

approach rather attractively.¹⁴³ This is Ulpian:

It often happens that people who know the whereabouts of runaway slaves pass this information to their owners. This does not make the informants into accessories to the theft.^[144] Sometimes they even seek a fee for such information. There is nothing illicit about such a fee, so they needn't worry about having to pay it back: there is a *causa* for the payment and it is not unlawful. But suppose that there has been no actual payment, just an agreement that a certain sum will be paid: would a suit lie if the information has been given and the fugitive is recaptured? There is certainly some kind of deal here, not just a bare pact of the non-actionable variety, so a civil action will lie, namely the *actio praescriptis verbis*¹⁴⁵

"Some kind of deal"—a very nice approach. No nonsense about "What do you mean by 'deal'?" or "How does 'deal' fit in with my normative theory of contract?" No wonder Bentham was irritated.

USE OF THE CIVIL LAW IN POST- REVOLUTIONARY AMERICAN JURISPRUDENCE

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I. INTRODUCTION

Men and women in the young American Republic held ancient Rome in esteem, sometimes almost to the point of veneration. They admired its architecture, its language and literature, its public institutions, even its personal names, drawing inspiration from what they knew of classical sources.¹ Current developments in European thought also commanded the attention and respect of many Americans in the years following the Revo-

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1. See generally Meyer Reinhold, *Survey of the Scholarship on Classical Traditions in Early America*, in *CLASSICAL TRADITIONS IN EARLY AMERICA* 1 (John W. Eadie ed., 1976). On American lawyers, see the evidence collected and the remarks in HERBERT A. JOHNSON, *IMPORTED EIGHTEENTH-CENTURY LAW TREATISES IN AMERICAN LIBRARIES 1700-1799*, at xxiv (1978).

143. DIG. 19.5.15 (Ulpian, Sabinus, bk. 42).

144. The slave who ran away stole himself, and those who knowingly harbored him were accessories, fully liable.

145. The *actio praescriptis verbis* was used for claims on a real innominate contract, but it is doubted whether the Edict contained a general formula. See LENEL, *supra* note 9, at 300-12.

lutionary War.² The former colonists had looked to the Continent for support during the War, and they continued to look to the Continent for some of their most basic notions about the right ordering of society.³

The question for anyone interested in the growth of American law, however, cannot rest with noting a general admiration for classical and European ideas. Instead, one must ask whether or not this habit of mind made any substantial difference in the development of American law. On this subject, various opinions have been expressed. Some commentators have minimized any influence coming from civil-law sources.⁴ A few have magnified it.⁵ The dominant view today, however, is undoubtedly the one elegantly expressed by Professor Peter Stein in an article published some twenty-five years ago. Stein concluded that the civil law played its principal role in the education of elite American lawyers.⁶ Although "its impact on the legal practitioners was disappointing," he wrote, "the campaign for civil law had more success in the field of legal education."⁷

Stein found that the study of Roman law served as a broadening and enlightening introduction to the science of the law for young American lawyers.⁸ The civil law provided a happy alternative to immediate immersion in the *arcana* of practice that would otherwise have overwhelmed the beginner required first to sample and then to digest Sir Edward Coke's treatise on Littleton's *Tenures* and the other crabbed learning of the English common law. But that was all. In the courtroom, it made little

2. See M.H. Hoeflich, *Transatlantic Friendships & the German Influence on American Law in the First Half of the Nineteenth Century*, 35 AM. J. COMP. L. 599, 599-601 (1987).

3. See CHARLES F. MULLETT, *FUNDAMENTAL LAW AND THE AMERICAN REVOLUTION 1760-1776*, at 32 (1933); Donald S. Lutz, *The Relative Influence of European Political Writers on Late Eighteenth-Century American Political Thought*, 78 AM. POL. SCI. REV. 189 *passim* (1984).

4. See, e.g., KERMIT L. HALL, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* 10 (1989) ("The civil law tradition contributed only modestly to the origins of American law."); C. Paul Rogers III, *Scots Law in Post-Revolutionary and Nineteenth-Century America: The Neglected Jurisprudence*, 8 LAW & HIST. REV. 205, 206 (1990) (arguing to the effect that "few American lawyers had any knowledge or understanding of French or civilian legal systems").

5. See, e.g., Richard M. Gummere, *The Classical Ancestry of the United States Constitution*, 14 AM. Q. 3 *passim* (1962).

6. See Peter Stein, *The Attraction of the Civil Law in Post-Revolutionary America*, 52 VA. L. REV. 403, 423 (1966), reprinted in PETER STEIN, *THE CHARACTER AND INFLUENCE OF THE ROMAN CIVIL LAW* 431-39 (1988).

7. *Id.*

8. *Id.*

headway.⁹ Other recent work on this subject has reached similar conclusions.¹⁰ American lawyers regarded Roman law and the Continental legal tradition as aids to understanding the overall structure of the law,¹¹ or as scholarly adornment to be used to impress others in the rude environment of their new nation.¹² Civil law served this secondary function; it was not a working component of American jurisprudence.

There is undoubtedly much to be said in favor of this view. The evidence of the ways in which the civil law was used in training young lawyers, unearthed and sifted by Stein, Hoeflich, and other scholars, is undoubted and impressive. To this writer, however, their conclusion seemed unsatisfying, and in its negative implications, actually unlikely. It seemed unsatisfying in that, within a legal system like ours in which so much depends on judges and cases, to speak of civilian influence that makes no difference in the decisional law is to speak of a very marginal sort of influence. It seemed unlikely in that, assuming American lawyers knew and used the civil law for purposes of legal education, systematic thinking, and scholarly adornment, it would be natural to think that these well-springs of admiration would spill over into the cases. Can human minds, even the minds of lawyers, easily keep their interests quite so separate? I thought not.

Dissatisfaction spurred investigation. The scope of the investigation begun in consequence included reading as many

9. *Id.*

10. See, e.g., PERRY MILLER, *THE LIFE OF THE MIND IN AMERICA* 169 (1965) ("In practice the courts and the writers of textbooks did not make such extensive use of the Civil Law as the learned advocates pretended."); M.H. Hoeflich, *John Austin and Joseph Story: Two Nineteenth Century Perspectives on the Utility of the Civil Law for the Common Lawyer*, 29 AM. J. LEGAL HIST. 36, 75 (1985) (arguing that the function of the civil law is "to elevate the study of law to a university level") [hereinafter Hoeflich, *Perspectives*]; M.H. Hoeflich, *Roman and Civil Law in American Legal Education and Research Prior to 1930: A Preliminary Survey*, 1984 U. ILL. L. REV. 718 *passim* [hereinafter Hoeflich, *Roman and Civil Law*].

11. See Charles Donahue Jr., *The Civil Law in England*, 84 YALE L.J. 167, 179-81 (1974) (Book Review); see also F.H. Lawson, *Roman Law as an Organizing Instrument*, 46 B.U. L. REV. 181, 197 (1966); Michael Lobban, *Blackstone and the Science of Law*, 30 HIST. J. 311, 321 (1987) (describing Blackstone as using Roman law "in order to prove that [English law] was a logical structure"); Calvin Woodard, *Progress and Poverty in American Law and Legal Education*, 37 SYRACUSE L. REV. 795, 808 (1986) (finding that the Roman law was important for Langdell in promoting "the notion of 'jural relations' and legal classification").

12. Daniel R. Coquillette, *Justinian in Braintree: John Adams, Civilian Learning and Legal Elitism, 1758-1775*, in *LAW IN COLONIAL MASSACHUSETTS 1630-1800*, at 359, 360-66 (Daniel R. Coquillette et al. eds., 1984); Hoeflich, *Perspectives*, *supra* note 10, at 74 (finding that its function in part is to provide "pleasant excursions into esoteric learning").

American cases decided between 1790 and 1825 as possible, noting whether and in what circumstances Continental sources were used. No one, it appeared, had undertaken this plodding assignment before.¹³ The search entailed looking at all American jurisdictions¹⁴ for which any appreciable number of reports survived from before 1825.¹⁵ There were fourteen in all.¹⁶ To their number were added cases from the various federal courts and United States Supreme Court. Although it would certainly have been burdensome, and probably also unnecessary, to read all the reports, it was possible to keep reading within each jurisdiction until a considerable accumulation of notes from each had developed.¹⁷ At the end of the day, patterns had emerged from these labors, and they are the subject of this Article.

II. EXTENT OF KNOWLEDGE AND USE OF THE CIVIL LAW

A. Evidence of Usage of Civilian Sources

Investigation fully justified doubts about the conclusion that the influence of the civil law was confined to legal education, although it in no way conflicted with the finding that the civil law also served a broader educational purpose for American

13. See Hoefflich, *Roman and Civil Law*, *supra* note 10, at 722. The older studies cited are practically devoid of reference to case law. Lewis C. Cassidy, *The Teaching and Study of Roman Law in the United States*, 19 *GEO. L.J.* 297 *passim* (1931); Roscoe Pound, *The Influence of the Civil Law in America*, 1 *LA. L. REV.* 1 *passim* (1938). The only exception known to me is W. Hamilton Bryson, *The Use of Roman Law in Virginia Courts*, 28 *AM. J. LEGAL HIST.* 135, 138 *passim* (1984) (citing several cases to illustrate Roman influence on Virginia law from the Colonial period up to 1900).

14. Louisiana was omitted because of its civil-law heritage, well surveyed in this context in Shael Herman, *The Influence of Roman Law upon the Jurisprudence of Antebellum Louisiana*, in 2 *THE CLASSICAL TRADITION AND THE AMERICAS* (Wolfgang Haase & Hildegard Temporini eds., forthcoming 1992). See generally GEORGE DARGO, JEFFERSON'S LOUISIANA: POLITICS AND THE CLASH OF LEGAL TRADITIONS (1975); H.F. Jolowicz, *The Civil Law in Louisiana*, 29 *TUL. L. REV.* 491 (1955).

15. A few states, Indiana, Michigan, and Missouri, for example, published one report or only part of one report before 1825. They were not included in the survey because of the small sample they provided.

16. They are Connecticut, Georgia, Kentucky, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, South Carolina, Tennessee, Vermont, and Virginia.

17. For purposes of this Article, evident differences in time and juristic approach between Continental jurists have been largely disregarded. For most purposes, this would be indefensible. To lump Montesquieu (d. 1755) together with Bartolus of Saxoferrato (d. 1357) seems, and in fact is, absurd. However, because the question addressed here is simply the extent to which American lawyers looked outside the common law for inspiration and authority, not the extent of difference and development within Continental law itself, this oversimplification causes relatively little distortion.

lawyers. The survey demonstrated that more than a few American lawyers knew and made use of the civil law in arguments offered in courts, and also that American judges cited the same sources in more than an occasional judicial opinion written between 1790 and 1825. Although the ultimate importance of the civil law in the development of American law is a distinct and more difficult question, Roman law texts and Continental treatises were clearly used in forensic practice by American lawyers and cited by judges in American opinions. Cases from each of the fourteen states surveyed contain references to the civil law and to treatises from within the civilian tradition. Surprisingly, the list includes states like Kentucky and Tennessee, in which one might not initially expect classical scholarship to have flourished at so early a date.

No particular geographic tilt appears in the evidence. The reports of northern states like New Hampshire or Massachusetts produce citations to the civil law with about the same frequency as southern states such as South Carolina or Virginia. It is true that some states produce more usage of civilian sources than others,¹⁸ but there are multiple references to the civil law to be found within the reports of each of the fourteen states surveyed. Some lawyers, of whom Joseph Story is probably the prime example, made more use of the civil law than others. But many lawyers and judges in every jurisdiction surveyed made *some* use of Roman law and Continental treatises. The survey repeatedly showed that it is incorrect to suppose that civilian usage was an isolated phenomenon or the peculiarity of a single region. On the other hand, in no jurisdiction and at no time did usage of the civil law approach anything even approaching parity with the common law. Citation of civilian sources was regular, but it was comparatively infrequent. Continental treatises cited in the American reports were always vastly outnumbered by English cases, including those decided both before and after the American Revolution. As time went on, use of authorities drawn from the civil law was also increasingly overshadowed by references to American cases, including those from within and without the particular jurisdiction involved.

