, John Polhemes, 1881, *Codification an address delivered before the Law Academy of Philadelphia*, April 18, 1886, Printed for the Law Academy, Philadelphia, 1886., *Codification in the United States*, Judicial Review, vol. 1, 1889, p. 18–25, *Speeches, Arguments and miscellaneous Papers of David Dudley Field*, edited by A. P. Sprague, vol 1, D. Appelton and company, New York, 1884.
J. C. Carter: *Law: its origin, growth and function*, G.P. Putnam's sons, New York and London, 1907, p. 384, *The proposed codification of our common law,* Kessinger Publishing, 1884, p. 122, *The provinces of the written and the unwritten law*, Nabu Press, 1889, *Argument of James C. Carter in Opposition to the Bill to Establish a Civil Code Before the Senate Judiciary Committee*, The Committee, Albany, 1887, *The Ideal and the Actual in the Law: Address at the Thirteenth Ann. Meeting ABA*, Albany, Aug. 21, 1890.

can be illustrated by their exchange on their vision of a code, specifically its application. When Field explained that his code had to be consistent with the common law, Carter answered that he wanted to abrogate the common law and its contents entirely. When Field responded that his code could not and was not intended to provide for all possible cases and that it was never his will, Carter retorted that the code was indeed intended to provide all possible cases imaginable, which is not feasible in practice[508]. These are just two examples among many of the answers they give each other, which appear not to take into consideration what the other is saying, explaining or even defending. The background of hostility between the two men seemed to be too strong to allow them to have a debate where they listen and respect what the other is saying. They held steadfastly to their ideas without listening to their opponent.

The debate on the Civil Code for the State of New York, amid discord between two men, seems like a great excuse for a public and political confrontation between these two leading figures in New York.

Those conflicts between men in Louisiana and New York State were heated because of the inherent rivalry between those men but also because codification is a very emotional subject. Indeed, a codification has to do with culture, the code is a representative of the local culture[509] and those men tried in their ways to protect the

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[508] Masferrer, "The passionate discussion among common lawyers about postbellum American codification: An approach to its legal argumentation", p. 194-199.

[509] Masferrer A., "Codification as nationalisation or denationalisation of laws : the Spanish case in comparative perspective", *Comparative legal history*, 4-2 (2016), p. 100-130
See also Levy E., "The reception of highly developed legal systems by people of different culture", Washington Law Review, 25 (1950), p. 233-245; *Atias C., Levasseur A., « American Legal Culture and Traditional Scholarly Order », Louisiana Law Review, 46 (1986), p. 1117*-1136; Lintvelt Jaap D., "Culture et colonisation en Amérique du Nord : Canada, États-Unis, Mexique, Québec", Septention, 1994, p.89; Head, "Codes, cultures, chaos and champions: commun features of legal codification experiences in China, Europe, and North America", p. 1-93; Fontenot W., "The Louisiana Judicial System and the Fusion

initial culture like Livingston in Louisiana or Carter in New York when their opponent; whatever it was Field or Claiborne tried to implement a drastic change in the culture of the state. Hence, and not surprisingly, the debate quickly became heated, passionate and fundamental because it was not just about law but about feelings and identity.

These conflicts, whether in Louisiana or New York, had the advantage of putting the issue of codification at center stage. Because of these very public and vibrant conflicts, everyone took a position, whether they were a legal professional or not, and was concerned about the conclusion and decision. A subject of legal interest, hence, became societal.

2.2. The civil codes, legal tools driven by men

When the issue of code did not stir tensions, it was defended by individual men who wanted to impose their ideas. These men used their reputations to defend their ideas and allow the implementation of a civil code. The review of these cases shows that these promoter figures are mostly judges. Which is a testimony of the strength of judicial in common law states.

The Code of Georgia was led by two different champions, one for putting it into place, named George Gordon, and the other for its drafting and adoption, named Thomas Cobb.

George A. Gordon (born in 1830, died in 1872 due to typhoid fever that he contracted during the war), was admitted as a lawyer to the Georgia Bar on January 19, 1852. He was later a member of the Senate and the House of Representatives. At

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of cultures", p. 1149-1160; Kedar N., "Law, Culture and Civil Codification in mixed legal system", Canada Journal of Law and society, 22 (2007), p. 177-181; Leader S., "Legal theory and the variety of Legal Cultures", Journal of civil law studies, 3 (2010), p. 99-110; Auden F. Halperin J.-L., La culture juridique française, Paris, CNRS, 2014, p.211.

twenty-eight years old, the young lawyer fell in love with the "Code of Alabama"[510], which he discovered at the time of his marriage in Huntsville, Alabama, where the legal profession boasted their new code. Seduced by the principle of the code, he decided to go a step further, and strived for Georgia to adopt a document of this type but embracing all laws of the state.

As a member of the representative chamber, he was the man who pushed the legislature on November 9, 1858, to take the act for the implementation of codification which was adopted directly without any opposition[511]. This act was so easily adopted because it was pushed by this future general of the Confederate army who was highly regarded by his contemporaries. He was pushing a project that he had carefully drafted, deciding on some of the specific characteristics that would distinguish the Georgia Code from the other codes,[512] such as its organization or its inspirational model. This man, by the strength of his convictions, had used all his political power to push an idea that he believed in with all his heart. He was the one who brought the idea to the territory of the state and who adapted it to Georgia and its law. He maneuvered to establish its foundations, while trusting the commissioners with the implementation of his legal revolution. Indeed, once the Act providing for a codification of the law was adopted, Gordon stopped working towards enacting the code, he was the impetus behind this big project and he trusted the commission to make it a reality.

Of the three members of the commission, two of them, Irwin and Clark, were judges, while Cobb, who was mainly in charge of the Civil Code was a lawyer. Between them, they were responsible for publishing progress reports of their work, but they also took matters into their own hands regarding the necessary push for the adoption of the

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[510] *Report of the seventh annual meeting of the Georgia Bar Association*, p. 151.

[511] *Report of the seventh annual meeting of the Georgia Bar Association*, p. 150-151.

[512] *Report of the seventh annual meeting of the Georgia Bar Association*, p. 151.

code, by making every effort so that their code were adopted by the legislature. It is they who also proposed the vote of the code by sections instead of Article[513] in order to move the adoption process along. Each man was responsible for a code; hence, Cobb is the one who met with the different members of the legislature who marketed the civil code, published the report and ensured its adoption.

In California, the man that brought codification into the territory was a judge, Justice Stephen Joseph Field, David Dudley Field's brother. However, surprisingly, he is best known for his work as a US Supreme Court judge. Actually, he was a judge for a period of 12,614 days, making him the second man to exercise this function for the longest. He was nevertheless a major player of the codification in California.

Stephen Joseph Field was a lawyer at his older brother's law firm, starting in 1838 and staying for ten years before moving to California[514]. He arrived in San Francisco on December 29, 1849,[515] and began his career as a California judge in Marysville[516] while renting land he acquired earlier hoping to make fortune[517]. At the end of his office in May 1850, he resumed his attorney practice before being elected to the legislature in January 1851[518]. It was at that point that he became a member of the

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[513] Smith M., "The first codification of the substantive common law", p. 178–189.

[514] Bergan P., Fiss O., MacCurdy C., *The Fields and the Law*, p. 28.

[515] Swisher C., *Stephen J. Field Crafstman of the law*, Washington, The Brookings Institution, 1930, p. 26.

[516] Field, *Personal Reminiscences of Early Days in California*, Washington, 1893, p. 19.

[517] Field, *Personal Reminiscences of Early Days in California,* p. 30.
"To make a long story short, until I was superceded by officers under the United States government, I superintended municipal a airs and administered justice in Marysville with success. Whilst there was a large number of residents there of his character and culture, who would have done honor to any city, there were also unfortunately many desperate persons, gamblers, blacklegs, thieves, and cut-throats; yet the place was as orderly as a New England village. There were no disturbances at night, no riots, and no lynching. It was the model town of the whole country for peacefulness and respect for law".

[518] Swisher, *Stephen J. Field Crafstman of the law,* p. 48.

Judiciary Committee. This commission, ran by Stephen Joseph Field, is the one that worked towards the adoption of the civil procedure and criminal code that his brother David drafted for New York, while modifying them to suit the particular Californian needs[519]. It is Field brother's initiatives that brought codification to the Californian territory. Following the adoption of the procedural code, the California lawyers started to wonder about codification of substantive law. However, it is not Field who would be advocating for this. Indeed, a year after the adoption of the Field codes, he resumed his activities as a lawyer and was appointed in 1857 as a judge of the California Supreme Court and Justice of the US Supreme Court in 1863 by Abraham Lincoln.

The end of Stephen Field's commitment to fight for codification did not involve the abandonment of it. He implemented the other codes and the idea of codification in the territory so strongly, that when adopting the civil code there was barely any resistance. In fact, in 1868, a motion for the appointment of a commission to draft a civil code for the State of California[520] passed.

In Dakota Territory, the codification champions were judges of the State Supreme Court. Founded in 1861, this court comprised three men. Chief Justice Philemon Bliss, Associate Justice George P. Williston, and Associate Justice Joseph L. Williams were all appointed by the US president, Abraham Lincoln[521]. Not many details are available about these men as sources on Dakota Territory during 1860 are disparate. However, the historian Kingsbury in his 1915 book on Dakota Territory's

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[519] Field, *Personal Reminiscences of Early Days in California,* p. 78.
"I took up the Code of Civil procedure, as reported by the commissioners in New York, remodeled it so as to adapt it to the different condition of things and the different organization of the courts in California, and secured its passage".

[520] Grossman, « Essay Codification and the California Mentality. », p. 625-626.

[521] A photographic history of South Dakota https://ujs.sd.gov/ .

history explains that the 1860 draft New York codes made their way up to Dakota Territory:

> "a printed copy of the report of the commission containing the civil and penal codes, and also the maritime code, came into the possession of the Supreme Court of the Territory of Dakota"[522].

Having this innovative document at his disposal, and being in a formative area of the state, the Supreme Court judges seized the opportunity. They asked the legislature to adopt the draft Civil Code for the State of New York[523]. Seeing no reason to refuse this gift of a clear, up to date, piece of law it was adopted without any change or revision by the act of 1865. Sadly, no records of the discussions that decision might have entailed before or after have survived to be accessed today.

One of the main surprises with the Dakota Territory is the why? Why was the draft of the civil code for the state of New York sent to this barely populated place? And why was it sent to the Supreme Court judge when, in New York, most of the magistrates were against the code? Examination of some of the protagonists of this seems to bring an answer to these questions while bringing some light to codification in the US during the 19th century.

Philemon Bliss's lineage shows that his great-great-grandmother was the sister of the great-grandfather of David Dudley Field. Indeed, Lydia Field, Zechariah Field's sister, married John Bliss I. This lineage examination shows that there is a link between

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[522] Kingsbury, *History of Dakota Territory*, p. 430.
"A printed copy of the postponement of the commission Containing the Civil and Penal Codes, and the Maritime Code, came into the possession of the Supreme Court of the Territory of Dakota".

[523] Kingsbury, *History of Dakota Territory*, p. 431.

the Field and the Bliss families[524] which made David and Stephen Field distant cousins by marriage of Dakota Territory's Supreme Court Judge Philemon Bliss.

As to whether the cousins knew each other, there is no documented evidence. However, they were born in the same state, Connecticut, and David and Philemon did their legal studies in 1820 in the same city, New York. The third element that supposed they knew each other or met each other is that the three of them personally knew Abraham Lincoln[525]. Therefore, it is not unlikely to assume that these cousins knew each other as they were evolving in the same circles[526]. Hence, this could explain the arrival of a copy of the civil code so early and quickly to Dakota Territory.

The link between Field and Bliss is a connection that seems key in the history of American civil codes, as it explains the arrival of a key document in a sparsely populated, and, at the time, irrelevant, territory. This family connection also sheds new light on the codes inspiring each other, as family is at their heart–one family, to be more precise.

While no organization has been created to promote the codification on the US territory, it seems that within the territories where codes influence each other, the key men of the codification are part of the same circles with David Dudley Field at the center. Indeed, during his drafting year, Field engaged in profuse correspondence with Livingston in Louisiana. His brother then became the Californian advocate for

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[524] Appendix 8.
Field genealogy: https://www.wikitree.com/
Bliss genealogy: Bliss J., *Genealogies of the Bliss family in America, from about the year 1550-1880*, John Homer Bliss, Boston, 1881.

[525] Bliss, *Genealogies of the Bliss family in America, from about the year 1550-1880*; Bergan P., Fiss O., MacCurdy C., *The Fields and the Law*.

[526] Field life history: Field H., *The Life of David Dudley Field*, New York, Charles Scribner's Sons, 1898.
Bliss Life history: Bliss, *Genealogies of the Bliss family in America, from about the year 1550-1880*.

codification, and the codes arrived in Dakota because he sent it to his cousin. Thus, there is no agency for codification, but instead just a family effort.

In conclusion, the issue of a civil code in the US is, in all the states, fought by men who used their political power and fought strongly either to advocate for, or to oppose it. The magistrate population meanwhile did not stand still. It seemed to involve itself in every state, either negatively, as in New York, working actively against the code, or positively in the other states. Even in Louisiana, where they did not seem to intervene, they were the point of origin of the 1825 civil code revision. In other states, Georgia, California and Dakota, judges were active supporters and instigators of civil codes. They were invested positively from the beginning of the code in committees and were even their original promoters.

History seems to hold that David Dudley Field is the man behind codification in the United States, and he certainly is the one man who actively promotes the circulation of his codes, but he was not the only defender or actor for codification in the United States. There could not have been so many codes in the US without many powerful men in different states. Gordon Bliss, Moreau Lislet, Livingston, and Joseph Field are also leading figures of the codification alongside David Dudley Field. It could be stated that codification in the US is more a matter of men than agency, or even perhaps that codification is the result of a collective effort of Field and his men.

To summarize, all the factors examined here to try to explain codification of the civil law in the United States, seem to have an impact, but cannot be found in all the states; most of the codifying states were young states in their formative years. It does not seem as if there was one political party mainly working towards codification, even if a slight majority of the political orientation during the codes' key moments were republican. Most states experienced an influx of inhabitants during the years preceding the adoption of the code and/or the arrival of new railways, while the development of law schools seems to have worked against codification.

However, among all of the studied factors common elements are found in all the states and had influence over the codification endeavors in a similar way. All the codifying states justified their endeavor as a will to organize and modernize the law, they all had a civil law colonial legacy, they all used the same procedure to codify the law, and all had a champion of the civil code. Finally, in my opinion, one of the main factors that drove the codification in the different states is the availability of an already existing model, hence the circulation patterns of the codes in the states that needed them.

Looking at all the common elements between the codifying states, there is one external element remaining. Indeed, looking at the geographical situation of the states, none of them are central states. All the codifying states are peripheral states, also called border states, which means that all the states that adopted a civil code lie on one of the United States borders[527]. Did this location on the border of the US play a role? It is difficult to say–maybe because they were farther from the central power, they might had more leniency, or, maybe the fact that it is on the border and hence a possible point of entrance might have increased the population flux compared to central states.

These border states also are points of entry for business on the American territory, via port or border access they are centers of circulation and exchange, which facilitate the circulation of ideas. This seems to be the most likely explanation for the coincidence of geographic location.

[527] See Appendix 1.

III – Concepts, theory and application: patterns of the American civil codes

Deciding to go for a codification of the law is one thing but executing the project is another. Many codification projects existed within the different codifying states and numerous solutions and different types of code were adopted (1). It also means that according to the different codes, they did not have the same impact on the law (2) or the same application (3).

1. One nation different conceptions of codification - sketches study of the different type of US civil codes.

As Portalis said, codification is not anything other than the "spirit of method applied to the law."[528] The term codification according to its etymology and its Latin origin is the operation to make a code[529]. The accepted definition of codification varies according to the theories, location and time. Indeed, the vision of codification from Rome during antiquity[530], to the canon law in the Middle Ages[531], to Napoleon[532], are poles apart from each other. Even today there is no universal accepted definition of the concept of codification. The books and articles on this topic are also numerous and sit on all ends of the spectrum[533]. This legal concept can therefore take many meanings. The basic elements that make up a code consequently vary from one accepted definition to another, and from one theory to another, in terms of exclusivity, type of

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[528] Portalis, *Discours préliminaire du Premier Projet de Code civil*
« l'esprit de méthode appliquée à la législation ».

[529] Varga C., *Codification as a socio-historical phenomen*, Sven Társulat Istvan, Budapest, 2011, p. 19.

[530] Vassart P., *Manuel de droit romain*, Paris, Larcier, édition Bruyant, 2015, p. 61-62.

[531] Della Rocca F., *Manual of Canon Law, London,* Bruce Pub, 1959, p. 487.

[532] On this matter see Halperin JL., *Le code civil*, Dalloz, Paris, Connaissances du droit, 2003.

[533] See Introduction for an overview of the evolution of codification.

writing, structure, applications, philosophy and so on. Many elements can be considered fundamental[534]. If a universal definition seems an impossible mission, however, it is possible to look at the various theories and concepts attached to it and to put them in line with the American civil codes. The idea is not to confront the theories, but rather to see which theory the American Civil Codes in the 19th century was based upon and if there is an American definition or adaptation of the civil code concept.

The analysis of codification has already helped to highlight a possible classification of the codes based on the colonial tradition of the state. The US codes are therefore at this moment examined under the prism of innovation, compilation and recodification (1.1.) and under the prism of imitation or consolidation, meaning according to the codifying model which shows a circular pattern of the civil code (1.2.). Those two angles of classification are the ones considered as the most spread codification classification theories among many.

1.1. Civil Codes: compilation, innovation and recodification

Various studies on the concept of codification have enabled us to distinguish a kind of conceptualization of codification. These studies underline two main types of codification: codification innovation and codification compilation[535].

The notion of codification innovation appears in the years following of the Napoleonic Code. Also called traditional codification, classical codification, or codification *per se* it is a type of codification characterized by the creation of a legal document containing the various legal materials related to a subject, which creates a shift or a change in the law. Thus, it is characterized by two factors: the formal aspect

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534 Vanderlinden, *Le concept de code en Europe occidentale du XIIIe au XIXe siècle* ; Head, "Codes, cultures, chaos and champions: common features of legal codification experiences in China, Europe, and North America", p. 1-93.

535 Cabrillac, *Les codifications* ; Varga, *Codification as a socio-historical phenomen;* Crepeau P., "Reflexions on the codification of private law," *Osgoode Hall Law Journal*, 38 (2000), p. 267-295.

of the reduction of the law into one document and the creation of new legal rules. By contrast the codification compilation is more formal, it corresponds mainly to a formal arrangement of the various legal materials on a subject. In principle, a codification compilation does not change the contents of the law. The important thing in this case is the rationalization and organization of the law. In line with its two types, a third type of codification also exists, which is called recodification[536]. As the term suggests, the code in question is recodify, in other words, reworked. The format as well as the basis is reworked, after a certain period of it being applied. Based on those three main visions, the question is to see under which project the various US civil codes fall.

Two codes specifically identify their choice for codification innovation: Louisiana and New York.

In the report of the commission for the revision of the Digest in 1825, the commissioners clearly explain that they were not going to pursue a simple recodification of the Digest: “It is our first duty to comprise in the several Codes we were directed to prepare, all the rules we deem necessary for stating and defining the rights of the individuals"[537]. The idea was therefore to codify the existing law whether they were inside or outside the 1808 Digest and to include the legal provisions that were previously not included in the Digest.

In the initial Commissioners’ report of the Field Code in New York in 1865, they explained that their job was "to reduce into a written and systematic Code the whole body of the laws of this State, or so much and such parts thereof as shall seem to them

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[536] Pineau J., "A very brief history of recodifications and Its problems", *SUBB Jurisprudentia*, 2011, p. 70-76.

[537] *Civil Code of the State of Louisiana,* 1825, p. 12,
“It is our first duty to comprise in the several Codes we were directed to prepare, all the rules we deem necessary for stating and defining the rights of individuals in their personal relations to each other, for giving force and effect to the different mode of acquiring, preserving and transferring property and rights, and for seeking civil redress for any injury offered to either.”

practicable and expedient"[538]. The idea of a simple compilation of law is rejected here, as the goal was to overhaul the law and modify it to make it as efficient as possible.

The case of California is a little more complicated than that of the other two states. The examination of the code clearly demonstrates that the Civil Code is a codification innovation, even as the commissioners' report did not mention it or provide any information on it. This intention of creating new legal rules is, however, stated in the Governor of California's address to the legislature for the years 1869-1870:

> "Such commission shall proceed to revise all the statutes of this state, [...] and correct verbal errors and omissions, and suggest such improvements as will introduce precision and clearness into the wording of the statutes, [...] and prepare substitutes therefore when necessary; to recommend all such enactments as shall, in the judgment of the Commission, be necessary to supply the defects of and give completeness to the existing legislation of the State."[539]

This speech does not seem to highlight a codification project but rather seems to present a revision of statutes. Nevertheless, it is the commission appointed after this discourse that prepared the Civil Code of 1872 and the commissioners extended their prerogatives to a code. That is also why Charles Lindley, one of the code commissioners stated that realistically the commission went "a little beyond" the powers that the legislature had given them[540]. In light of these elements, it seems quite obvious that California went for a codification innovation with the civil code.

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[538] *Code commissioners report for the civil code for the state of New York, The Civil Code for the State of New York,* p. X,

[539] *Report of the attorney general*, appendix 1 to Journals of Senate and assembly, No. 6, 1869–1870, governors message to the Senate, day 54, p. 5, Klepsc R., "The revision and codification of California Statutes", p. 766-802.

Understanding the intent and the choice of the codification type of Dakota Territory is quite complicated. Indeed, no document documenting the codification process seemed to exist at this time and the Dakota Territory had adopted the New York code directly without creating a commission nor apparently any parliamentary debate. Hence, it is quite difficult to see if they went for an innovation or if it was simply a compilation of the law. The only document available on the Code is the act of adoption of the latter which simply states that the code "provides for the revision and codification of the laws of Dakota Territory"[541]. However, the examination of the existing common law in the territory [542]and changes in the content of the law brought by the code with the adoption of an already fully written code, shows that the code is a form of innovation. The innovation brought in the law is there, but the intent to do it remains unprovable.

Therefore, it appears that the majority of American civil codes, despite their reputation, went for a codification innovation. Indeed, US codes are generally considered by the research as compilation codes hence, as some mock-up code. However, the reality is quite different, only one American civil code is a compilation, the code of Georgia. More precisely, this code is in fact a restatement of the law, a kind of extensive Revised Statutes in the form of a code. This rejection of a codification innovation is clearly exposed in the commissioners' reports where their work and the fundamental principles used are explained,

> "This principle was, to attempt no change or alteration in any defined rule of law which had received legislative sanctions or judicial exposition, and to add

[541] Dakota act providing for the codes, adopted on January 14, 1865, dans The Revised Codes of the Territory of Dakota, op. cit., p. XXI.

[542] Lamar H., *Dakota Territory, 1861-1889: A study of Frontier politics,* Yale University Press, 1956.

no principle or policy which had received the condemnation of the former or was antagonistic to the settled decisions of the latter."[543].

By engaging in this exercise to create a Civil Code, the Commissioners therefore knew precisely how they wanted to undertake it. The code is a compilation that gathers the legal principles recognized by all and offers no legal addition. However, in the rare occurrence where they would have to create a new legal rule they explained that the new hypothetical legal principles should not disagree with an already established legal rule which seems to leave a small but unlikely opening for innovation that the commissioners did not seize.

Aside from Georgia's compilation code, some recodification codes can be found on the territory. The nineteenth century was a period of strong territorial change in the US; territories received statehood, borders between states changed, and new states sometimes coming from large areas were created. Dakota Territory and its subsequent division is one of those cases, hence the recodification of the law that occurred in Montana, North Dakota and South Dakota. On gaining self-government and independence, the states had to recodify the law[544]. Indeed, two of those states went directly for recodification—Montana and North Dakota—the latter waited until the early 1900s to recodify its law. One other famous recodification is the Louisiana Civil Code of 1870 that happened just after the end of the Civil War and was implemented to enact the changes brought about by the war and the new reality of the country[545].

Looking at the reality of the 19th century American civil codes, there is diversity in the types of civil codes existing within the territory. Hence, there is no linear or

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[543] *Georgia report of the code commissioners, The code of the state of Georgia*, p. V.

[544] *Report of the code commissioners, Code civil de l'état de la Louisiane*, 1825, p. 20, *Report of the code commissioners, The Revised Civil Code of the state of Louisiana*, 1870, p. XV, *The Revised Codes of the state of North Dakota,* p.XX; *Montana Code*, p.22; *The Revised codes State of South Dakota,* p. 10.

[545] Yiannopoulos AN., "Two Critical Years in the Life of the Louisiana Civil Code : 1870 and 1913", p. 5-33.

national American interpretation or adaptation of the concept of civil code, at least regarding these possible criteria and classifications.

1.2. Codification consolidation or imitation the circulation of the civil codes and the snowball effect[546]

Codification is a broad subject with so many definitions and types of codification possible. Another possible classification of codification is the one according the idea of the code being a consolidation of the state law, or, on the contrary, being the imitation of another code. This classification allows to look closely at the code and to see if it copies or imitates another code or, on the other hand, if the code is a consolidation of existing law[547]. This distinction is based on the main factors and elements that influenced the civil codes in the US; it is the circulation of the diverse civil codes from one state to another. In fact, most states undertook codification because they had a local American model to use.

The law being a moving subject by definition, it is not surprising that the American civil codes circulated throughout the territory. Indeed, since its birth, the legal field has been the subject of numerous exchanges as Professor Azzedine Kettani explains,

> "one of the qualities of the law is its dynamism. The law evolves, the law changes, the law circulates, it migrates, it spreads, it is imitated, it scores, it inspires other law: these phenomena to which the lawyer cannot be indifferent"[548].

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[546] See Appendix 11.

[547] Oppetit, *Essai sur la codification,* p. 17.

[548] Kettani A., *Indépendance nationale et système juridique au Maroc*, Actes du colloque des 26 et 27 mars 1998, Grenoble, Collection mélanges, PUG, 2000., p. 31.

The interinfluence, importation, transformation, transposition and so forth of the law make up its core. It is the fundamental nature of the law.

In opposition with the interinfluence reality of the 19th century American civil code, the prefaces to some codes reflect a vision of reality that is somewhat surprising; they each state that they are the first civil code and do not take into account the existence of the other codes that influenced them. Whether it was New York[549], California[550], Georgia[551] or Dakota Territory[552] they all arrogate to themselves the leading role of being the first state to have a codification of civil law even if it is impossible for all of them to be the first.

Chronologically, the first civil code to appear in the US territory is the Digest in Louisiana in 1808. However, other civil code can claim to be first, just not the first one in the US like they claim. The Code of Georgia can claim the title of the first code, but first code of common law, while the civil code of Dakota Territory can also be given this title because it is the first state to adopt the Civil Code of New York. Following that logic, the civil code of the state of California is also a first as it was the first state to adopt a revised version of the New York Civil code.

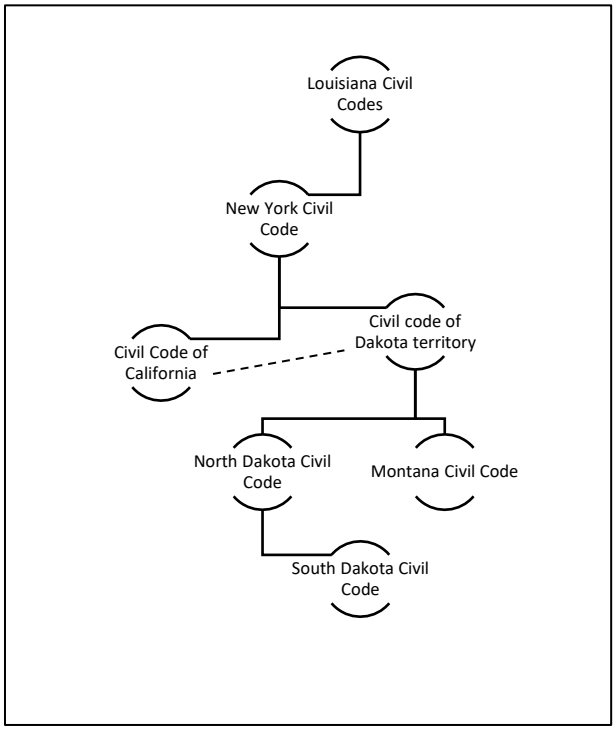
« l'une des qualités du droit est son dynamisme. Le droit évolue, le droit change, le droit circule, il migre, il se diffuse, il est imité, il marque, il inspire d'autres droits : autant de phénomènes auxquels le juriste ne peut être indifférent »

549 *New York Code Commissioners report, The Civil Code for the State of New York*, p. XIII
"The first common law code".

550 *Report of the Commissioners to Examine the Codes adopted by the Nineteenth Legislature, California Code commission, reports 1868-1874*, p. 33,
« That California has been the first of this class to enact a complete code [....] It will be the boast of California that first of English-speaking States, she set the example of written law as the necessary complement of a written Constitution for a free people ».

551 *Georgia commissioners of the code, The code of the state of Georgia*, p. II
"The first comprehensive code of common law"

552 *The Revised Code of the State of North Dakota,* p. 4
"The territory of Dakota Was the first English community to adopt a codification of substantive law.".



The circulation of the American civil codes

The succession of the civil code in the United States adheres to the following pattern.

After the 1808 Digest in Louisiana, the revised Civil Code came in 1825. These codes were modeled on the Napoleonic code[553]. Twenty years later, when the New York State decided to undertake a codification of the private law, they naturally turned to the Louisiana Civil Code for inspiration and source of law. Indeed, the Draft for the Civil Code of New York in its first versions shows its source below each article and the Louisiana code appears multiple times.

After its creation, the Civil Code for the State of New York became the main vector of codification of civil law in the territory, subsequently replacing the Louisiana Civil Code. This is probably because, unlike the Louisiana Civil Code, its content was imbued with common law, not civil law. This New York code was then adopted 'as is' in the Dakota Territory and later adapted to local conditions in California. Dakota Territory meanwhile revised its civil code in 1887, this time basing its work on the slightly modified Californian version. The revised civil code for the Dakota Territory was therefore adopted and adapted after the territory division. Next, North Dakota revised it to create its own code which was then adopted in South Dakota who would revise it years later.

[553] *Louisiana code commissionner report, Code civil de l'état de la Louisiane, 1825,* p. 9.