The most frequently cited civilian treatises in the early American reports were those written by seventeenth- and eight-

18. Vermont and Georgia had the fewest civil-law references of the fourteen states surveyed.

eenth-century Continental authors. Research turned up only one reference to a medieval author on the *ius commune*, Bartolus de Saxoferrato (d. 1357), and even this isolated instance seems to have been taken second-hand from a more modern work.¹⁹ American lawyers made occasional use of sixteenth century treatises; those of Andreas Gail (d. 1587)²⁰ and Benvenuto Straccia (d. 1578)²¹ are found in the reports. In total numbers, however, relatively contemporary writers such as Hugo Grotius (d. 1645), Samuel Pufendorf (d. 1694), Jean Domat (d. 1696), J. G. Heineccius (d. 1741), and Robert Pothier (d. 1772) easily predominated over the older, classic treatise writers from the civilian tradition.

Within the 1790-1825 period, the variety in kinds of civil-law authorities cited by American lawyers was considerable. The basic texts of the Roman law—Institutes, Codex, Digest, and Novels—were frequently cited and commented upon. Also used, although with considerably less frequency, were standard commentaries upon those texts, such as the works by Johannes Voet (d. 1713) or Antonius Perezus (d. 1637). The "Natural Law School" was well represented in the American reports. Works by Jean Jacques Burlamaqui (d. 1748), Grotius, and Pufendorf are the most frequently found. Writers on the law of nations, such as Vattel (d. 1784), Jean Barbeyrac (d. 1744), and Cornelius Bynkershoek (d. 1743), also appeared with regularity in the early American reports. Finally, American lawyers also used some of the more specialized Continental writers on particular subjects arising in litigation: for example, Ulrich Huber (d. 1694) on conflicts of laws, Cesare Beccaria (d. 1794) on criminal law, Balthazard Emerigon (d. 1784) on maritime law, and most often, Robert Pothier on commercial law.

English speaking civilian writers also served as a source of American knowledge and usage of the European *ius commune*. Arthur Browne's *Compendious View of the Civil Law* (N.Y., Halsted & Voorhies 1840), Thomas Rutherford's *Institutes of Natural Law* (Cambridge, W. Thurlbourn 1754-56), and Thomas Wood's *New Institutes of the Imperial or Civil Law*

(London, J. Knapton 1730) were probably the most often cited. The more specialized works of Henry Swinburne (d. 1624) and John Godolphin (d. 1678) on the law of last wills and testaments made regular though somewhat less frequent appearances in the early reports.²² The American entrant into this field was Thomas Cooper (d. 1839).²³ Cooper's *Institutes of Justinian with Notes* (N.Y., Halsted & Voorhies 1841) was the first work to relate specifically American case law to the civil law. It deserves to be better known than it is. Judging by the several references to it found in American cases, Cooper's work met a need felt by many American lawyers for a repository of information about the civil law.

As a general matter, when American judges and lawyers commented on the civilian tradition, they normally did so in favorable terms, although they were united in recognizing that the civil law could not have the precedential force of a prior decision of their state courts or that of an English case. For instance, a New Jersey judge described the civil law as useful because it was "founded on the broad basis of immutable reason and justice."²⁴ Counsel in a Pennsylvania case of 1811, arguing for adoption of a principle drawn from Roman law, suggested that it was "clearly a salutary rule; and where there is any color of authority for the application of the rule, it ought to be applied."²⁵ A South Carolina judge similarly spoke of the civil law as "deeply founded in reason and justice," going on to describe the *Digest of Justinian* as "a most valuable mine of judicial knowledge."²⁶ These lawyers evidently admired the civil law and did not feel constrained about applying it to current legal problems.

There is, however, another side. These glowing estimates of the value of civil law were not shared by all American lawyers.

22. For Swinburne, see J.D.M. DERRETT, HENRY SWINBURNE (?1551-1624) CIVIL LAWYER OF YORK (1973). For Godolphin, see DANIEL R. COQUILLETTE, THE CIVILIAN WRITERS OF DOCTORS' COMMONS, LONDON, 186-89 (1988).

23. See DUMAS MALONE, THE PUBLIC LIFE OF THOMAS COOPER 1783-1839, at 222-24 (1926).

24. *Den v. Urison*, 2 N.J.L. 197, 203 (N.J. Sup. Ct. 1807).

25. *Lessee of Cluggage v. Swan*, 4 Binn. 150, 153-54 (Pa. 1811).

26. *State v. Lehre*, 7 S.C.L. (2 Tread.) app. at 809, 814 (1811) (quoting Sir William Jones for the latter); see also *Sturges v. Crowninshield*, 17 U.S. (1 Wheat) 122, 151 (1819) (Counsel cited "that great treasury and reservoir of rational jurisprudence, the Roman law."); *Bean v. Smith*, 2 F. Cas. 1143, 1153 (C.C.D.R.I. 1821) (No. 1,174) ("[T]he light of the civil law to guide our inquiries on this subject" of fraudulent conveyances.); *Betts v. Lee*, 5 Johns. 348, 350 (N.Y. Sup. Ct. 1810) ("The civil law, in its usual wisdom . . .").

19. See *Vandenheuvel v. United Ins. Co.*, 2 Johns. Cas. 127, 161 (N.Y. Sup. Ct. 1801) (apparently cited from a treatise by Roccus).

20. See *State v. Candler*, 10 N.C. (3 Hawks) 393, 398 (1824) (involving the incompetence of a witness previously convicted of forgery in Tennessee).

21. See *Williams v. Grant*, 1 Conn. 487, 490 & n.(a) (1816) (defining Act of God, but perhaps cited from Roccus).

Against them may be set anti-civilian views expressed by other lawyers: a Kentucky counsel who contrasted the purity of American institutions with the vice of the Roman system summed up by the Emperor Caligula,²⁷ or the Indiana lawyer who stigmatized a law from the *ius commune* as a product of "the gloomy times of popery,"²⁸ or the counsel before the United States Supreme Court who described Bynkershoek's treatment of the law of nations as "written in blood."²⁹ Quite sophisticated American lawyers were capable of criticizing basic features of the civil law. Even Joseph Story, ordinarily an enthusiast for civilian learning, himself stigmatized the "metaphysical niceties, and over-curious learning" on conflicts of laws that was to be found among the writings of some of the civilians.³⁰

Any fair treatment of the issue should therefore recognize the complexity found in the early American lawyer's attitude towards the civil law. On the one hand, it contained much that was useful, fair, and wise. It provided lawyers with an "exhaustless store-house of jurisprudence."³¹ Many did not hesitate to use it. On the other hand, the civil law was a system given to overly elaborate distinctions and contradictory opinions. Some Americans also regarded the Roman law as a system more compatible with a tyrannical system of government than with the regime of a free people. The consequence is that disparate opinions about the civil law, both pro and con, appear in the early American reports.

27. See *Elmondorff v. Carmichael*, 13 Ky. (3 Litt.) 472, 492 (1823).

28. *Fuller v. State*, 1 Blackf. 63, 66 (Ind. 1820) (speaking about the law of benefit of clergy and sanctuary); see also *Dumaresly v. Fishly*, 10 Ky. (3 A.K. Marsh.) 368, 377 (1821) (Fishly, J., dissenting) (arguing that American courts should reject such parts of the English common law of marriage as were "tainted by canonical mixtures"); *Ex parte M'Clenachan*, 2 Yeates 502, 507 (Pa. 1799) (rejecting counsel's argument as one that "would disgrace the morality of the Jesuits").

29. *THE AURORA*, 12 U.S. (8 Cranch) 203, 216 (1814); see also *Griswold v. Waddington*, 15 Johns. 57, 62 (N.Y. Sup. Ct. 1818) ("[A] treatise by the hand of a master, but, like the laws of *Draco*, it is written in blood.").

30. JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 14, at 19-20 (8th ed. Boston, Little, Brown & Co. 1983) (1834); see also *Johnson v. Moore's Heirs*, 11 Ky. (1 Litt.) 371, 381 (1822) (criticizing "the senseless jargon of metaphysical disputation" and refusing to enter into "the respective merits of the varying and conflicting systems of the schools"); *Den v. Vanclève*, 5 N.J.L. 589, 632 (N.J. 1819) (containing a contention by counsel that civilian writers should be rejected because they "exhibit a mass of uncertainty and confusion"); J.J. Robbins, *Memorial for the Late Mr. Justice Baldwin* (1779-1844), 6 PA. L.J. 1, 11 (1846) (approving his view that "true law for a free and a young country" should be "unshackled by the specifications of civilians, untainted by the casuistry of schoolmen" (quoting Justice Baldwin)).

31. *Mactier v. Frith*, 6 Wend. 103, 115 (N.Y. 1830).

B. Areas of American Law Making Use of Civilian Sources

In what kinds of cases did references to principles and doctrines found within Continental treatises most commonly appear? The American reports produce a combination of some straightforward, expectable usages and some usages of Continental sources that were quite unanticipated. The primary example of the first consists of maritime disputes, particularly those involving marine insurance. Dealing with problems of international trade and traditionally falling within admiralty jurisdiction, which was itself based on the civil and international mercantile law, such cases provided the most natural situations for citation and application of Continental legal treatises. As a Massachusetts judge stated in 1825, at least "so far as they may . . . be found agreeable" to the common law, the American cases "stand upon the principles of marine or mercantile law."³²

Occasionally, usage of Continental law is found in these maritime cases to the exclusion of common-law rules. For example, in *Brown v. Hartford Insurance Co.*,³³ an early Connecticut case, the outcome depended on determining the standard to be used for interpreting the words of an insurance policy, and the (successful) argument was that the recent, English common-law cases should be rejected in favor of what plaintiff's counsel described as "the ordinances of almost every commercial nation," in which category he placed the regimes of Spain, France, Antwerp, Hamburg, and Stockholm.³⁴ Most American cases, however, stressed the compatibility of common and Continental maritime law, citing the two together. The early reports of virtually every American state, at least those bordering on the Atlantic, produce such maritime cases.³⁵ The treatises found

32. *Griggs v. Austin*, 20 Mass. (3 Pick.) 20, 22 (1825).

33. 3 Day 58 (Conn. 1808).

34. *Id.* at 66 (quotation from counsel's argument, accepted in the court's opinion as also constituting "anciently the law in England," although altered there by more recent decisions).

35. See *THE AURORA*, 14 U.S. (1 Wheat.) 96, 109-11 (1816); *THE TWO CATHERINES*, 24 F. Cas. 424, 430 (C.C.D.R.I. 1821) (No. 14,288); *Hart v. THE LITTLEJOHN*, 11 F. Cas. 687, 687 (C.C.D. Pa. 1800) (No. 6,153); *King v. Middletown Ins. Co.*, 1 Conn. 184, 202 (1814); *Carrere v. Union Ins. Co.*, 3 H. & J. 324, 328 (Md. 1813); *Taggard v. Loring*, 16 Mass. 336, 338 (1820); *Taylor v. Lowell*, 3 Mass. 330, 342-43 (1807); *Scott v. Willson*, 3 N.H. 321, 324 (1825); *Elliott v. Rossell*, 10 Johns. 1, 10 (N.Y. Sup. Ct. 1813); *Hastie & Patrick v. De Peyster & Charlton*, 3 Cai. R. 190, 196 (N.Y. Sup. Ct. 1805); *Vandenheuvel v. United Ins. Co.*, 2 Johns. Cas. 127, 161-63 (N.Y. Sup. Ct. 1801); *Murray v. Sermon*, 8 N.C. (1 Hawks) 56, 58 (1820); *Lapsley & Ikin v. Pleasants*, 4 Binn. 502, 508-09 (Pa. 1812); *Calhoun v. Insurance Co.*, 1 Binn. 293, 308 (Pa. 1808); *Messonier v. Union Ins. Co.*, 10

can lawyers did much the same. Indeed, in the American reports, Mansfield and Pothier seem sometimes almost to have vied for the attention of American lawyers, the former emerging only slightly ahead of the latter in general repute.⁴³

Situations in which Continental law was *not* cited seem equally straightforward. Questions involving interests in real property—the stuff of our law of estates in land—did not normally call for either argument or decision taken from the civil law. Questions of dower and curtesy, not to speak of the elaborate rules relating to contingent remainders and executory interests, required reference to common-law cases to the exclusion of authorities drawn from the civil law.⁴⁴ These were peculiarly English legal concepts. Although some of them had Continental parallels, the parallels were distant enough so that it would have been the comparatist rather than the practicing lawyer who would need or wish to draw upon them, and that is not the sort of need or desire that led to appearance in the case law.

Equally expectable and understandable is the dearth of civil-law citation in cases involving rules of pleading. Among the most arcane and highly developed elements of the common law, precedents on points of pleading both filled contemporary English reports and spawned a considerable treatise literature.⁴⁵ They were repeatedly cited, though not uniformly followed, by American lawyers. Close parallels with Roman law, and any particular need for having recourse to Roman law, were lacking in this corner of the law. Pleading should, of course, be distinguished on this score from the law of civil and criminal procedure, in which important principles of justice could be at stake and in which civil law was in fact sometimes cited.⁴⁶ Within its

43. See, e.g., *Peetle v. Merchants' Ins. Co.*, 19 F. Cas. 98, 102 (C.C.D. Mass. 1822) (No. 10,905) (Story, J.) (favoring Lord Mansfield's approach); see also Peter C. Hoffer, *Principled Discretion: Concealment, Conscience, and Chancellors*, 3 YALE J.L. & HUMANITIES 53, 72-75 (1991). High opinions of Pothier's authority on commercial law questions are also found in English reports of this era. See, e.g., *Cox v. Troy*, 106 Eng. Rep. 1264, 1266 (K.B. 1822).

44. See, for example, the sentiments expressed in connection with the rule in *Shelley's Case* in Lyle v. Richards, 9 Serg. & Rawl. 322, 365 (Pa. 1823) (rejecting proposed application of the maxim "that nothing is law, that is not reason").

45. The period under discussion in fact coincided with renewed attention to the subject in England, culminating in Henry J. Stephen, *Treatise on the Principles of Pleading* (2d ed. Phil., R.H. Small 1831). See generally 13 SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 458-60 (A.L. Goodhart & H.G. Hanbury eds., 1952).

46. See *infra* note 61.

most often cited in them are those of Emerigon,³⁶ Franciscus Roccus (d. 1676),³⁷ Sebastianus Scaccia (fl. 1620),³⁸ and René Josué Vain (d. 1765),³⁹ together with that written by an English judge, Charles Abbott (d. 1832), which was first published in 1802 and which arranged and summed up a great deal of both Continental and English learning on maritime law.⁴⁰

Commercial law is the second area where American lawyers made the most consistent use of Continental sources. Cases dealing with negotiable instruments, the rules of trade, and ordinary principles of agency law referred regularly to Continental sources for guidance.⁴¹ This sort of usage is only to be expected. The civil law on these subjects was considerably more sophisticated than the contemporary common law. Just prior to this period, Lord Mansfield (d. 1793) had himself attempted to remedy some of the imperfections of the English law by importing Continental rules relating to commercial transactions.⁴² Ameri-

S.C.T. (1 Nott & McC.) 155, 160 (1818); *Commonwealth v. Gaines*, 4 Va. (2 Va. Cas.) 172, 181 (1819); see also Stephen B. Presser, *A Tale of Two Judges: Richard Peters, Samuel Chase, and the Broken Promise of Federalist Jurisprudence*, 73 NW. U. L. REV. 26, 35 (1978) (discussing Richard Peters' use of "the technique of admiralty jurisdiction of picking the best rule for America from a variety of sources").

36. Author of *Traité des Assurances et des Contrats à la Grosse* (1783), translated (1811) in the United States as *An Essay on Maritime Loans* (1911).

37. His work, *De navibus et nauis*, was translated as *A Manual of Maritime Law*, and published (1809) in Philadelphia.

38. Author of *TRACTATUS DE COMERCII ET CAMBIO* (1620), a work that was several times reprinted, but for which I have been unable to find any published English translation.

39. Author of *TRAITÉ DES PRISES OU PRINCIPES DE LA JURISPRUDENCE FRANÇOISE CONCERNANT LES PRISES QUI SE FONT SUR MER* (Paris, Chez Menget 1763).

40. Author of *A TREATISE OF THE LAW RELATIVE TO MERCHANT SHIPS AND SEAMEN* (1st ed. James Humphreys 1802).

41. See, e.g., *McHard v. Whetcroft*, 3 H. & McH. 85, 89-90 (Md. 1791) (citing Domat on right of obligor to satisfy bond before date); *Lenox v. Leveart*, 10 Mass. 1, 5 n.(a) (1813) (citing Pothier and Van der Linden on necessity of protest for nonpayment by holder of bill of exchange); *Wright v. Steele*, 2 N.H. 51, 53 (1819) (citing the Roman Law Institutes and Puffendorf in case involving a negotiable instrument executed by a minor); *Chandler v. Herrick*, 19 Johns. 129, 133-34 (N.Y. Sup. Ct. 1821) (citing Pothier on law relating to novations); *Markle v. Hatfield*, 2 Johns. 455, 459 (N.Y. Sup. Ct. 1807) (citing the Digest and Pothier on effect of payment by a forged negotiable instrument); *D'Arcy v. Lyle*, 5 Binn. 441, 446 (Pa. 1813) (citing variety of civilian authors on scope of the law of Pandects in a case dealing with the rights of a factor against his principal). For a fuller treatment of the general subject, see Daniel R. Coquillette, *Legal Ideology and Incorporation IV: The Nature of Civilian Influence on Modern Anglo-American Commercial Law*, 67 B.U. L. REV. 877 (1987).

42. On Mansfield's use of the civil law and the Natural Law School, see J.H. Baker, *An Introduction to English Legal History* 291 (1971); Peter Birks, *English and Roman Learning in Moses v. Macferlan*, 37 CURRENT LEGAL PROBS. 1 *passim* (1984).

technical sphere, pleading nonetheless remained a common-law monopoly in the American courts.

Two areas of the law which at first sight seem to have been likely candidates for using Continental works, the law of slavery and the law relating to church government, also produced surprisingly little evidence of the application of civil law. There were many reported cases on both these subjects in the early American reports. However, fewer of them refer to Continental sources than might be expected. Slavery was not, of course, a living institution in Continental Europe in the early 1800s, as it was in the United States, but the Roman law itself was full of it, and the institution of slavery was commonly treated by writers on natural law.⁴⁷ Except for the State of South Carolina, however, and to a somewhat lesser extent the Commonwealth of Virginia,⁴⁸ American decisions produce relatively few examples of lawyers or judges referring explicitly to the Roman law on the subject.⁴⁹

The explanation for this absence is not immediately apparent in the reports. There, of course, would have been a natural unwillingness to use civilian doctrines in the northern states. The moral ambiguity surrounding the institution may explain the absence of citation in the North to the Roman law, which had sanctioned it. Even in states where slavery existed, thoughtful men doubted its legitimacy and may have hesitated to embrace civilian doctrines on that account.⁵⁰ Moreover, the widespread adoption of express legislation on the subject in

47. See generally ALAN WATSON, *SLAVE LAW IN THE AMERICAS* (1989). My findings on this point are not identical to those of Professor Watson. See *id.* at 65 (finding it a common practice to turn to Roman law for guidance). His study extends to the period after 1825, and perhaps this may account for part of the difference.

48. See *Bull v. Horlbeck*, 1 S.C.L. (1 Bay) 301, 302 (1793) (reporting a statement by counsel that because slavery was unknown in England, "[e]very rule, therefore, respecting slaves, must be taken from the civil law," or else derived from local custom); see also *Wingis v. Smith*, 15 S.C.L. (3 McCord) 400, 402 (1825); *Milledge v. Lamar*, 4 S.C. Eq. (4 Des.) 617, 640 (1816); *Bynum v. Bostick*, 4 S.C. Eq. (4 Des.) 266, 267 (1812). For Virginia cases, see Bryson, *supra* note 13, at 142-44.

49. There are only occasional exceptions, mostly in which natural law principles were invoked to restrict the rights of slaveowners. See, e.g., *Mahoney v. Ashton*, 4 H. & McH. 295, 297, 300 (Md. 1799) (Grotius, Bynkershoek, Pufendorf, and Rutherford cited by counsel for plaintiff in petition of freedom, arguing that enslavement of Africans was incompatible with all justifications for slavery found in these works).

50. See *Almeida v. Certain Slaves*, 1 F. Cas. 538, 539-40 (C.C.D.S.C. 1814) (No. 255) (holding that slaves were not to be treated as property for purposes of prize law because that could not have been the intention of Congress). For a typical judicial expression in a northern state, see, for example, *Cook v. Neaff*, 3 Yeates 259, 260 (Pa. 1801) ("Colour or complexion cannot effect a difference in the great essentials of justice.").

southern states would equally have lessened the occasion to look to the civil law for aid in cases involving slavery. It, nonetheless, must be confessed that these explanations seem only partial, although no other is suggested by the cases. The fact of the absence of frequent Roman law citation, unfortunately, seems clearer than its explanation.

The almost complete absence of civilian citation in cases relating to ecclesiastical governance and property is only slightly easier to explain.⁵¹ There is some evidence to suggest that anti-Catholic views on the part of American jurists lay behind their reluctance to cite Continental writers on ecclesiastical questions.⁵² There were Protestant writers on this subject on the Continent, however, so that religious feelings do not furnish a complete explanation. It seems just as likely that the nature of the common law played a determinative role here. English law had long treated most questions relating to ecclesiastical property as belonging to the secular courts.⁵³ Doctrines drawn from the law of real property, not the canon law, furnished the primary rules of decision. Doctrines imported from the Continent were therefore mostly out of place in England, and this pattern was repeated in the United States.⁵⁴ It is also likely that the issues in some of the American cases, involving conflicting claims between the several religious denominations within the

51. See, e.g., *Mason v. Muncaster*, 16 F. Cas. 1048 (C.C.D.D.C. 1821) (No. 9,247) (citing no civil or canon law in case involving rights in land formerly held by a parish of the Church of England); *United States v. McCormick*, 1 D.C. (1 Cranch) 593, 597-98 (1809) (defining the word "clerk" without reference to original canon law); *Commonwealth v. Spooner*, 18 Mass. (1 Pick.) 235, 241 (1822) (defining the term "ordination" exclusively from American cases and statutes); *Van Vechten v. Paddock*, 12 Johns. 178, 178 (N.Y. Sup. Ct. 1815) (mentioning canon law in case involving delivery of writ on Sunday, but not directly applied).

52. See, e.g., *Baker v. Fales*, 16 Mass. 488, 517 (1820) (effect of schism within a Congregational parish, stressing the "free principles which laid the foundation" for religious life in New England); *In re Corporation of St. Mary's Church*, 7 Serg. & Rawl. 517, 539-40 (Pa. 1822) (suggesting that it was "scarcely possible that the Roman Catholics of the United States of America should not imbibe some of that spirit of religious freedom which is diffused throughout the country"); see also 1 JOHN ADAMS, *Dissertation on the Canon and the Feudal Law*, in *PAPERS OF JOHN ADAMS* 114 (Robert J. Taylor et al. eds., 1977) (American polity established "in direct opposition to the cannon and the feudal systems" (emphasis added)).

53. See generally W.R. Jones, *Relations of the Two Jurisdictions: Conflict and Cooperation in England During the Thirteenth and Fourteenth Centuries*, in 7 *STUDIES IN MEDIEVAL AND RENAISSANCE HISTORY* 77, 102-04 (William M. Bowsky ed., 1970).

54. Some slight reference to Continental works is found in *Turpin v. Lockett*, 10 Va. (6 Call) 113, 119-20 (1804) (questioning constitutionality of a statute ordering glebe lands to be sold for the benefit of the poor).

same area, happened so much less often in Europe that the Continental treatises would inevitably have been of lesser value. As a consequence, American lawyers seem almost consciously to have wished to "start over" in establishing rules for many parts of the ecclesiastical law applied in the United States.

When one moves beyond these relatively clear-cut areas of inclusion and exclusion, firm lines are less easily drawn. Civil-law sources were employed here and there in a great variety of the cases heard by the American courts before 1825. Roman and canon law were cited on questions involving the law of evidence,⁵⁵ in disputes over real⁵⁶ and personal property,⁵⁷ in cases involving procedural rules,⁵⁸ in questions relating to the law of agency and partnership,⁵⁹ in pleas raising the statute of limita-

55. See, e.g., *Spurr v. Pearson*, 22 F. Cas. 1011, 1012-14 (C.C.D. Mass. 1816) (No. 13,268) (citing a wide variety of civilian sources on competency of witnesses); *Townsend v. Bush*, 1 Conn. 259, 267-69 (1814) (discussing and finally rejecting application of Roman-law maxim related to impeaching a negotiable instrument); *Mahoney v. Ashton*, 4 H. & McH. 295, 297, 300-02 (Md. 1799) (citing Bynkershoek, Grotius, Pufendorf, and Rutherford on whether a special verdict from prior trial could be put in evidence before a jury); *Lessee of Cluggage v. Swan*, 4 Binn. 150, 153-54 (Pa. 1811) (citing Roman law on whether testimony of jurors could be admitted to show their own misconduct); *Taylor v. Beck*, 24 Va. (3 Rand.) 316, 345 (1825) (citing the civil law on question of whether endorser of a negotiable instrument was a competent witness in suit alleging note was usurious).