Excluding the Code of Georgia, the codes are thereby all related. Indeed, the lack of movement of the Georgian code is also noticed by David Dudley Field in 1889, who seems surprised that the code did not make its way up north to New York who was at the same time undertaking the same project:

> "Before the New York Commissioners had finished their labors, the State of Georgia enacted a civil code for that State which, though not so full as the New York Codes, was drawn up with care and precision, and is now in force, and, according to all accounts, is working well.
> The preparation of this last-named code, which was published I think about the year 1861, was not known to the New York Commissioners while they were engaged in their labors, owing, it is supposed, to the breaking out of the Civil War."[554]

Field speculates that the Civil War blocked the northward journey of the code. However, the code was not exported to Georgia border states neither. Was this due to a strong attachment to the common law in the southern states or major concerns due to the Civil War? It is not possible that both of these elements prevented the circulation of the civil code to neighboring states. It is possible that the lack of circulation of the Georgia Code is due to the fact that the code is an object imbued with the state culture and therefore inapplicable to other states. A final assumption can be made to try to explain the lack of circulation of such an innovative document. At the time, very few copies of the code had been printed, because of paper rationing during this period. Indeed, the printing of the code was greatly threatened by the civil war and because of the various embargoes in the south, it was almost impossible to find printing paper. To ensure the printing of the code, they had to rely on paper from another state, North Carolina. Due to the delays, the job was given to eleven printers

[554] Field, *Codification in the United States,* p. 18–19.

simultaneously to be able to produce the code faster[555]. Only 5000 copies of the Civil Code were printed which made them rare and it was then almost impossible to depart from one of them to send it to another state[556].

This view of the codes as interdependent and interinfluencing each other has many consequences. The fact that they reproduced and adopted each other's means that the law was acculturated, and so states with vastly different cultures adopted and enforced a very culture-based law. This had for consequence to create some changed in the law, and sometimes some evolution outside the culture of the state.

In view of the different elements on American civil codes that have been analyzed here and the circulation patterns demonstrated earlier, the answer to whether codification was imitation, or consolidation seems clear: that all of the American civil codes are imitations of others. Indeed, it is quite difficult for a code to be purely a consolidation. This even includes the Georgia code, which uses the form of another code, the code of Alabama. In fact, the Code of Georgia clearly stated in its preface that the code was written to,

> "Embody the great fundamental principles of our jurisprudence from whatsoever source derived, together with such legislative enactments of the State, as the wants and circumstances of our people had from time to time, shown to be necessary and proper."[557].

While recognizing the use of the Alabama Code as primary from model.

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[555] Surrency, "The Code of Georgia in 1863 and Its Place in the codification movement", p. 96.

[556] Jefferson, "The Code of Georgia in 1863: America's First Comprehensive Code", p. 25-26.

[557] *The code of the state of Georgia,* p. IV
"Embody the great Fundamental principles of our jurisprudence from whatsoever source derived, together with such legislative enactments of the State, as the wants and circumstances of our people HAD from time to time, shown to be necessary and proper. ".

This methodology of imitation is easily illustrated by observing the definitions of marriage within the different codes. The Louisiana code's definition of marriage uses the Napoleonic vision of marriage in articles 1 and 2[558], which defined it as a civil contract, a rule that originated in the revolutionary period. This very culture-based rule was then taken up in Louisiana, which was a very religious state, but nevertheless adopted and so assimilated to the French vision and definition of one of the fundamental acts of life, marriage.

Regarding New York, California and Dakota Territory's imitations of codes, this reality is truly visible–Articles 34 and 35 of the New York Civil Code are found word for word in Articles 55 of the California Civil Code and 34 of the civil Code of Dakota Territory. These articles state that marriage is a relationship between people arising from a civil contract and therefore the consent of capable individuals is fundamental[559]. In these cases, imitation is pushed to its limit with word to word reproduction of the original code. However, the codes are not carbon copies on all points, they mostly imitate, but maintain some peculiarities, as evidenced by the diversity of minimum age for marriage[560].

The issue of the New York code as code consolidation or imitation may arise. Indeed, in drafting the common law in the form of code, it consolidates it, but a lot of changes in the law were made due to the inspiration drawn from the Napoleonic code,

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[558] LA Digest - Book 1, Title 4, Chapter 1,
"Article 1: The law considers marriage only as a civil contract.
Art 2 - Marriage is a contract which, in its origin, is intended to last until the death of one of the contracting parties, however, the contract can be dissolved before the death of either spouse for reasons determined by law. "

[559] N.Y. Civil Code §34 & 35, CA. Civil Code §55, DT Civil Code §34
"Marriage is a personal relationship arising out of a civil contract, to which the consent of the parties able of making that contract is considered. Consent alone will not constitute wedding; it must be followed by a solemnization authorized by this code. "

[560] See Annex No. 10 age minimum for marriage according to the different civil codes.

the Louisiana civil code and Roman law[561]. Hence, it seems that the New York Code is a hybrid of imitation and consolidation.

1.3. The American dictionaries and codification

During the 19th century in the US, codification was a burning issue, especially during the American codification movement and after the adoption of procedural[562] and civil codes. All these codes did not depart from the same initiative nor the same purpose and did not correspond to the same vision of codification. In parallel with these changes in the law, legal dictionaries were developing.

The proposal here is to look at the definition of codification and code in the different editions of the legal dictionaries to see if it evolved or changed to follow the American codification reality. To gain insight into the impact of codes on American legal theory, one dictionary was mainly studied: the Bouvier Law Dictionary. It was selected because it is the first American legal dictionary to have been published and whose publication has continued during the subsequent centuries.

Author John Bouvier began drafting a legal dictionary of American law, because "to find among the reports and the various treatises on the law the object of inquiry was a difficult task: a labyrinth without a guide"[563]. He also explains that the lack of American legal dictionary obliged the American legist to refer to English legal dictionaries, parts of which were not applicable in the territory as the law grew away from its English roots.

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[561] Batiza R., "Sources of the Field Civil Code: The Civil Law influences on a common law code", *Tulane Law Review,* 60 (1986), p. 799-819.

[562] We-have the bear in mind that there was also the civil procedural code in the USA during the 19th century. The first one is in New York in 1848 then it was adopted through the century by almost all the states, see Funk, *The Lawyers' Code*.

[563] Bouvier J., *Law Dictionary and concise encyclopedia*, Kansas City, Vernon Law book company, 1839, p. I.

This dictionary project appeared during the formative period of American law, that is to say, in the early nineteenth century. In the preface to the first edition of his dictionary Bouvier also explains his methodology for drafting the various notices, "in the first place, [is] defined and explained that various words and phrases, by giving their most enlarged meaning and then all the shades of signification."[564] He also explains that the different definitions are driven from federal and state statutes, justice decisions, customs and constitutions[565].

The first edition of Bouvier *Law Dictionary* was published in 1839 and in it a code is defined as:

> "legislation, signifies in general a collection of law. It's the name given by way of eminence to a collection of such laws made by the legislature."[566]

The dictionary entry goes on to list the existing codes: canonical collections, Justinian codification, Austrian code and Napoleonic Code. This definition remains unchanged until 1891 and thus for most of the century. Despite the evolution and transposition of the concept of code ans its own usage in the country, this definition stayed the same for years without taking into consideration the reality. The definition denied the reality so much that the Civil Code of Louisiana did not appear in the list of codes during this time. For 52 years, the US territory was therefore satisfied with a broad definition and empirical examples of code. As for the origins of this definition, its inspiration is found in one of the most famous dictionaries in the world, the Diderot

[564] Bouvier, *Law Dictionary and concise encyclopedia*, 1839, P. IV.

[565] Bouvier, *Law Dictionary and concise encyclopedia*, 1839, p. VII.

[566] Bouvier, *Law Dictionary and concise encyclopedia*, 1839, p. V.

Encyclopedia[567], which defines a code as a "collection of laws" and then lists the major existing codes throughout history.

The reason for such an imprecise definition can have several justifications. Chronologically and taking into consideration the national debate over the opportunities of codification, the first justification of this vague definition maybe to give freedom to the American codification movement to then adapt the definition later according to what came about from the movement. However, this justification seems unlikely because the definition was maintained long after the end of the debate. The reality is that at the time of the dictionary's publication, American law and American legal theory were under construction, and after the question of codes and codification lost its appeal it might seem likely that the idea of changing the definition had not been a priority.

On the definition itself, two points must be highlighted. First a code is defined as "collection of laws" which ties it to a unique vision of codification, the codification compilation. Here, the idea of change in the law is not even mentioned, it seems that this definition assimilates compilation and codification. Second is the fact that private codifications are excluded from the definition. Hence, official codifications were recognized, granting it one of its main attributes, the official seal over it, which seems to take into account changes brought to the notion in the eighteenth century in Europe by the different codification endeavors.

Then, in the 1891 edition, the definition evolved, and a code was defined as "a body of law established by the legislative authority of the state, and designed to regulate completely, so far as a statute may, the subject to which it relates"[568], a

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[567] Diderot D., Le Ron D'Alembert J., *Encyclopédie ou Discours raisonné des sciences, des arts et des métiers*, Stuttgart, Bad Cannstatt, F. Frommann, 1988 [1751 à 1772], t. III, Ch-Co, article « code ».
"un recueil de lois".

[568] Bouvier, *Law Dictionary and concise encyclopedia*, Kansas City, Vernon Law book company, 1891.

definition followed by the famous list of existing important codes worldwide. This time, this version adds to the list the American implementation with the history of the codes for the state of New York, particularly the Civil Code and the Code of Civil Procedure and the Louisiana codes. It is only from 1891 that the codes appear to have enough impact to be worth mentioning in a nationwide reference document.

The new addition of this definition is the application limit it defines. Indeed, a code only regulates the law "as a statute may". This means that the code has to be strictly applied by judges and only for cases specifically mentioned. By saying "so far as a statute may" the definition provides a way for the common law to be a substitute for the code and, if desired, to remain hierarchically above it[569]. With the 1891 definition the legal dictionary seems to truly implement the new reality brought by the American codes, whether civil or procedural, which are now subsequent sources of law here to supplement the common law. Finally, this definition is important for two reasons. First is the fact that this definition will be used and written in legal dictionaries over the following century because it is the one most suited to the American vision of codification. Secondly, this definition is not found in other countries over the world, especially in the civil law ones, as the American definition of codification is attached so much to their specificities that it cannot travel to other places.

To complete this swift overview of the concept of code in legal dictionaries, some other less fundamental dictionaries can be mentioned. Indeed, they all have similar definitions of code which allows us to see that there is not a lot of change for the definition of codification over the different American legal dictionaries and editors.

[569] Zimmermann R., "Statua sunt stricte interpretanda ? Statutes and the common law a continental perspective", p. 315.

One of the first editions of the *Burrill Law dictionary* in 1851 defines a code as "a body of laws: a collection or compilation of laws, by public authority"[570]. This definition is worth mentioning because after this it explained that,

> "a code may be either a mere compilation of existing laws (though this is more properly a Digest) or a new system of laws founded on new fundamental principles"[571].

Then, entries continue with the familiar list of various codes considered to be important worldwide. The list of codes is the same as in Bouvier's dictionary, in other words, no Louisiana Civil Code.

This definition is maintained in the different editions of the Burrill Dictionary throughout the century and the beginning of the next. What is fundamental with this definition is that for the first time in the US, the theoretical distinction between codification compilation and innovation is rendered official. As for why this distinction was implemented, it can be the influence of the entry writer, the influence of other countries, particularly of European countries, the influence of the American codification movement, or the influence of the Louisiana Code; it is difficult to know for sure.

Finally, the third definition and dictionary necessary to be mentioned here is the *Black Legal Dictionary*, particularly in its 1891 edition. Here it defined a code as "A collection or compendium of laws. A complete system of positive law, scientifically arranged, and promulgated by legislative authority"[572], then like in the Burrill

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[570] Burrill A., *A law dictionary and glossary*, New York, Baker, Voorhis & Co, 1851, p. 224.

[571] *Ibid.*

[572] Black, *Black's law dictionary*, First edition 1891 The lawbook Exchange Ltd., 1991, p. 215.

Dictionary it distinguishes the different types of code–innovation and compilation[573]. However, the novelty in this definition is that, contrary to the others, it does not give a list of the codes. Consequently, this definition puts the emphasis on the scientific method and the rationalization of the law more than on its physical manifestation. The definition is here more theoretical than centered on the practical side of the code, which seems to be more of a European and civil law way to see the law than a common law one.

To conclude this brief analysis of the evolution of the definition of code through the dictionaries, it is certain that it has evolved over the century to become more and more accurate. However, it is impossible to know whether this development and evolution are the fruit of the development of American legal theory or of the codes themselves.

2. The peripheral clauses of the codes

The peripheral clauses, articles or even sections of the codes are sections or articles of a code that identify and define the elements surrounding the code: application, title, implementation date, definitions, impact on the other law, etc… These elements do not contain any legal rules in themselves, but they have a strong informative value on how the code should work. Situated at the beginning of codes within the preliminary provisions generally, or in rarer cases among the last articles of the code, peripheral clauses provide for its use. They thus set up a vision of the code.

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[573] *Ibid*
« The collection of laws and constitution made by order of the Emperor Justinian is distinguished by the appellation of The Code, by way of eminence. See Code of Justinian.
A body of law established by the legislative authority, and intended to set forth, in generalized and systematic form, the principles of the entire law, whether written or unwritten, positive or customary, derived from enactment of from precedent.
A code is to be distinguished from a digest. The subject matter of the latter is usually reported decisions of the courts. These consist of an orderly collection and classification of the existing statutes of a state or nation, while a code is promulgated as one new law covering the whole field of jurisprudence. ».

The review of these articles allows us to know the intention of the legislation and commissioners in relation to the code. They state what the legislature specifically decided for the law within the code and for the code itself.

The analysis of the articles shows that there are two main types of peripheral clauses. The first category corresponds to the rules of construction for the articles, the establishment of the extensiveness of the articles and concepts within the code (1). The second category corresponds to repeal provisions (2) which are the articles concerning the adequacy provided between the code and other sources of law.

2.1. The establishment of the interpretation of the code

How should the Civil Code be interpreted? How extensive are the vocabulary and principles present in the code?

The civil law tradition is reflected in the civil codes in the preliminary articles of the code through the concept of "spirit of the law"[574]. This concept appears for the first time with Montesquieu in his book "*L'ésprit des lois* "and allowed foundations to be laid in terms of the theories of separation of powers with a body that drafted the law, one that executes, and one that applies it. The "spirit of the law" is the search for the will of the legislator in case of doubt regarding the application of a law or in this case within a code an article[575]. In parallel to the civil law tradition, this key concept is mentioned in several codes[576].

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[574] Carbasse JM., *Manuel d'introduction historique au droit*, Paris, Presse Universitaire de France, 4e édition, 2011, p. 227.

[575] Sevé R., *Philosophie et théorie du droit,* Paris, Dalloz, 2007, p. 171-209.

[576] LA. Digest (1808) art 18 & 16, LA C.CIV. (1825) Art 17 & 15, LA R. C.CIV (1870) Art 17 & 15, N.Y. Civ. Code (1865) §1998.

" Art. 18. The most universal and effective way to discover the true meaning of a law when expressions are dubious is to consider the reason and spirit of the law, or the cause that determined the legislature give it."[577]

This concept of the spirit of the law is in the same vein as the Napoleonic Code and is also found in Portalis's "*Discours Prélimianire au Code Civil des Français*" where he explains that for the interpretation of an article and its application "It is the magistrate and lawyer, imbued with the general spirit of the legislation, who directs its application."[578]

"There is a science of the legislators, as there is for judges, and one is not like the other. The science of the legislator is to find in each subject the most favorable principle for the common good; the science of the magistrate is to put these principles into action, to ramify them, to expand them by a wise and reasoned application to the expected assumptions, to study the spirit of the law when the letter kills, and avoid exposure risk of being alternately slaves and disobeying by spirit of slavery."[579]

The two functions—legislator and judge—are thus separated in the civil law tradition. This separation is difficult to understand and apply for the American legal profession considering that in the common law tradition they are the same office and

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[577] LA. Digest (1808)
« Art. 18. Le moyen le plus universel et le plus efficace pour découvrir le véritable sens d'une loi, lorsque les expressions en sont douteuses, est de considérer la raison et l'esprit de cette loi, ou la cause qui a déterminé la législature à la rendre. ».

[578] Portalis, *Discours préliminaire du Premier Projet de Code civil,* p. 17.
« C'est au magistrat et au jurisconsulte, pénétrés de l'esprit général des lois, à en diriger l'application ».

[579] Portalis, *Discours préliminaire du Premier Projet de Code civil*, p. 20
« Il y a une science pour les législateurs, comme il y en a pour les magistrats, et l'une ne ressemble pas à l'autre. La science du législateur consiste à trouver dans chaque matière les principes les plus favorables au bien commun ; la science du magistrat est de mettre ces principes en action, de les ramifier, de les étendre par une application sage et raisonnée aux hypothèses prévues, d'étudier l'esprit de la loi quand la lettre tue, et de ne pas s'exposer aux risques d'être tour à tour esclave et de désobéir par esprit de servitude.

person. However, the aim of the codes is to implement this idea of the spirit of the law and in consequence to distinguish judge from legislator. The American civil codes indeed, decided that in the case of an obscure code section, whether uncertain or insufficient, the judge can refer to maxims, customs, and the intention of the legislature when drafting the code to interpret and apply it to the case.

The adjunction of this rule of interpretation of articles in line with the spirit of the law is a major shift for US states. Indeed, it cements the fact that the judge is no longer legislator or creator of law as he was according to the common law tradition[580]. His role is now partitioned to the interpretation of the will of the legislature. Aware of the difficulty of introducing this new judicial role, legislators specify that if in doubt the judge must refer to the "the best known and most used meaning"[581] except in cases where the sense is clarified and "technical expressions and phrases should be interpreted according to the meaning and sense given to them by persons skilled in each of these arts, crafts or professions"[582].

The common law tradition, however, does not disappear in favor of the civil law and this translates directly through some of the clauses. Indeed, it is difficult to remove so many years of practice, in particular of legislation drafting. Probably uncertain of

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[580] Granville F., "Does the court make or interpret the law?", *University of Pennsylvania Law Review*, 58 (October 1909 - June 1910), p. 365-375.

[581] LA. Digest (1808) Article 14,
« Les termes d'une loi doivent être généralement entendus dans leur signification la plus connue et la plus usitée, sans s'attacher autant aux raffinemens des règles de la grammaire, qu'à leur acception générale et vulgaire. ».
NY Civ. Code (1865), §1999,
« Words used in this Code are to be understood in their ordinary sense except when a contrary intention plainly appears, and except also that the words hereinafter explained are to be understood as thus explained. ».

[582] LA. Digest (1808), Art 15, Ca. Civ. Code (1872) §13
« Words and phrases, how construed. Words and phrases are construed according to the context and the approved usage of the language; but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning-in-law, or are defined in the succeeding section, are to be construed according to such peculiar and appropriate meaning or definition».

how concretely a generic document would work or how to write it, the editors of the civil codes thus referred and used the legislative techniques they knew within the new legal tool.

In fact, the civil codes appeared to be written like a special statute. A statute is a legislative act establishing the legal rules precisely and narrowly on a specific topic[583]. To ensure its operation and proper application, the legislator specifies the meaning of the terminology used in the statute. This method of defining terminology and precision is partly found within the codes. Thus, even as some clauses state that, as previously seen, the vocabulary must be understood as it's generally accepted meaning. These clauses also give the general meaning of certain terms with terminology clarifications and go as far as possible to ensure their widest application[584] and as best an understanding as possible. Such explanations and clarifications are numerous and common in the American civil codes, except in Louisiana as it is the only code arising from a strong civil law tradition. Indeed, according to the civil law tradition a code must retain a sufficient level of generality[585]. As for vocabulary explaining, article 5 of the Code of Georgia and 14 of the Civil Code of California are a great example of how it was done:

> "Words used in this code in the present tense include the future as well as the present; words used in the masculine gender include the feminine and neuter; the singular number includes the plural, and the plural the singular."[586]

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[583] Zimmermann, "Statue sunt strict interpretanda? Statutes and the common law continental perspective", p. 315-328.

[584] N.Y. Civ. Code (1865) §2000-2032; CA. Civ. Code (1872) §4 and §14, GA. CODE (1861) §6.

[585] Carbasse, *Manuel d'introduction historique au droit,* p. 261.

[586] CA. Civ. Code (1872) §14 is word to word §5 and §6 of the GA. CODE (1861).

The article therefore continues by explaining the meaning of different terms such as person, property, month, will or section, among others[587]. Hence, the definitions list is quite extensive in order to cover as much ground as possible.

This need for explaining the vocabulary and its extent shows that the state commissioners and likely users of the code were not accustomed to write generic legislation in the civil law sense. There was therefore a need for precision that might appear to be excessive in a civil law country or according to the civil law tradition. The idea was to make the clearest code possible. These vocabulary explanations are also found in another code with similar articles.

A quick detour has to be made here to point out the link between the California and Georgia Civil codes. They both went along the same road with articles written exactly the same. However, the Georgia code is not supposed to have traveled outside the state, nor was it recognized as an influence of the California Civil Code. However, seeing how it was the same article word for word, it would be safe to assume that the California Commissioners probably had access to the code of Georgia and were inspired at least on those provisions because this article did not exist in the same exact way in the New York codes and the similarities seems too great to be coincidence.

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[587] « the word person includes a corporation as well as a natural person, country includes city and county; writing includes printing and typewriting; oath includes affirmation or declaration, and every mode of oral statement, under oath or affirmation is embraced by the term "testify", and every written one in the term "depose", signature or subscription includes mark, when the person cannot write, his name being written near it, by a person who writes his own name as a witness; provided that when the signature is by mark it must in order that the same may be acknowledged or may serve as the signature to any sworn statement be witnessed by two persons who must subscribe their own names as witness thereto. The following words have in this code the signification attached to them in this section unless otherwise apparent from the context:
The word "property" includes property real and personal:
The word "real property" are coextensive with lands, tenements, and hereditaments;
The word "personal property" include mener, goods, chattels things in action and evidence of debt;
The word "month" means a calendar month, unless otherwise expressed;
The word "will" include eodicil;
The word "section" whenever hereinafter employed refers to a section of this code, unless some other code or statute is expressly mentioned».

The purpose of these word definition articles was to enable the broadest application and avoid potential problems regarding the scope of the code. In the words of Portalis, "forecasting everything is an impossible goal"[588]. Nonetheless, the commissioners of the code were definitely trying to protect the inapplicability of a provision because of the chosen vocabulary. Hence, one of the goals was to avoid being outside the scope of the code on a technicality. In addition, for a user of the common law reading a statute, such articles and information would appear relatively traditional, as evidenced by the statutes of building regulations still applied today[589]. In fact, by writing the code in that way they somehow were writing a special statute according to the common law tradition and it had to follow some special rules. The "Rules for Construction of statutes", written by the US Supreme Court, present the rules for drafting a statute.

These written guidelines are important because they also explain that the judge should not interpret a statute. In the few cases where they have to perform an interpretation, they must refer to the intention of the legislature, known also as the "spirit of the law". In an attempt to avoid this situation, the statute must define the terms that might be confusing, its scope, and all the information that is considered useful for the sole purpose of avoiding having to interpret. It is for this reason that the judge almost never interprets a statute and that they are written with much detail.

2.2. The abrogative clauses in the civil codes

Among the peripheral clauses there is another type of special clause, the abrogative articles. The aim of these sections is to clarify the relationship between the different sources of law, especially between the code and the other sources of law.

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[588] Portalis, *Discours préliminaire du Premier Projet de Code civil,* p. 8,
« Tout prévoir est un but impossible à atteindre ».

[589] Rules for Construction of statutes, US Suprem Court Website, 2016.

These articles in consequence highlight the strength the legislature wanted to give to a code. Most of the abrogative clauses give the code an abrogative power making it superior to the other potential source of law.

In Louisiana, the question of abrogation of the other sources of law is covered in the act of March 31, 1808, adopting the Digest, Article 2,

> "Section 2. All that in former civil laws of this territory, or in the territorial status, are contrary to the provisions contained in the digest, or incompatible with them, are repealed by this"[590].

This legal phrasing is not new. Indeed, it is the same as Article 7 of *la loi du 30 Ventose An XII* on the reunion of the civil laws into the French Civil Code[591], organizing the interaction of the civil code and the other sources of law. Consequently, in continuity with the Napoleonic Code tradition, the code was supposed to become the only source of civil law in Louisiana.

For the New York code and its successors—all common law codes except the code of Georgia—the common law was officially abolished in favor of the Civil Code,

> "In this state/territory there is no common law in any case where the law is declared by the five codes/ the code"[592]

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[590] Moreau Lislet, *Digest general acts of the legislature,* p. 207-208
« Section 2. Tout ce qui dans les anciennes lois civiles de ce territoire, ou dans le statut territorial, se trouve contraire aux dispositions contenues dans ledit digest, ou incompatibles avec elles, est et demeure abrogé par le présent ».

[591] Loi du 30 Ventose An XII, *Sur la réunion des lois civiles en un seul corps, sous le titre de Code civil des Français*
« Art 7. À compter du jour où ces lois sont exécutoires, les lois romaines, les ordonnances, les coutumes générales ou locales, les statuts, les règlements cessent d'avoir force de loi générale ou particulières dans les matières qui sont l'objet desdites lois composant le présent code ».

[592] NY Civ. Code (1865) §6, CA. Civ Code (1872) §5, DT Code (1877) §6, NDR Code (1895) §2696, SDR Code (1903) §6, MO. Code (1895) §5.

The content of this article reflects the will of the legislature to make the civil code the only source of law for their civil law. In consequence, all legal or jurisprudential provisions relating to a field covered by the Civil Code were repealed in favor of the code unless the code noted otherwise. Consequently, they did not intend to create the code in half measures. The idea was that the code did not have to interact or be concurrent with the previous ones, and other sources of law because it replaced all of them. This is why it stated that the code goes as far as required to establish a repeal of all previous law.

In this line of thinking, Article 2033 of the New York State Civil Code and 20 of the California Civil Code explained precisely the intent of the code by stating that all statutes, laws, or rules inconsistent with the provisions of the Civil Code would be repealed unless otherwise provided for in the code[593].

The other states with a version of this civil code did not repeat themselves with this kind of article but stayed with the general abolition of the common law. The code was the new standard and the only representative of the law.

Up to this point looking at the abrogative clauses, it seems that the idea and functioning of the code with the other laws was in the line of the civil law tradition. The code was used as a way to wipe the slate clean and start afresh while keeping carefully selected laws. The US civil codes were intended to be a bridge between the past and the future, the cornerstone of the law, at least in their official versions.

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[593] N.Y. Civ. Code §2033
« All statutes, laws and rules heretofore in force in this state, inconsistent with the provisions of this Code, are hereby repealed or abrogated; but such repeal or abrogation does not revive any former law heretofore repealed, nor does it affect any rights already existing or accrued, or any proceeding already taken, excepting as in this Code provided».
CA. Civ Code (1872) §20
« No statute, law, or rule is continued in force because it is consistent with the provisions of this code on the same subject; but in all cases provided for this code, all statutes, laws, and rules heretofore in force in this state, whether consistent or not with the provisions of this code, unless expressly continued in force by it, are repealed or abrogated».

Only the Civil Code of the State of Georgia differs from other American codes as it was based on a different philosophy. Indeed, Article 1 of the Civil Code[594] outlines the hierarchy of the different legal sources of civil law, a hierarchy that was later confirmed by the 1865 Constitution of the state of Georgia, Article V, Section 5[595]. The laws in force within the state of Georgia were hierarchized in the following way: 1. United States Constitution, federal law, and treaties; 2. The constitution of the state of Georgia; and 3. The code of Georgia with its amendments, the common law, English statutes in force in the territory and the state common law not expressly repealed by

[594] GA Code (1861) §1
« The law of this state shall be thus graduated in reference to their obligations: *First*. The constitution of the United-state [changed at the printing by Confederate State]. *Second*. Treatises entered into by the Federal Government within the scope of their power. *Third*. Laws of the United States [changed at the printing by Confederate State] made in pursuance of the constitution. *Fourth*. The constitution of this State. *Fifth*. The Statutes of this State including this code *Sixth*. Such portions of the Common, Civil, Canon and Statute Laws of England, as were usually in force in the Province of Georgia prior to 14th May, A. D. 1776, which were applicable to the condition and habits of the people so far as the same are consonant with our form of Government, and are not repealed, modified or superseded by the provisions of this Code. *Seventh.* The customs of any business or trade shall be binding only when it is such universal practice as to justify the conclusion, that it became, by implication, a part of contract».

[595] *Georgia State constitution of 1865* Article 5 section V
« The laws of general operation now of force in this State, are 1st, as the supreme law, the Constitution of the United States, the laws of the United States in pursuance thereof, and all treaties made under the authority of the United States; 2d, as next in authority thereto, this Constitution; 3d, in subordination to the foregoing, all laws declared of force by an act of the General Assembly of this State, assented to December l9th, A. D. eighteen hundred and sixty, entitled "An act to approve, adopt, and make of force in the State of Georgia, a revised code of laws, prepared under the direction and by authority of the General Assembly thereof, and for other purposes therewith connected," an act of the General Assembly aforesaid, assented to December 16th, A. D. eighteen hundred and sixty-one, amendatory to the foregoing, and an act of the General Assembly, aforesaid, assented to December 13th, A. D. eighteen hundred and sixty-two, entitled "An act to settle the conflicts between the Code and the legislation of this General Assembly;" also, all acts of the General Assembly aforesaid, passed since the date last written, altering, amending, repealing, or adding to any portion of law hereinbefore mentioned (the latter enactment having preference in case of conflict); and also, so much of the common and statute law of England, and of the statute law of this State, of force in Georgia in the year eighteen hundred and sixty, as is not expressly superseded, by, nor inconsistent with said Code, though not embodied therein, except so much of the law aforesaid as may violate the supreme law, herein recognized, or may conflict with this Constitution, and except to so much thereof as refers to persons held in slavery, which excepted laws shall henceforth be inoperative and void and any future General Assembly of this State shall be competent to alter, amend, or repeal any portion of the law declared to be of force in this Third Specification of the fifth Clause of this Fifth Article. If in any statute law herein declared of force, the word "Confederate" occurs before the word States, such law is hereby amended by substituting the word "United" for the word "Confederate».

the code. Hence, the common law and the code are at the same level, completing each other instead of repealing each other.

The idea behind the Civil Code of Georgia is not the same as the other codes as they designed the code as a complement to the common law. In fact, the two main sources of civil law: common law and the civil code, should run in parallel and work together to define the civil law of the state. To go even further, the code of Georgia is understood as the continuation of the common law[596], a way to "shape and order, system and efficiency, to the sometimes crude and often ill expressed, sovereign will of the state"[597].

In consequence the civil codes are well-defined and planned projects, but the reality of the application of the code changed their initial plan, at least for most of them. However, aside from the question of their application, the abrogative clauses in the codes show a strong will from the commissioner and the legislature to make the code the exclusive source of civil law within the state.

3. **The application of US civil codes as a source of law**

Between the vision of the Civil Code approved by the legislature at the time of the adoption of the Civil Code and the reality of its application there is sometimes a world. The civil law model was indeed more difficult to apply in the US than expected. If in Louisiana the Civil Code quickly became the main source of civil law (1), for the New York lineage common law civil codes, they quickly became subsidiary sources of civil law, sometimes even being forgotten in order to give its power back to the common law (2).

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[596] *The code of the state of Georgia* Prepared by HR Clark, T RR Cobb and D. Irwin, Published by John H. Seals, Atlant, 1861 Report of the commissioners of the code, p. VIII.

[597] *The code of the state of Georgia*, p. IX.