56. See, e.g., *Doe v. Morrell*, Smith Rep. 255, 257 (N.H. 1807) (action for trespass); see also *Atherton v. Johnson*, 2 N.H. 31, 34 (1819) (citing Justinian's *Institutes* on character of adverse possession of land); *Tucker v. White*, 1 N.J.L. 111, 117, 119 (N.J. 1791) (citing Grotius, Barbeyrac, and Vattel on question of rights accruing from possession of an island in Delaware River); *Jackson v. White*, 20 Johns. 313, 322 (N.Y. Sup. Ct. 1822) (citing Pufendorf and Vattel in ejectment action involving property held by alien); *Biggus v. Bradley*, 12 S.C.L. (1 McCord) 500, 502 (1821) (citing Domat and the French *Civil Code* on question involving warranty of title).

57. See, e.g., *Woodbridge & Co. v. Perkins*, 3 Day 364, 373 (Conn. 1809) (citing Domat on transfer of incorporeal rights); *Jarvis v. Rogers*, 15 Mass. 389, 406-07 (1819) (citing Roman-law *Codex* and *Digest*, Heineccius, and Huber on rights of pledges); *Odiorne v. Colley*, 2 N.H. 66, 70 (1819) (citing Pothier in trover action involving sheriff's power to transfer good title); *Betts & Church v. Lee*, 5 Johns. 348, 349-50 (N.Y. Sup. Ct. 1810) (citing Vinnius and the *Digest* on law of accession involving timber). *But cf. Seymour v. Brown*, 19 Johns. 44, 47 (N.Y. Sup. Ct. 1821) (citing, but rejecting, Roman-law texts and Bynkershoek on the law of bailments).

58. See, e.g., *Nicholls v. Hodge*, 18 F. Cas. 180, 181 (C.C.D.D.C. 1825) (No. 10,231) (citing Francis Clerke's *Praxis curiae admiralitatis* on question of scope of review on appeal from Orphan's Court); *Jones v. Henry*, 13 Ky. (3 Litt.) 427, 431 (1823) (citing Pothier to the effect that actions involving principal and surety do not fall within the scope of the rule *res inter alios acta*); *Houghton v. Page*, 2 N.H. 41, 47 (1819) (citing Vattel on special character of penal statutes).

59. See, e.g., *Boardman v. Gore*, 15 Mass. 331, 333 (1818) (Voet was cited by counsel on the question of extent of one partner's power to bind the other.); *Jessup v. Cook*, 6 N.J.L. 434, 441 (1798) (Pufendorf was cited by counsel in question involving apportionment of loss between partners.); *D'Arcy v. Lyle*, 5 Binn. 441, 450 (Pa. 1813) (Heineccius was cited in action by agent against principal.).

tions,⁶⁰ in criminal prosecutions,⁶¹ in disputes about principles of statutory construction,⁶² on questions relating to the law of damages,⁶³ and in many probate matters.⁶⁴ Cases dealing with ques-

60. See, e.g., *Sheftall v. Clay*, R. M. Charlton Rep. 7, 9 (Ga. 1811) (citing Pothier in justification for suspending running of statute in debt claim); *Troup v. Smith*, 20 Johns. 33, 38 (N.Y. 1822) (citing Domat and Vattel for proposition that statute should not be used to reward fraudulent conduct); *Richards v. Bickley*, 13 Serg. & Rawle 395, 399-400 (Pa. 1825) (employing civilian categories of contract to interpret statute of limitations); *Gourdine v. Graham*, 3 S.C.L. (1 Brev.) 329, 330 (1804) (citing Pothier for principle of applicability of statute in trover for conversion of a slave).

61. See, e.g., *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 163 n.(a) (1820) (citing a number of civil-law writers on definition of piracy); *THE EMULOUS*, 8 F. Cas. 697, 702 n.8 (C.C.D. Mass. 1813) (No. 4,479) (citing Grotius on the confiscation of criminal's property); *In re J.V.N. Yates*, 4 Johns. 317, 375 (N.Y. Sup. Ct. 1809) (citing Montesquieu on power of judiciary and necessity of judicial discretion); *Respublica v. Gibbs*, 3 Yeates 429, 432 (Pa. 1802) (finding the argument that requiring a voter to answer possibly incriminating questions was "against the very law of nature"); *Respublica v. Roberts*, 1 Yeates 6, 6-7 (Pa. 1791) (defining adultery in part according to Roman law); *State v. Lehre*, 7 S.C.L. (2 Tread.) 809, 814 (1811) (citing Domat and Roman-law texts in criminal prosecution for libel); *State v. Hobbs & Strong*, 2 Tyl. 380, 381 (Vt. 1803) (citing Beccaria in prosecution of official for torturing suspect). Also suggestive is Mitchell Franklin, *Romanist Infamy and the American Constitutional Conception of Impeachment*, 23 BUFF. L. REV. 313 *passim* (1974).

62. See, e.g., *Heath v. White*, 5 Conn. 228, 233 (1824) (applying the civil law and text from *Codex* to Connecticut statute of descent and distribution regarding rights of illegitimate children); *Callender v. Marsh*, 18 Mass. (1 Pick.) 410, 423, 429 (1823) (citing the Roman-law *Digest*, Heineccius, Pothier, and Jacobus Facciolatus in interpreting the word "repair"); *Simpson v. Coe*, 3 N.H. 85, 87 (1824) (citing Vattel for meaning of word "resident"); *Den v. Urison*, 2 N.J.L. 212, 218 (1807) (citing *inter alia* Roman law as stated by Cicero and laws of Bologna in favor of giving liberal construction to statute); *Respublica v. Richards*, 1 Yeates 480, 483 (Pa. 1795) (ridiculing mechanical construction of statute by citing story from Pufendorf); *Murray v. M'Carty*, 16 Va. (2 Munf.) 393, 397 n.(a) (Va. 1811) (invoking Grotius, Pufendorf, Vattel, and Heineccius in interpreting act regulating the importation of slaves).

63. See, e.g., *Emerson v. Howland*, 8 Fed. Cas. 634, 636 (C.C.D. Mass. 1816) (No. 4,441) (citing Pothier, Domat, and Valin on proper measure of damages for mariner dismissed wrongfully); *Morris v. Phelps*, 5 Johns. 49, 56-57 (N.Y. Sup. Ct. 1809) (citing the Roman-law *Digest* and Pothier on apportionment of damages where title failed as to only part of land conveyed); *Joyce v. Sims*, 1 Yeates 409, 410 (Pa. 1795) (Emerigon cited by both parties on availability of consequential damages in *assumpsit*); *Davis v. Executors of Richardson*, 1 S.C.L. 43, 43 (1 Bay) 105, 106 (1790) (citing Domat on question of proper time for valuing property subject of loss in contract action); see also *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 79-80 (1823).

64. See, e.g., *Penfield v. Savage*, 2 Conn. 386, 388 (1818) (defining statutory guardianship in light of *cura* and *tutela* from Roman law); *Griffin v. Executors of Griffin*, R.M. Charlton Rep. 217, 227 (Ga. 1822) (citing Justinian's *Institutes* in dispute over standards of testamentary capacity); *Erickson v. Willard*, 1 N.H. 217, 230 (1818) (employing Vattel in construing precatory language in a will); *Jackson v. White*, 8 Johns. 59, 61 (N.Y. Sup. Ct. 1811) (Swinburne cited by counsel in case involving interpretation of words of a devise of land); *Fox v. Wilcocks*, 1 Binn. 194, 197 (Pa. 1806) (discussing argument from Denizart and Pothier on liability of personal representative for failure to invest decedent's assets properly); *Legare v. Ashe*, 1 S.C.L. (1 Bay) 187, 187 (1795) (citing Swinburne and Burn on court's ability to probate a lost will).

tions of fundamental and constitutional law also frequently called for citation of principles and authorities drawn from Continental law.⁶⁵ More will be said below about the variety of purposes for which civilian authorities were employed in such cases, but as an initial matter, it is well to emphasize the great variety of cases in which the civil law appeared. The kinds of early American cases in which the reports *do not* contain references to civilian sources turn out to be easier to summarize overall than those that do.

III. FUNCTIONS OF THE CIVIL LAW

When and for what specific purposes did American lawyers and judges most often resort to the civil law? This section examines this question in detail, looking at the patterns of usage made of foreign materials and asking what the results reveal about the habits of mind of the lawyers of the new Republic. Essentially three answers to this question—some expectable, some not—emerge from a systematic examination of the reports. First, the civil law was introduced where the English common law was considered nonexistent, inconclusive, or wrong. Second, civilian writers were cited where fundamental principles of justice were at stake. Third (and initially most puzzling), the civil law was used where it was identical with the common law, but where the English cases were thought to need buttressing by reference to rules drawn from outside its boundaries.

A. *Deficiencies in English Common Law*

The first of the three—deficiencies in the common law—is the most obvious, although the line between cases where there was no common law at all and those where the common law was thought either unacceptable or insufficiently clear turns out to be difficult to draw. It is certain, nonetheless, that real gaps in the English law were perceived by American lawyers, and that these lawyers sometimes used Continental law to fill the gaps. As a South Carolina judge described one such instance, "[t]he case was considered so new and without precedent, that the counsel resorted in their arguments to the authors of foreign countries."⁶⁶

The best known example of "gap perception" is the old

65. See *infra* text accompanying notes 99-118.

66. HENRY W. DESAUSSEURE, *Introduction to Reports of Cases Argued and*

chestnut of the basic, law school property course, *Pierson v. Post*.⁶⁷ In *Pierson*, the question was how a hunter acquired property rights in a wild animal, and for an answer to the question Judge Tompkins found reason to turn to Justinian's *Institutes* and to treatises by Grotius, Pufendorf and his annotator Barbeyrac, as well as to the medieval English "Romanizers," Bracton and Fleta. Professor Donahue has argued that the case could have been decided out of the common law alone.⁶⁸ This is doubtless correct, but this was not how the New York judge stated that he himself perceived the matter. His opinion stated that the English cases had all arisen either under particular statutes, or in disputes between hunters and the owners of land where the animal was taken, and that "[l]ittle satisfactory aid [could], therefore, be derived from the English reporters."⁶⁹ It was in just such circumstances that American judges commonly chose to resort to Continental authorities for answering immediate questions of law.

Pierson v. Post does not stand alone. Civilian texts and commentators defining and explaining ownership by occupancy of wild animals also appear in early decisions from New Hampshire,⁷⁰ New Jersey,⁷¹ and Pennsylvania.⁷² Moreover, the sentiments found in Judge Tompkins' opinion were matched in a wide variety of American decisions.⁷³ Other questions of law on which American lawyers regarded common-law sources insufficient, and had recourse to civil-law traditions in consequence,

DETERMINED IN THE COURT OF CHANCERY OF THE STATE OF SOUTH CAROLINA XXIX (West Publishing Co. 1917) (1817).

67. 3 Cai. R. 175 (N.Y. Sup. Ct. 1805). Its use of civil-law authority is fairly described as, "one very unmodified characteristic of the opinion," in A. JAMES CASNER & W. BARTON LEACH, *CASES AND TEXT ON PROPERTY* 15, 62 (1st ed. 1950).

68. Charles Donahue, Jr., *Animalia Feræ Naturæ: Rome, Bologna, Leyden, Oxford and Queen's County, N.Y., in STUDIES IN ROMAN LAW IN MEMORY OF A. ARTHUR SCHILLER* 39, 57 (Roger S. Bagnall & William V. Harris eds., 1986).

69. *Pierson*, 3 Cai. R. at 177.

70. See, e.g., *Fisher v. Steward*, Smith Rep. 60, 61 (N.H. 1804) (trespass for the taking of a swarm of bees).

71. See, e.g., *Arnold v. Mundy*, 6 N.J.L. 1, 71 (N.J. Sup. Ct. 1821) (citing Vattel to show "transient usufructuary possession" appropriate for fish); *Shepard & Layton v. Leverston*, 2 N.J.L. 391, 394 (N.J. Sup. Ct. 1808) (citing Domat in trover action for taking oysters in a navigable stream); see also *Tucker v. White*, 1 N.J.L. 111, 117 (N.J. Sup. Ct. 1791) (where defendant's counsel argued that the rights to an island in the Delaware River were "scarcely referable to the municipal law of any particular country . . . but [that] we should refer to the law of nature, as in many other cases.')

72. See, e.g., *Wallis v. Mease*, 3 Binn. 546, 552-53 (Pa. 1811) (slander for imputation of the theft of bees).

73. See *infra* notes 74-77.

included: determining rights inter se of two owners who held in severalty a house of which one had precipitously demolished his own half,⁷⁴ fixing correct rules for the abatement of legacies,⁷⁵ deciding if and under what circumstances jurors should be admitted to impeach their own verdict,⁷⁶ and sorting out a difficult procedural question involving what would later be called collateral estoppel.⁷⁷ The judges who decided these cases treated them as matters of first impression. In much the same fashion that Sir William Jones had turned to civilian learning to formulate the law of bailments when English law on the subject was wanting,⁷⁸ American lawyers had recourse to Continental sources in cases that came before them when they believed the common law was insufficient.⁷⁹ No doubt they *could have* made more creative use of the common-law precedents, but the fact is that they did not believe themselves obliged to do so. Apparently they did not think that limiting themselves to English common-law precedents would have been sensible where the precedents would have required stretching.

The law of conflicts provides the most frequently found example of "gap perception" in the pre-1825 American reports. Justice Story, our first and most influential writer on the subject, was an admirer of the civil law. He read widely within its traditions.⁸⁰ Story himself saw no incongruity in resorting to civilian sources in conflicts cases, because he believed that the common law itself had long been aligned with the Continental law on the subject. His professed aim in dealing with the law of conflicts

74. See Doe v. Morrell, Smith Rep. 255, 257 (N.H. 1809) (Judge Smith citing Domat after noting, "I have taken some pains to examine the books in relation to this case, . . . but have not met with much success,").

75. See Nash v. Nash, 2 N.C. (1 Hayw.) 228, 232 (1795) (Judge Haywood remarked: "These books [referring to the works of Swinburne and Godolphin], it must be admitted, are not of the best authority, . . . yet as the rule laid down by them is so equitable in itself, and has not been contradicted by any adjudged case, it seems fit to be adopted in the present case . . ."; see also Delaplaine v. Jones & Seaming, 8 N.J.L. 340, 349 (N.J. Sup. Ct. 1826) (attempting to turn to the civil law in an inheritance dispute when the judge had "not found any reported decision which [could] aid [him] in [his] enquiry,").

76. See Lessee of Clugage v. Swan, 4 Binn. 150, 153-54 (Pa. 1811).

77. See Boardman v. DeForest, 5 Conn. 1, 10 (1823) (citing only Pothier's treatise on obligations).

78. See WILLIAM JONES, AN ESSAY ON THE LAW OF BAILMENTS (1st ed. 1781).

79. For an American example referring to the law of bailments, see BURROWS v. REEVES, 10 S.C.T. (1 Nott & McC.) 427, 428 (1819).

80. See R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY 297 (1985) ("[N]othing sort of prodigious" and including the works of no fewer than forty-seven commentators); see also Roscoe Pound, *The Place of Judge Story in the Making of American Law*, 48 AM. L. REV. 676, 693-94 (1914).

was "to use the works of the civilians, to illustrate, confirm, and expand the doctrines of the common law."⁸¹ He did that and more, expounding a variety of rules and expressions drawn from the civil law which he found had also been "incorporated into the very substance of the jurisprudence" of the new American states.⁸² It is, of course, wrong to oversimplify. Story used many English and American cases, and he was quite capable of criticizing the "over curious learning" of Continental authors.⁸³ He drew selectively from civilian fonts, but he drew from them constantly.

Story's use of civilian treatises is mirrored in many early conflicts decisions from the pens of other American judges.⁸⁴ In an 1803 case, for example, suit had been brought in New York to enforce a promissory note barred by the statute of limitations of that state but not by that of Connecticut, where the note had been executed.⁸⁵ The court invoked the authority of Huber and Emerigon to hold that the courts of one state did "not derogate from their [own] dignity by enforcing the laws of the state where the contract originated."⁸⁶ In a North Carolina case of 1801, involving a choice of law problem in the law of intestate succession, the judge similarly decided the case according to the "principle of the law of nations," citing Vattel's Law of Nations along with English authorities that had adopted the same rule.⁸⁷ The

81. STORY, *supra* note 30, § 16, at 26. For representative comment on Story's use of civilian learning, particularly Ulrich Huber (d. 1694), see ROGER C. CRAMTON ET AL., CONFLICT OF LAWS 3 (2d ed. 1975), and WILLIS L. M. REESE & MAURICE ROSENBERG, CONFLICT OF LAWS 4 (7th ed. 1978). As a judge, Story made frequent use of conflicts principles taken from the *ius gentium*. See, e.g., Van Reimsdyk v. Kane, 28 F. Cas. 1062, 1065 (C.C.D.R.I. 1812) (No. 16,871).

82. *Id.* § 14, at 19.

83. *Id.* § 14, at 19.

84. Citation to foreign authors on conflicts questions by American judges clearly antedated Story's *Commentaries*, which were first published in 1834. See Samuel Livermore, *Conflict of Law*, 2 AM. JURIST 214 *passim* (1829); Kurt H. Nadelmann, *Commentary, Joseph Story's Contribution to American Conflicts Law*, 5 AM. J. LEGAL HIST. 230, 231-32 (1961). For an earlier English example of the same kind of usage, see Hunter v. Poits, 100 Eng. Rep. 962, 963 (K.B. 1791). I agree with Nadelmann that it is a mistake to see Story's work as a "complete break" with prior writing on conflicts, as had been suggested by ERNEST G. LORENZEN, *Story's Commentaries on the Conflict of Laws—One Hundred Years After*, in SELECTED ARTICLES ON THE CONFLICT OF LAWS, 181, 193 (1947). See also Bruce Wardhaugh, *From Natural Law to Legal Realism: Legal Philosophy, Legal Theory, and the Development of American Conflict of Laws Since 1830*, 41 ME. L. REV. 307, 308-21 (1989); Hessel E. Yntema, *The Comity Doctrine*, 65 MICH. L. REV. 9, 31 (1966).

85. See Nash v. Tupper, 1 Cal. R. 402, 415 (N.Y. Sup. Ct. 1803).

86. *Id.*

87. See Williamson's Adm'rs v. Smart, 1 N.C. (Cam. & Nor.) 355, 361 (1801).

law's purpose, he wrote, was "to cherish a spirit of friendly intercourse amongst their respective citizens."⁸⁸ For this purpose, principles drawn from the law of nations seemed helpful, indeed all but required. In the law of conflicts, American lawyers repeatedly turned to Continental sources when they could not find the answers they needed either fully or adequately stated in the English cases.⁸⁹

Areas of legal practice in which sufficient English law did not exist do not, however, exhaust this subject. The early American reports also contain cases in which the English common law was clearly established, but was nonetheless ignored in favor of a rule drawn from the civil law. The clearest example comes from South Carolina. The courts there regularly rejected the common-law rule that no implied warranty of quality existed in the sale of goods. This state, as one judge put it, "will ever continue to be governed by the Civil Law maxim, 'that a sound price

88. *Id.* at 362; see also *Robinson v. Campbell*, 16 U.S. (3 Wheat.) 212, 219 n.(a) (1818) (Justice Todd noted: "The foundations of this doctrine, and of all the other principles concerning the *lex loci*, are laid down by Huberus, in his *Praelectiones*, with that admirable force and precision which distinguish the works of the writers who have been formed in the school of the Roman juriconsults . . ."); *Banks v. Greenleaf*, 2 F. Cas. 756, 757 (C.C.D. Va. 1799) (No. 959) (Judge Washington opening his opinion, "The principles laid down by Huberus, and universally acknowledged, are . . ."); *Woodbridge v. Wright*, 3 Conn. 523, 526 (1821) (quoting Huber and Emerigon on when the *lex fori* governs enforcement of contractual obligations); *Rankin v. Lydia*, 9 Ky. (2 A.K. Marsh.) 467, 477 (1820) (citing Vattel as authority for necessity of comity in case involving seven-year residence by a slave in free territory); *Pearsall v. Dwight*, 2 Mass. 84, 90 (1806) (applying the rationale from Huber's *Praelectiones*, and observing that "no authorities in point have been cited from our books, nor do I recollect any."); *Bryant v. Ela*, Smith Rep. 396, 401 (N.H. 1815) ("The law of nations forms a part of the law of Vermont, and of this State, and every independent State."); *Gibbons v. Livingston*, 6 N.J.L. 236, 283 (N.J. 1822) (employing Vattel to interpret statute involving constitutional relations between New York and New Jersey); *Smith v. Smith*, 2 Johns. 235, 241 (N.Y. Sup. Ct. 1807) (citing *inter alia* the work of Huber and applying the "reasoning of all the elementary writers, and the decisions of courts of justice"); *Desesbats v. Berquier*, 1 Binn. 336, 347 (Pa. 1808) (citing and defending the opinions of Vattel, Huber, Wolfe, and other civilians on conflicts questions involving succession to moveables). *But cf.* *Respublica v. Gaoler of Philadelphia*, 2 Yeates 263, 264 (Pa. 1798) (distinguishing counsel's citation of Vattel as applicable "merely to nations entirely independent on [sic] each other"); *Vaughan v. Phebe*, 8 Tenn. (Mart. & Yer.) 4, 24 (1827) (citing Vattel in slavery case for the rule *lex loci rei sitae*); *Lewis v. Fullerson*, 22 Va. (1 Rand.) 15, 24 (1821) (citing Huber in justification for denying validity to deed of emancipation executed in Ohio).

89. On this inadequacy, see WILLIAM E. NELSON, *The American Revolution and the Emergence of Modern Doctrines of Federalism and Conflict of Laws*, in *LAW IN COLONIAL MASSACHUSETTS, 1630-1800*, at 419 (David R. Coquillette et al. eds., Colonial Soc'y of Mass. vol. 62, 1984). The perception, explained in Nelson's article, is illustrated in *State v. Chandler*, 10 N.C. (3 Hawks) 393, 401 (1824) (Henderson, J.)

requires a sound commodity.'"⁹⁰ He rejoiced that the citizens of his young state were not yet so "hackneyed in arts of deception and fraud" that they would embrace the degenerate regime of caveat emptor in force under English law.⁹¹

Similar instances are to be found in the reports of other states. A few American jurisdictions equally flirted with the civilian rule about implied warranties involving the sale of goods,⁹² and rejection of inherited common-law rules also occurred in other areas of the law. In 1825, for example, the Supreme Court of New Hampshire rejected a line of English cases that permitted enforcement of wagering contracts, expressly adopting instead civil-law authority holding against actionability on the grounds of public policy.⁹³ "The better part of the community here," the judge wrote, "would regret" adoption of the common law on this subject.⁹⁴ In a Connecticut case decided the year before, the supreme court of that state similarly refused to give a reading based on English law to its own statute of descent and distribution.⁹⁵ The court preferred instead the

90. *Barnard v. Yates*, 10 S.C.L. (1 Nott & McC.) 142, 145 (1818). In *Nelson v. Emerson*, 3 S.C.L. (1 Brev.) 48 (1802), the court held, "[O]ur courts of Justice are not bound by the decisions of the English Courts, farther than they may comport with the general principles of law and the genius and policy of our government." *Id.* at 49. For Roman law on the subject, see REINHARD ZIMMERMAN, *THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION* 334 (1990), and F. DE ZULUETA, *THE ROMAN LAW OF SALE* 46-51 (1945).

91. *Barnard*, 10 S.C.L. (1 Nott & McC.) at 150; see also *Stinson v. Bowlware*, 15 S.C.L. (3 McCord) 251, 254 (1825); *Vandehost & Co. v. Mactaggart*, 3 S.C.L. (1 Brev.) 269, 271 (1803); *Parker v. Kennedy*, 1 S.C.L. (1 Bay) 160, 173 (1795). But compare the only slightly veiled criticism of the civil-law rule in *Biggus v. Bradley*, 12 S.C.L. (1 McCord) 500, 501 (1821) (describing South Carolina's adoption of the "more dangerous, if more inviting maxim of the civil law"), and *Ware v. Weathnall*, 13 S.C.L. (2 McCord) 413, 414 (1823) (rejecting the principle, at least in dictum). For an interesting and instructive parallel, albeit with a different result, see M.H. Hoeflich, *Laidlaw v. Organ, Gulian C. Verplanck, and the Shaping of Early Nineteenth Century Contract Law: A Tale of a Case and a Commentary*, 1991 U. ILL. L. REV. 55.