3.1. A civil code main and exclusive source of civil law in Louisiana

The debate of the application of the Civil Code of Louisiana was not an easily settled one. Indeed, how to use the Digest was from the start a source of conflict from the early years of the code, to finally a few decades later joining up with the pure civil law tradition.

The trouble started in July 1817, nine years after the adoption of the Digest when the Louisiana Supreme Court, composed at this time of Pierre Derbigny, George Mathews and François-Xavier Martin[598], in the decision *Cottin v. Cottin*. With this decision the Suprem Court states that the enactment of the Digest repeals only the laws contrary to the code, hence confirming Section 2 of the code[599].

This voluntary confirmation by the Supreme Court has an effect that the code draftsmen had not foreseen: All legal provisions not contrary to the code, particularly Spanish law, would remain applicable. In consequence, this decision recreated the previous state of confusion of the law for which the Digest was supposed to be the remedy for. This decision was then used to justify why, in practice, the Digest was used as an incomplete body of laws[600].

The idea behind the 1808 Digest was the formalization of Louisiana's inheritance of civil law and therefore accordingly creating a single source of civil law or at least making it the main source of law. The rule of application defined by the Supreme Court did not correspond to the intended philosophy of the code.

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[598] Barham, "La méthodologie du droit civil de l'État de Louisiane", p. 800.

[599] LA Digest (1808), article 2
« It must not be lost sight of that our civil code is a digest of the civil laws, which were in force in this country, when it was adopted; that laws must be considered as untouched, whenever the alterations and amendments, introduced in the digest, do not reach them… ».

[600] Yiannopoulos AN., « *The Civil Codes of Louisiana*», p. 11-14.

This *de facto* lack of exhaustivity of the code pushed the legislature on March 14, 1822, to adopt a resolution, appointing Edward Livingston, Moreau and Pierre Lislet Derbigny,[601] "to revise the Civil Code [of 1808] by amending the same in such manner as they will deem it advisable, and by adding unto ... [it] ... such of the laws that are still in force and not included therein..."[602].

As for the rule of application of the code to prevent the same issues as with the Digest, a provision of the Code states that all legislation related to the subject but not present in the code is no longer enforceable,

> "Art 3521 - from the date of enactment of this code, the Spanish, French and Roman laws that were in force in this state, when Louisiana was ceded to the United States, and the acts of the *Conseil législatif,* of the Territory of Orleans, and Louisiana state legislation, are and remain abrogated in all cases to be filled within the code; and they cannot be invoked as laws, even under the pretext that their provisions are not contrary to this code"[603].

The objective of the Louisiana officials in 1825 is clearly indicated: they wanted to repeal all laws related to any subject treated in the code and not included in it; they

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[601] Among those intending to draft the code the votes are distributed as follows: 43 votes pour Moreau Lislet, 25 pour Livingston, et 25 pour Derbigny, Workman 23, Mazureau 22, Smith 3, Morel 2 et Carleton ; Levasseur A., *Louis Casimir Elisabeth Moreau-Lislet Foster Father of Louisiana Civil Law*, p. 140.

[602] *Preliminary reports of the code commissioners, project of the civil code of 1825, 13 Février 1823*, Louisiana legal archives LXXXV LXXXIV, 1937, p. 29.

[603] LA. Civ. Code (1825)
« Art 3521 – à dater de la promulgation de ce code, les lois espagnoles, romaines et françaises, qui étaient en force dans cet état, lorsque la Louisiane fut cédée aux États-Unis, et les actes du Conseil législatif, de la législature du Territoire d'Orléans, et de la législature de l'état de Louisiane, sont et demeurent abrogés, dans tous les cas auxquels il est pourvu spécialement dans ce code ; et elles ne pourront pas être invoquées comme lois, même sous le prétexte que leurs dispositions n'en sont pas contraires à celle de ce code.

wanted the code to be the only legal source in the legal field of civil law [604] and, in consequence, to ensure the effective and official establishment of the civil law system with the Civil Code.

However, the Louisiana Supreme Court did not share the same opinion as the legislature and in 1827 it ignored article 3521 in its decision *Fowler v. Griffith*[605] and in *Lacroix v. Coquet*[606]. With these decisions the Supreme Court of Louisiana declared that all civil laws, whether within the code or not, were still enforceable within the state, such as the Spanish law not include in the 1825 codes, or all articles of the 1808 Digest that were not taken up again in the 1825 Civil Code.

This opposition of the Supreme Court has various possible explanations. Besides the desire to retain certain provisions not included in the code, they seem to be using this opportunity to try to assert themselves the same power as a common law state Supreme Court law. Indeed, following the integration of Louisiana to the United States, the courts are trying to follow the practices of common law: the judgments are signed by their authors who give their opinion on the legal issue, and decisions are brief and concise[607]. Based on this model, the Supreme Court, since the adoption of the code, therefore tried to detach themselves from the civil law tradition and to gain the legal creative power that the common law court had, at the risk of jeopardizing the code.

This will on the part of the Supreme Court is not new, as demonstrated in the case *Orleans Navigation Co. V. New Orleans* in 1811 where one of the judges, Justice

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[604] On the innovation of old laws in another form in France see Renoux-Zagamé MF, "Additionnel ou innovatif ? Débats et solutions des premières décennies de mise en œuvre du Code civil ", *droit*, 2005-1, p. 19-36.

[605] Fowler v. Griffith, 6 Mart. (NS) Louisiana Suprem court, 8 (1827).

[606] Lacroix v. Coquet, 5 Mart. (N.S, 527 [1827]).

[607] Barham, "The methodology of civil law of the State of Louisiana", p. 801-802.

Mathews, considered the distinction between common law and civil system as superfluous,

> "The solutions are the same in both legal systems, why ask if they were established by an edict of the Roman Praetor, or an emperor, or defined by a distinguished English jurist..."[608]

To which Justice Martin replied that,

> "the common law of England is not recognized by the party as rules of conduct; and in this case the civil law rule is the only one enforceable within the state and different totally on this point that it has pleased the Court to pronounce"[609].

This example reveals the vision and division of the Louisiana judge concerning the common law, the common law functioning of a court and the will of some of the judges to access the same power as a common law judge, especially the ability to create laws.

Faced with this deadlock, the legislator had to intervene this time by adopting two acts[610] including the Great Repealing Act of 1828 which states that except for title ten[611] of the Digest, all provisions outside of the 1825 Civil Code and the 1808 Digest were now repealed.

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[608] *Orleans Navigation Co. V. New Orleans*, 1811
« les solutions étant les mêmes dans les deux systèmes de droit, pourquoi se demander si elles ont été établies par un édit du préteur romain, ou un empereur, ou définies par un éminent juriste anglais… ».

[609] *Orleans Navigation Co. V. New Orleans*, 1811
« que la *common law* d'Angleterre n'est pas reconnue par les parties comme règles de conduite ; et qu'en l'espèce, la règle de droit civil, seul applicable dans l'État diffère totalement sur ce point de celle qu'il a plu à la Cour de prononcer ».

[610] Hood, "The History and Development of the Louisiana Civil Code", p. 32.-34.

[611] Title that focuses on communities or corporations.

In response, the following year, in 1839, the Louisiana Supreme Court refusing to give up its ambitions, a compromise was found by stating that certain principles not present in the code but accepted by all, have always been and always would be in force within the state. As a result of this decision, even nowadays there are still some colonial Spanish laws enforceable in Louisiana[612]. In addition, over the years, the Supreme Court of Louisiana has justified some of its decisions on the basis of English lawyers and some common law principles while stating that the Civil Code is the main source of law in the state, creating the famous hybrid Louisiana system[613].

3.2. The common law codes as subsidiary sources of law

The tangible application of all the American civil codes, except that of Louisiana, does not come without surprises. Indeed, even if the code's peripheral clauses are put in as replacements for the common law, the implementation of these articles in reality did not happen as intended. This applies at least for all the common law codes, with the exception of the Code of Georgia, which from the start was considered to be the code in support of the common law. Hence, for the California, Dakotas and Montana codes, the reality of their application was quite different from how it was planned. In order to understand how this application and usage of the code, we must examine the first years of application of the state of California's Civil Code.

In fact, shortly after the adoption of the California Civil Code, John Norton Pomeroy[614] developed an application rule of the California Civil Code, which was quickly adopted in California. This then became the rule of application for the civil

[612] Reynolds v. Swain, 13 LA.193 (1839); Hugh v. New Orleans & Carrollton R.R., 6 LA. Ann. 495 (1851); Moulin v. Monteleon, 165 LA. 169, 115 SO. 447 (1828); Yiannopoulos AN., "The Civil Codes of Louisiana", p. 1-23.

[613] Barham, "The methodology of civil law of the State of Louisiana", p. 802-805.

[614] Leary J., "John Norton Pomeroy, 1828-1885", *Law Library Journal*, 47 (1954), p. 138–144.

code in all the states that had adopted a version of a common law code, except in Georgia as explained earlier.

John Norton Pomeroy [615](1828 - 1885), son of a judge in Rochester, N.Y., was admitted to the bar of New York state in 1851. He then practiced law until 1861 when he moved from Rochester to New York to become Headmaster of the Kingston Academy. It was during this period that he wrote his first book on municipal law which allowed him to obtain a professorship at New York University Law School from 1865 to 1871, during which he was the dean from 1864 to 1871. Due to health problems, he abandoned his post to become a full-time writer and returned to his hometown. In 1878, he moved to California after obtaining a position in the Hastings College of Law, the first law school established in California. There, he would go on to develop a teaching method over three years while continuing to write legal books.

Professor John Norton Pomeroy was initially a fervent defender of codification in California. Moreover, in his inaugural address to the faculty in 1878, he praised Californian achievements in the field of law, in particular regarding their codification's endeavors.

> "The work which California has thus accomplished will certainly be imitated by other states [...] and spread with ever-increasing rapidity, until its effect shall be shown throughout the entire extent of our common country"[616].

He was convinced that a code would be a positive step for the law, provided that it included statutory law and common law[617], which is what California seemed to have done. However, in the years following the implementation of the Civil Code, Pomeroy's

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[615] Rabban D., "*Law's History*", London, Cambridge University Press, 2013, p. 32–35.

[616] Pomeroy J., *The Hastings law department of the University of California: inaugural address*, AL Bancroft & Company, San Francisco, 1878 (August 8), p. 11.

[617] Leary J., "John Norton Pomeroy, 1828-1885", p. 141.

enthusiasm for the Civil code declined severely. It was at this point that he would mark the death of the civil code with a set of articles on the application of the civil code and its rules of interpretation[618].

Within his articles he explained with great conviction that the Civil Code contained many defects he considered to be insurmountable. It was for this former defendant of the code a great disappointment to see how the code commissioners, in his opinion, went wrong with the law. Indeed, as his articles explained, for him the code generated more uncertainty in the law than the previous law, because of the language used and the inefficiency of its organization.

> "No reader of the code can feel certain that any given title or chapter relating to a particular subject matter contains all the rules which have been enacted concerning that subject matter, and which affect the private rights, duties and relations of persons. Additional rules, often of the very highest importance, are found in wholly different and unconnected portions of the same code, or even in the other codes-the" political code or the code of procedure-in portions where no ordinary reader would have expected to find them"[619]

Because of the inherent flaws within the code, especially its lack of exclusivity and completeness, it was impossible for him to apply the European vision of a code. Which means that it was impossible to make the code primary source of civil law. Indeed, the California civil code lacks a lot of legal matters and dispositions concerning the different subject matter of the code that were related to the civil law field. For him, the code absolutely needed to be interpreted and explained by the court of law[620] in order to be efficient.

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[618] Pomeroy JN., *The "Civil Code" of California, originally published as The true method of Interpreting the Civil Code,* Bar Association Building, 1885.

[619] *Ibid*, p. 12.

[620] *Ibid*, p. 6-7.

The flaws of the code for him can be found on all levels, whether it was a question of content as explained previously, or its arrangement[621], or even the way the articles were written[622].

In addition to the issues of clarity and completeness, he considered the European vision of a code-only source of law to be inapplicable to the US territory because of its common law tradition, and so a code should be applied and used as a complement to the common law[623]. Accordingly, early in the discussion, Pomeroy insisted that to avoid confusion and insecurity within the law related to the code, specific rules on the interpretation of the Civil Code had to be established and followed, and so he offered the following rule of interpretation and application of the code:

> "Except in the comparatively few instances—where the language is so clear and unequivocal as to leave no doubt of an intention to depart from, alter, or abrogate the common law rule concerning the subject matter, the courts should avowedly adopt and follow without deviation the uniform principle of interpreting all the definitions, statements of doctrines, and rules contained in

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"our civil code, regarded as a comprehensive system of statutory legislation, covering the entire private jurisprudence of the state, as a scientific or practical arrangement ans statement of principles, doctrine and rules constituting that jurisprudence—in other words, as an example for true codification—is even in the estimation of its original authors, full of defects, imperfections and omissions and even inconsistencies, which must, so far as possible, be supplied, removed and harmonized by the courts

[621] *Ibid*, p. 13
"it is a defect of arrangement. No reader of the code can feel certain that any given title or chapter, relating to a particular subject matter contains all the rules which have been enacted concerning a subject matter".

[622] *Ibid*, p. 31
"I have thus given some striking instances of the uncertainty which mist result from the adoption of new phraseology in the place of what was familiar and settled in its meaning and effect".

[623] *Ibid*, p. 52-56.

> the Code in complete conformity with the common law definitions, doctrines, and rules, and as to all the subordinate effects resulting from such interpretation"[624].

This means that except in cases where the will of the Code, clearly expressed, is to repeal or amend the provisions of the common law, the common law applies and is superior to the Civil Code, hence making it a subsidiary, or at best a secondary source of law. The code then became a piece of law used to illuminate the common law, such as a kind of explanatory statute for the common law.

This proposed interpretation rule was discussed and expressly adopted by the California Supreme Court in *Shannon v. Shannon* in 1888, 3 years after Pomeroy's set of articles, which is usually the necessary delay for a case to go to the State Supreme Court. In addition, this rule of interpretation and application of the code was seen and praised by the common law supporters, as it was the way to correct the rigidity of the code without making the common law lose its adaptability. This rule was also for them proof and implementation of the superiority of the common law over codification, as codification are imperfect and non-exhaustive.

This application rule was then readopted and applied multiple times over time, such as in the judgment of the District Court of Appeal for the Third District in *Siminoff v. Goodman Bank* in 1912, where the Court took a decision in favor of the complainant on the grounds that even if the literal provisions of the Code seemed to cover the case, they were never intended to alter the common law liability, hence the application of the common law rule[625]. On the other hand, when the code clearly intended to change the law, the will of the commissioners and legislature was respected; for example, the article of the code regarding ownership and future interests

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[624] *Ibid*, p. 51.

[625] Harrison M., "First Half-Century of the California Civil Code", *California Law Review*, vol1-85 (1922), p. 190.

which arose directly from the Field Code of New York and were adopted to change the law on the subject. Here, therefore, the rules of the Code prevailed over the rules of the prior common law.

This rule of interpretation demonstrates that they respected to some extent the will of the codifiers, but at the same time a full substitution of the common law by a codification was not permitted. Somehow, it seemed for them to be the best of both worlds, the certainty of a codification while allowing a social and evolutive adaptation of the law through time with the common law. This is why the Code remained relevant and dominant in the event that it settled a law dispute or improved the law, but in all other cases the common law would take precedent.

This application rules where the code is subsidiary unless there is no disposition in the preexisting law or will to change it is not unique in the world. Indeed, in Spain[626] "the application of the civil code is merely subsidiary, that is, when regional laws do not contain a legal rule applicable to solve a legal dispute"[627]. This idea of using the civil code as a subsidiary source of law seems to be a solution used in the cases where there is already some strong preexisting law and an attachment to them. Therefore, even if the Napoleon Code is the source of inspiration for codification all over the world this reality shows that the French codification can be taken and used in different ways. If the modern idea of code arising from the Code Napoléon is usually used like for everything there is not only one way but several one to apprehend codification and civil code and what they mean to the place adopting it. This rule also demonstrated whereas it is in Spain or in an American state that a code does not need to be the primary source of law to be effective or relevant and a useful source of law, a code

[626] The Spanish civil code was adopter in Spain in 1889.

[627] Masferrer, "Codification as nationalisation or denationalisation of laws : the Spanish case in comparative perspective", p. 101.

whatever its way of working cannot be reduced to its match with the other source of law to be a "real codification." A model is just a model, the French code is just a model not the only way to do and work a codification of the law.

One of the problems created by this rule of interpretation and adoption of the code is to be found in the cases where the commissioners of the code voluntarily intended to change the law. In this case, it was decided in the 1888 *Shannon v. Shannon* decision that the court had to refer to the annotations of the code commissioners and to Field's note on his code in order to determine if the change brought in the law was intended or not[628]. It is somehow a usage of the spirit of the law, like it was planned in the peripheral provisions.

The adoption of this rule of interpretation was heavily criticized by the defendant of the code because they considered that it prevented the code from reaching its full potential in terms of change of and in the law[629]. Hence, that why for many, Pomeroy is regarded as the man who killed the California Civil Code as his rule kept it under heavy and locked barriers.

Why did Professor Pomeroy change from a pro-codification vision to the opposite, and decide to undertake serious action to destroy it? Officially, in his article he explains that his change of mind was due to the numerous defects of the code. It was a duty and a mission that he gave to himself as a law professor to right this wrong[630].

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[628] Harrison, "First Half-Century of the California Civil Code", p. 194-195.

[629] *Ibid*, p. 197-198.

[630] Pomeroy, *The "Civil Code" of California, originally published as The true method of Interpreting the Civil Code,* p. 5-6
"my position as a teacher of the law, compelled to deal with the code as a whole and with all of its separate parts, to examine, compare, contrast and expound all of its material sections as constitution

However, if the problem was just a matter of error or misleading provisions, then the various revisions that followed the adoption of the code would have solved the issues, but this was not the case for him. Therefore, it is possible to assume that his initial enthusiasm for codification decreased at the time of application, especially when judges, practitioners and law professors like him might have realized that the usage of a code required a completely different legal education, legal understanding and legal usage of the law that they had not mastered. Being happy with the changes, but puzzled by the usage of the code, like his unpleasant surprise facing the numerous broad definitions inserted in the code[631], the easiest way seemed to be to create a rule that allowed the change in the content of the law to remain, while at the same time returning to the familiar common law.

Pomeroy's rule of application and interpretation of the civil code did not stay in California, as the code traveled to Dakota Territory, his rule followed and remained even after the Dakota division. When creating this rule, Pomeroy could not have foreseen that his proposed rule of application for the civil code would become with time and transposition of this legal feature, the rule of application and interpretation of the American common law civil code and that he would in effect have created an entirely new legal civil codification tradition.

In conclusion, looking at the application of the 19th century civil code, two categories can be distinguished, corresponding to the three possible applications of the code. In the first group is the civil code that is the main source of civil law, hence the civil codes of Louisiana, the United States' most famous civil code, probably because of

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element of a complete system–this duty I say perhaps enable me to perceive more clearly thant the practicing lawyezr, the defect and imperfections of the code, and to appreciate the imperative necessity of adopting some uniform method or principle in its construction and interpretation".

[631] *Ibid,* p. 40-45.

this feature in particular. Indeed, usually a code is considered as a *true codification* when it becomes the main source of law, but as the other two possible American options show, a true codification can be more than how the code is applied. In the second group are the civil codes that are a subsidiary or complementary source of law, whether it was willing, like in Georgia, or due to the reality of the code enforcement and interpretation in California, Dakota Territory, North Dakota, Montana and South Dakota's civil codes.

Surprisingly, sometimes, and indeed quite often, the common law civil codes are not considered as effective or "real" civil code. Why? Because they are not the only source of law and even sometimes the principal source of civil code. Those remarks raised the question to ask did a code need to be the main source of law of a legal field to be an effective or even a "real" civil code? Hence is the application of the code is an element of definition, at least according to the American Civil Code that shows us that how the code is applied is not fundamental. Even if it is quite contrary to the definition of codification coming from the Napoléon Code.

In consequence, it can be said that the application of the code can be an element of definition, but it will depend on the definition chosen and the importance given to the exclusivity character in the civil code definition. As it was seen in the introduction there is no international definition of civil code and codification. Hence, based on this some scholars reject the common law codes as civil code, they consider that those codes did not make a hybrid legal system within the state nor the influence decision and the law[632] but became "immersed in the sod of common law"[633].

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[632] Englard I., "Li v. Yellow Cab. Co.--A Belated and Inglorious Centennial of the California Civil Code", *California Law review*, 65-4 (1977), Lewinsohn J., "Mutual assent in contract under the civil code of California", California law review, 2 (1914), p. 345–366, Rosen M., *"What has happened to the common law?- Recent American codification, and their impact on judicial practice and the law's subsequent development",* Wisconsin Law Review, 1994 (1994), p. 1119–1286.

[633] Englard I., "Li v. Yellow Cab. Co.--A Belated and Inglorious Centennial of the California Civil Code", p. 15.

Indeed, a code to be effective need to be law and source of law but not the only source which seems here to be a plus and not one of the essential points to qualify the documents as civil codes. From the different sources related to the 19th century American civil code it even appeared that the code commissioners in the several states never intended for their code to be enforceable as the main or sole source of law, like in Europe. Indeed, they knew it would not work with the American peculiarities hence it seems normal for them to cast aside the application form the defining criteria.

Behind those arguments the reality is that most of the state adopting those civil code could not change years of culture to make it the first place they would look at to know the law, indeed, they did not even seem sometimes to want to create this change. However, like Pr. Vanderlinden definition of code[634] requires all states went for a codification because they wanted to create a better understanding of the law. In fact, there is not internationally accepted definition of the notion of codes and civil code and the different between the French interpretation of the notion and the American one example among many examples why there is not. The idea of a civil code can cover a broad number of possibilities and there is no reason to restrict it.

[634] Vanderlinden J., *Le concept de code en Europe occidentale du XIIIe au XIXe siècle, Essai de définition*, p. 15-16.

Chapter 3

Inside the 19th century American civil codes: substance and shape

The civil codes are the result of a history of implantation and transplantation[635]. The reasons for their origins can be as varied as the codes themselves, and the content of the codes makes no exception as it translates this diverse reality. Consequently, how is this reality transposed within the civil codes themselves?

Studying the codes from the first to the last line would take a full dissertation on its own, which is not the point here. However, to have a picture of the 19th century civil codes, some selected elements from them have to be looked at in order to fully understand them and to see how the codes' elements are translated concretely.

The first element of the content of the code examined is the source, meaning exactly which legal elements were used for the content of the codes? Where do the rules of law enforced by the codes originate from? (1). The study of the sources of the civil codes allows us to know which part of the state's cultural identity is translated in the code, or on the contrary, which new cultural elements are introduced within the state through the code.

The second element studied is the form of the civil code. This is the organization of the legal notions inside the codes: which ones are chosen to be part of the civil code? How are they organized alongside each other? This allows us to see how the concept of civil codes is interpreted via the 19th century American civil code. The study

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[635] Watson A., *Legal transplants : an approach to comparative law,* Edimbourg, Scottish Academic Press, 1974. Parise, A., "Owning the conceptualization of ownership: American civil law jurisdictions and the origins of 19th-Century Code Provisions", Comparative Legal History. Moréteau, O., Masferrer, A. & Modéer, K. (eds.). Cheltenham: Edward Elgar Publishing, p. 432-464, "Metaphors and analogies on civil law codification", Web publication/site, Maastricht University (2020).

of the form of the civil codes also involves an analysis of the article of the code's writing features and choices. These elements combined allow us to see if there is a 19th century American definition of civil codes (2).

The final element studied for the content of the code is a legal institution. Indeed, no examination of the code would be complete without looking, in a comparative manner, at a particular legal institution in order to see if the civil code brought unity in the law among states. The idea is not to look at the law before and after the code, which might take an entire dissertation on its own but to look at a legal institution and to see if it is used defined and understand in the same way in the codes who are supposed to be influencing each other, or if the states decided to keep some elements state based. In order to have an idea, it was chosen to study a legal institution that was present in all the codes and was fundamental to the everyday lives of everyday people. What is more relevant and important to people than love and marriage? Hence, a comparative study of the institution of marriage and separation through the spectrum of the condition to enter and depart from it, was done in order to illustrate the different and common content of the 19th century American civil codes (3).

I - The sources of the 19th century American civil codes

The 19th century American civil codes are based on multiple sources that are extremely different, whether it is from a geographical or institutional point of view. They come from all over the world and in all forms. The analysis shows that four types of civil code sources can be identified: legal, statutory, doctrinal and the codes. These different sources come from several countries, namely ancient Rome, The United States, England, France, Spain and Mexico, and cover a large period of time[636].

The identification of the sources of a code allows us to see where the code commissioners found the laws within in, as well as if the law in the newly adopted code is local or a transposition of foreign or out of state law. "The fact that national parliaments enacted codes whose content had been highly influenced by foreign codes reveals that codification also contributed to the denationalization of law".[637]

The identification of the source of the civil codes is made from multiple sources. Firstly, the civil codes generally set out the list of their sources in their reports or introduction to the code. Secondly, the code itself can contain in the article the list of material sources. This post-article identification appears for the first time in the New York Civil Code and then is kept by its heir in their codes.

The examination of the source of the codes is done by code first: Louisiana (1), Georgia (2), New York and its heir (3). Then those sources are studied comparatively (4) to see the usage of the different type of source in the United States in order to try to find a sources pattern of the 19th century American civil codes.

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[636] See Appendix No. 11 Table of codes according to the code's sources.

[637] Masferrer A., « Codification as nationalisation or denationalisation of laws : the Spanish case in comparative perspective", p. 100.

1. The Civil Codes of Louisiana, "a Spanish girl in a French dress".

The Louisiana Civil Code[638] is often referred to as "a Spanish girl in a French dress"[639]. The legacy of the Louisiana colonial tradition is found in the codes' two main sources and naturally comes from French and Spanish law.

The identification and study of the material sources of the 1808 Digest are relatively accessible. Many sources are available on the subject, in particular a copy of the 1808 Digest[640] hand annotated by Moreau Lislet himself, principal author of the Civil Code. In this copy he identifies and lists the sources of the various articles of the code. He also explains his approach of the Digest,

> "The goal of this publication is to make known through written notes in white pages attached to the Digest of the laws of this state, what are the texts of civil and Spanish laws who report to those articles. [...] We did not merely cite the laws that have some connection with the various articles of the Digest and to only mark which one contains similar provisions; but we added on the same subject the one that prescribe or contain exceptions to the general principles set out there"[641].

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[638] LA Digest (1808), LA C.Civ (1825), LA. RCiv. Code (1870).

[639] Pascal R., "Of the Civil Code and Us", *Louisiana Law Review,* n°59, 1998, p. 303.

[640] *Moreau Lislet's copy of the digest of the civil laws now in power in the territory of Orleans Containing manuscript references to icts sources and other civil laws on the Sami subjects: the de la vergne volume*, Claitor's publishing, Baton Rouge, 1971.
Dainow J., "Moreau Lislet's Notes on Sources of Louisiana Civil Code of 1808," *Louisiana Law Review*, 19 (1958), p. 43-51; Darby and McDonald, "A Recent Discovery: Another Copy of Moreau's Lislet Annotations to the Civil Code of 1808", *Tulane Law Review*, 47 (1973), p. 1210; Franklin, "Libraries of Edward Livingston of Moreau and Lislet", *Tulane Law Review*, 15 (1941), p. 401-414; Pascal R., "A Recent Discovery: A Copy of the" Digest of the Civil Laws "of 1808 with marginal Source References in Lislet Moreau's Hand", *Tulane Law Review*, 26 (1965), p. 25-27; Tete, "A Digest of the Civil Laws Now in Force in the Territory of Orleans (1808) (the de la Vergne flight.)", *Loyola Law Review,* 17 (1971) p. 780-781.

[641] *A reprint of Moreau Lislet's copy of the digest of the civil laws now in power in the territory of Orleans Containing manuscript references to icts sources and other civil laws on the Sami subjects: the de La Vergne volume*, p. I-XX.

As a result, this document offers a comprehensive list of the sources of the 1808 Digest in Louisiana. Indeed, after his methodological explanation of the documents, Moreau Lislet lists all the sources of his code which are: the Roman Justinian code, Roman law, Domat and Pothier, The French Civil Code, las Partidas, Fuerto Real, Libreria of Escribanos de Febrero and the Curia Philipica of Don Juan Hevia Bolanos, the canon law, canon and civil law class of Peter Murillo Velarde, the works of Anthony Gomez, Fuero Juzgo and Fuero Viejo, the laws of Toro, the recompilation of Castile, and the Autos Acordados[642].

This code, annotated by its editor, the preliminary document to the code added to the extensive literature on the subject makes the question of the sources of the Civil Code in Louisiana one of the most debated points about the Louisiana civil codes by the researcher. The goal here is not to undertake an extensive study of these sources and their uses, as this has already been done,[643] but to present the state of the research as well as the main sources of the Civil Code in Louisiana.

« Le but de cet ouvrage est de faire connaitre par des notes écrites sur des pages en blanc attaché au Digeste des lois de cet état, quel sont les textes des lois civiles et espagnoles qui y ont quelques rapports. [...] On ne s'est pas borné en citant les loix qui ont quelques rapports avec les divers articles de Digeste de marquer seulement celle qui contiennent des dispositions semblables ; mais on y a ajouté celles qui, sur la même matière, offrent des différences dans ce qu'elles prescrivent ou qui contiennent des exceptions aux principes généraux qui y sont énoncés ».

[642] *A reprint of Moreau Lislet's copy of the digest of the civil laws now in power in the territory of Orleans Containing manuscript references to icts sources and other civil laws on the Sami subjects: the de La Vergne volume,* p. I-XX.

[643] Batiza R., "The Louisiana Civil Code of 1808: It's Actual Sources and Present Relevance", *Tulane Law Review*, 46 (1971), p. 1-12; "Sources of the Civil Code of 1808 Facts and Speculation: A Rejoinder", *Tulane Law Review*, 46 (1972), p. 628; Pascal R., "Sources of the Digest of 1808: A Reply to Professor Batiza", *Tulane Law Review*, 46 (1972), p. 603.
For a summary see Sweeney, "Tournament of Scholars over the sources of the Civil Code of 1808", *Tulane Law Review*, 46 (1972), p. 585.
Written by other authors on the subject: Baldwin, "The Influence of Code Napoleon", *Tulane Law Review*, 33 (1958), p. 21; Due, "Louisiana and the Code Napoleon", *Louisiana Bar Journal*, 17 (1969), p. 177; Moreteau O., "Louisiana 1812-2012: 200 Years of Statehood and 300 Years of French Law Influence", Louisiana Bar Journal, 59 (2012), p. 325-326; Tucker, "Source Books of Louisiana Law", *Tulane Law Review*, 6 (1932), p. 280.

The main study of the sources of the 1808 Digestwas carried out by Professor Rodolfo Batiza who identified the sources of all articles of the 1808 code one by one, articles by articles in 1971.

He sets out the result of his work by stating that 85% of the articles of the Code are influenced, derivatives, or a replica of the 1804 French civil code[644]. As a consequence of this statement, he created a controversy over the origin of law within the 1808 Louisiana Digest. On the other side of the controversy is Professor Pascal who considers that as Spanish and French law are derived from Roman law it is dangerous to describe certain articles as being inherited from the French as they might as well be from Spanish law[645]. He also explains that Spanish law is present on American soil and at the time of codification in Louisiana is predominant in the courts.

Indeed, the study of the legal foundations of Louisiana jurisprudence over the period 1803-1828 shows that the codes, customs, and Spanish laws are indeed cited four times more than their French counterparts to legally justify a decision[646]. Many articles have been written by the two professors going back and forth to each other debating the French or Spanish origin of the code provisions. Not surprisingly, this controversy is still going on nowadays as people still debate if the Digest is more French or more Spanish.

Controversy aside, to know whether France or Spain predominates, these two geographical sources are not the only sources of the civil codes in Louisiana. Indeed, both authors reveal a surprising source of the Digest: Blackstone[647]. Specifically, in the

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[645] Pascal, "Sources of the Digest of 1808: A Reply to Professor Batiza", p. 603-608.

[646] Rabalais R., "Influence of Spanish Laws and Treatises on the Jurisprudence of Louisiana: 1762-1828", *Louisiana Law Review*, 5 (1982), p. 1504.

[647] Sheppard S., "Legal Jambalaya: A Commentary on Hohn Cairns Blackstone on the Bayou" in *Re-interpreting Blackstone's Commentaries: A Seminal Text in National and International Contexts*, Wilfred Perst, ed, Hart Publishing, 2014; Cairns J., "Blackstone on the Bayou Inscribing Slavery in the Louisiana

preliminary title[648], two articles are a retake of the famous Blackstone *Commentaries*[649]. Even as, this source is not extensive, the fact is that there is a small introduction of the common law tradition in the heart of Louisiana's civil code. Maybe it can be seen as a premonition of the evolution of Louisiana law through the following centuries.

From one version of the code to another, the sources stay quite similar and do not change a lot. The 1825 Civil Code looks a lot like the Digest but with the addition of a few chapters and changes.

Professor Batiza also studied the source of the 1825 civil code like he did for the Digest. By doing so, he traced the origin of the additions to the codes to the Roman Corpus iuris civilis, las Partidas, the draft of the French Civil Code of 1800, as well as various works of authors such as Pothier, Blackstone, Domat, Febrero, Maleville and

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Digest of 1808," in *Re-interpreting Blackstone's Commentaries: A Seminal Text in National and International Contexts,* Wilfred Perst, ed, Hart Publishing, 2014, p. 71-94.

[648]

LA. Digest art 14 Les termes d'une loi doivent être généralement entendus dans leur signification la plus connue et la plus usitée, sans s'attacher autant aux raffinements des règles de la grammaire, qu'à leur acceptation générale et vulgaire.	Blackstone Traduction française *Commentaries* (N3, vol.1.) p.86 : Les mots doivent être entendus dans le sens le plus connu & le plus usité ; c'est à dire, en faisant plus d'attention à l'usage général & populaire, qu'à la propriété grammaticale
Digest art 18 Le moyen enfin le plus universel et le plus efficace pour découvrir le véritable sens d'une loi, lorsque les expressions en sont douteuses, est de considérer la raison et l'esprit de cette loi, ou la cause qui a déterminé la Législature à la rendre.	Blackstone Traduction française *Commentaries* (N3, vol.1.) p.88 : Le moyen enfin le plus universel & le plus efficace pour découvrir le véritable sens d'une Loi, lorsque les mots sont douteux, est d'en considérer la raison & l'esprit ; c'est-à-dire, le motif qui l'a fait faire.

See also Carter, *The Provinces Of The Written And The Unwritten Law* (1889), in an assessment of the Louisiana Civil Code, he observed that the drafters were "largely imbued with the principles and methods of the English Common Law, they have looked to that body of jurisprudence, so far as the Code permitted them, as containing the real sources of the law, and have fully adopted its maxim of stare decisis. Nothing is more observable than the extent to which the English and American reports and text books are cited as authoritative in that State."

[649] Cairns, "Blackstone on the Bayou Inscribing Slavery in the Louisiana Digest of 1808", p. 83.

Touiller[650]. The 1825 code is majorly inspired in his additions by Spanish law mainly because it was created to include in the code the remaining legislation in force, that were not present in the Digest. Thus, the Civil Code of 1825 differs more from the Napoleonic Code due to the incorporation of Spanish law, it bringing its number of articles to 3556 against 2281 for the French Civil Code. It is because of this revision that the Civil Code of 1825 and the following ones are called "a Spanish girl in a French dress".

As for the 1870 revision of the civil code, there is no change or addition in the source of the code. It simply adapts the civil code to the post-civil war situation, mainly by suppressing all articles about or including slavery.

In consequence, looking at the three versions of the Louisiana civil codes it is safe to say that most of their sources arose from French or Spanish law and come from civil law, hence legislation and doctrine with very little to no common law content.

2. The sources of a code like no other, the Civil Code of Georgia

The Georgia code does not explicitly state the different sources used within its code. Indeed, the code does not give the source of each section, and no document seems to exist that provides the source by article. In 1951 Professor Bond considered that there is a lack of source justification “because the Commissioners did not want the legislature to really know how much new law they had written into the code"[651].

However, if the quantity and how the different sources are not explicit, the act of the General assembly of the Legislature of December 9, 1858, appointing the

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[650] Batiza R., "The Actual Sources of the Project of Louisiana 1823: A General Analytical Survey", *Tulane Law Review*, 47 (1972), p. 1-32.

[651] Bond A., "The Preparation and Adoption of the Code of 1863", *Georgia Business Journal,* 14 (1951), p. 161-167; Clark R., *The history of the first Georgia Code*, Report of the Seventh Annual Meeting of the Bar Association, 1890, p. 159.

commission for the codification of the law, indicated the sources that should be used to write the code of Georgia. This was the law of the state of Georgia, whether they are derived from the Constitution, the statutes or common law or the decisions of the Supreme Court, then the next source is the English statutes applicable within the territory[652]. As for the English statutes in force in the territory[653], it is the one as defined by William Schley who was appointed in 1826 to compile the English law in use in Georgia[654]. In consequence, the legislature gives an exhaustive list of legal sources for the code rather than giving the commissioner room to maneuver with the possible material source. This way they isolate a precise list and have control over the content of the code.

This act of 1858 also sets out one more source for the code, which is the model the code of Georgia must take: its layout must take the form of the Code of Alabama[655]. Even if it does not use the content of the Alabama code, the latter is still a source as its organization and form originates from it. This is also why the organization of legal concepts in the Civil Code is then very different from the Napoleonic code[656]. As for a study of the source of the code, no full study exists; however, in 1996 Professor Davis, in his study of the code, examined the source of a portion of the code. His analysis covers 482 articles (over the 1575 articles of the civil code) related to contracts, tort and equity corresponding to three titles (over nine) of the civil code.

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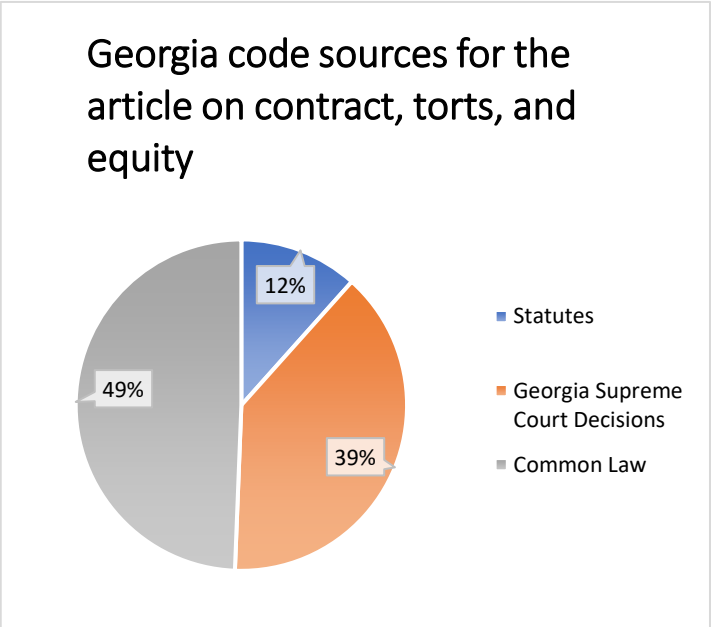
[652] Georgia Laws, No. 95, 29 November 1858
« a code, which shall as near as practicable, embrace in a condensed form, the Laws of Georgia, whether derived from the Common Law, the Constitution of the State, the Statutes of the State, the Decisions of the Supreme Court, or the Statutes of England of force in this State».

[653] Surrency E., "The Code of Georgia in 1863 and Its Place in the codification movement", p. 91.

[654] Ga. Code (1863) p. 1-2.

[655] Georgia Laws, No. 95, 29 November 1858
"Shall be modeled and, if practicable, upon the present Code of Alabama. ".

[656] Davis J., "The Code of Georgia in 1863: America's first comprehensive code", *Journal of Southern Legal history*, 4 (1995-1996), p. 14.



His study showed that 56 articles were derived from the statutory provisions, 188 from decisions of the Supreme Court of Georgia, and the remaining 238 arose from the common law including the different legal texts it is based on[657].

This study certainly does not include the entire Civil Code. Nonetheless, it attests to the use of the primary sources of the Civil Code which are the ones the legislature were required to use.

One of the most surprising elements of the source of the Georgia Code is that at no point does it seem to be using civil law sources. Even if the study is partial and the official list of sources is pre-code, it only showed common law sources. This lack of civil law sources like the Napoleonic Code can even be interpreted as a willful rejection of civil law sources can explain why the code is so different from the other. Even if some similarities may appear with the French or Louisiana civil code, the legislature, commissioners and Georgia never recognize or admit any influence from them.

3. Source of the Civil Code of New York and its heirs

The Civil code of New York has its own set of sources that are identified by the person who drafted them (1). Those sources are very important because they circulated

[657] Davis, "The Code of Georgia in 1863: America's first comprehensive code", p. 22.

all over the US. Consequently, the sources of the Civil Code of the State of California, the Civil Code of Dakota Territory, the Civil Code of North Dakota, Montana Civil Code and the Civil Code of South Dakota are the New York code's sources, are those coupled with the local law (2).

3.1. Source of the Civil Code of New York the common law code reference

The Field code, or New York State Civil Code, is considered the common law code reference because of its circulation across the US.

The main writer of the Civil Code of the state of New York, David Dudley Field, identified the sources of his code and had them printed in the official version of the code. Indeed, the author places under the article of the code the source identification. It can be a very precise identification as sometimes it mentions the exact common law decisions the legal principle comes from.

Hence under those articles it thus specifies the jurisprudence, the statute, doctrine, or some of its sources that allows the origin of the rule of law that the code article confirms, reinforces or implements to be traced. Field references in this way the source of about two thirds of the code[658].

Looking at the articles of the Civil Code searching for their sources, three cases may arise. The first case is the absence of source reference. Those are usually articles that transcribe a well-implanted rule that does not need to be traced, like for example for article 75[659]. The second possibility is to find the following statement mentioned:

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[658] Batiza R., "Sources of the Field Civil Code: The Civil Law Code influences were common law", *Tulane Law Review*, 60 (1986), p. 799-819.

[659] NY Civ. Code §75

"This provision is new, but manifestly just, under the present state of the law, "[660] like in article 83[661]. Hence, it shows an endorsement of the creation of a new legal rule and to justify it with the state of the law/society. In consequence, those represent pure societal legislation. Finally, the third case, which represents two thirds of the code's articles, are drafted in the following way:

> If the wife abandons the husband, he is not liable for her support[1] until she offers to return[2,] unless she was justified, by his misconduct, in abandoning him.
>
> [1] Blowers v. Sturtevant, 4 *Denio*, 46, and cases there cited
>
> [2] McGahay v. Williams, 12 *Johns*, 293.

Article 85 of the civil code shows how precisely the code commissioners justify and explain their source. They go into detail when explaining the common law origins of each part of the necessary articles. It can also be a way to show how much the commissioners master the common law and to show that code does not necessarly mean full 360 of the law.

Why the code was written in such a peculiar way? As Field never justified it, it is possible to supposed that it might has been a justification of the work, an educational effort or an attempt to illustrate each article with a familiar reference for readers? The three options are possible, probable and convincing.

The Civil Code of the State of New York consists of 2034 articles, which have their sources explicitly identified by Field himself for 1376 of them. Professor Batiza[662] in

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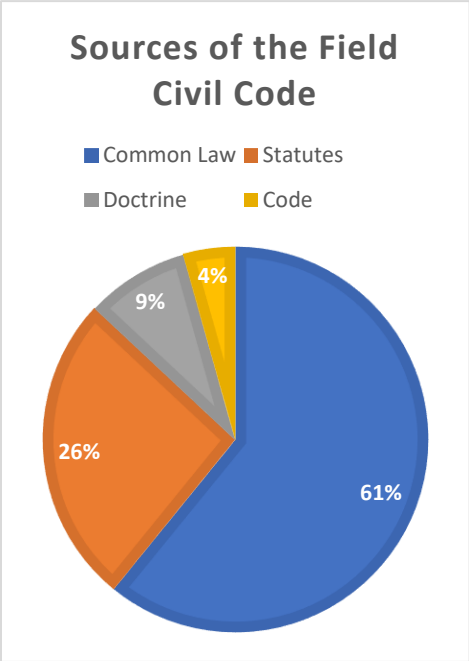
« Husband and wife contract towards each other obligations of mututal respect, fidelity and support».

[660] NY Civ. Code §83
« This provision is new, but manifestly just, under the present state of the law».

[661] NY Civ. Code §83
« Neither Husband nor wife, as such, is answerable for the acts of the other».

[662] Batiza, "Sources of the Field Civil Code: The Civil Law Code influences were common law", p. 799-819.

Louisiana also did a study of the sources of the New York Civil Code and divided them into four categories: statutory, judicial, doctrinal and codes.



After analysis, it appears that 700 references arose from the judicial sources. Specifically, they are judgments from the English, national and local court arising from more than 50 different common law reports[663].

Statutory sources are 300 in number and mainly come from the New York Revised statutes[664].

Doctrinal sources consist of slightly more than 100 references from the following authors: Coke, Blackstone, Kent, Story, Lewin, Branch, Broom, Francis's Maxims, Bouvier, and Pothier[665]. These sources are varied enough territorially but represent the main legal references in the first half of the nineteenth century.

Finally, regarding the code sources there is 50 references divided among five codes from three different territories: Louisiana with the Digest and the Civil Code of 1825, Rome with the Justinian Digest, and France with the Napoleonic code and the commercial code[666].

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[663] Batiza, "Sources of the Field Civil Code: The Civil Law Code influences were common law", p. 804.

[664] Batiza, "Sources of the Field Civil Code: The Civil Law Code influences were common law", p. 799-819.

[665] *Ibid.*

[666] *Ibid.*

Looking at these sources, the Civil Code of New York really appears as a drafting of the common law, it being the code's primary source, while being the connection between the common law legislation and doctrine.

Geographically, the sources of the Field Civil Code come from five locations around the world and two different traditions for which it tries to be the bridge. On one side are the sources of English and American common law, on the other side are civil law sources, that is to say, Rome, France and Spain through the Louisiana code. The New York State Civil Code seems to draw from both traditions of common law and civil law. However, given the number, an imbalance in favor of the common law tradition seems to appear. Indeed, the common law legal references correspond to the 700 common law references and the 300 statutory ones, so 1000 references in total over 1376 identified ones. This number does not even take into account the common law doctrinal references. In consequence, it is safe to say that the common law is the main source of the Civil Code of the State of New York, incorporating only a small amount of civil law tradition[667].

3.2. The source of the descendants of the Civil Code of the State of New York

The New York civil code's heir all have some peculiarities as they add their own laws to the codes; the idea here is to see to what extent the inclusion of the local law changes the face of the civil code.

[667] *Draft of a Civil Code for the state of New York*, Prepared by the Commissioners of the Code and Submitted to the judges and others for examination prior to revision by the commissioners, Albany: Weed, Parsons and company, printers, 1862 p. viii.

The Civil Code of the State of California adopted in 1872 is in reality the draft of the civil code for the state of New York, adapted to California law[668]. The civil code's editors chose to base their work on the project, not the Civil Code of 1865. This choice is probably due to the availability of the document having the draft in hand and not the definitive version. The California Civil Code contains 3543 articles, hence 1509 more than the Civil Code of New York, including 385 articles on society and hydraulic rights[669], which correspond to 25% of the new articles in the civil code. Those 25% in particular are dispositions that are specific to California's living situation and local features.

To identify the sources of the California Civil Code, it is necessary to summarize the sources of the Civil Code of New York, namely English, American, and New York, common law and statute's plus the Louisiana, Roman and French codes. To those, the Californian commissioners added the California law which is partly derived from Mexican and Spanish law[670]. The California laws in themselves are the statutes and common law of the State of California. Indeed, 1361 of the 3543 articles of the code are citing a statute of the state of California as their source, which corresponds to just over 38% of the articles of the code. However the code does not only include the statutes of the state but also its common law, as the revision commission states in 1874, "Codes collect the principles established in a series of cases, and reduce them into maxims or forming general formula."[671].

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[668] Harrison M., "First Half-Century of the California Civil Code", p. 187; Rolston A., "An uncommon Common Law: Codification and the Development of California Law 1849-1874", p. 159.

[669] CA. Civ. Code §283-653, §1410-1425.

[670] Rolston, "An Uncommon Common Law: Codification and the Development of California Law", p. 149-151.

[671] California Code Committee Reports 1868-1874, p. 22
"Collect the codes principles Established in a series of boxes, and Reduce them into general maxims gold forming formula."

For the Civil Code of Dakota Territory's sources, its original version from 1865 is the draft of the Field Civil Code[672] adopted without any alteration. Hence, the sources of the code here did not vary or change from the New York Code. They did not even include some local law; they just adopted the code as it was.

Things changed with the revision of 1877 and the code of the Dakota Territory became more than the Field civil code, to include changes and translate the evolution of their civil code model.

> "It is well known to the profession that our codes are for the most part transcripts from the New York Code and the California code, completed by the leading local decision in the state"[673].

In consequence, the revised code of Dakota Territory is a transposition of the California Civil Code adapted to the local law. To go back to the source of the code, we must now add to the Field code sources—namely English, American, and New York, common law and statutes plus the Louisiana, Roman and French codes—the Californian ones: Spanish and Mexican law that became California state common law and statutes. Then to these was added the law of the Dakota Territory, meaning Dakota Territory's common law and statutes.

The 1877 revised code of Dakota Territory, like its predecessors, also displays its sources by articles, though it does so less than it's out of state predecessors. Specifically, 1770 of the 2133 articles of the code contain references stressing their origins, which correspond to a bit more than 50% of the articles of the Civil Code.

Three types of sources are found among its references: the California Civil Code of 1872, local jurisprudence and the statutes of the Dakota Territory. Each article's cited

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[672] Dakota Laws, 1865-1866, p. 361.

[673] DTR Code (1877), p. iii.

sources contain a reference to the California civil code article from which it arose. The second main source is a local court decision; more precisely, 542 articles cite references to the Dakota courts of law divided into 3 different reports the *Northwestern Reporter*, the *Dakota Reporter*, and the *Minnesota Reporter*. The last reference that can be found in the code is from the statutes of the territory of Dakota from the *Laws of Dakota* that can be found in 114 articles. Hence, the Dakota local law, meaning common law plus the statutes, are cited in 645 articles, so 31% of the articles of the civil code. The amount of local law in the Revised Civil Code of the Dakota Territory seems quite low compared to the other codes but it seems to be more than enough especially compared to the previous code where none of the code arose from local law. However a nuance has to be mentioned here. Most of the reference to Dakota territory laws are common law or statutes that date between the first civil code and the start of the civil code revision process, hence most of the local law references correspond to the previous civil code, meaning the New York civil law, which does not create in consequence a big shift in the law.

After the Dakota territory division, three different codes appeared each trying to implement its new reality.

For the Civil Code of North Dakota, its sources are all the same as those of the Revised Civil Code of Dakota Territory–namely English, American, and New York, common law and statutes; the Louisiana, Roman and French codes; Spanish and Mexican law that became California state common law and statutes, and the statutes and common law of the Dakota Territory. The idea with this code is not to implement a lot of change but to keep the same code and sources with a few tweaks. Indeed, the code even displays the numeration of the former code to find the original article and only mention the source of the article when there is a change from the original version. Hence, it appears that only 322 articles over the 2476 are different from the Dakota Territory civil code, which only corresponds to 13% of the articles of the codes. It can then be safely assumed that the intent of this code was not to change the law but only to keep the legal continuity with the change to state status. All of these changed

articles contained a reference to Dakota Territory or North Dakota local common law and statutes.

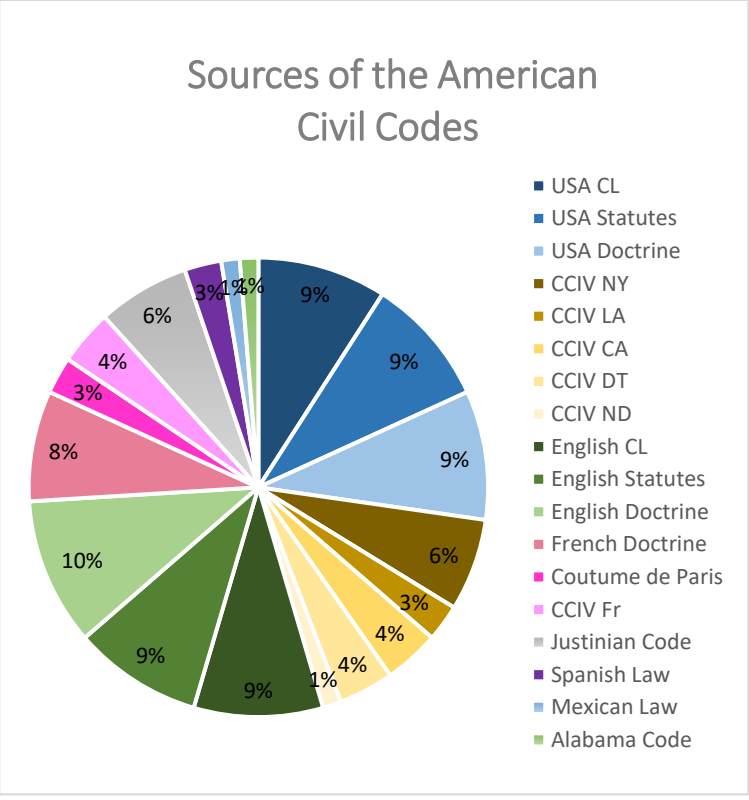
For the Civil Code of Montana, a different system is used. Only 164 articles among the 1291 show a small paragraph explaining some specific clauses with a reference to a statute (10 articles) or to case law (159 articles). This allows us to connect the Civil Code to the previous local law. For the rest, no sources are listed, however, as the code arose from the Revised Code of Dakota Territory, we can safely assume that this code's sources are the same (namely English, American, and New York, common law and statutes; the Louisiana, Roman and French codes; Spanish and Mexican law who became California state common law and statutes, and statutes and common law of the Dakota Territory).

Finally, the Civil Code of South Dakota does not mention the sources of its articles. However, we can suppose that it has also been adapted to the local law especially taking into account firstly the fact that the code's introduction recognizes the Civil Code of North Dakota as inspiration and transliteration in part, and secondly the number of articles in the code compared to its model. The Civil Code of South Dakota consists of 2477 article, 212 less than in the Civil Code of North Dakota. The code is then adapted to this state, whether it was because they thought some articles were not efficient or non-applicable in this state, or because they wanted in some cases to implement a different law. In consequence, the local peculiarities are shown by the suppression and adaptation of the articles but without any explanation on why they changed the law or where the changes came from.

4. Comparative study of the use of different sources within the American civil codes.

The sources of American civil codes[674] are as varied as the codes themselves. Indeed, the following graph shows the use of the different sources within all the codes. Out of all the codes put together, there are 18 different possible sources.

The comparative analysis of the use of the sources shows that the one found in most of the codes is the English doctrine. However, even as the English doctrine makes up 11% of the total sources, it is not that far ahead from the 9% representing American common law, statutes and doctrine, and the English statutes and English common law. Hence, the preliminary observations from the most used sources of the 19th century civil codes show that common law sources are the main ones. This makes perfect sense as all the civil codes except one, the Louisiana's, are common law codes.



A more detailed comparative study of the sources of the codes can be undertaken under two different angles of analysis.

First, the sources are studied according to the country of origins. This allows to identify whether a country has a predominant influence over the 19th century American civil codes.

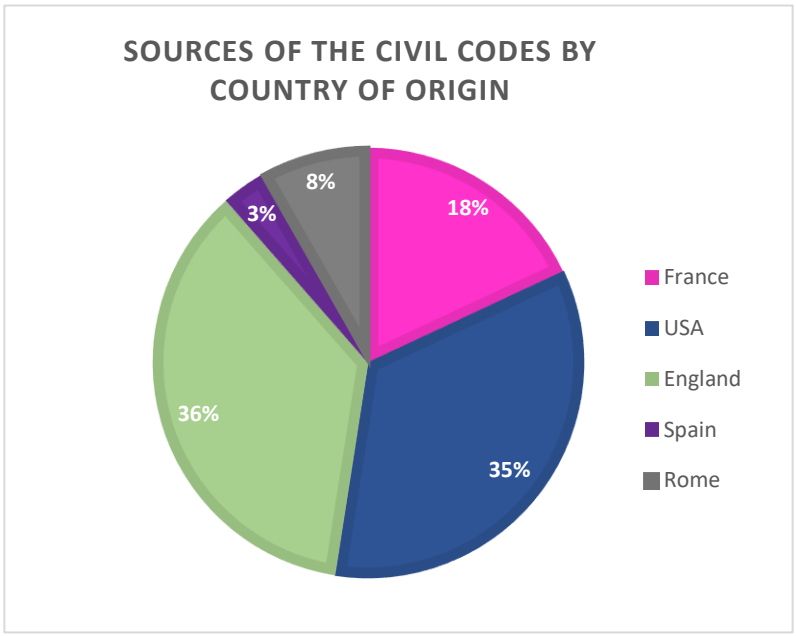
[674] La Digest, LA C.Civ (1825), LA. RCiv. Code (1870), GA Code (1861), N.Y. Civ. Code (1865), CA. Civ Code (1872), D.T. Code (1877); N.D. R. Code (1895), S.D. R. Code (1903), MO. Code (1895).

Then the sources are examined according to the type of sources in order to understand whether a type of legal document is more used than others for the drafting of the codes.

The different number and percentage in the following charts are based solely on the main sources of the code. The main source of a code is the source identified by the code commissioners to justify the law existing within the code, they are the primary source of the codes used to create the different legal rules in it.

The other sources, the non-intentional ones, are present within the code by reworking some articles of other codes. The secondary sources are not shown in the chart to calculate the usage of the different sources in the codes. These secondary sources are the sources of a code's model.

These had been put aside from the calculation as the idea is to see where the draftsmen intended to go, but they are still mentioned as they show the reality. The reality and existence of these secondary sources explain how sometimes some surprising law, outside of the state culture, can be found. This is how for example some Spanish or Mexican law dispositions can be found in the Dakota Territory, a place that never saw any Spanish or Mexican dominion.



The study of the sources according to their country of origin shows that the most common sources are those of common law tradition countries, meaning the sources from England and America, which together correspond to 71% of the primary sources of the 19th century American civil

codes.

This is hardly surprising considering the applicable legal tradition in the majority of states that codified their civil law and the fact that most of the codes on the US territory are common law codes and largely Field Civil Code successors. Indeed, English and American law, whether it originated from the common law or statute law, are sources present in all codes except Louisiana's, which still had a light common law influence through Blackstone.

However, one civil law source can be found in all the codes, but as a secondary source: Roman law. Roman law can be found in Louisiana, Georgia and New York as a primary source, and a secondary source in all of the New York civil code successors. In other words, this means all the 19th century American civil codes. The importance of this source is definitely not a surprise, as Roman law is the law reference used throughout the world. Even nowadays Roman law is looked at with great reverence and is considered as a great example of law. Indeed, over the previous centuries, Roman law was highly considered and often used as an example when looking at civil law, probably because it was considered the "first" one with a complete set of civil laws[675].

The same logic of primary and secondary sources is also applicable for another civil law source, French law. It appears as a primary source in Louisiana and New York, and as a secondary one in all the other codes except Georgia. There is also no surprise here, considering the high regard for French law and French authors in the 19th century added to the huge influence and prestige of the Napoleonic Code.

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[675] Schulz F., *History of Roman Legal Science,* Oxford Univeristy Press, 1946, Vassart P., *Manuel de droit romain*, Castellucci, "Law v. Lex : An analysis of a critical relation in Roman and Civil Law", p.1-31; Kearley T, "From Rome to the Restatement: S.P. Scott, Fred Blume, Clyde Pharr, and Roman Law in Early Twentieth-Century America", *Law Libraries Journal*, 108-55 (2016), p.55-76.

Lastly, Spanish law is also a big secondary source as it is a main source of both Louisiana and California, and thus secondarily the Civil Code of Dakota Territory and its successors (North Dakota, Montana and South Dakota). It is with the implementation of the Spanish law disposition that the transplant created by the civil code takes the most power, as it allowed it to be introduced in a state with no link to a country, its history and by consequence its law. Hence, some legal dispositions that are deeply rooted in a foreign and unknown culture are introduced and implemented without sometimes even realizing it. This introduction of different rules can be illustrated by the introduction of prescription as a way for acquiring private property, defined under the same circumstances in Louisiana, California in the same way and then reused with the exact same Californian article in Dakota Territory[676].

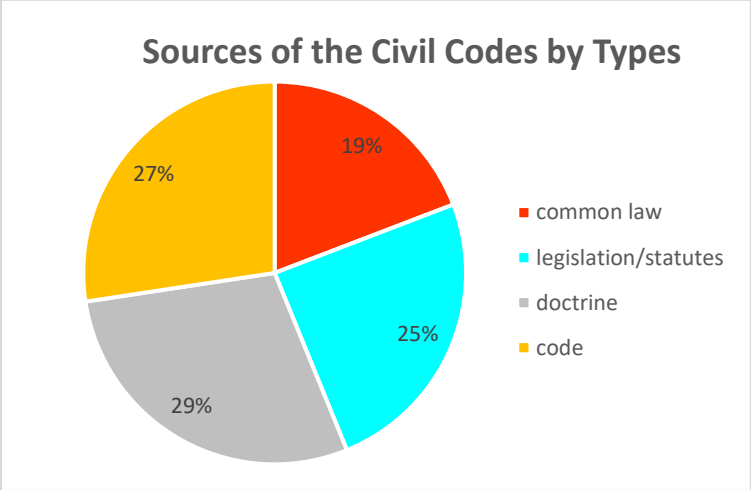
According to those remarks and taking into consideration the secondary sources, it seems clear that the geographical analysis of the sources of law shows that the common law is the main primary source while the civil law is a secondary influence of all the codes, except for Louisiana which works in the exact opposite. What is also striking is that for two civil codes, Louisiana and New York, out of the three main codes (Louisiana, New York and Georgia), the civil law sources are the primary source of law, which shows the importance of civil tradition in the codification process. This reality shows also that common lawyers chose to focus on the French code rather than on the other European codes[677],

> "standard of code is the continental Napoleonic civil code," and consequently, "for the English the model of a code is the Code Napoleon." Many common

[676] Code LA. Digest (1808) TPre Livre 3, LA .C.Civ (1825) art 866, LA. R. Civ Code (1870) art 870, CA. Civ Code (1872) §1000 §1001, D.T. Code (1877) §580 §582.