92. See *Fitch v. Brainerd*, 2 Day 163, 189 (Conn. 1805); *Baring v. Reeder*, 11 Va. (1 Hen. & M.) 154, 161-63 (1806); see also *Jollife v. Hite*, 5 Va. (1 Call) 301, 316-17 (1798) (citing Grotius, Domat, and Pufendorf to the same effect in a land plea, although at least the first was probably taken from an English case). *But cf.* *Wilson v. Schackelford*, 25 Va. (4 Rand.) 5, 7 (1826) (rejecting civil law in favor of English law on the subject).

93. See *Perkins v. Eaton*, 3 N.H. 152, 155 (1825) (citing THOMAS WOOD, *A NEW INSTITUTE OF THE IMPERIAL OR CIVIL LAW* 218 (London, Knapp 1730) for the applicable civil law on the subject). Most other American jurisdictions, of course, followed the common law on the subject. See, e.g., *Seixas & Seixas v. Woods*, 2 Cai. R. 48, 52-56 (N.Y. Sup. Ct. 1804); *Shepherd v. Sawyer*, 6 N.C. (2 Mur.) 26, 27 (1811).

94. *Perkins*, 3 N.H. at 155.

95. *Heath v. White*, 5 Conn. 228, 234 (1824).

civil-law rule as "agreeable to the law of nature and reason."⁹⁶ The judge added, "I cannot admit any influence on my opinion from the common law of *England*, which never has been adopted here."⁹⁷

The absolute frequency of such decisions rejecting the common-law in favor of a civil-law rule should not be exaggerated. They were the exception. Against them stand others in which counsel argued that a civil-law rule should be adopted, only to meet with judicial rebuff. "[W]hatever may be the decisions of the civil law," wrote Chancellor Kent after hearing an argument based partly on the Roman-law Digest and Codex and on the Commentaries of Jean Domat, "we must decide this question by the common law of England."⁹⁸ The cases making explicit use of the civil law do, nevertheless, stand as a reminder that American judges faced a real choice of whether or not to "receive" the English common law. Mostly they did receive it.⁹⁹ But this result was by no means a foregone conclusion, and as these examples show, in circumstances where American judges found the common law unsuitable to conditions in the new land or contrary to principles of utility or fairness, the civil law and the learning that went along with it presented them with a lively alternative.

96. *Id.* (quoting *Canaan v. Salisbury*, 1 Root 155, 156 (Conn. 1790)).

97. *Id.* at 235; see also *M'Coul v. Lekamp's Adm'x*, 15 U.S. (2 Wheat.) 111, 117-18 (1817) (discussion of admission in evidence of a merchant's books of account, contrasting civilian practice as shown by Pothier with its general inadmissibility under English common law and approving of inroads in latter rule); *McClain v. Hayne*, 6 S.C.L. (1 Tread.) 212, 227 (1812) ("Many of the principles of our decisions are drawn from the civil law, and are confessedly contrary to the decisions of the English courts."); *Miller v. Beverleys*, 14 Va. (4 Hen. & M.) 415, 419 (1809) (rejecting English common-law decisions "which do not conform to the standard of that justice, which commands us to live honestly, hurt nobody, and render every one his due." (emphasis added)).

98. *Frost v. Raymond*, 2 Cai. R. 188, 191 (Sup. Ct. N.Y. 1804); see also *Martin v. Brown*, 7 N.J.L. 305, 333 (N.J. Sup. Ct. 1799) ("The opinions of public jurists can have but a remote bearing upon a question which is to be governed wholly by our own municipal laws . . ."); *Jackson v. Marshall*, 5 N.C. (1 Mur.) 323, 329-30 (1809) (A claim "will derive very little weight from the consideration that it would have been enforced by a Roman Praetor," if it turned out to be opposed to rules "that have grown out of the condition and positive institutions of the country."); *Commonwealth v. Walker's Executor*, 11 Va. (1 Hen. & M.) 144, 149 (1806) (John Randolph remarking in argument as counsel, "Grotius and Puffendorf have been quoted, as if this question was now before the Legislature. This is not the first time . . .").

99. See the discussion in *Fitch v. Brainerd*, 2 Day 186, 189 (Conn. 1805) (English common law has "as such, nor ever had, any force here yet, . . . it long since became necessary, in order to avoid arbitrary decisions, and for the sake of rules, which habit had rendered familiar, as well as the wisdom of ages matured, to make that law our own . . ." (emphasis added)).

B. Fundamental and Constitutional Principles of Law

Natural law and the *ius gentium* had much to say about fundamental legal principles, and the evidence of the early American reports shows that some of what they said was found relevant and useful by American lawyers. A voluminous treatise literature grew up on the Continent around these twin sources of juristic speculation. Writers like Hugo Grotius or Samuel Puffendorf, men whose names are still known to educated lawyers, developed elaborate and sophisticated legal systems from the tenets of natural law, and one can speak of the existence of a "Natural Law School" during the seventeenth and eighteenth centuries. From the vast treatise literature spawned by this School, judges and counsel in the American Republic drew in appropriate cases. Where questions about basic principles of government were raised in litigation, many lawyers did not hesitate to refer to civilian authority.¹⁰⁰

Some of this ground has already been explored. Reference by American lawyers to Continental sources has been demonstrated by scholars pursuing the "higher law" background to the United States Constitution.¹⁰¹ They have set our Constitution into its contemporary context by showing the debt the Framers owed to natural law thought. For the Framers, their argument runs, constitutions were expressions of a "higher law," rather than simply expressions of the will of a sovereign people. According to this view, the United States Constitution should properly be read within the context of the "Natural Law School" then prevalent in Europe, and it makes sense to speak of fundamental rights embedded in the spirit, though not found in

100. See, e.g., *State v. Delieseline*, 12 S.C.L. (1 McCord) 52, 60 (1821) (citing Grotius, together with English civilian writers and John Locke, in a case raising an issue that involved the nature of republican government); see also Gerald Stourzh, *Constitution: Changing Meanings of the Term from the Early Seventeenth to the Late Eighteenth Century*, in CONCEPTUAL CHANGE AND THE CONSTITUTION 35 (Terrence Ball & J.G.A. Pocock eds., 1988).

101. See Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 365, 380-86 (1928); J.A.C. Grant, *The "Higher Law" Background of the Law of Eminent Domain*, 6 WIS. L. REV. 67, 71 (1931); Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 861-63 (1978); Charles G. Haines, *The Law of Nature in State and Federal Judicial Decisions*, 25 YALE L.J. 617, 622 (1916); Phillip A. Hamburger, *The Constitution's Accommodation of Social Change*, 88 MICH. L. REV. 239, 259-65 (1989); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1167-77 (1987); Franz Wieacker, *The Importance of Roman Law for Western Civilization and Western Legal Thought*, 4 B.C. INT'L & COMP. L. REV. 257, 260-61 (1981).

the exact letter, of constitutional provisions.¹⁰² In doing this, some of these scholars have demonstrated incidentally that civilian sources played a role in forming our Constitutional law, because many of the natural-law principles had their origins in Continental juristic thought.

For purposes of appreciating the place of Continental sources in American case law, it is not necessary to enter into this contentious subject. All that is required is to show that ideas drawn from Continental sources were employed in American cases that raised issues of fundamental legal principle. This is easy to do. Most examples turn out to be either cases in which statutes were interpreted in light of natural-law principles or in which legislative acts were challenged as unconstitutional, although it is true that there were also cases in which the civil law was contrasted with the common law in order to emphasize the latter's merits, or cited as showing the strength of a fundamental legal rule because it had been enforced *even* under the despotic system of Roman law.¹⁰³

The majority of American cases that invoked fundamental legal principles drawn from Continental law did so in straightforward fashion. They cited what lawyers regarded as basic principles of law and justice drawn from the fontes of natural law thought and from the *ius gentium*, treating them as relevant for deciding current controversies. Some of the clearest such cases involving general principles of law dealt with the rights of aliens.¹⁰⁴ Property held by English subjects at the time of the outbreak of hostilities, for example, presented a continuing prob-

lem. Where not specifically dealt with by treaty, the law of nations was sometimes cited in decisions dealing with subsequent passage of title to the land. In *Jackson v. White*,¹⁰⁵ a New York case of 1822, for instance, the authority of Pufendorf and Vattel was cited for the proposition that a civil war "cuts the knot which united its members, and discharges them from their former obligations,"¹⁰⁶ thus excluding the descent of American lands to the alien claimant. Similar in substance was a North Carolina decision of 1824, denying an application of a British subject to practice law within the state. It was a principle "laid down by writers on the civil law," the court held, that a foreigner might "only claim the benefit of the law of nations, . . . [not those] of any particular place."¹⁰⁷ In the North Carolina court's view, a license to serve as an attorney was one of the latter. More favorable to the rights of aliens, but no different in its substantial reference to the civil law, was a Pennsylvania habeas corpus case from 1823. In it, Chief Judge Tilghman surveyed the opinions of an extensive list of civilian writers in holding unlawful the arrest within the commonwealth of a man accused of having committed a murder in Ireland.¹⁰⁸

Equally revealing of the American lawyer's habits of mind are the cases dealing with the rights of American Indians, particularly those dealing with Indian lands. In such cases, judges sometimes looked for assistance to fundamental juristic principles drawn from the *ius gentium*. An 1805 Tennessee case, for example, found the *ius gentium* useful in interpreting the relevant treaties and in sorting out a question of title to land derived

102. See, e.g., *Dickinson v. Dickinson*, 7 N.C. (3 Mur.) 327, 329 (1819) (holding legislative act changing sanction for adultery contrary to the North Carolina Declaration of Right, "if not by the very words, at least by their fair meaning and spirit").

103. See, e.g., *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 578 n.(a) (1819); see also *Livingston v. Dorgenois*, 11 U.S. (7 Cranch) 577, 589 (1813) ("Even under the Roman civil law, the EMPEROR himself cannot by rescript affect the property of a person who has not been heard."); *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 79-80 (1823) (citing Roman-law texts and treatise by Pufendorf in discussion of rights to mesne profits by wrongful possessors of land); *State v. Candler*, 10 N.C. (3 Hawks) 393, 398 (1824) (exclusion of witness convicted of perjury; the basic rule being found in and supported by the civil law, but contrasted with the superiority of its stricter application in North Carolina, "leaving nothing to the discretion of the Court"); *State v. Hobbs*, 2 Tyl. 380, 381-82 (Vt. 1803) (invoking the Roman-law Digest and Beccaria to show the unreliability of judicial torture for discovering the truth, even though torture was lawful in Roman law).

104. See Edwin D. Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26, 48-49 (1952); Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 825 (1989).

105. 20 Johns. 313 (N.Y. Sup. Ct. 1822).

106. *Id.* at 322.

107. See *Ex parte Thompson*, 10 N.C. (3 Hawks) 355, 362 (1824).

108. See *Short v. Deacon*, 10 Serg. & Rawle 125, 126-30 (Pa. 1823) (citing Grotius, Burlamaqui, Pufendorf, Vattel, Heineccius, and Beccaria, but considering "far more important, the opinions and authorities in our own country"). For other cases involving the rights of aliens and invoking civilian sources, see *Brown v. United States*, 12 U.S. (8 Cranch) 110, 124 (1814); *Society for the Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756, 759 (C.C.D.N.H. 1814) (No. 13,156); *Robinson v. Cathcart*, 2 D.C. (2 Cranch) 590, 610 (1825); *Inhabitants of Manchester v. Inhabitants of Boston*, 16 Mass. 230, 232 (1819); *Dulany v. Wells*, 3 H. & McH. 20 (Md. 1790); *Martin v. Brown*, 7 N.J.L. 305, 310 (Sup. Ct. N.J. 1799); *Griswold v. Waddington*, 15 Johns. 57, 68, 78 (N.Y. Sup. Ct. 1818); *Clarke v. Morey*, 10 Johns. 69, 72, 75 (N.Y. Sup. Ct. 1813); *Marshall v. Lovell*, 1 N.C. (Cam. & Nor.) 412, 421, 424 (1801); *Lacaze, Mallet & Ross v. Pennsylvania*, 1 Add. 53, 83 (Pa. 1793); *M'Grath & Jones v. Isaacs*, 10 S.C.L. (1 Nott & McC.) 563, 570 (1819); *Turnbull v. Ross*, 1 S.C.L. (1 Bay) 20, 21 (1785); *Murray v. M'Carty*, 16 Va. (2 Munf.) 393, 397 (1811); *Commonwealth v. Walker's Ex'r*, 11 Va. (1 Hen. & M.) 144, 147 (1806); *Read v. Read*, 9 Va. (5 Call) 160, 209, 221 (1804).

from the Cherokee Indians.¹⁰⁹ That court announced its decision as "conformable to the law of nature applied to nations," citing Vattel's *Law of Nations* in addition to the Federalist Papers and American notes on Blackstone's *Commentaries*.¹¹⁰ Important issues were at stake in these cases, and where guidance was needed some American judges looked to European law.