[677] Masferrer A, "French codification and "Codiphobia" in common law traditions", p. 5.

law lawyers cannot envisage the possibility of codifying without Napoleon in mind."[678]



The second angle of analysis of the different sources of the code is the use of different sources according to their types, meaning according to the legal document they are. Surprisingly, for most common law codes the usage of the different type of source is relatively balanced, at least in terms of strict usage not in terms with how often they are used within the code.

Indeed, it should be noted that the least represented source is case law. Even as it is the main source of all the common law codes it is not one in the the Louisiana codes, which switches the balance and makes it less important in global. It is also explained by the fact that even if it can be found in most of the code as the principal source, it is concurrent with all the other sources of law, like statutes and doctrine. Indeed, the study here looks only at what is used, and not to what extent each source is used in the codes, because it differs a lot from one code to another as the earlier code studies show.

The pyramid system created by the codes circulating and influencing each other also had as a consequence the existence in a code of a non-planned, desired or

[678] *Ibid*, p. 6.

identified source because they are taken from another code[679]. Specifically, this is the case for all the successors of the Field code. Indeed, looking at the influence of the code, the circulation of the New York model and the source of the New York codes, this makes the Louisiana civil code a source of all the common law codes, even for the states that did not intend to take upon Louisiana's laws. Those elements just translate the reality of a codification model that creates an acculturated transplant of the law into new territories.

[679] For details of primary and secondary sources of each code see Appendix No. 11.

II- The shape of the American civil codes

The question of the organization of a civil code in the US states, particularly for the code of states accustomed to the common law, is central in the debates preceding the codes. Indeed, they all wonder how to make the change in the law, how to write it and organize it in the form of a code. Particularly they wonder how to write the common law effectively and how to keep the law without changing it but only its form.

To help themselves in their endeavor, the code draftsmen used the Napoleonic Code, which is the great example of civil code for the nineteenth century. It is the model for writing the law and rationalization and it is used as a beacon for codification endeavors when it is not simply imposed by Napoleon himself during his territorial conquests[680]. Hence, the French Civil Code is used here as a comparator in order to understand the formal aspects of the code and to see if the 19th century American civil codes depart from it and went their own way. The idea is also to identify if there is a 19th century common American civil code shape model.

Formal code analysis is performed initially by studying the editorial features of the codes such as syntax (1) then by looking at the language (2) and finally by doing a comparative analysis of the organization of the 19th century civil codes (3).

1. Analysis of the form of the civil code article: syntax and type of provisions

The shape of an article is defined by its writing. The writing of an article is fundamental as it determines the way it is read and understand. The grammatical form used for an article is then essential because it is through this that the law is expressed.

[680] Blanc-Jouvan X., "Worldwide Influence of the French Civil Code of 1804, on the Occasion of Its Bicentennial Celebration", *Cornell Law school Berger International Speaker Papers*, 3 (2004).

It allows a message to be transmitted or in some cases to be imposed. That is why one of the most emblematic features of a civil code is the writing style. This iconic writing style and features are represented worldwide by the Napoleonic Code, and it became a symbol of codification. It is by its particular style of writing that code section acquires its soul and strength.

This style is characterized, first of all, by an iconic syntax (1) and by the duality of the possible types of provisions (2).

1.1. The civil code articles, an iconic syntax

The grammatical and syntactic choice for writing an article has a direct impact on the law. Indeed, depending on how the article is written it can also restructure certain aspects of the legislation or attempt to predict or control the future. The purpose of the code is to try and determine the acceptability of a social behavior and this is done by the code's content and the writing of the law[681].

One of the first editorial characteristics of a code section or article set up by the Napoleonic code is the austerity of the text. This means that the law is exposed soberly without the use of images or ornament, it is clearly stated without seeking a colorful or romantic style[682]. This style is nowadays called the legislative style[683]. Also called neutral language, it allows the code editor to make timeless and universal legislative provision[684]. The strength of the legislative style is the use of clear, short sentences

[681] Moreteau O., "Les frontières de la langue et du droit : vers une méthodologie de la traduction juridique", *Revue internationale de droit comparé,* 2009, p. 695-713.

[682] Ray J., *Essay on the structure of the French Civil Code*, Félix Alcan, 1926, p. 23.

[683] Ray, *Essay on the structure of the French Civil Code*, p. 24.

[684] Klinck D., "The Language of codification", *Queen's Law Journal*, 14 (1989), p. 38.

written succinctly, highlighting the inherent logic of the content of the provision and consequently the rationalization of law.

The rejection of a more poetic language makes the law more formal and therefore more serious. The law is not a matter of decorum, but a fundamental subject whose form should not divert attention from its content[685]. Writing code in the legal legislative style allows the accuracy of the legal rule to be promoted and to give it the most possible clarity. The austerity in the text is enhanced by the use of the third person. This choice allows the widest possible audience to be addressed as a code's purpose is universality. Indeed, the purpose "of modern legislation is to have nothing to the imagination"[686].

This question of vocabulary and definition of terms used in articles also allows the use of legal language to be set up[687] which is quite different from ordinary language. Legal language is characterized by accuracy, precision, conciseness and simplicity of terms[688] and is directly linked to the iconic austerity of civil codes. The use of legal language also means that words sometimes do not have the same meaning as usual. The law through legal language must be serious without being too solemn[689]. In this case also the use of legal terms has created a form of revolution as the terms see their meaning blocked and precisely defined, especially considering the constant vocabulary evolution of legal language within the common law. It also allows the definition of certain concepts, and terms to be set.

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[685] Klinck D., "The Language of codification", p. 14.

[686] Ray, *Essay on the structure of the French Civil Code*, p. 25.

[687] Heikki M., *Comparative Legal Linguistics, Language of Law, Latin and Modern Lingua,* Francas, 2nd edition, Ashgate, 201.

[688] Crepeau, "Reflexion on the codification of private law", p. 286.

[689] Heikki, *Comparative Legal Linguistics, Language of Law, Latin and Modern Lingua,* p. 54.

Example of article "The Legislative Style"	
France	Art 2—The law only states for the future: she has no retroactive effect.
Louisiana	Art 1—Law is a solemn expression of Legislative will, upon a subject of general interest and interior regulation.
Georgia	1652 - Marriage is encouraged by the law, and every effort to restrain or discourage marriage by contract, condition limitations or otherwise is invalid and void.
New York	1884 - Law is a rule of property and conduct prescribed by the sovereign power of the state.
California	Section 3—No part of it is retroactive unless expressly so declared.
Dakota	Section 2—Law is a rule of property and of conduct prescribed by the sovereign power.
North Dakota	§ 2763—husband and wife contract toward each other obligations of mutual respect, fidelity and support.
South Dakota	§ 2—Law is a rule of property and of conduct prescribed by the sovereign power.
Montana	1 - this act shall be known as the civil code of the state of Montana [...]

The example of articles selected randomly, from the American civil codes shows the famous legislative legal style in action. Whatever the code, the articles are all written in the legislative style - austerity, a clear and precise style, no image. Indeed, to go even further all are more or less grammatically composed in the same manner demonstrating the rationalization and standardization of the law.

This wording of the law is, as stated previously, is in the tradition of the Napoleonic Code hence, very different from the common law tradition. Indeed, the writing style of the common law is more vivid, full of facts from which are deducted the legal solutions. The common law uses a more poetic language, is stronger on emotions and references other texts or cultural elements. The reasoning is then reversed in a civil code; the civil codes are using a simpler language which fulfills its goal of accessibility and comprehensibility of law by all and consequently it grows further away from the traditional writing of the common law. Hence the code is not only a writing on paper of the common law but more of a re-writing of it too. The implementation of the legislative style by the civil codes also allows a theory of the law to develop and the creation of numerous definitions of legal concepts that did not exist explicitly before but were deducted from case law.

By never mentioning precise facts, the civil codes are also setting up an inversion of the legal reasoning: the facts must now be attached to legislative solutions and not the opposite. Moreover, in cases where a word requires a definition that is not found in the code nor is created by the code then the law sends the reader to refer to

the statutes and the common law that the rules come from, meaning they have to look for the spirit of the law.

By being short and writing in the present, the article reaches a level of universality allowing any fact to be attached to it and to adapt it to the intention needed according to time and space. With these particular writing features, the code's articles really became timeless laws instead of time-limited ones.

Another characteristic and symbolic feature of the writing of a code article is its tense. Indeed, the codes are primarily written in the present tense. The present tense is used to report on something, here the law, and state a fact or principle to be stated, which is the purpose of a code: state the applicable law in a territory. It also helps to make the law present in the code a mature unchangeable element applicable at the time of writing and in the future.

1.2. The declarative and facultative dispositions

The distinction between mandatory/declarative and facultative/subsidiary provisions is as old as law and dates back to Roman law and the distinction between *jus cogens* which was imperative and *jus dispositivum* which was possible to derogate from by private contractual agreement. As illustrated in the table articles[690] below, the American civil codes follow the tradition of the Romanic civil codes and resume this distinction:

[690] Codes articles codes were selected as examples and do not alone account for unique vision of the codes.

	Examples of declarative provisions	Examples of facultative provisions
France[691]	Art 214 — La femme est obligée de vivre avec son mari.	Art 1986 — Le mandat est gratuit, s'il n'y a pas de convention contraire.
Louisiana[692]	Book 1—Title II—Art 1—The domicile of each citizen is in the parish wherein is situated his principal establishment.	Title XIII—Art 5—The procuration is gratuitous, unless there have been a contrary agreement.
Georgia[693]	2022—Lawful interest in this state shall be at the rate of seven per cent, per annum.	1889 - A partnership may be created either by written or parole contract, or may arise from a joint ownership, use and enjoyment of the profits of undivided property, real or personal.
New York[694]	15 - A minor cannot give a delegation of power.	128 - A guardian appointed by a court has no power over the person and property of the ward, unless otherwise ordered.
California[695]	236 – A guardian is a person appointed to take care of the person or property of another.	Section 70—Marriage may be solemnized by either a Justice of the Supreme Court, District or County Judge, Justice of the Peace, mayor, priest, or minister of the gospel of any denomination.
Dakota Territory[696]	265 - The owner of land in fee has the right to the surface, and to everything permanently situated beneath or above it.	1432 - If no term is prescribed by agreement for its duration, a general partnership continues until dissolved by a partner or by operation of law.
North Dakota[697]	2776 - All children born in wedlock are presumed to be legitimate.	5024 - Except as otherwise provided in this article the specific performance of an obligation may be compelled.
South Dakota[698]	6 - In this state the Common Law is in force except where it conflicts with the codes or the constitution.	920 - A transfer nay be made without writing in every case in which a writing is not expressly required by statute.
Montana[699]	Section 131— The effect of a judgment of divorce is to restore the parties to the state of unmarried persons.	Section 2180— A contract is either express or implied.

Both types of dispositions are typical of civil law. They help to highlight the link between authority and citizens[700] and give different strengths to the articles. This

[691] C. Nap.

[692] LA. Digest (1808).

[693] Ga. Code (1861).

[694] NY Civ. Coded. (1865).

[695] CA. Civ. Code (1872).

[696] DT Code (1877).

[697] NDR Code (1895).

[698] SDR code (1903).

[699] MO. Code (1895).

[700] Klinck D., "The Language of codification", p. 43.

distinction has always existed in the civil law system and is a direct consequence of the principle of free will[701]. Articles 11 and 12 of the 1825 Louisiana Civil Code clearly explain this distinction,

> "Article 11 - Individuals cannot, by their convention, derogate from the force of laws made for the preservation of public order or good morals.
> But in all cases in which it is not expressly or impliedly prohibited, they can renounce what the law has established in their favor, when the renunciation does not affect the rights of others, and it is not contrary to the public good.
> Article 12–Whatever is done in convention of a prohibitory law is void, although the nullity is not formally directed."[702]

These articles set out the fundaments of how the article of the civil code worked. Depending on the case, when the article is not related to public order or good morals it is possible to derogate from it, to adapt the law to the circumstances. Those articles, represent free will and the flexibility in the law who sometimes in some particular cases understand that people have to go another way[703]. Hence, it is possible to derogate from those facultative/subsidiary provisions with a private contract.

To implement this openness and possibility to derogate from them those articles are not written in the same way as the declarative ones. Indeed, the writing has to show that a choice between different options are possible, e.g. Article 5 of the French Civil Code, or the article implied by it, article 920 of the Civil Code of South Dakota. In this case, the codes provide an option granting more freedom to conduct business affairs while allowing a separate statute more specialized to deal with the

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[701] Garro A., "Technical Codification and the problem of residual and Imperative Law," *Louisiana Law Review*, 41 (1981), p. 1007–1030.

[702] LA. Civ. Code (1825) art. 11 & 12.

[703] Garro, "Technical Codification and the problem of residual and Imperative Law", p. 1013.

issue in depth. The last way to write a facultative provision is the use of a negative formula, e.g. Article 5024 of the Civil Code of North Dakota.

As for the dispositions related to public order or good moral, those cannot be put aside with a private contract, those are called the mandatory/declarative provisions. They are usually identifiable because of the chosen verbs which are usually descriptive verbs or verbs creating obligation. The declarative provisions can be divided into two categories: the explanatory ones or the mandatory ones, which means they can explain a law or give a definition, or in the second case impose a duty or an obligation. Their main purpose is educational and informative. They are the code's foundations.

A final editorial feature of the civil code, more precisely of the common law civil code feature must be pointed out here. The common law civil codes have at the beginning of an article a kind of nonverbal sentence explaining the main principle contained in the article. This nonverbal expression can have two forms depending on the code.

The civil codes of Georgia, California, the Territory of Dakota and North Dakota, put this proposal at the beginning of each provision after the article number, like in article 155 of the California Civil Code:

> § 155. **Mutual obligations of husband and wife**. Husband and wife contract Toward Each other obligations of mutual respect, fidelity and support.[704]

In New York and South Dakota this expression is put on the side, on the margin of the code, like for example article 37 of the Civil Code of South Dakota:

[704] CA. Civ. Code (1872) §155.

consent must be present

§ 37 - The agrees to a wedding it must be Commencing Instantly, and not to an agreement to marry afterwards[705]

This particular presentation in these codes demonstrates the didactic and pedagogical concern that animates the common law civil codes. By announcing the content and the rule of law of each article, the commissioners are trying to quickly inform the code reader of the law at a glance. It also reflects an interest in efficiency. Indeed, the codes were written to allow easy and faster access to the law, with the expression they made the rule of law even more visible.

2. The special case of Louisiana and bilingualism

All American civil codes are written in English except the 1808 Louisiana Digest and the Civil Code of the State of Louisiana of 1825 which are written in French then translated into English[706]. This particularly begs the question of the importance of the chosen language and of the translation of the codes.

Vis-à-vis the situation in Louisiana, it is not surprising that the first codes in Louisiana are written in French. Indeed, in the first year of being an American territory the people in Louisiana did not speak English. They spoke French and were far from willing to change their national language to a point where English only became the official language of the state after the civil war. This reality is reflected in the civil codes all along the nineteenth century.

[705] NY Civ Code (1865) §37.

[706] Moreteau O., "La traduction du Code civil louisianais, exercice historico linguistique", *Codes, termes et traduction*, Enrica Bracchi et Dominique Garreau, Giuffré, Milan, 2017, p. 107-119.

The resolution appointing the commissioners to draft the 1808 Digest does not specify the language to use for writing it[707]. The editors have therefore drafted the Digest in French, their preferred language and the official language of the state in 1808. However, Louisiana is a part of the US so they had to have the code translated into English. For this task, two men are commissioned by the legislature[708], which allowed the code to be published in English and French.

As to which language is the dominant version in case of doubt about the application of certain articles, a rule was defined by the act that provides for the enactment of the Digest of civil laws currently in force in the territory of Orleans, approved March 31, 1808:

> "Section 5. If in any of the provisions made in this Digest, there is some obscurities or ambiguities, or some mistakes or omissions, both English and French texts will be consulted to interpret each other '[709].

In consequence, both versions have the same force and are there to explain each other. In case of doubts one code can then help to enlighten the other one. The legislature, conscious of the state bilingualism has decided that in order to avoid any linguistic confusions, no code and therefore no language prevailed over the other[710]. The choice of using and giving to the English version as much strength as the French one demonstrates a willingness to be include the United States.

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[707] Hood, "The History and Development of the Louisiana Civil Code", p. 26.

[708] US Territorial Papers, vol. IX - Orleans Territory, 1937 The past acts at the second session of the legislature approved April 14 180, p. 190-192.

[709] Moreau Lislet, *Digest general acts of the legislature,* p. 207–208.
« Section 5. Si dans quelqu'une des dispositions contenues dans ledit *Digest*, il se trouve quelques obscurités ou ambiguïtés, ou quelques fautes ou omissions, les deux textes anglais et français seront consultés pour s'interpréter mutuellement ».

[710] Moreteau O., "The Louisiana Civil Code in French: Translation and Retranslation," *Journal of Civil Law Studies,* 9 (2016), p. 223–258.

However, even if they are supposed to have the same strength, the English version is a translation of the code originally written in French and has many shortcomings because the translation had been done in a hurry.

By simply translating words as quickly as possible without thinking of the intent of the law or their meaning, the English version, which appears only a few weeks after the Digest in French, was full of translation mistakes. In consequence, lawyers and the doctrine therefore consider that despite the resolution giving equal force to both versions, the French version prevails and used the French version without even looking at the English one. In the case where the mistaken English version was used, the judge usually quickly corrected it by enforcing the French intended meaning of the article[711].

The Civil Code of 1825 made no change on the issue of the bilingualism of the code. In the same way then with than 1808 code, the 1825 code is prepared in French and then translated into English[712]. The legislature by an *act that provides for the printing and the promulgation of the amendments made to the Civil Code of the State of Louisiana* approved April 12, 1824, provides for the publication and implementation of the Louisiana Civil Code according the following procedure:

> "Section 2. This Code as it was amended and will be printed neatly on good paper, in the English and French languages, with both texts under the title of" civil state of Louisiana Code".[713]

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[711] *Preliminary reports of the code commissioners, project of the civil code of 1825*, 13 February 1823, Louisiana legal archives, New Orleans, LXXXV LXXXIV, 1937.

[712] Hood, "The History and Development of the Louisiana Civil Code", p. 28–32.

[713] Moreau Lislet, *Digest general acts of the legislature,* Act to be able to print and promulgation of the amendments made to the Civil Code of the State of Louisiana, p. 210–212
« Section 2. Ledit Code tel qu'il a été amendé sera imprimé proprement et sur du bon papier, dans les langues anglaise et française, avec les deux textes en regard sous le titre de "Code civil de l'état de la Louisiane.

This impression of the code took place under the responsibility of the "lawyers responsible for drafting the amendments" and is performed as follows : the text in its final form must be written in French on one page with its English equivalent on the other side to simplify the understanding for all[714]. This bilingual original layout is an attempt to resolve the problems of translation of the articles. This print side by side is also an attempt to ensure effective equality between the different versions of the code and to help each version to enlighten the other.

English language being more used within the state, with time mainly because of immigration, made the English version slowly but surely the new reference for the Louisiana civil code[715]. However, the attachment to the French legacy prevents the French version from losing all use, at least until the civil war.

It was after the Civil War that the problem of bilingualism is set. Indeed, it is only after it that English became the only official language of the state with the adoption of the constitution of 1868, hence the new civil code is only written in English, even the articles arising from the French civil code. For the previous articles kept in the code they are once more translated into English but this time very carefully. In consequence, a unique version of the code is now enforceable, it is one that has to be in line with the constitution, it is the revised civil code for the state of Louisiana of 1870, written only in English.

The question of the language of the code and the preferred “version” who evolved with time is one more proof of how much a civil code is a culture product who evolves with the state and its population. Indeed, the French version disappeared when Louisiana become more and more included in the US.

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[714] Moreau Lislet, *Digest general acts of the legislature,* Act to be able to print and promulgation of the amendments made to the Civil Code of the State of Louisiana, p. 210–212.

[715] Moreteau, “The Louisiana Civil Code in French: Translation and Retranslation”, p. 252.

3. The structure of the civil codes, assertion of the American uniqueness

From the structure of a civil code shines the vision and definition of the concept of a civil code that the commissioners decided to enforce. From the organization of legal concepts, the concepts present or not in the code, to the structure of the code those elements are there to show the chosen personality of the code. The uniqueness of the American civil codes is found initially with a particular structural vocabulary (1) and in a second time through organizational particularities consequent of the various influences on the 19th century civil codes (2).

3.1. A particular structural vocabulary

Common law codes, that is to say all American civil codes, except those in Louisiana, have a unique structural feature. Indeed, they do not use the same vocabulary as that found in codes such as the Code Napoleon or the Roman civil law ones. Nevertheless, even as the vocabulary is different, they transpose the organization and division of legal concepts to the same levels just with different words.

The Napoleonic code and the civil law tradition codes are organized as follows: book, title, chapters, and sometimes Section, Paragraph and finally Article. Common law codes, that is to say, all the American civil codes except the Louisiana code, are themselves divided as follows: Divisions Parts, Titles, Articles and Sections. Both codes therefore use a completely different vocabulary but there is a concordance of the different organizational level.

France	USA
Book	Divisions
Title	Parts
Chapter	Titles
Section	Articles
Articles	Sections

The table on the side shows that although the vocabulary is not the same there is a matching of the codes' structural level, and the content review of the codes shows that the only difference in the structure of the code is just a question of vocabulary. Hence, the Books of a civil law tradition code are Divisions in the common

law codes, and same goes for Titles that become Parts, Chapters become Titles, Section tuned into Article. Finally, the civil law Article become Sections and is marked by the sign § within the codes.

This structural ad equation between the civil law tradition of codes and common law tradition raises the question of why a different vocabulary was selected by the American commissioners—vocabulary that is also found in the latter common law code like the USC—United State Commercial Code?

To answer this question, several assumptions can be made. The first, which seems unlikely, is a mistranslation. Taking into consideration the predominance and notoriety of French worldwide during the 19th century those errors in translation are highly unlikely.

The second hypothesis is a willful desire to retain a known and mastered vocabulary and adapted it to the shape of a code. The organization "Division, Part, Title, Article, Section" is found indeed in the statutes that are organized and divided accordingly to those terms. The conversation of the statutory division allows a sense of tradition to be retained and security by using a known vocabulary and in the same time to respect the common law tradition and honor the content of the codes. At the same time, these organizational peculiarities with a vocabulary continuity allow the US civil code to show their uniqueness and distinguishes them from the civil law tradition civil codes.

The common law codes are then divided in three possible ways according to this structure. The first one is the Book[716] or division[717] structure that is found most often

[716] LA Digest (1808); LA C.Civ (1825); LA. R. Civ. Code (1870).

[717] NY Civ. Code (1895); CA. Civ. Code (1872); DA Code (1877); SDR Code (1903); MO. Code (1895).

with the US civil codes. The civil code corresponds then to one document with the highest structural level being a book or a division. The second type of structure is the Title one in Georgia and the third one is the chapter one on the Dakota Territory. The peculiarity of the two codes compared to the other is that the top structural level; namely the division; does not exist. The difference between the three types of structure is therefore here also a question of vocabulary.

3.2. The organizational peculiarities of the civil codes

The organization of the legal concepts within the Code is fundamental because it helps to show its exclusivity and strength; it is its backbone. To look at the different elements of the different civil code let us look from beginning to end.

The first element on the structure of the code is to look at the document as a whole and to notice that for a few of them, Georgia, Dakota Territory, North and South Dakota, and Montana, the civil code is not the only code in the document. Looking at these codes the first striking element is the title. They are not named "Civil Code of" but "Code of", which means that in each Code there is a civil code, but not only that - in the codes there can be found a criminal code, a procedural code, a public code, a governmental organization code… Hence the code is then seen as part of a whole codification endeavors and is distinguished in content from the other code but concretely is in the same document. To give an example of group code to understand better this idea of full codes in a single document we can look at the Georgia code. The Georgia code is a document divided in 4 parts which are: Part 1 The Political and Public organization of the State, Part 2 The Civil Code, Part 3 The Code of Practice, and Part 4 The Penal Laws.

These peculiarities, that did not change anything in terms of the content of the different codes, allowed a classification of the codes to be created based on their shapes, with the solitary code like in Louisiana, New York and California on one side, and the group code in Georgia, Dakota Territory, North and South Dakota, and

Montana on the other. In other words, some of them are civil codes adopted alone, meaning that when being adopted, only the code was adopted on its own; it was not a part of a bigger document. The second type of category is the civil codes that have been adopted as part of a whole codification document, which means the code is not implemented on its own but is included in a bigger document. This is probably why they are sometimes called statutes instead of codes.

A document, in particular an important document, legal or not, usually starts with a table of contents. The goal of the table of contents is to allow the reader to look at it once and to know the document's contents and organization. In this regard, it is noteworthy that some codes have chosen not to include at the beginning of their codes an index or table of contents.

These codes are those of Montana and South Dakota. This choice may appear surprising. However, it is offset by an index of concepts organized alphabetically at the end of the code. This inexistence of the table of contents is definitely a choice and not simply an editorial choice as it is found again and again whoever the editor of the civil code was. This small change shows that the need to list all the legal concepts and institutions contained in the civil code exists for all of them.

Following the chronological organization of codes, there is also some uniqueness with the preliminary titles. A preliminary title is placed at the beginning of the code as the name suggests. It is used to expose the legal rules relating to codes and their applications and all generic legislation that appears as essential like the information on the promulgation of the Code, its application[718], its entry into force[719], or even their chosen definition of law[720]. It generally contains the peripheral provisions. Most of the

[718] For example, see LA. Digest (1808) Preliminary title chapter II Chapter IV.

[719] For example, CA. Civ. Code (1872) § 2.

[720] For example, see NY Civ. Code (1865) § 2.

codes have chosen to write a preliminary title except three of them: Georgia, Dakota Territory and Montana.

The Civil Code of Georgia does not have a preliminary title. However, the Georgia code that contains the Civil Code and all the other codes has a general preliminary division containing all the information for the use and application of the codes in general. As for the other two, the Civil Code of the Territory of Dakota and Montana Civil Code has no preliminary provisions at all, anywhere in the code. One of the reasons for this might be the fact that those states are already accustomed to the functioning of a civil code and they might have not feel the need to give details on its working, as they already know, how it works and all the surrounding information of the codes.

One other point worth mentioning is the issue of the numbering of the articles. Are the code's articles continuously numbered or does the numbering start at zero at the beginning of a new different level of organization? Traditional numbering for a code is a successive numbering from the first article to the last article of the code. This type of numbering simplifies the understanding of the document and avoid confusion as the Code became a coherent whole. All codes except one are using a successive and consecutive numbering of the code articles. Only, the 1808 Louisiana Digest uses a numbering that restarts at each title of the code. This numbering can be found in other European 19th century codes such as the February 5 1794, Prussian Code entitled *Allgemeines Landrecht*. No link was found up to today between the two codes, however, it is quite possible that a copy of the Prussian code was imported to the New World. Probably aware and realizing that this type of numbering is not the most efficient the 1825 revision changed it to pass to a successive numbering.

One last remark about the numbering of articles is the numbering of the civil codes contained in a document containing several codes such as the Civil Code of Georgia, Dakota Territory, North Dakota, South Dakota and Montana's choice. In these cases, there are two options. The first option is that the article numbering is continuous from the beginning of the document to the end despite the change of

codes, which is the case for the Code of Georgia. In Georgia the civil code is the second code, the first being the political code and state public organization. Hence, the first articles of the Georgia Civil Code starts at number 1582. The second option is the one of the Dakota Territory codes and its subdivisions, North and South Dakota as well as Montana. In those cases, the numbering starts over at each code contained in the General Code. This option allows the codes to be more independent from each other.

The other type of peculiarities of the code organization are regarding to the plan. According to Roman law, the use of a plan to organize different ideas is the perfect way to reach didactic clarity. The study of the organization of code raises awareness of the level of rationalization of law in general and in each code. It also helps to understand the choices made by the commissioners as to the meaning of civil law and legal concepts it covers.

The overall structure and organization of ideas among the civil common law codes inspired by New York code is not new. Indeed, this quadripartite organization – persons, property, obligations, and general provisions - is found in the Kent *Commentaries*[721] when the Napoleon code is divided into a tripartite structure[722]- Person, Property, and the different ways we acquire property.

The Napoleonic structure is now considered traditional. This structural division is explained by the experts of the Napoleonic Code by the fact that Napoleon chose to focus on property in his code because for him it is one of the most fundamental rights in the world[723]. Some authors go even further, stating that the first book is an

[721] Batiza, "Sources of the Field Civil Code", p. 807.

[722] To find more information on the French choice for the tripartite structure see Arnaud AJ., *Les origines doctrinales du codes civil français,* Librairie Générale of law and jurisprudence 1969.

[723] Savatier R., *L'art de faire les lois Bonaparte et le code civil*, Dalloz, Paris, 1927, p.302.

introduction to the two others[724]. Other authors argue that this division comes from the Roman institutes which are divided into three parts: people, things and actions[725]. The plan of the French Civil Code, whatever its origin uses the following reasoning: the individual has their own rights — book one - and rights over things - book two - and these rights can be granted, modified or lost by various processes—book three.

Going back to the US civil codes, surprisingly, little discussion took place regarding the organization of the code; the debates focus more on the content of the code than its organization. Probably because they were not used to stop on such element. On a plan level only the Louisiana codes retook the French tripartite organization[726].

Other American codes are divided into a quadripartite structure explained as follows by David Dudley Field and the commissioners of the New York civil code,

> "The Civil Code was required to embrace the law of personal rights and relations, of property and of obligation. It has four general divisions: the first relating to persons, the second to property, the third to obligations, and the fourth containing general provisions relating to these different subjects."[727]

Despite this quadripartite organization, the link between the codes of civil law traditions such as the Napoleonic code and American code is visible. Indeed, Field himself explains that when he wrote the Civil Code for the State of New York and when

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[724] On this matter see Ewald F., Naissance du code civil, les raisons. Flammarion, 1989.

[725] Gaius, *Institutes*
I 8 "omne autem quo just utimur vel ad personas pertinet, ad val res vel ad actiones.".

[726] Levasseur A., "On the structure of a civil code," *Tulane Law Review*, vol. 44, 1969-1970 p. 694-695.

[727] NY Civ. Code (1865) V.

he worked for the organization of the code and the legal concepts, he was greatly inspired by the 1808 Digest and consequently the Napoleonic Code[728].

The main difference between the French and American organization is the addition of this fourth part on general provisions. The reason for this new part in the common law codes seems pretty simple. Indeed, it may appear as logical for commissioners to the code, not used to this form of rationalization of law, to create a miscellaneous part.