Beyond these areas of the law, relatively natural in their use of civilian principle because of their "international" character, other and more unexpected cases of such use also emerge from an examination of the pre-1825 American cases. The following are three representative examples. In an 1824 North Carolina case, a motion for a new trial was made after the time for seeking appellate review had expired.¹¹¹ Taken together, however, the circumstances involved militated strongly in favor of granting the motion. The action taken by the trial court, which had been presided over by a justice of the peace, had been clearly the product of a mistake on his part. Despite that, the supreme court denied the motion.¹¹² The opinion cited a basic policy favoring finality of judgments and invoked a law of Justinian and the authority of Pothier in support of "a rule so wise and well calculated to promote the tranquility of society."¹¹³ In a South Carolina case a few years earlier, the supreme court of that state used the authority of Domat in similar fashion to interpret its statute of limitations, which had been invoked by trespassers for purposes of acquiring title to land by adverse possession.¹¹⁴ "The civil law distinguishes between honest and fair possessors, and those who possess knavishly," Judge Brevard concluded, and "[u]pon general principles of reason, justice, and policy, naked possession, without title, is intitled to no consideration."¹¹⁵ In a New Hampshire decision of 1815, an action brought against a state official for taking an illegal fee under a

statute that permitted a citizen to recover a statutory penalty, the question was whether subsequent repeal of the statute abated the action.¹¹⁶ The court decided that it did not.¹¹⁷ Calling upon what he described as a "principle of universal jurisprudence" found in Pufendorf's *Law of Nature and Nations*, the judge held that it would be an "act of absolute injustice to abolish with a law all the effects which it had produced."¹¹⁸ These three decisions, quite disparate on their facts, are thus united in their use of civil law to express a fundamental principle of justice relevant in each.

The most dramatic examples in which American judges made use of natural law principles were those cases where they declared specific legislative acts invalid. Of this type, the 1816 New York case of *Gardner v. Trustees of Newburgh*¹¹⁹ provides an accessible and instructive example. The New York legislature had authorized the trustees of the village to supply the village with an adequate supply of water from a stream that Gardner had used "from time immemorial" for watering cattle, making bricks, and distilling whiskey. On his complaint, the Court of Chancery held this enabling statute invalid unless and until it should be amended to make adequate provision to indemnify him for his loss. Citing treatises by Grotius, Pufendorf, and Bynkershoek, the New York chancellor relied on what he described as "a clear principle of natural equity" to invalidate the legislature's act.¹²⁰ This limitation on the power of the legislature, he wrote, "is admitted by the soundest authorities . . . from a deep and universal sense of its justice."¹²¹

116. *Lewis v. Foster*, Smith Rep. 420, 420 (N.H. 1815).

117. *Id.* at 423.

118. *Id.* at 426; see also *United States v. Robins*, 27 F. Cas. 825, 828 (C.C.D.S.C. 1799) (No. 16,175) (right of American sailor to resist impressment by British Navy as both a natural right and a service to country supported by citation to Vattel's *Law of Nations*); *Warren v. Lynch*, 5 Johns. 239, 247 (N.Y. Sup. Ct. 1810) (legal requirement of use of a seal justified by citation to the Institutes of Justinian and works by Heineccius and Cicero, criticizing lax Virginia practice); *Polk's Lessee v. Hill*, Windel, 2 Tenn. (2 Overt.) 118, 134 (1811) (need for security of land titles granted by state as fundamental in nature and supported by Pothier's treatise on obligations, together with common law cases); *Patterson's Devises v. Bradford*, 3 Ky. (Hard.) 108, 111 (1807) (rules requiring plaintiff in a land dispute to recover on the strength of his own title said to be "deducible from the principles of natural law"); *Field v. Harrison*, Wythe's Rep. 273, 289 (Va. 1794) (citing Roman-law Digest as stating "pure principles of equity" that party to a contract ought not to suffer from fraud in the contract).

119. 2 Johns. Ch. 162 (N.Y. Ch. 1816).

120. *Id.* at 166.

121. *Id.*

109. *Glasgow's Lessee v. Smith & Blackwell*, 1 Tenn. (1 Overt.) 144, 166 (1805); see also *Johnson & Graham's Lessee v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 563 (1823); *Doe v. Welsh*, 10 N.C. (3 Hawks) 155, 160 (1824); *Thompson v. Johnston*, 6 Binn. 68, 80 (Pa. 1813).

110. *Glasgow's Lessee*, 1 Tenn. (1 Overt.) at 166.

111. See *Bain v. Hunt*, 10 N.C. (3 Hawks) 572, 572 (1825).

112. *Id.* at 573.

113. *Id.* at 576.

114. See *Owen v. Lucas*, 3 S.C.L. (1 Brev.) 519, 523 (1805).

115. *Id.* at 526-27; see also *Strike's Case*, 1 Bland's Rep. 57, 76 (Md. Chan. 1825) (resting distinction on a "sound and a very generally admitted principle of justice" that was "expressed in the Roman law").

Such language, coupled with express invocation of fundamental legal principle and buttressed by citation to Continental sources, is to be found in a number of early American cases challenging the constitutionality of legislation.¹²² A North Carolina judge, citing the authority of Vattel and "principles of reason, justice and moral rectitude" as preferable to English law on the subject, declined to enforce a statute confirming title to land over the objections of the heirs of a party with a colorable claim to it.¹²³ "Miserable would be the condition of the people," he wrote, "if the Judiciary was bound to carry into execution every act of the Legislature, without regarding the paramount rule of the constitution."¹²⁴ A Virginia judge, after calling upon the authority of a law from the Emperor Justinian in a case challenging a statute that varied the terms of a mutual insurance contract, concluded that any other rule would be "to lay prostrate, at the footstool of the legislature, all our rights of person and of property, and abandon those great objects, for the protection of which, alone, all free governments have been instituted."¹²⁵ A Vermont judge, striking down a legislative act that required the admission of a deceased pauper's deposition in a pending case, found the act to be against the Constitution of the United States, the State of Vermont, and "even against the laws of nature."¹²⁶ These judges were articulating a not uncommon view: fundamental legal principles, found elegantly and persuasively stated in Continental texts and treatises, had a role in constitutional litigation.¹²⁷ The Constitution of the United States and those of the several states were understood in the light of these civilian statements of principle.

C. Civil Law as Reinforcing English Common Law

Most of the decisions discussed so far have involved an

122. For a perspective on this issue, see John P. Reid, *Another Origin of Judicial Review: The Constitutional Crisis of 1776 and the Need for a Dernier Judge*, 64 N.Y.U. L. REV. 963 (1989).

123. See *Robinson v. Barfield*, 6 N.C. (2 Mur.) 391, 421-22 (1818).

124. *Id.* at 420.

125. *Currie's Adm'rs v. Mutual Assurance Soc'y*, 14 Va. (4 Munf.) 315, 346-47 (1809).

126. See *Dupy v. Wickwire*, 1 D. Chip. 237, 238-39 (Vt. 1814).

127. See, e.g., *Merrill v. Sherburne*, 1 N.H. 199, 208, 212 (1818); *Dickinson v. Dickinson*, 7 N.C. (3 Mur.) 327, 329 (1819); *Lindsay v. Commissioners*, 2 S.C.L. (2 Bay) 38, 45-46 (1796); *Commonwealth v. Walker's Ex'r*, 11 Va. (1 Hen. & M.) 144, 151-52 (1806). *But cf. Goshen v. Stonington*, 4 Conn. 209, 223 (1822) (refusing "to derive aid from the civilians" in passing on an allegedly ex post facto law).

imperfection, real or perceived, in the English common law. Civil law filled a gap, mended a deficiency in the received law, or otherwise stated a fundamental principle of natural justice better or more fully than could be found in the English reports. It would be mistaken, however, to conclude that providing for the common law's inadequacies was the sole, or indeed the normal, situation in which civil law was employed in the American cases. Numerically at least, such cases were dwarfed by those in which common law and civil law were basically the same, but in which authorities from both were adduced to support a rule or a decision. For instance, a Georgia lawyer argued in 1807 that even in the absence of an escheat statute, the property of a man who died without heirs should be returned "back to the common mass . . . to be enjoyed by the community."¹²⁸ Citing the authority of Vattel together with that of common-law cases as directly in point, he announced: "This is the law of nations, the law of England, and the law of America."¹²⁹

This Georgia lawyer spoke more grandly than most, but in fact, he was describing the normal situation in which civil law was used in the early American reports. A Massachusetts judge in 1809, dealing with the question of whether an action of assumpsit was extinguished by the giving of a bond for the amount promised and having cited common-law authorities, went on to assert that his affirmative conclusions were not based upon "mere technical and arbitrary rules of the common law."¹³⁰ They were founded, he wrote, "in justice and common sense, and are adopted by the civil law."¹³¹ In support, he cited works by Domat, Pothier, and Heineccius.¹³² Similarly, in an early New York case, the question was whether the fact that a creditor had appointed one of his debtors to act as his executor operated to extinguish the debt.¹³³ To show that the appointment did have that effect, the lawyer argued that the desired rule "was not peculiar to the common law."¹³⁴ It was instead "a rule of *general reason* . . . adopted by every finished system of jurisprudence."¹³⁵ He cited works by Voet and Pothier in support of

128. See *White v. Wayne*, T.U.P. Charleton Rep. 94, 98 (Ga. 1807).

129. *Id.*

130. *Banorsee v. Hovey*, 5 Mass. 11, 18 (1809).

131. *Id.*

132. *Id.* at 18 n.6.

133. See *Marvin v. Stone*, 2 Cow. 781, 782-83 (N.Y. Sup. Ct. 1824).

134. *Id.* at 788.

135. *Id.* (emphasis added).

that view.¹³⁶ In a Kentucky case from 1809, the judge similarly took care to point out that the rule of where a party made a conditional contract but then himself prevented the condition from occurring, the condition would be treated as fulfilled, was "not a mere technical . . . rule of the common law."¹³⁷ It was rather "a rule of reason and natural justice," that had been "acknowledged by civilians as a correct rule of enlarged and liberal jurisprudence."¹³⁸ The judge cited Pothier's treatise on obligations in support.¹³⁹

In addition to such cases in which a judge expressly recognized the identity of legal rules both in the civil law and at common law, there stand a considerable number of cases in which a lawyer simply cited an authority from the civil law without express comment. Many in fact appear in "string" citations of common-law cases and treatises. For instance, in *Troup v. Smith*,¹⁴⁰ a New York case of 1822, a reference to Domat's *Civil Law in its Natural Order* appears almost exactly in the middle of nineteen English and American cases cited to show that the statute of frauds could not be pleaded to bar an action brought to recover for fraud.¹⁴¹ The lawyer's assumption in this, and in other like cases,¹⁴² seems to have been that where the two legal systems reached identical results, adding the civil-law reference somehow reinforced the weight of the common-law authorities.

136. *Id.* at 788 nn. J, K.

137. *Marshall v. Craig*, 4 Ky. (1 Bibb) 386, 391 (1809). For other examples of similar recognition of identity, see *Woodbridge v. Perkins*, 3 Day 364, 373 (Conn. 1809); *Bridgen v. Cheever*, 10 Mass. 450, 454 (1813); *Whallon v. Kauffman*, 19 Johns. 97, 103 (N.Y. Sup. Ct. 1821); *Roget v. Merritt & Clapp*, 2 Cai. Cas. 117, 119 (N.Y. Sup. Ct. 1804); *Fox v. Wilcocks*, 1 Binn. 194, 197 (Pa. 1806); *McKim v. Moody*, 22 Va. (1 Rand.) 58, 63 (1822).

138. *Marshall*, 4 Ky. (1 Bibb.) at 391.

139. *Id.*

140. 20 Johns. 33 (N.Y. Sup. Ct. 1822).

141. *Id.* at 38.