This part allows all the legal provisions they intended for the code to be included in it even when they could not figure where to put them, as it was the case for example for the famous maxims of jurisprudence derived from Roman law. In addition, this fourth part can act as a safeguard, allowing a free and accessible place to be left for adding elements that might have been forgotten or that may occur over time without having to revise the code and its organization.

A final quick remark on the organization of the code is about the choice of legal concepts contained within the code. The civil codes usually contain all the legal concepts and institutions of the civil law field such as personal relations, marriage, family relations, relationships, private property, obligations, contracts and so on. However, the common law codes—all American civil codes except Louisiana—went a bit further; by adding provisions relating to corporations. This is one of the major innovations of the American common law civil codes, they included in the civil law the elements related to corporations and by consequence extend the field of civil law.

[728] Batiza, "Sources of the Field Civil Code", p. 799-819.

To conclude, the organizational features of the 19th century US civil codes are quite n line with the tradition of the 19th century civil codification, while creating two main American particularities : the structural vocabulary and the four parts division of the civil code.

III – A comparative overview of the foundation and dissolution of marriage in the 19th century American civil codes

The study of American civil codes could not be complete without an analysis of the content, or at least a part of it. Indeed, the American civil codes' history is a strong representative of the culture of their state but what about the codes' content? Are the same institutions apprehended in the same way? Is there some cultural change in the law? Are the same institutions defined in the same way as the inspirational code whatever the state culture? All those questions draw to a study of at least one of the main institutions that can be found in a civil code. Indeed, the comparative study of all the institutions present in the American civil codes in itself would correspond to a full doctorate hence due to time factors and continuity of the intellectual process of the work, it was chosen to focus on one institution and to see if it is apprehended in the same way throughout all the civil codes.

The chosen institution had to be one that was mainly regulated at a state level in order to see if the codes created a unification of the law throughout the country or if they still maintained and translated the cultural diversity of the states. The chosen institution also had to be a fundamental one and, what is more fundamental to society than marriage? Especially in the 19th century, marriage is the foundation of the society. Marriage is a legal institution defined and governed by the civil code that affects all men and women. It is the cornerstone of society in the nineteenth century and previous centuries. In a time where stigma over divorce and being unmarried was strong, it appeared that marriage was the fundamental institution of the civil codes.

Marriage in the US, in the eyes of a European man, already seemed quite different to marriage in Europe. As Alexis de Tocqueville wrote in his book *De la démocratie en Amérique*, there is a new structure of the *bourgeois* family in America with children being more independent and a less strong parental authority than in the

Old Europe[729]. Hence, how this more liberal and independent way of seeing the family is reflected in the institution of marriage within the civil codes?

The choice of marriage was also made taking into consideration the changes undertaken by the law of domestic relations during the 19th century in the US. In the early 19th century, there was no family law, "a single figure was assumed to serve as husband, father and master. He was not one but three legal persons. The wife, the child, and the servant were just subordinate"[730]. Starting in the middle of the 19th century family law changed, and the codes seemed to enact those changes. Indeed, by allowing divorce the wife's contractual capacity is extended to its maximum, she acquires the rights with a possible divorce to have responsibility for herself.

Marriage is a vast subject, hence two fundamental moments of marriage were selected for the study, after finding the definition of marriage in the American civil code (1) the conditions to enter (2) and to willingly dissolve it (3) were identified.

1. The definition of marriage in the 19th century American civil codes

Before studying an institution, it is important to know its vision and its definition, hence, what is the definition and vision of marriage within the 19th century American civil codes?

Since the heyday of canon law in the 12th century, marriage, a basic sacrament, is considered a religious institution. For centuries, it was under ecclesiastical law and courts. Starting only in the sixteenth century, the transfer of competencies on this matter will start in favor of the temporal authorities like kings and government. With

[729] Tocqueville, *Democracy in America*, p. 97.

[730] Halley J., "What is Family law?", *Yale Journal of law and the Humanities*, (23-1) 2011, p. 2.

time the kings would gradually take over the institution, justifying their actions by the fact that marriage is a contract before being a sacrament and above all is a family affair hence a temporal concern. It is up to the State to regulate this issue and not to the Church. Nevertheless, it is really with the Napoleonic Code that marriage would become first a secular institution solely defined by the temporal law. With the French civil code, marriage becomes a civil contract between two people[731]. As the US is a religious land the code could go either way with the definition of marriage, is it a religious matter or a temporal one?

The 19th century American civil codes stay on the line of the French civil codes and the legal theorist of the 19th century and put marriage outside of religion in particular at an institutional level. In the words of the civil codes of Louisiana, "The law considers marriage only as a civil contract"[732]. All American civil codes, except Georgia[733], define marriage in their first article on the subject and the terms "civil contract"[734] is used in this definition in each state. This kind definition is, however, in the line of the common law as it is the same found in the Blackstone *Commentaries* "Our laws consider marriage in no other light than as a civil contract"[735].

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[731] Van Kan E., *Les Efforts de codification en France. Étude historique et psychologique*, Paris, 1929.

[732] LA. Digest (1808) art 1, LA C.Civ (1825) art 87, LA. R Civ Code (1870) art 86.

[733] There is no article with a definition of marriage in the Georgia Code, indeed the section start with §1652. Marriage is encouraged by the law, and every effort to restrain or discourage marriage by contract, condition, limitation or otherwise is invalid and void. Prohibiting marriage to a particular person or persons, or before a certain reasonable age, or other prudential provisions looking only to the interest of the person to be benefited, and not in general restraint of marriage, will be allowed and held valid.

[734] LA. Digest (1808) Art 1, LA. C.Civ (1825) art 87, LA. R. Civ Code. (1870) art 86, N.Y. Civ Code (1865) §34, CA. Civ Code (1872) §55, D.T. Code (1877) §34, N.D. R.Code (1895) §2720, MO. Code (1895) §50, S.D. R. Code (1903) §34.

[735] Blackstone, Commentaries, 1765, p. 421.

This idea of marriage as a civil contract is anchored deeply in American tradition to the point of being ratified by the US Supreme Court in 1888 in its judgment *Maynard v. Hill* where in addition to making official the detachment of marriage from religion, they point out that marriage is just not any simple civil contract but much more,

> "Marriage is often termed by text writers and in decisions of court as a civil contract, generally to indicate it must be founded upon the agreement of the parties and does not require any religious ceremony for its solemnization, it is something more than a mere contract. The consent of the parties is, of course, essential to its existence, but when the contract to marry is executed by marriage, a relationship between the parties is created which they cannot change"[736]

Marriage is also the "foundation of the family and society without which there would be neither civilization nor progress"[737]. This vision of marriage as a special civil contract is not new in America and has its origins in the post-revolutionary laws. This highlights the fact that the authority is the only one to have the power to determine the rule of marital validity and define consent[738], indeed, consent became so important that it quickly became the main condition for validity of a marriage[739].

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[736] US Supreme Court, *Maynard v. Hill*, 1888.

[737] US Supreme Court, *Maynard v. Hill*, 1888.

[738] Grossberg M., *Governing the heart and the family law in nineteenth-century America*, The University of North Carolina Press, Chapel Hill and London, 1985, p. 18–19.

[739] N.Y. Civ. Code (1865) §34
« Marriage is a personal relation, arising out of a civil contract, to which the consent of the parties capable of making it is alone necessary».
N.D. R. Code (1895) §2720
«Marriage is a personal relation, arising out of a civil contract, to which the consent of the parties thereto is essential, but the marriage relation may be entered into, maintained annulled or dissolved only as provided by law».

Marriage is hence legally a civil contract but in reality, it is leaning more toward a status. By status the intended idea is that the legal area is set by the state with parties having little or no power to waive or alter them[740]. The freedom usually attached to a contract is pushed aside in favor of a state defined status qualification for this special union. Indeed, from the 19th century to nowadays the legal characterization of marriage oscillates between the contract or status category[741]. The only certainty is that marriage puts two persons into the law of marriage which creates rights, duties, obligations and privileges. For example, by entering a marriage the parties lose the capacity to contract again except after the dissolution of the contract which can only be dissolved in some very particular cases.

Consent is according to the definition of marriage, the key element to enter it. However, some codes go even beyond consent as the element defining marriage. Some states like California will add some elements to the definition like the fact that a marriage is defined by the consent of the parties and the official celebration[742] while others will take an option in between and considered that the fact of living as husband and wife in the eyes of the community[743] is enough to characterize a marriage. This

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[740] Bix B, *The Oxford introduction to US law Family law*, Oxford University press, New York, 2013, p. 12.

[741] Grossberg M., *Governing the heart and the family law in nineteenth-century America*, p.25.

[742] CA. Civ Code (1872), §55
«Marriage is a personal relation, arising out of a civil contract, to which the consent of the parties capable of making it is alone necessary. Consent alone will not constitute a marriage; it must be followed by a solemnization».

[743] D.T. Code (1877) §34
«Marriage is a personal relation, arising out of a civil contract, to which the consent of the parties capable of making it is alone necessary. Consent alone will not constitute a marriage; it must be followed by a solemnization or by a mutual assumption of marital rights, duties, or obligations».
MO. Code (1895) §50
«Marriage is a personal relation, arising out of a civil contract, to which the consent of the parties capable of making it is alone necessary. Consent alone will not constitute a marriage; it must be followed by a solemnization, or by a mutual and public assumption of the marital relation».
S.D. R. Code (1903) §34

element in the definition of marriage is really interesting because it makes official the practice of the "common law marriage", which is a marriage in the facts, a *de facto* marriage without any official formalities.

Marriage is, as a civil contract, supposed to be detach from religion but despite the appearance of detachment, the institution does not exclude it entirely. Indeed, in the US territory a marriage officer does not have to be a state official and can be a religious representative, and this is allowed in all states[744] with or without a civil code. This raises a fundamental difference here with the French code where for the marriage to be valid it must be solemnized by a state official. Indeed, the code was used to officialize the detachment of marriage from religion. In the US, even if the definition of marriage detached it from the religion on a theoretical level and marriage is a civil contract and status, in reality, marriage is a celebration performed by a religious minister.

The definition of marriage hence, appears after examination, to be the same throughout all the civil codes, sometimes even words to words.

2. Conditions to enter a marriage

Looking at the condition to enter a marriage allows to see if they are the same in the different states and to see if the civil codes creates a unity of legal provisions on the matter.

The family law specialist traditionally considers that the conditions of validity of a marriage are divided into substantive and formal conditions. The substantive conditions are examined first and correspond to two main elements: consent (1) and

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«Marriage is a personal relation, arising out of a civil contract, to which the consent of the parties capable of making it is alone necessary. Consent alone will not constitute a marriage; it must be followed by a solemnization or by a mutual assumption of marital rights, duties, or obligations».

[744] LA Civ. Code (1808/1825/1870) art 102 & 104, GA Code (1861) §1660, NY Civ. Code (1865) §45, CA. Civ Code (1872) § 70, DT Code (1877) § 46, NDR Code (1895) §2724, MO. Code (1895) §71, SDR Code (1903) §46.

capacity (2). Then the various formal requirements essential to the validity of a marriage are examined (3).

The conditions to enter a marriage in the Civil Codes					
	Want	Can	Consummation	Forms	Common law marriage
Louisiana	X	X		X	
Georgia	X	X	X		
New York	X				
California	X	X	X		
Dakota Territory	X			X	X
North Dakota	X			X	
Montana	X			X	
South Dakota	X			X	X

The American civil codes defined different conditions of validity to a marriage. Indeed, as shown by the table on the side, the two classical substantive and formal conditions are found in the codes but there are also some extra elements for the validity of a marriage, as for example the consummation in Georgia and California, when Dakota Territory and South Dakota on the other side recognize the common law marriage. The New York code meanwhile pushed consent to its broadest form by recognizing it as the only condition for the validity of a marriage.

2.1. "I do", the consent requirement

Consent to Marriage is the element that is found as condition of validity in all the codes, whether American or French, and probably all over the world. It is the element of unity between all of them. It is the central condition to a marriage as "There is no marriage when there is no consent"[745], however, what is consent and how to make sure it is not defective? Indeed, having the same requirement might not always they are interpreted and seen under the same light.

[745] C.Nap art 146.

"Marriage is a personal relationship arising from a civil contract, to which the consent of the competent parties is necessary"[746]. Consent is considered as the fundamental condition for a marriage, it is one of its base elements. This vision of consent as a fundamental condition for marriage is not innovative and is found throughout history.[747] If all codes recognize it as a valid marriage condition, the New York Civil Code goes further than others by making consent alone the condition of validity to a marriage[748]. The Civil Code of New York innovates by reducing the validity of a marriage to consent only. Before the Civil Code, it was necessary in order for a marriage to be valid in the state of New York to have a celebration[749] or consummation[750] legacy of those former condition, article 35 states that the consent is manifested in any form possible[751]. Even as the Civil Code does not come into force within the state of New York, it is the vision of marriage defined by consent alone will be endorsed by the jurisprudence[752].

[746] NDR Code (1895) §2720.

[747] Westermarck E., *Histoire du Mariage*, Mercvre de France, Paris, 1938, p.1-87.

[748] NY Civ. Code (1865) §34.

[749] *Jacques v. Public Administratior*, 1 Bradf. 499.

[750] *Jacques v. Public Administratior*, 1 Bradf. 499.

[751] N.Y. Civ. Code (1865) §35
« Consent to a marriage may be manifested in any form, and may be proved like any other fact».

[752] *Hayes v. People,* 25 NY 390.

Consent in the civil codes		
	Free	direct
Louisiana	X	
Georgia	X	
New York		X
California	X	
Dakota Territory		X
North Dakota	X	
Montana	X	
South Dakota		X

Consent, according to American civil codes, must be free and direct. The consent to be valid must be free within the states of Louisiana[753], Georgia[754], California[755], North Dakota[756] and Montana[757]. That means that the consent of spouses should not be hampered in any manner whatsoever. As for California and Montana, they did not use the term "free" but "voluntary" to endorse the same idea.

In New York[758], Dakota Territory[759] and South Dakota[760] said consent must be direct, that is to say, it must be stated immediately in person directly at the ceremony and cannot be given for the future.

Two different accents are therefore placed on this notion. On one hand, the importance is put on the absence of vice when another importance is placed on the lack of intermediaries. These differences in vision shows that even if the civil codes implement the same requirement the unity stop tjere as they interpret it differently according to the state, probably because they are following their own states classical

[753] LA. Digest (1808) art 5 et LA. R. Civ. Code (1870) et LA C.Civ (1825) art 91.

[754] GA Code (1861) §1657.

[755] CA. Civ Code (1872) §57.

[756] NDR Code (1895) §2270.

[757] MO. Code (1895) §52.

[758] NY Civ. Code (1865) §37.

[759] DT Code (1877) §37.

[760] SDR Code (1903) §37.

definition of the concept. Those differences also have impact on the defect of consent listed by law.

The defect of consent in the Civil Codes					
	Violence	Mistake	Abduction	Fraud	Capacity
Louisiana	X	X	X		
Georgia[1]	X			X	
New York	X			X	X
California	X			X	
Dakota Territory	X			X	
North Dakota	X			X	
Montana	X			X	
South Dakota	X			X	

Defect of consent are fundamental because in the case that consent to marriage is flawed then the marriage is null and void. If the consent to marriage is not "real" then it is like the marriage never existed before as the person never really agreed to it. Hence, the vices of consent also called defect of consent are cause for marriage annulment. According to the different states, five different defects of consent can be found and only one is found in all civil codes.

The one defect of consent present in all the States is violence. Indeed, the consent must not have been obtained through violence, whether physical or psychological. Louisiana meanwhile goes further because it distinguishes abduction, that is to say the kidnapping, of the bride, from any other forms of violence. It is fundamental to note that violence from one partner is never accepted and tolerated by society hence, such a strong consequence. Mainly this defect is here to protect an unwilling bride from forced marriage.

The next most common cause of defect of consent after violence is fraud. Fraud is consent obtained by machinations, lie or capacity alterations. The only state that does not recognize fraud is Louisiana, however, it recognizes a defect of consent called error which is a form of fraud without the mandatory intent to deceive. The State of Georgia goes into detail explaining that there is fraud if one spouse consent while in a state of involuntary intoxication, but there is no fraud, however, if the intoxication is voluntary. The distinction is here based on the will of the spouse to be intoxicated. If the intoxication is a voluntary act then there should be no consequence for the

intoxicated person as he or she voluntary chose to be in this state, however, on the other hand, the victim of intoxication is protected.

The last vice of consent in the American civil codes is found in the Civil Code of New York which in addition to fraud and violence states that "if either party to a marriage is incapable of consent for want of age or understanding, or is incapable from physical causes, of entering into the marriage state"[761] then the marriage is void. This precise description seems to include all the conditions of “capacity” necessary to get married. The assimilation of capacity and consent here seems logical as this code considers consent to be the only condition for the validity of marriage. As it is impossible to move fully away to the question of capacity in order to protect the vulnerable person New York lawyers therefore add capacity within the consent sphere.

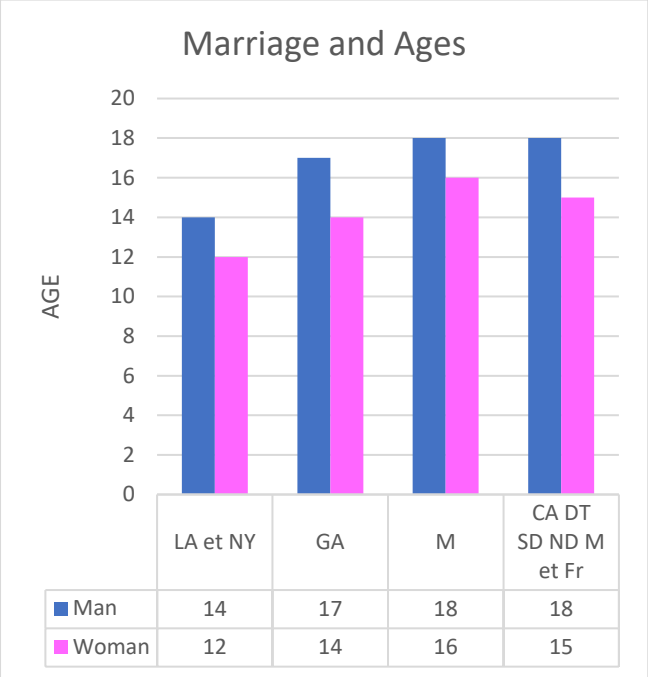
To summarize the defect of consent, the idea is that in the case where the spouse’s consent is altered without their knowledge then the consent is defective and the marriage is null and void.

As for the unity between the ocdes, even as they all implement violence and deception as a defect of consent, it is difficult to say the codes created unity in the defect as those are quite classical defect of consent they existed before and still does.

[761] N.Y. Civ. Code (1865) §39
« if either party to a marriage is incapable of consent for want of age or understanding, or is incapable from physical causes, of entering into the marriage state, or if the consent is either obtained by fraud or force, the marriage is void from the time its nullity is adjudged by a competent court. ».

2.2. The capacity to marry

Does all the civil codes considers the capacity to marry in the same way? The capacity to marry and its definition is strongly attached to the culture and the vision of society of a state. It is with it that is decided who can marry so it is fundamental to see how they appreciate it as it is a way to understand if the states decided to go with an attachment to the state tradition or the go with the idea of code as unification of the law thought the codifying states.



The ability to marry is the fact that the man and the woman must understand that they are being married and what it means to be married. If one of the future spouses does not fulfill the capacity requirement then the marriage is null and void. Different conditions and elements create the capacity. These are found in all codes, even New York that included them in the default of consent.

To get married, spouses-to-be must be a man and a woman who have reached a minimum age. The minimum age for marriage is not the same in all US states and the codes did not have a consensus show s here a will to keep state legal dispositions over unification.

In Louisiana[762] and New York[763] the minimum age is 12 for a woman and 14 years old for a man. In Georgia[764] the legal age is 14 for women and 17 for men. In Montana [765]the woman must have a minimum of 16 years and men 18 years. In the remaining states,[766] the minimum age is 15 years for women and 18 for men, which corresponds to the ages defined in the Code Napoleon[767].

Hence, the concept of minimum maturity to enter a marriage varies from one state to another. The one constant that is found, regardless of the states, is the minimum age for the woman who always is below the age for the man. This difference varies from two to three years depending on the state. The chosen ages also translate the idea that women are supposed to reach maturity before men.

The minimum age to enter a marriage may appear relatively young for today's standard but the reality was different in the 19th century. The fact is despite this relatively young age the spouses-to-be, until they are much older, need the parental or legal guardian's authorization and consent to enter a marriage. Hence, they were not granted full freedom to marry until much later. However, like the age at which a person can marry, the age until which a person need parental consent varies a lot from one state to the other.

> First, in two states parental consent is not required to enter marriage, those are the territories of Dakota and South Dakota, which sets the minimum age to 18 years for men and 15 for women and considers that before that no

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[762] LA. Digest (1808) art 6; LA C.Civ (1825) art 93; LA. RCiv. Code (1870) art 92.

[763] NY Civ. Code (1865) §36.

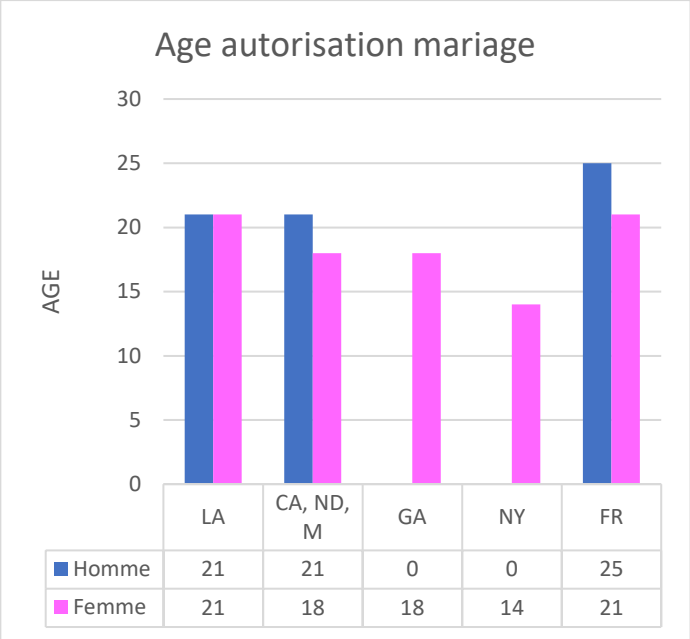
[764] GA Code (1861) § 1654.

[765]MO. Code (1895) § 51.

[766] CA. Civ Code (1872) §56, D.T. Code (1877) §36, N.D. R. Code (1895) §2721, S.D. R. Code (1903) §36.

[767] C.Nap. art 144.

marriage is possible and after that the person is mature enough to make their own marital decision. Two other states, Georgia[768] and New York[769] consider for their part that the man does not need parental authorization regardless of age as long as he reaches the minimum age of 17 in Georgia and 14 in New York.



However, on the contrary, the consideration that the woman needs parental authorization to get married until 18 in Georgia, which is 4 years after the minimum age and 14 years in New York, which is 2 years after the minimum age. For other states, the spouse-to-be needed parental authorization up to the 3 years following the minimum age to get married.

Parental or legal guardian authorization to and for marriage is really important. First because it transcribes the importance of the family on this issue. Marriage is the relationship between two people, but not only that, it is the creation of a link between two families. This explains the importance and necessity of the family agreement to this family merger. Indeed, it is such important authorization and consent that the child needs consent or parental authority which are, according to the US civil code and US law, both parents, the father and the mother. This shows a big difference with the Napoleonic Code that it only requires parental permission.

[768] GA Code (1861) §1653.

[769] NY Civ. Code (1865) §54.

Age and sex are not the only physiological requirements to have the capacity for marriage. In fact, some states require that spouses-to-be have the physical capacity to marry. This ability is reflected in two ways: consummation and the ability to procreate. In Georgia[770] and California[771], wedding consummation is regarded as a condition of validity of the latter and as a proof of having the capacity to marry. Indeed, in Georgia an impotent man is considered unable to marry. In California, the legislature is less specific and simply states that a person incapable physically cannot marry and then makes the consummation of the marriage one of the conditions of validity of the latter. In New York[772], Dakota Territory[773], South Dakota[774] and Montana[775], there is no physical definition of the incapacity to marry and in consequence is not a condition of nullity alone. However, they mention the physical inability to marry and by that they intend: importance, infertility of either party and immaturity because of age. As for the civil code of the state of North Dakota, no physical ability to define the capacity to marry except age is mentioned in the code.

In some States, an additional physiological condition is required, which is the color of the skin. The ban on interracial marriage, that is to say between a free black person and a white person, is found in Louisiana[776] as well as in Georgia[777] and California[778]. The only state that would lift the ban during the nineteenth century was

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[770] GA Code (1861) §1653 and §1654.

[771] CA. Civ Code (1872) § 58.

[772] NY Civ. Code (1865) §39.

[773] DT Code (1877) § 36.

[774] SDR Code (1903) § 36.

[775] MO. Code (1895) § 53.

[776] LA. Digest (1808) art.8, LA C.Civ (1825/1870) art 96.

[777] GA Code (1861) §1664.

[778] CA. Civ Code (1872) §60.

Georgia, which prohibits any marriage between a white and a mixed-raced person until 1865.

Capacity is also defined by the status of a person. This is the situation in which the pre-civil war slaves stand. As they were considered property, they could not marry without the consent of their owners even if the marriage involves two slaves[779]. This marriage ban for slaves would disappear after the American Civil War.

There is also one other particular status in the US, which is the case of the Native American. Regarding the capacity to marry, some US codes recognized the marriage between a Native American and a non-Native American, which are the states of New York[780], Dakota Territory[781], North Dakota[782]And South Dakota[783], but above all they recognize marriage between Native Americans celebrated according to Native American traditions.

The second part of the capacity to marry is the fact that there is no family bond between the spouses-to-be. Those are called impediments to marriage or a marriage ban and are quite classical. These are a way to ensure a degree of social continuity. A certain level of kinship will prohibit marriage for social morality.

The first family link forbidding a marriage is the existence of a valid marriage between one of the spouses-to-be and someone else. It is the interdiction of bigamy

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[779] *Girod v. Lewis*, LA Supreme Court, 1819
LA. Digest (1808) art.8, LA C.Civ (1825/1870) art 96; GA Code (1861) §1664 to 1666.

[780] NY Civ. Code (1865) §42.

[781] DT Code (1877) §42.

[782] NDR Code (1895) §2728.

[783] SDR Code (1903) §42.

and all codes prohibit it[784]. In practice, this means that it is not possible to enter into marriage before the dissolution of the first. This is one of the most traditional impediments to marriage and is found in most societies of the world. It allows the parentage of a child to be ensured.

Then there are the traditional family links prohibiting a marriage, which will vary to a certain level according to the codes.

Marriage impediment for family links in the Civil Codes								
	Between or with Ancestors	between or with Descendants	Brother sister Stepbrother stepsister	Uncle/ niece Aunt / nephew	uncle widow	Cousin	Up to the 4th degree	Stepmother or stepfather Stepdaughter Stepson
Louisiana[785]	X	X	X	X				
New York[786]	X	X	X					
Georgia[787]	X	X	X	X	X	X	X	X
California[788]	X	X	X	X				
Dakota Territory[789]	X	X	X	X		X		X
North Dakota[790]	X	X	X	X		X		
Montana[791]	X	X	X	X				
South Dakota[792]	X	X	X	X		X		X
France[793]	X	X	X	X				

[784] LA. Digest (1808) art LA 1808 art 4 ; LA C.Civ (1825) art94, LA. RCiv. Code (1870) Article 93.; ; GA art 1654 ; NY Civ. Code (1865) §Ny art 40; CA Civ. Code (1872) §art 60; DT Code (1877) Art 40; NDR Code (1895) §; ND 2723 ; SDR Code (1903) § ; SD art 40; MO. Code (1895) § ; M ART 55.

[785] LA. Digest (1808) art 9 & 410, LA C.Civ (1825) art 9 & 97, LA. RCiv. Code (1870) Article 94 & 95.

[786] NY Civ. Code (1865) §38.

[787] GA Code (1861) §1655.

[788] CA. Civ Code (1872) §59.

[789] DT Code (1877) §38 and §39.

[790] NDR Code (1895) §2722.

[791] MO. Code (1895) §54.

The first prohibition for kinship is found in all states and prohibit the union between parents, children, brother, sister and half-brother, half-sister.

Then everywhere except New York—which on this issue is the most liberal state—is prohibited the union between uncle and niece and aunt and nephew. Regarding the union between cousins, only Georgia, Dakota Territory, North Dakota, and South Dakota prohibit them.

The next prohibition concerns union with in-laws either by marriage to an ascendant or that of a former spouse. Those are banned in three states: Georgia, Dakota Territory and Dakota South.

The most restrictive state on impediment to marriage for family relationship is the State of Georgia which prohibits unions with the widow of an uncle, and marriage up to 4th degree, including to small nieces and nephews, cousins and grandparents, aunts and uncles.

All these impediments to marriage are prohibitive. This means it does not cancel the marriage but are grounds for annulment and make it null and void.

Those interdictions are definitely not new and nor innovative. Those are classical marriage empidement. They existed before the code and have not changed after it.

Hence, the examination of the question of capacity shows that every time the state had some leniency to change some dispositions and implement their uniqueness, they did it. The capacity discrepancy, whereas it is the age difference, or the physical

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[792] SDR Code (1903) §38 and §39.

[793] C. Nap. art 161 to 164.

capacity requirement though the different states shows that as much as the code can be seen a way of unity thought the states, they were not ready to depart from local law.

2.3. The formal requirements

Even when the necessary consent to the conclusion of a marriage was given and when the man and woman had the capacity to enter a marriage, some extra conditions can be asked and shows once again unity or distinctiveness.

Indeed, some states also require some formal requirements to make the marriage valid. Even the state of New York requires the accomplishment of one formality.

This requirement of formalities is primarily intended there to give publicity to the union. There are two types of required formalities; one is prior to the marriage and is the obtention of the license and the second possible formality is the celebration, the ceremony of marriage. The type of formalities required will depend on the state.

Prior to the celebration of marriage some states may require a license to marry. A man and a woman wishing to marry must obtain a license in the state they wish to be married. Usually it is a document obtained from a county clerk or a clerk of court for a small fee but it can also be free. For example, in South Dakota to obtain the license to marry the future spouses are required to pay the sum of one dollar[794].This document contains basic information on future spouses like their names, date of birth, descent, residence, color, previous union… It allows the various elements relating to the capacity of the future spouses to be checked. The states requiring a license are the states of Louisiana[795], California[796], Montana[797], North Dakota[798] and South Dakota[799].

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[794] SDR Code (1903) §52.

[795] LA. Digest (1808) art 6–11; LA C.Civ (1825/1870) art 99.

[796]CA. Civ Code (1872) §68.

In Georgia[800]the spouses-to-be have a choice: they can either get the license or go with the publication of banns in the Church of the Congregation of the spouses for at least three Sundays before the celebration. They also create an exception for the free people of color, for whom this license obligation or publication of banns is lifted[801].

Surprisingly, the license only requires the living address of the spouses, but not for them to be living in the state they decide to get married in. Indeed, nowhere in the codes' articles is it mentioned that the spouses must be inhabitants of the state they want to be married in.

The other formal requirement possible is the wedding ceremony. This obligation is set up to distinguish between legitimate and illicit unions. The ceremony is allowing the advertising of the marriage. It is through this ritual that marriage is officially celebrated by an authority.

The marriage ceremony is not mandatory in all states. Indeed, some codes such as Dakota Territory[802], Montana[803] and South Dakota[804] recognize common law marriage in lieu of marriage. The common law marriage is a special institution. The common

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[797] MO. Code (1895) § 70.

[798] NDR Code (1895) §27, 24.

[799] SDR Code (1903) §46.

[800] GA Code (1861) §1658.

[801] GA Code (1861) §1665.

[802] DT Code (1877) § 34.

[803] MO. Code (1895) §50.

[804] SDR Code (1903) §34.

law marriage is based on a present agreement between a man and a woman that they are married, without making any document or celebration[805].

The common law marriage does not require a formal ceremony to make the union official and in the same time a simple cohabitation cannot be considered a common law marriage because the spouses "only" have to consider each other as husband and wife and live as if they were. The fact that men and women consider themselves husband and wife and live as such is sufficient and directly affords them husband and wife status[806].

Common law marriage exists for centuries its continuity and recognition can be explained because of US conditions; especially in the 19th century. The country is composed of large areas populated sparsely and sometimes without any accessible legal or religious official to perform the ceremony. Moreover, this type of marriage is more affordable than paying a judge or religious representative to perform the ceremony[807]. The common law marriage corresponds to a very utilitarian view of marriage.

In other states: Louisiana[808], California[809], New York[810] and North Dakota[811]; the wedding ceremony is mandatory. As for the ceremony itself, the law remains vague and leaves them to be relatively free. It is generally stated that the wedding ceremony

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[805] Grant Bowman C., "A feminist proposal to bring back common law marriage", *Oregon Law Review,* 74 (1996), p. 717–750.

[806] Bloomfield M., *American lawyers in a changing society, 1776–1876*, Harvard University Press, Cambridge, 1976, p. 93.

[807] Bloomfield, *American lawyers in a changing society, 1776–1876*, p. 94.

[808] LA C.Civ (1825) art 105; LA. RCiv. Code (1870) Art 107.

[809] CA. Civ Code (1872) §55.

[810] NY Civ. Code (1865) §45.

[811] NDR Code (1895) § 70.

can take any form as long as it meets the criteria described in previous articles about consent and capacity[812].

As for who can officiate the wedding ceremony, the codes are quite open. The marriage may be solemnized by a religious representative or a representative of the State[813]. This raises here a fundamental difference to the French code where for the marriage to be valid it must be solemnized by a civil servant.

The final formal requirement to a marriage celebration is the obligation to have some witness to the wedding ceremony. In California, the officiant serves witness to the marriage. Within the state of New York[814], Dakota Territory[815] and South Dakota[816] it is required that the spouses have a minimum of one witness. The number increased to two for the State of North Dakota[817] and Montana[818]. Finally, it passes to three adults in Louisiana[819]. As for Georgia, no witnesses are required by law.

To be valid, a marriage then needs to fulfill various requirements, from a free and willful consent to the capacity of the man and woman and the formal requirement there is a number of possible conditions to enter this so special contract that is a marriage.

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[812] CA. Civ Code (1872), §71; DT Code (1877) §45.

[813] LA C.Civ (1808/1825/1870) art 102 & 104, GA Code (1861) §1660, N.Y. Civ. Code (1865) §45, CA. Civ Code (1872) §70, D.T. Code (1877) §46, N.D. R. Code (1895) §2724, MO. Code (1895) § art 71, S.D. R. Code (1903) §46 .

[814] NY Civ. Code (1865) §46.

[815] DT Code (1877) §46.

[816] SDR Code (1903) §54.

[817] NDR Code (1895) §2724.

[818] MO. Code (1895) §77.

[819] LA C.Civ (1825) Article 105, LA. RCiv. Code (1870) Article 107.

The study of this subject seems to show that even if all the states respect the principle of conjugality—two persons of the opposite sex entering a marriage who create different rights and obligations—the civil codes do not seem to create a consensus in their requirements. Indeed, even when a state uses another code it adapts those rules, e.g. the minimum age, to fit their particular conditions and culture. If marriage stays different from one state to another how about its dissolution, what about divorce? Are the rules to willingly break the marital bond the same?

3. The voluntary dissolution of the marital relationship, the conditions to divorce

After seeing that the civil code did not brought an unification on the law of marriage conditions, the next step is to see if they might have created one on the marriage dissolution conditions?

The different ways to dissolve the marital bond are the annulment of marriage, death of one of the spouses or divorce[820]. The causes of nullity have already been examined previously and put the person in the situation prior to marriage as if it had never existed, as for the question of death, it is when one of the spouses dies, whatever the cause of the death. A divorce is when a court of law enact that a valid marriage no longer exists. It usually provides for the division of property and makes arrangements for child custody and spousal support, while leaving both parties free to remarry, sometimes under conditions. As divorce is a strong societal act the acceptance of it and its recognized causes are a big point of divergence of the code and showcase their peculiarities.

[820] LA C.Civ (1825) art 133 ; LA. RCiv. Code (1870) art 136; GA Code (1861) §1669, N.Y. Civ. Code (1865) §59 ; CA. Civ Code (1872) §90; D.T. Code (1877) §59; N.D. R. Code (1895) §2736; S.D. R. Code (1903) §66, MO. Code (1895) §130.

Only a single code does not permit divorce, which is the Louisiana Digest of 1808 which only allows the separation from bed and board. The separation from bed and board is the fact that the spouses decided to live separate lives and to stop their marital duties, especially cohabitation, they are separated and living different lives, but the marital bond still exists. It can be proposed as an alternative to divorce especially when there is no fault, or as a first step to divorce. However, legally, the separation does not end the marriage.

As for the usage of divorces in 1867, 10,000 divorces had been granted in the entire territory of the US. To have some elements for comparison, in 1929, 201,468 divorces were granted, which correspond to one every two minutes[821], and in 2019, 782,038 were granted in the territory[822]. Studies show that the number of divorces has increased from a rate of 0.82 in 1870 to 1.83 by 1900[823] which makes divorce a more and more relevant subject for the 19th century society.

3.1. A US divorce for fault exclusively

> "To speak exactly, the law does not allow, nor legalize the divorce … she cannot give a freedom that we have by nature; she does not speak about restricting or confined it in limits that could not be crossed without disrupt society… The law stops there and forsake the usage of divorce to the conscience…"[824]

[821] Cahen A., *Statistial analysis of American Divorce,* Colombia University Press, New York, 1932, p. 15–21.

[822] https://www.cdc.gov/nchs/fastats/marriage-divorce.htm

[823] Cahen A., *Statistial analysis of American Divorce,* p. 130.

[824] Portalis, *Discours Préliminaire Du Premier Projet de Code Civil*, p. 251.

The examination of the causes of divorce legally authorized by the American civil codes shows that only divorces for faults are allowed. Indeed, while in France divorce by mutual consent is recognized under strict conditions by the 1804 civil code[825], the American civil codes do not go as far as to allow no-fault divorce. Hence, the grounds for divorce can only be the result of a relatively serious misconduct on the part of either party to the marriage.

This idea of only allowing a judicial divorce for the innocent party who could prove a fault is in the direct line of the 19th century mentality. Divorce is quite a controversial act in the 19th century society, it has an especially strong impact on women, hence it has to be strongly justified. This explains why a divorce, in which neither person blames the other for the breakdown of the marriage, appears impossible.

The causes of divorce in the 19th century American civil codes							
	Adultery	Conviction	abandonment	Habitual intemperance	Violence	Negligence	Other
Louisiana	X	X	X	X	X		Defamation Attempted murder
Georgia	X	X	X	X	X		Causes of nullity
New York	X		/	/	/		
California	X	X	X	X	X	X	
Dakota Territory	X	X	X	X	X	X	
North Dakota	X	X	X	X	X	X	Madness
South Dakota	X	X	X	X	X	X	
Montana	X	X	X	X	X		
Total	8	7	7.5	7.5	7.5	4	

« A parler exactement, la loi ne permet, ni n'autorise le divorce… Elle ne donne pas une liberté que tous tiennent de la nature ; elle ne parle que pour le restreindre et la circonscrire dans le limites qui ne pourraient être franchies sans que la société fut troublée… La loi s'arrête là et abandonne ensuite à la conscience l'usage du divorce… ».

[825]C.Nap. art 233

In total there are nine other divorce causes recognized within the different 19th century American civil codes. They are presented here in order of frequency that is to say from the most common to the least frequently found within the codes.

Regarding the possible causes of faults, they are quite various but only one are found in all states, it is the divorce for adultery of one of the spouses.

The definition of adultery is relatively similar in the different States. It is defined as a voluntary sexual intercourse between a married person and someone who is not his or her spouse[826]. The state of New York adds meanwhile in its definition of adultery that the divorce for adultery is only valid if one spouse is a resident of the State and the marriage was celebrated in the state of New York[827]. Adultery is also the only valid cause of divorce that this state recognizes. Indeed, all the other causes mentioned in the Civil Code of New York are causes of separation from bed and board and do not grant a divorce.

Three different faults are found in all American civil codes after adultery, although in New York they are just causes of separation. They are the abandonment, habitual intemperance and violence.

Violence is mentioned in the different civil codes under two names. In Louisiana, it is the term violence[828] that is used and not defined but explained. Indeed, the codes specify that violence also includes attempted murder of the other spouse and defamation, which are causes of divorce in themselves. In the other code, violence is called extreme cruelty, it is defined as causing serious bodily or mental harm by one

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[826] LA C.Civ (1825/1870) art 139, GA Code (1861) §1670 ; CA. Civ. Code (1872) §93; D.T. Code (1877) §60; N.D. R. Code (1895) §2738, MO. Code (1895) §133, S.D. R. Code (1903) §68.

[827] NY Civ. Code (1865) §60.

[828] LA C.Civ (182/18705) 138 & following.

spouse to the other[829]. This cause for divorce is not surprising as it is found like adultery in codes all over the world[830]. What makes the difference, and the distinctiveness of the American code is the fact that the psychological violence is sanctioned in addition of the physical one. Sanctioning the two type of violence is quite groundbreaking and innovative at this time in history.

The second cause for divorce is abandonment. It is the desertion of the marital life by one spouse without the consent of the other[831]. In this case a divorce can be granted if one of the spouses decides to stop fulfilling his or her cohabitation duties or for example when one of the spouses disappears, leaving the other alone.

The third ground is called habitual intemperance. It is the fact that alcoholism of a spouse prevents them from functioning like a normal person. That is to say, it prevents them from working properly or it inflicts anxiety and / or impossible living conditions upon the other spouse[832]. This cause for divorce corresponds to what is now considered as non-functional alcoholism. It is a rather unique cause of divorce that is not found in other codes such as the various European civil codes.

These three grounds for divorce show a certain protection by the law and the state of the more vulnerable spouses. It is a way to allow the abused spouse to free themselves from a toxic life environment.

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[829] GA Code (1861) §1671 ; CA. Civ Code (1872), §94; DT Code (1877), §60; NDR Code (1895) §2739; SDR Code (1903), §69; MO. Code (1895) §134 ; NY Civ. Code (1865) §66 because of separation.

[830] For exemple cf C.Nap Art 237.

[831] LA. Civ. Code (1825/1870) art 138 ; GA Code (1861) §1670 ; CA. Civ Code (1872) §95; D.T. Code (1877) §60; N.D. R. Code (1895) §2740; S.D. R. Code (1903) §70; MO. Code (1895) §135; N.Y. Civ. Code (1865) §66 cause de séparation de corps.

[832] LA. Civ. Code (1825/1870) art 138 ; GA Code (1861) §1670 ; CA. Civ Code (1872) §92; D.T. Code (1877) §60; N.D. R. Code (1895) §2742; S.D. R. Code (1903) §72; MO. Code (1895) §144 ; N.Y. Civ. Code (1865) §66 because of the separation from beds and boards.
« Is that degree of intemperance from the use of intoxicating drinks with disqualifies the person a great portion of the time from properly attending to business or which would reasonably inflict a course of great mental anguish upon the innocent party ».

The next most frequent cause for divorce is conviction[833]; every civil code allows divorce for the conviction of one of the spouses except New York.

Most of the civil codes, 5 out of 7 (California, Dakota Territory, North Dakota, South Dakota and Montana) specify that the spouse has to be convicted for a felony. A felony is in the hierarchy of criminal offenses the most serious one. A felony is punishable by more than a year of imprisonment and corresponds to crime like murder, treason, rape, armed robbery…

In Georgia the conviction must be,

> "for an offense involving moral turpitude, and under which he or she is sentenced to imprisonment in the Penitentiary for the term of two years or longer."[834]

A crime for moral turpitude is quite a vague concept as it corresponds to any condemnation for conduct that the public conscience sees as contrary to the rules of morality. This ground seems to have been chosen because first it gives some leniency in case of condemnation and two because it reflects the idea behind this cause for divorce.

As for Louisiana, the conviction has to be for "an attempt of one of the married person against the life of the other"[835] or "when the husband or the wife has been

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[833] LA. Civ. Code (1825/1870) art 139 ; GA Code (1861) §1670 ; CA. Civ Code (1872) §95; D.T. Code (1877) §60; N.D. R. Code (1895) §2737; S.D. R. Code (1903) §67; MO. Code (1895) §132.

[834] GA Code (1861) §1670.

[835] LA Civ. Code (1825/1870) art 138.

charged with an infamous offense, and shall actually flee from justice"[836]. However, to be freed from the marital link through this reasoning, article 139 specifies a separation from bed and board of at least a year.

Whatever the specifics, the idea behind it is the same, to protect the innocent spouse from the crime of the other. It is a reason for divorce that is representative of the 19th century society. At this time, reputation, moral and character are everything so it is important for the state to protect the innocent victim from the disgrace and shame that the sentence of the guilty might cast on their life.

Another reason for divorce that is found within the American civil code is willful negligence. This reason appeared in California and then in all the civil codes that chronologically followed its example (Dakota Territory, North Dakota, and South Dakota). Willful neglect is the fact that the husband does not provide for the necessary needs of his wife, family life and common life. However, this requires an intention, in that the husband had to do this deliberately while he has financial means to do so[837].

Finally, three remaining causes of divorce are found only in certain states. The first is impossible cohabitation, in this case cohabitation between spouses became impossible because of the behavior of one of them. However, no definition of impossible cohabitation is given in the code. In Georgia, it is a cause for divorce[838] whereas in New York it is only a cause of separation[839]. This cause is interesting

[836] Ibid.

[837] CA. Civ Code (1872) §105; D.T. Code (1877) §60; N.D. R. Code (1895) §2741; S.D. R. Code (1903) §71; MO. Code (1895) §143.

[838] GA Code (1861) §1670.

[839] NY Civ. Code (1865) §60.

because it is a divorce for faults but it stays quite open, in a sense it gives some leniency to the spouses to divorce where there is no great offense.

The second cause is also found in Georgia[840], the causes listed in other states as causes of nullity are here listed as grounds for divorce: consanguinity, default of consent or lack of capacity. These are customary causes for annulment here transformed in divorce grounds which make them more shameful to use than to get an annulment. In this line of thinking they add a special reason for divorce based on the deception of the wife, indeed the concealment of a pregnancy prior to marriage is a cause of divorce in itself.

The last possible cause of divorce found within the code is the madness of one spouse and this cause is only found in North Dakota[841]. In this case the capacity of the spouses is altered after the marriage.

The list of the different grounds for divorce shows, despite its diversity, a unity of divorce ground and interpretation of it though the states. This unity exists despite some particularities that may appear with some grounds.

Indeed, all the divorce causes were all enforce with the same idea in mind, the protection of the victim spouse. Hence only divorce for faults involving a damageable or deficient behavior of one of the spouses is legally allowed. The idea of those divorces is to free the innocent spouses while punishing the guilty one. The divorce is then seen as a punishment, as an extra-legal sanction of misconduct and not as a regular the dissolution of contract.

[840] GA Code (1861) §1670.

[841] NDR Code (1895) §2739.

3.2. Overview of the additional conditions for divorce

Divorce is the final dissolution of the marriage; however, grounds for divorce alone are not sufficient. Indeed, some states will add some time and execution conditions to grant a divorce, that are quite similar from one state to the other.

For a few of the above listed grounds for divorce—abandonment, habitual intemperance, willful neglect—some codes require a certain period of damaging action before they can become divorce cases. Usually, the codes require that the offenses had taken place for a minimum of one year before legally becoming grounds for divorce[842]. The idea of an isolated mistake is considered here as forgivable whereas repetition is here seen as punishable.

Speaking of time conditions, in California, there must be a minimum period of one year between the demand for divorce and the divorce[843] and in Louisiana, the couple must be legally separated for at least a year before they can file for divorce[844]. These delays are justified as a way to ensure the seriousness of the spouses and means for spouses to be certain of their choice to break the marriage bond forever. Indeed, a divorce is no ordinary act and the legislature, by adding this delay, ensured that the spouses were thoughtful about what they were asking for: the dissolution of their marriage and family.

[842] CA. Civ Code (1872) §107; D.T. Code (1877) §60; N.D. R. Code (1895) §2743; S.D. R. Code (1903) §73; MO. Code (1895) §145.

[843] CA. Civ Code (1872) §132.

[844] LA C.Civ (1825/1870) section 139.

In order to file for divorce there is also a residence condition asked from the spouses. Indeed, the spouses, or at least one spouse, must be a resident of the State[845] in order to ask for a divorce. The divorce has to be filed at the court of residence of the spouses as the judge is the only competent person to rule on the dissolution of marriage[846].This condition is a way to avoid some spouses living in states that do not recognize divorce coming to the state to get one. It is for this reason that residence is often effective only after a year of living in the state.

As divorce is a legal act taken very seriously there are also elements that will cancel the grounds for divorce. The first cause is the reconciliation of the spouses and/or the forgiveness of the failing by the victim[847]. These impediments are found in all the causes and seem quite normal. Indeed, if the innocent spouse forgives the other, then there is no reason for divorce anymore. One other cancelation element is the fact that the supposedly innocent spouse was in connivance with the one at fault[848], which means they knew or helped the other spouse somehow, or that the guilty spouse made the error with the approval of the other spouse. The last case of divorce impediment is prescription, which means that an unreasonable delay passed between the victim learning of the failing and the divorce request[849]. The unreasonable duration is fixed by law, so it is different from one state to another.

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[845] LA C.Civ (1825/1870) art 151 ; GA Code (1861) §1669 ; N.Y. Civ. Code (1865) §59; CA. Civ Code (1872) §128; D.T. Code (1877) §67; N.D. R. Code (1895) §2755; S.D. R. Code (1903) § 86; MO. Code (1895) §130.

[846] LA C.Civ (1825/1870) art 140 ; GA Code (1861) §1670 ; N.Y. Civ. Code (1865) §59; CA. Civ Code (1872) §132; D.T. Code (1877) §60; N.D. R. Code (1895) §2736; S.D. R. Code (1903) §66; MO. Code (1895) §130.

[847] LA C.Civ (1825/1870) art 149 ; CA. Civ Code (1872) §111; D.T. Code (1877) §61; N.D. R. Code (1895) §2744; S.D. R. Code (1903) §74; MO. Code (1895) §160.

[848] GA Code (1861) §1673; N.Y. Civ. Code (1865) §61; D.T. Code (1877) §61; N.D. R. Code (1895) §2744; S.D. R. Code (1903) §74; MO. Code (1895) §160.

[849] CA. Civ Code (1872) §111; D.T. Code (1877) §61, N.D. R. Code (1895) §2744; S.D. R. Code (1903) §74; MO. Code (1895) §160.

The grounds for divorce are quite varied from one state to another. Aside from the financial and property effects, the effect of a divorce are quite numerous and complex to a point they might require their own dissertation, however, one effect of the divorce has to be nuanced here, which is the effective dissolution of the marriage. This means that according to some civil codes, even the divorce is implemented that doesn't mean the spouses are free to re-enter into a marriage contract.

Indeed, three scenarios are possible according to the civil code. In cases where divorce is pronounced in California, then both parties must simply wait for the pronouncement of the final judgment[850]. In Louisiana, Georgia, and New York it is prohibited for the husband guilty of adultery to remarry during the lifetime of the cheated spouse[851], if he ever remarried, he will face the penalty for bigamy. Finally, the most restrictive are Dakota Territory, South Dakota and Montana, which prohibit the guilty spouse from remarrying, whatever the wrongdoing, during the life of the wronged spouse[852].

This examination of the conditions to divorce shows that opposite to the condition to enter a marriage, the conditions are quite similar from one state to the other and hence, create a form of unity on that matter.

This overview of the content of the American civil codes on one specific legal institution seems to show that despite some inspiration from each other, or even sometimes the use of each other's content, they all keep their particularities and try to enforce their state reality with the different laws the code implements. For a legal institution as important as marriage, the law is evidently adapted to the state's culture

[850] CA. Civ Code (1872) §132.

[851] LA C.Civ (1825/1870) art 161 ; GA Code (1861) §1683 ; NY Civ. Code (1865) §64.

[852] DT Code (1877), §64; SDR Code (1903), §83; MO. Code (1895) §146.

and customs, which show that despite all the inter-influence, the states kept their freedom. The point was not to do a full study of conditions to enter and leave marriage in the US, but to show that even if the codes inspire each other, they do not deny the essence of the state.

Conclusions

In chronological order the American civil codes of the 19th century are : The civil codes of Louisiana from 1808, 1825; the 1860 Project of Civil Code for the state of New York; the Code of Georgia from 1862; the Revised Civil Code of Louisiana of 1870, the Civil Code of California of 1872, the Civil Code of Dakota Territory of 1872, the Revised Code of North Dakota of 1895, the Civil Code of Montana of 1895, and the Revised Code of South Dakota of 1903.

Codification of the Civil law during the 19th century is a shadowed subject which is so unfortunate because those codes are the proof that the common law codes exist and works. Indeed, they teach us a lot the versatility of codification and about the US.

First the examination of the history of the 19th century American civil codes showed us that the main goal behind the code was identified from the start, before even the first common law codes were started. It was in fact first spotted during the American codification movement. The codes, as much as they are a controversial subject, were created to make the law more understandable; they are a tool of clarity.

Hence, the 19th century American civil codes with their clear goals reinforce an element of the definition of codification by enlightening a classical motif of it: making the law clearer. Thought the code is allowed, as they said themselves, “a better understanding of the law.” Indeed, all codes commission recognized the same goal: making the law more understandable, despite having all a very strong story leading to their implementation.

Second, the examination of the code's history per see, shows that they are the conclusion of the long history. They are legal tools in place to enforce the state reality at that special moment in their history; they all exist as a result of diverse elements that work differently but they all have one goal: to help and fix the law.

Third, despite the diversity of the 19th American civil code history what drove them and had influenced them is actually quite similar country-wise. Putting aside the first

legal common motive – rending the law more clear – they all write the code with the intend to putt law into written form and they did it without writing a definition of code and codification. It was like it existed a strong accepted by all definitions of the notion, which was for sure not the case. Despite this lack of definition the codes are a practical tool of clarity and organization. The common goal of all States was to structure and harmoniously combine the law as a coherent whole, which goes straight to the line of understanding of codification in the 19th century, they are a product of rationalization.

Fourth, the legal motives for codification are not the only common ground, indeed all the codifying states knew at some point during their colonial period civil law, whereas it was French law – Louisiana, Dakota Territory, North Dakota, Montana South Dakota - or Spanish law – Louisiana, Georgia, California. Then most of the state that adopted a codification – all except Georgia – were young state in their formative area. They also, all, had an important increase of population in the years preceding the codes and after the code adoption, the number of inhabitants within the states steadied itself. For Dakota Territory and California, the arrival of codification also coincide with the arrival of the railway's expansion within the states. As much as those elements can induce codification they are not enough on their own. In fact, if those were enough all the US states would have a civil code. Those states had an extra push that drove them to codification, it is a codification champion.

Fifth, codification in the US during the 19th century, whereas it was the national debate, or the state endeavor was never led by any national or federal agency, but it is a story of men. Even the two main political parties did not make codification their panacea. Codification in the US is fully detached from any agency. While looking at the codification champion, the surprise was to discover they all knew each other, more precisely they are all linked somehow to David Dudley Field, except, with no surprise, for the man of the Georgia Code. During his drafting year, Field engaged in profuse correspondence with Livingston in Louisiana. His brother then became the Californian

advocate for codification, and the code arrived in Dakota because he sent it to his cousin.

In addition, the men of the codes became codification defender because of their private life experience. Indeed, Sampson and Field became the defender of codification because they stayed in France for personal reason and witnessed the code Napoleon, then all the main code actors were privately connected with each other's. The history of the civil code in the US during the 19th century existed thanks to the private history of men.

Private connection aside, the codification process also had a strong effect on the men interactions. Such a heated and cultural subject turned to be the fuel of disputes between men in Louisiana and New York, disputes that in both cases turns out to and end up really personal, while in the other state it was an endeavor brought by unity.

Sixth, what allowed the spread of the codification within the different states, outside of the men of the codes, is the availability of an already existing model, hence the circulation patterns. Indeed, there is a strong link between the codes. The Louisiana Civil Codes influenced the New York Civil Code, who influenced the California Civil Code and the first Civil Code of the Territory of Dakota. Then, the Civil Code of California influenced the Civil code of the Territory of Dakota, which in turns influenced the Civil code of North Dakota and Montana. Finally, the Civil code of North Dakota influenced the Civil Code of the state of South Dakota. The only code that does not have any official influence on the other codes is the Code of Georgia, even if it was found Georgian dispositions in the Civil Code of California. This circulation pattern shows that all the codes are all linked and works together. They create a codification whole within the territory.

Looking at the 19th century American civil code, what is striking is that one code stood aside from the others during the entire research, it is the Code of Georgia who really distinguished itself from the other common law codes, whereas it was in terms of motive, factors, shape or content. First it is the only old state that adopted a code, code

that was adopted by a democrat's institutions. It is also the only code with a structure based on the Alabama code. The code was the only one written to supplement to common law instead of replacing it and never intended to bring any content based changed in the law, only formal. Indeed the 1865 constitution gives the hierarchy of the law in the state and the code is at the same level as the common law and statutes, not higher not lower to them. George A. Gordon the man behind the Georgia Codes is also the only one that was not connected to the other codes champion.

Seventh, as for the adoption mechanisms of the civil codes they the same in all the states. They all used the legislative way with the vote of the idea of codification, the appointment of the commissioner based on their abilities, the vote of the code itself and its implementation. That process brought a huge change in the law as it went from judicial to legislative. In consequence this change of origins of the law increased the legislative power while in theory limits the power of the judges.

This idea of limitation the judge's powers showed in the intended application of the civil code. They were written to become the main source of law within the state and due to the creation of the rule of application of the code by Professor Pomeroy and the stronghold of the common law tradition they ended up being a subsidiary source of law, which only exists to complete the common law.

Eight, the 19th century American civil, in terms of content, due to their interinfluence the civil codes, have two categories of sources. The primary sources are the intended one and the secondary are the one arising from the retake of the code's models. The US civil codes are transplants from other codes which bring new and unexpected legal content to some new territory e.g., Spanish law in Dakota. The main primary source of the 19th century American civil is the common law while the main secondary source that can be found in all the codes is civil law, more precisely Roman law then French and Spanish law. Which made them a bridge between the two main legal tradition. Especially taking into consideration their shape features who followed the classical 19th century civil law guidelines with the use of legislative style and

language. As for the content of the article the codes, depending on the subject to create a country unity as the disposition regarding divorce shows.

To leave the subject with a few last words I would say that the 19th century American civil codes are an essential but forgotten part of American legal history. With them the history of codification has a new stone to its edifice.

Chronology of the Research

1626	Foundation of the New Netherland colony
1664	The New Netherland become New York and an English colony
1674	New York definitely become English
1681	Foundation of Louisiana by Robert Cavalier de la Salle
1685	New York becomes a royal colony
1752	Georgia become a royal colony
1762	Fontainebleau treaty also call Paris treaty ceding Louisiana to Spain
1765	Colonization of California by Spain
1769	25 November Spain takes possession of Louisiana
1779	Foundation of the 1st law school in the United States: Marshall-Whyte School of Law
1788	New York is the American capital until 1790 and is granted statehood in January Georgia became the 4th state of the Union
1792	Foundation of the Democrat party
1800	September 1st Retrocession of Louisiana to France with the St Ildephonse treaty
1803	May 20 Paris treaty ceding the Louisiana Territory to the United States
1806	June 3: Louisiana Manifesto against the governor June 7: Act allowing the drafting of the Civil Code in Louisiana
1808	March 31 Mars Adoption of the *Louisiana Digest*
1811	*Orleans Navigation Co. V. New Orleans* in Louisiana
1812	Janvier 1st constitution in Louisiana Louisiana is granted statehood
1817	Foundation of Harvard School of Law *Cottin v. Cottin* in Louisiana
1820	Start of the *American Codification Movement*
1821	Alta California became Mexicana
1822	March 14 Appointment for the revision of the Louisiana Digest
1824	April 12 Adoption of the legal practice code in Louisiana
1825	June 20 Adoption of the *Civil Code of the State of Louisiana*
1827	*Fowler v. Griffith*, and *Lacroix v. Coquet* in Louisiana
1828	*Great Repealing Act* in Louisiana
1846	New York constitution with the article on the codification
1847	April 8 1st commission for the codification of the law in New York
1848	Adoption of the Civil Procedure Code in New York February 2 Guadeloupe Hidalgo treaty ceding California from Mexico to the US
1849	Appointment of a new codification committee in New York
1850	California is granted statehood and adopt the *common law*
1851	There is now 19 law school in the US
1852	*Code of Alabama*
1852	Foundation of the Republican Party
1857	April 6 Appointment of a new codification commission in New York
1858	November 9 Act for the drafting of a code Georgia
1860	End of the *American Codification Movement*
1861	1ere presentation of the Civil Code for the state of New York: adoption and veto January Georgia ceases from the Union
1862	Adoption of the Georgia Code Extension of the work schedule for the New York civil code commission 1st legislature of Dakota Territory July 1st *Pacific Railroad Act*
1863	Adoption of the *Code of Georgia*
1864	Creation of the Montana Territory
1865	Adoption of the New York Civil Code in Dakota Territory February 13 Adoption and veto of the *Code civil for the state of New York*
1867	*Revised Code of the state of Georgia*
1868	Post-civil war Constitution in Louisiana October 21 Act for the revision of the Civil code and civil practice code in Louisiana
1870	Appointment of a commission for the drafting of a civil code in California March 14 mars Adoption du *Revised Civil code of Louisiana*
1872	Adoption du *Code Civil of the State of California*
1873	Revision of the Georgia Code
1878	Adoption + veto for the civil code in New York
1879	End of the Cowboy railroad line
1893	Appointment of a commission for the revision of the code of North Dakota
1895	Adoption of the *Code of the state of North Dakota* Adoption of the *Code of the state of North Dakota* in South Dakota Adoption of the *Code of the state of Montana*
1901	Appointment of commission for the revision of the code in South Dakota
1903	Adoption *Code of the state of South Dakota*

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Past members of the South Dakota legislature, sdlegislature.gov;

South Dakota Past Governors Bios, nga.org

www.aals.com

https://www.ourdocuments.gov/

https://www.american-rails.com/chicago-and-north-western.html

https://www.cdc.gov/nchs/fastats/marriage-divorce.htm

A photographic history of South Dakota https://ujs.sd.gov/

Généalogie Field : https://www.wikitree.com/

Maps

"California Map", Johnson, 1867

Northern Plains, Johnson 1864 and 1870

Louisiana 1895 New Orleans 1873 Historical Map

PHD

Elston (Caroline), The civil code : an enduring and influential institution, thésis présented to the faculty of Carlifornia State University, 2006.

John W. Cairns, *Codification, transplants and history : law reform in Louisiana (1808) and Quebec (1866),* 2015.

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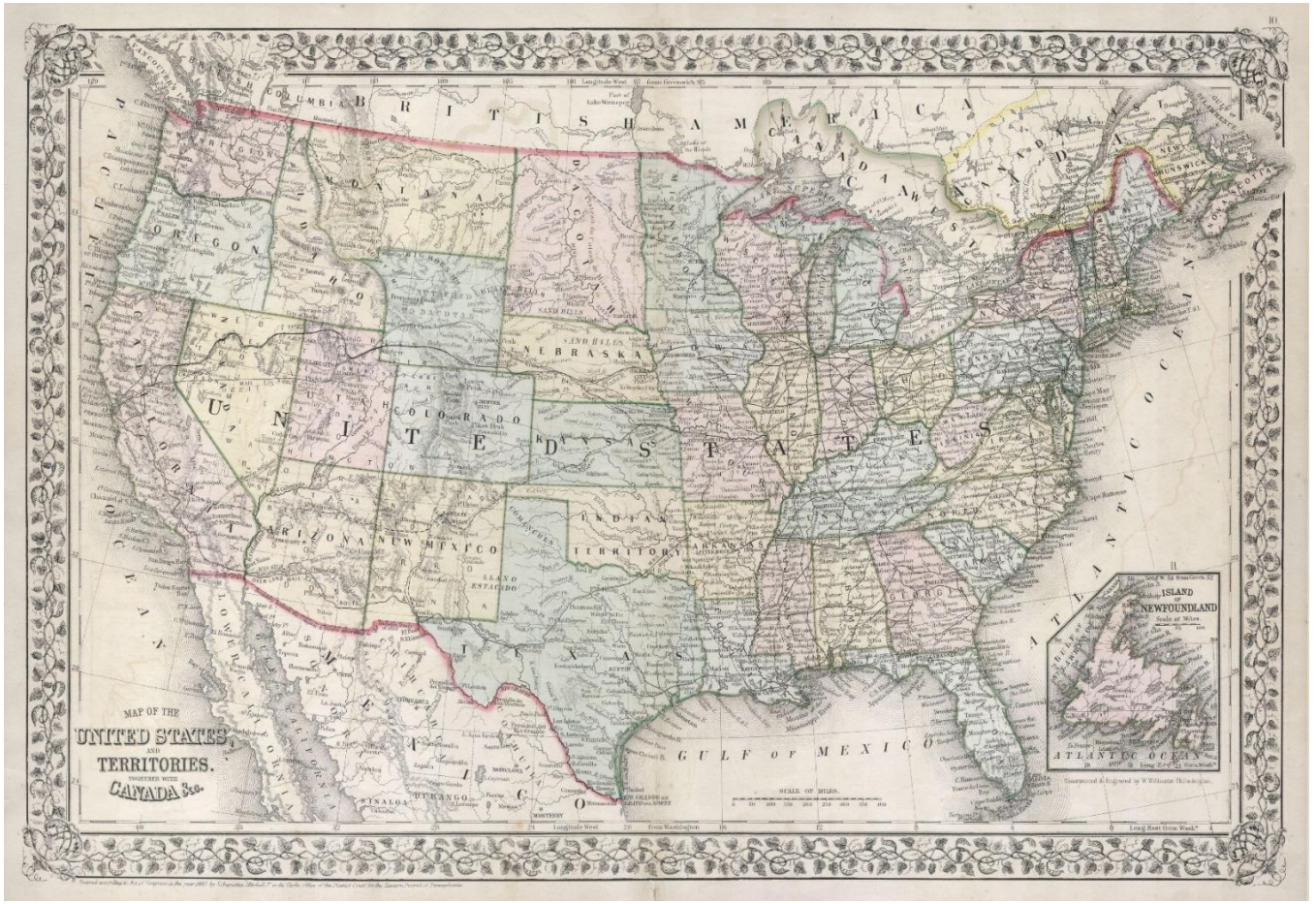
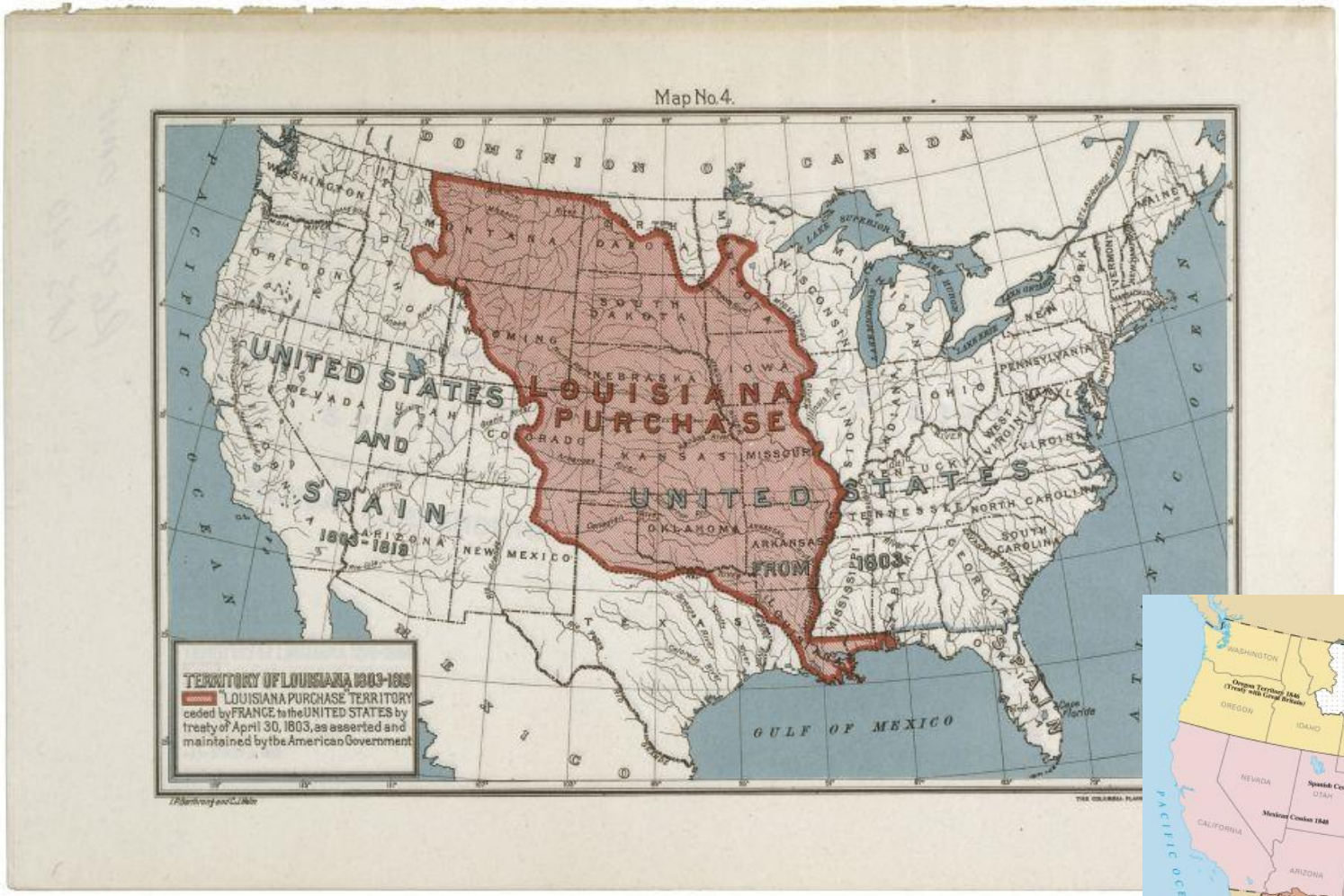
Zaradny Aude, Codification et Etat de droit, Université Panthéon-Assas Paris 2, 2011, 911p.

Annexes

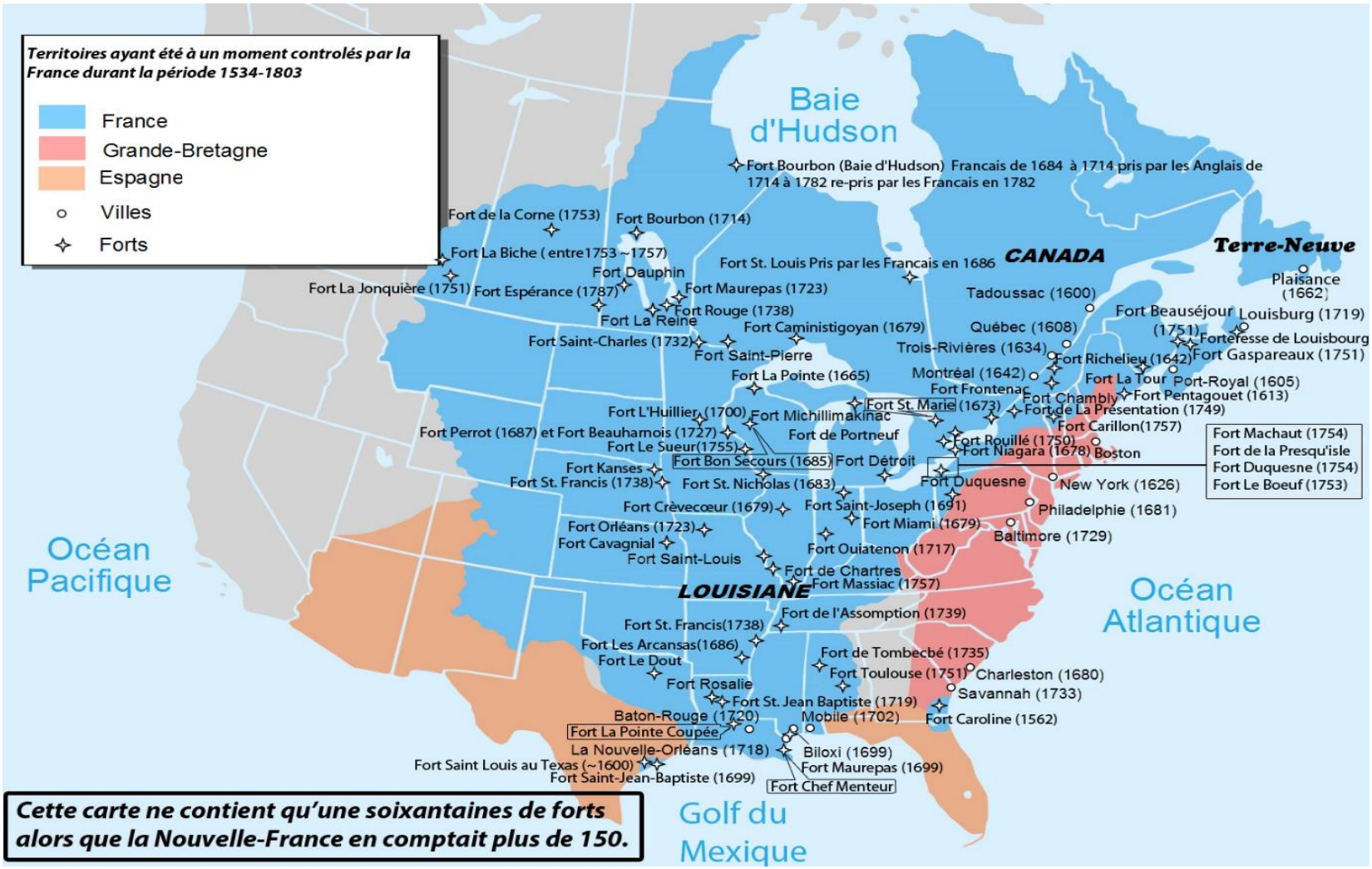
1. **19th-century map of the United States**



2. The Louisiana Purchase



3. Map of the American colonies



4. Political party and legislature in regards of the codes milestones

State	Adoption of the codes			Nomination of the commissions		
	Governor	Chamber	Senate	Governor	Chamber	Senate
Louisiana	Démocratics-républicains 1808	Democratics-républicains 1808	Démocratics-républicains 1808	Démocratics-républi ains 1806	Démocratics-républicains 1806	Démocratics-républicains 1806
Louisiana	Démocratics-républicains 1825	Démocratics-républicains 1825	Démocratics-républicains 1825	Démocratics-républicains -1822	Démocratics-républicains 1822	cratics-publicains 822
Louisiana	1870	1870	1870	1868	1868	1868
Georgia	1860	1860	1860	1858	1858	1858
New York	1860-1865	1860-1865	1860-1865	1860-1865	1858-1865	1858-1865
California	1872	1872	1872	1870	1870	1870
Dakota Territory	1877	1877	1877	No commission because adoption of the New York Civil Code		
North Dakota	1895	1895	1895	1893	1893	1893
South Dakota	1903	1903	1903	1901	1901	1901
Montana	1893	1893	1895	1889	Coalition car égalité 1889	Coalition car égalité 1889

5. The commissions and commissionner

State	Date	Nomination	Duration	Salary	Name of the commissioners	Date	Training	Profession	Political orientation
Louisiana Code Commission	1808	Legislature	24 months	2000$	Louis Moreau Lislet	1768 1832	Faculté de droit Paris	Lawyer, Judge	Democratic-republican
					James Brown	1766 1835	Apprenticeship (Kentucky)	Virginia Governor, American ambassador in France	Democratic-republican
Louisiana Revision Commission	1825	Legislature	3 ans	1000$	Edward Livingston	1764 1836	Apprenticeship (New York)	Lawyer, member of the American congress	Democrat
					Louis Moreau Lislet	1768 1832	Faculté de droit Paris	Lawyer, Judge	Democratic-republican
					Pierre Derbigny	1769 1829	Faculté de droit Paris	Lawyer, Louisiana Supreme Court Judge	Whig

Georgia Code Commission	1860	Legislature	24 months	4 000$	David Irwin	1807 1886	Apprenticeship (Georgia)	Lawyer, Judge	Whig /Unionist
					Thomas R.R. Cobb	1823 1886	Apprenticeship (Georgia)	Lawyer	Secessionist
					Richard H. Clark	1824 1896	Apprenticeship (Georgia)	Lawyer, créateur de la faculté de droit de Géorgie	Secessionist
New York State commission of the Code	1860	Legislature	5 Years	No salary planed	William Curtis Noyes	1805 1864	Apprenticeship (New York)	Lawyer	Republican
					Alexander W. Bradford	1815 1867	Apprenticeship (New York)	Lawyer	?
					David Dudley Field	1805 1894	University & Apprenticeship (New York)	Lawyer	Democrat / liberal Republican
Louisiana Revision Commission	1870	Legislature	24 months	15 000$ for Ray	John Ray Main writer		Apprenticeship (Louisiana)	Lawyer, landowner	
					Isaiah Garrett assistant	1845 1897	Apprenticeship (Louisiana)	Lawyer, Solider	Democrat
					Franklin Garett Assistant	1840 1896	Apprenticeship (Louisiane)	Lawyer, Soldat	Democrat
					F. A. Hall assistant			Colonel	
California Revision Commission	1870	Legislature	24 months	3 000$	Creed Haymond	1836 1893	Apprenticeship (California)	Solider, Lawyer	Republican
					John C. Burch	1826 1885	Apprenticeship (Missouri)	Miner, Lawyer, California Senator	Democrat

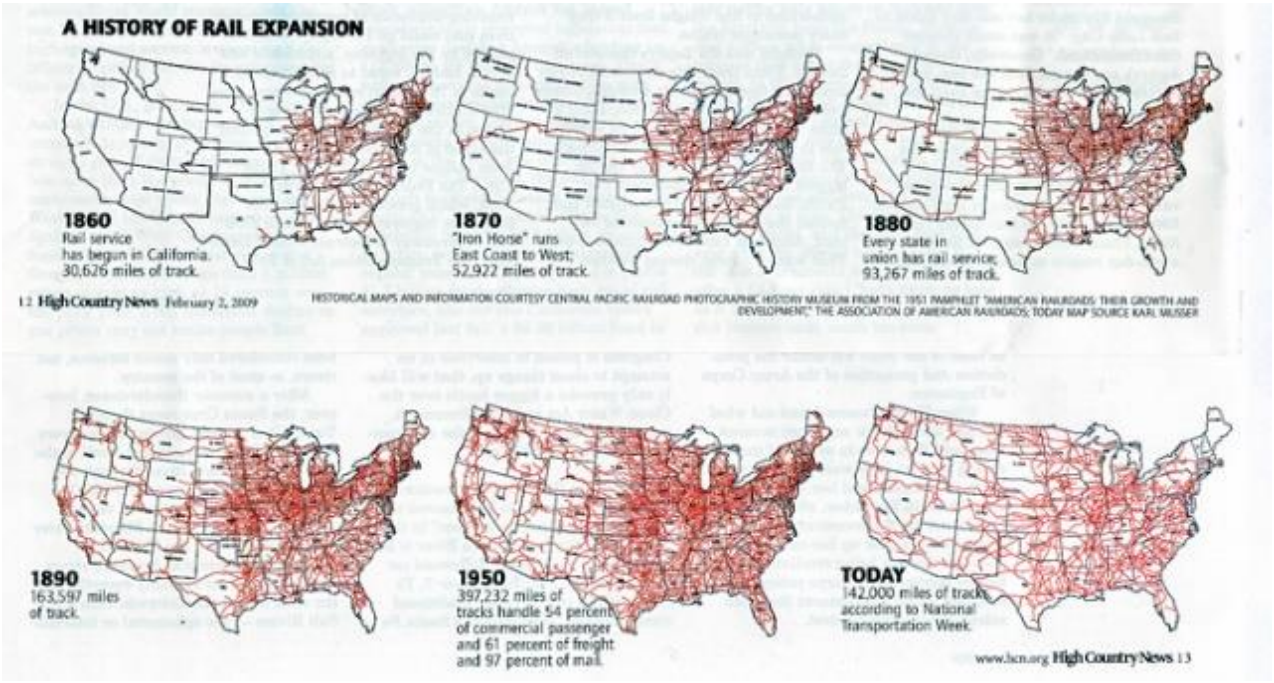
					Charles Lindley	1822 1882	Yale law school	Lawyer, Judge	Republican
Dakota Territory Revision Commission	1877	Governor	24 months	800§	Peter C. Shannon	1821 1899	Apprenticeship (Pennsylvania)	Lawyer Pennsylvania Supreme Court Judge	Democrat / Republican
					Granville Bennett	1833 1910	Self-taught (Iowa)	Solider, Iowa Senator	Republican
					Bartlett Tripp	1839 1911	Albany Law School	Lawyer	Democrat
Dakota du Nord	1893	Legislature			Burke Corbet	1855 1934	Apprenticeship (Pennsylvania)	Lawyer	Democrat
					George Withcomb Newton	1838 1927		Businessman, Poet	
					Charles F. Amidon	1856	Apprenticeship (Dakota)	Lawyer, Judge	Democrat
Montana Code Commission	1895	Governor	24 month	4,000$	Decius S. Wade	1835 1905	Apprenticeship (Ohio)	Lawyer, Judge	Republican
					Frederick W. Cole	1837 1895	Self-taught (New York)	Lawyer, Judge	Democrat
					B. Platt Carpenter	1837 1921	Apprenticeship (New York)	Lawyer, Montana State Senator	Republican

6. Chart of the inhabitant in the codifying states 1790–1900

	1790	1800	1820	1840	1850	1860	1870	1880	1890	1900
California	X	X	X	X	92 597	379 994	560 247	864 694	1 213 398	1 485 053
Georgia	82 548	162 685	340 989	691 392	906 185	1 057 266	1 184 109	1 542 180	1 837 353	2 216 331
Louisiana	X	X	153 407	352 411	517 762	708 002	726 915	939 946	1 118 588	1 381 625
Montana	X	X	X	X	X	X	20 595	39 159	142 924	243 329
New York	340 120	589 051	1 372 812	2 428 921	3 097 394	3 880 735	4 382 759	5 082 871	6 003 174	7 268 894
North Dakota	X	X	X	X	X	X	2 405	36 909	190 983	319 146
South Dakota	X	X	X	X	X	4 837	11 776	98 268	348 600	401 570

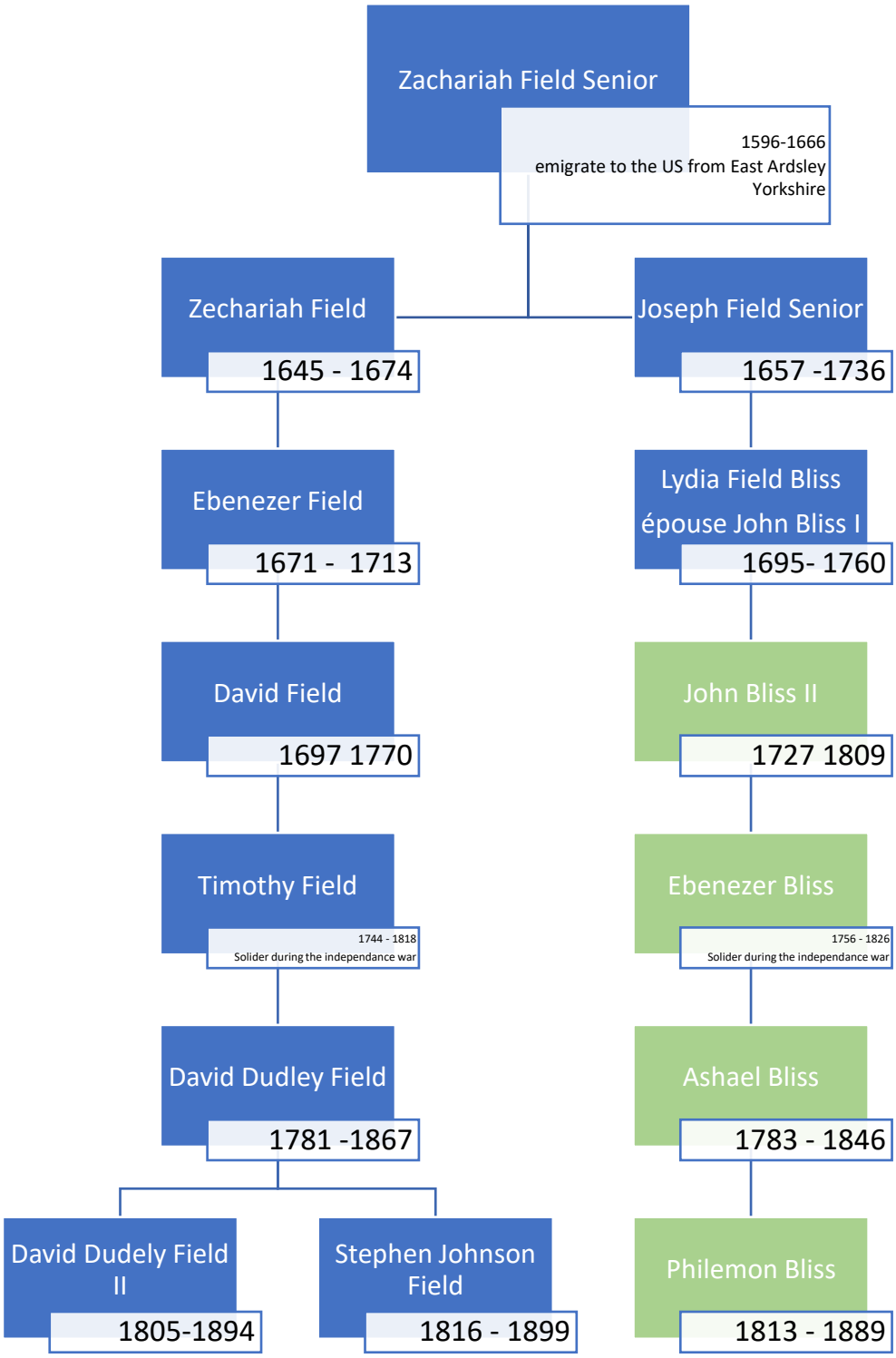
Data from FORSTALL (Richard L.), *Population of states and counties of the United States : 1790–1990,* Department of commerce US Bureau of census population division, March 1996, 225p.

7. Railways expansion during the 19th century



http://users.humboldt.edu:ogayle:hist111/industrial.htm

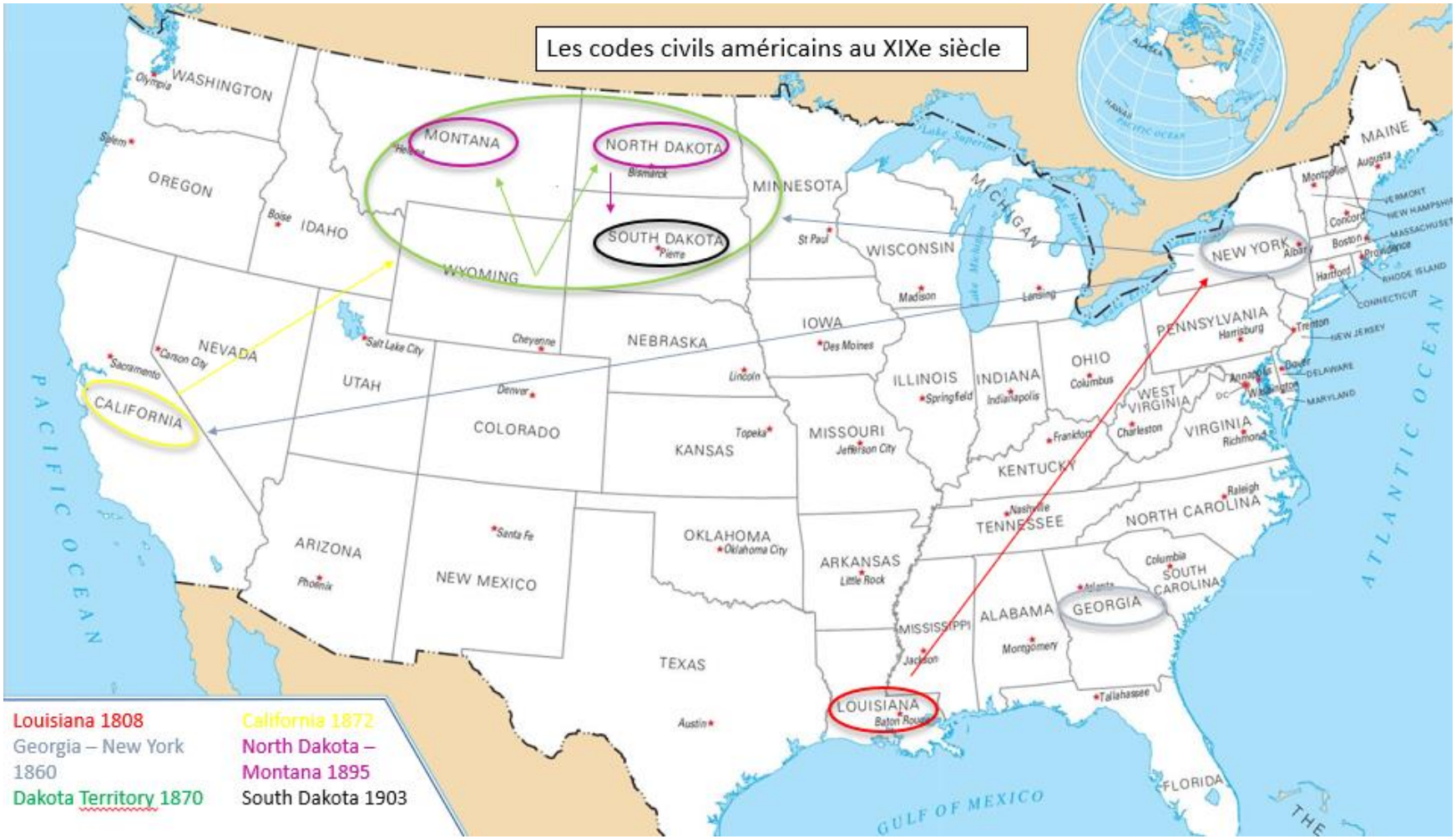
8. Genealogy Field – Bliss



9. Classifications of the American Civil Code

Classification according to the type of codification	
Innovation	Louisiana, New York, California, Dakota Territory
Compilation	Georgia
Recodification	North and South Dakota
Imitation	Louisiana, California, Dakota Territory
Consolidation	Georgia, New York
Classification according the application	
Main source of law	Louisiana
Subsidiary source of Law	Georgia, New York, California, Dakota Territory, North and South Dakota, Montana
Classification according to the document	
Solitary	Louisiana, New York, California
Group codes	Georgia, Dakota Territory, North and South Dakota du Nord, Montana
Classification according to the tradition	
Civil Law	Louisiana
Common law	Georgia, New York
Mixed/ hybrid	California, Dakota Territory, North and South Dakota Montana

10. The circulation patterns of the civil codes on the US



11. The sources of the civil codes

M: Main Source S: Secondary Source	Louisiana	Georgia	New York	Dakota Territory	California	North Dakota	Montana	South Dakota
US Common law		M	M	S	S	S	S	S
English Common law		M	M	S	S	S	S	S
US Statutes		M	M	S	S	S	S	S
English Statutes		M	M	S	S	S	S	S
US Doctrine		M	M	S	S	S	S	S
English Doctrine	M	M	M	S	S	S	S	S
French Doctrine			M	S	S	S	S	S
Local Law	M	M	M	M	M	M	M	M
Coutume de paris	M		M	S	S	S	S	
Roman Digest (CIC)	M	M	M	S	S	S	S	
Spanish Law	M				M			
Code Napoléon	M		M	S	S	S	S	
Mexican Law					M	S	S	S
Code civil of New York				M	M	S	S	S
Codes civils of Louisiana			M	S	S	S	S	
Code civil of California				M		S	S	S
Code civil of Dakota Territory						M	M	S
North Dakota Civil Code								M
Alabama Code		M						

12. Marriage and age according the American Civil Codes

	Age minimal for marriage		Age until parental authorization needed		Shape of the Consent		Article of the code
	Man	Woman	Man	Woman	Oral /written	License or solemnization	
California	18	15	21	18	Written	License	56
Dakota	18	15	18	15		solemnization	36
North D	16	13	21	18		License	2721
South D	18	15	18	15		solemnization	36
Georgia	17	14	None	18	Written	License	1654 1661
Louisiana	14	12	21	21		License	1808: chap 2 art 6–11 ; 1825 : 93 99; 1870 : 92 97
Montana	18	16	21	18	Written	License	51 – 73
New York	14	12					36
France	18	15	25	21	Oral	solemnization	144 148 151->156