142. See, e.g., *Williams v. Reed*, 29 Fed. Cas. 1386, 1392 (C.C.D. Me. 1824) (No. 17,733) (citing Pothier at end of five English cases and one treatise); *Brown v. Union Ins. Co.*, 5 Day 1, 3 (Conn. 1811) (citing Vattel with seven common-law cases); *Wells v. Wilson*, 6 Ky. (3 Bibb) 264, 265 (1814) (citing Pothier with two English citations); *Carrere v. Union Ins. Co.*, 3 H. & J. 324, 328 (Md. 1813) (citing Vattel in the middle of fourteen common-law authorities); *Dawes v. Head*, 20 Mass. (3 Pick.) 128, 145 (1825) (citing Vattel in the middle of eleven American cases); *Atherton v. Johnson*, 2 N.H. 31 (1819) (citing the Roman law Institutes with three American cases); *Pawling v. Wilson & Smith*, 13 Johns. 192, 208 (N.Y. Sup. Ct. 1816) (citing Huber together with Coke on Littleton, one English and one Massachusetts case); *Ferguson v. Phoenix Ins. Co.*, 5 Binn. 544, 546 (Pa. 1813) (citing Emerigon, Valin, and Pothier with seven American cases); *Harvey v. Pecks*, 15 Va. (1 Munf.), 518, 525 (Va. 1810) (citing Grotius, Pufendorf, Pothier, and the Codex together with seven English cases).

That the common law and the civil law should have been the same on many points of law is of course entirely unsurprising. Many rules will be identical in all developed legal systems, and when two societies are not vastly different in commercial institutions, religious sentiments, cultural norms, and societal mores, there will more than likely turn out to be few fundamental inconsistencies between their legal regimes. What is surprising, therefore, is not at all that American lawyers *could have* cited Continental sources for specific rules of law, but that they *did* cite them. As Dean Hoeflich has shown about Joseph Story, most of what Story wrote could easily have been written without citation of civil-law authorities.¹⁴³ The common law would have sufficed, but Story added the civil law despite this. The real question is: Why did Story, and so many other American lawyers, feel it appropriate to insert references to the civil law in these circumstances? It is not too difficult to see why they might turn to it when the common law was deficient or different from the result they desired. But why when it was *the same*?

This has been a difficult question with which to grapple, and an examination of the cases themselves does not reveal explicit discussions of the issue. Nonetheless, the cases do suggest three different reasons for the use of the civil law in these circumstances. First, in some cases, civilian learning plainly served no purpose save ornament. A Connecticut opinion of 1803 contains a learned, but quite superfluous, disquisition on the Roman law of marriage effected by *deductio ad thalamum*.¹⁴⁴ Another case from five years later includes a lengthy discussion by counsel on the laws of descent found in Roman law and the Bible, which had only the most tenuous relevance to decision of the case.¹⁴⁵ In a Virginia case of 1810, questioning whether an oath to suppress dueling could be required of applicants to the bar, counsel cited Cicero's *De officiis* on the dignity of official stations.¹⁴⁶ From the Ciceronian extract, how-

143. See Hoeflich, *Perspectives*, *supra* note 10, at 74.

144. See *Benton v. Benton*, 1 Day 111, 116 (Conn. 1803).

145. See *Hillhouse v. Chester*, 3 Day 166, 170-75 (Conn. 1808).

146. *Leigh's Case*, 15 Va. (1 Munf.) 468, 475 (1810); see also *Bank of United States v. Sill*, 5 Conn. 102, 112 (1823) (use of Latin quotation to explain error of Lord Ellenborough); *Clemson v. Davidson*, 4 Binn. 405, 416 (Pa. 1812) (likening the sale of goods to the struggle between Ajax and Ulysses). I confess that such ornamental usage seemed to me characteristic of the famous Virginian, George Wythe, in many of the opinions from his Reports cited in Bryson, *supra* note 13, at 141-43. But compare his learned treatment of concurrent tenancies in *GEORGE WYTHE, DECISIONS OF CASES IN VIRGINIA BY THE HIGH COURT OF CHANCERY* app. 361, 390 (1795) (concluding that there existed "an exact

ever, he drew no conclusions whatsoever. It is difficult—indeed impossible—to regard these uses of civilian authorities as anything but a show of classical learning. We need not despise them on that account, but we cannot fairly describe them as influential. They simply show once again the great prestige that the trappings of ancient civilization held for many American lawyers during the Republic's early years.

Second, there were many cases where American lawyers recognized that the civil law had already been taken into the common law. Where a rule from Roman law had "been incorporated into our law and become a part thereof," as a New Jersey lawyer put the matter in 1811,¹⁴⁷ there was every reason to look directly to civilian learning for guidance in interpreting and applying the rule. Maritime law,¹⁴⁸ conflicts of law,¹⁴⁹ probate and testamentary succession,¹⁵⁰ and many of the rules regulating the formation of marriage,¹⁵¹ were all aspects of the law where this had happened. The English cases on these subjects had themselves been shaped by civilian and canonical doctrines, and American lawyers knew this.¹⁵² As one South Carolina judge explicitly recognized, Roman law had furnished a "rich source from whence many of the best principles of the common

agreement between [the law of Virginia] and the civil law, . . . respecting the consequences of the so-called *jus accrescendi*.").

147. *Rosevelt v. Gardner*, 3 N.J.L. 358, 359 (N.J. 1811); see also *Griffin v. Executors of Griffin*, R.M. Charlton 217, 227 (Ga. 1822) (wills of lunatics made during lucid intervals); *Dumaresly v. Fishly*, 10 Ky. (3 A.K. Marsh) 368, 372 (1821) (marriage laws); *Smith v. Frost*, 4 Ky. (1 Bibb) 375, 377 (1809) (the law of bailments); *Bridgen v. Cheever*, 10 Mass. 450, 454 (1813) (liability of legatees under will for decedent's debts); *Baker v. Preston*, 21 Va. (Gilmer) 235, 272 (Va. 1821) (definition of embezzlement).

148. See *supra* text accompanying notes 32-40.

149. See *supra* text accompanying notes 80-89.

150. See, e.g., *Nicholls v. Hodges' Ex'r*, 2 D.C. (2 Cranch) 582, 584 (1825); *Jackson ex dem. Van Vechten v. Sill*, 11 Johns. 201, 210 (N.Y. Sup. Ct. 1814); *White v. Helmes*, 12 S.C.L. (1 McCord) 430, 438 (1821); *Bates v. Holman*, 13 Va. (3 Hen. & M. 502, 520 (1809).

151. *Dumaresly*, 10 Ky. (3 A.K. Marsh.) at 372 ("[I]t is a maxim of the common law, borrowed, it is true, from the civil law . . . that *consensus non concubitus facit matrimonium*."); see also *Benton v. Benton*, 1 Day 111, 116 (Conn. 1803); *West Cambridge v. Lexington*, 18 Mass. (1 Pick.) 506, 510 (1823); *Londonderry v. Chester*, 2 N.H. 268, 273 (1820); *Sterling v. Sinnickson*, 5 N.J.L. 756, 757 (1820); *Purcell v. Purcell*, 15 Va. (4 Hen. & M.) 507, 515 (1810).

152. See, e.g., *Murry v. Clayborn*, 5 Ky. (2 Bibb) 300, 300 (1811) ("[T]he common law has adopted the maxim of the civil law, that *ex nudo pacto non oritur actio*."); *Cook & Pratt v. Commercial Ins. Co.*, 11 Johns. 40, 44 (N.Y. Sup. Ct. 1814) (This was a maritime case, in which counsel argued that, "Marshall, who cites the doctrine of Emerigon, does it with approbation, and seems not to consider it, in this respect, as different from the English Law.").

law have been derived."¹⁵³ In these areas of the law, therefore, civilian learning could be consulted without self-consciousness and cited without incongruity. Reference to Continental treatises might appropriately be put directly alongside the English (or American) cases.

Third, the period being discussed, 1790-1825, was a time before legal positivism dominated the assumptions of most lawyers. To lawyers of this period, law derived its ultimate authority from immemorial custom and natural reason, not simply from the will of a sovereign.¹⁵⁴ In such a climate of opinion, citation to a system of law that learned men had described as *ratio scripta* might be warranted, even where it happened to coincide with one's own municipal law. Particularly when there was doubt about the justice of a legal rule, an "inquiry into the grounds" of the rule might legitimately be made and appropriately entail examination of Continental law.¹⁵⁵ Congruence between the systems would beget confidence in the result.¹⁵⁶

Articulation of this view is found in many of the reported cases. One North Carolina judge spoke for many in describing and justifying his decision as "founded no less upon the weight and number of the cases than upon the intrinsic justice of the principle which pervades them."¹⁵⁷ Many American lawyers would have agreed with Justice Story, who termed it "no slight recommendation" of a rule of American law that it stood

153. See *Smith v. McCall*, 12 S.C.L. (1 McCord) 220, 222 (1821).

154. See, e.g., *Hickman v. Boffman*, 3 Ky. (Hard.) 356, 372-73 (1809) ("There are many books which are not authority, but which ought to be read and used for the sound and clear reasoning they contain, as Poethier [sic] on Obligations."); *Thompson v. M'Kim*, 6 H. & J. 302, 305 (Md. 1825) ("[W]e should perpetually bear in mind, that it is the reason and spirit of cases make law, not the letter of particular precedents."); see also *Moss v. Wood*, R. M. Charlton 42, 44 (Ga. 1819) ("[D]ecisions of [English] courts are received here not as constituting the law, but only as evidence of what it is."); *Parker v. Kennedy*, 1 S.C.L. (1 Bay) 398, 420 (1795) (although civil law has "no intrinsic obligation here" it is nevertheless cited "as a rule of reason"); *Dandridge v. Lyon*, Wythe's Rep. 123, 125 (Va. 1791) (Authority of the Roman civil law "if not decisive, is respectable in cases of testamentary dispositions.").

155. See, e.g., *Hannan v. Towers*, 3 H. & J. 147, 149 (Md. 1810) (examining the civil law in connection with a controversy about applicability of the doctrine of consideration).

156. See generally *Randy E. Barnett, The Virtues of Redundancy in Legal Thought*, 38 CLEV. ST. L. REV. 153 (1990).

157. *Williamson's Adm'rs v. Smart*, 1 N.C. (Cam. & Nor.) 355, 362 (1801); see also *Foster v. Essex Bank*, 16 Mass. 245, 266 (1819) (arguing that special status for corporations was illegitimate both by "the reasoning in our own courts" and "the authority of the civilians"); *State v. Deliesseline*, 12 S.C.L. (1 McCord) 52, 60, 62 (1821) (citing both civilian and common-law authority on question so far not "settled upon any fixed or established principle" of whether delegated authority could be exercised by a bare majority).

“approved by the cautious learning of Valin, the moral perspicacity of Pothier, and the practical and sagacious judgment of Emerigon.”¹⁵⁸ Even where the common law dictated a particular result, it would have been useful to note that Roman law was in accord, because the congruence would show that the common law was agreeable to reason and sound principles of jurisprudence. A decision could be more than simply following previous cases. It would also be just. Lawyers who thought about law in these terms, who believed that “principles of universal jurisprudence” actually existed,¹⁵⁹ easily concluded that their search for justice could, and sometimes did, appropriately call for exploration within the rich resources of the civil law. Contemporary canons of jurisprudence did not confine them to common-law cases.

IV. CONCLUSION

The evidence surveyed here shows beyond doubt that civil-law sources were known and used in the early American case law. They were not used simply for purposes of education, adornment, and occasional large thinking, although of course they clearly were used for all these purposes. The ease and ubiquity of reference to the civil law and to the treatise tradition that surrounded it stands out in the American cases. This reference was never confined to one or two areas of the law, it was not indulged in by a small group of men, and it was not limited to a few areas of the country. Let it be said again that this ubiquity does not mean that the civil law was used with great frequency. Nor does it demonstrate a thorough mastery of the civil law on the part of those who used it. However, it does mean that the civil law was known to large numbers of American lawyers and that it was referred to by them in a wide variety of cases. Turning to civilian sources was not the resort of a privileged few, and its use was not narrowly restricted in time or extent.

To the fundamental question of assessing the extent to which the civil law made a substantive difference in the develop-

158. *Peele v. Merchants' Ins. Co.*, 19 F. Cas. 98, 102 (C.C.D. Mass. 1822) (No. 10,905); see also *Smith v. Lessee of Craig*, 2 Tenn. (2 Overt.) 287, 293 (1814) (“The further we advance in knowledge, the more sensible we are of our own weakness and limited powers: and with the greater pleasure will the mind seize those principles which have been tested by experience, in preference to the fairest and most beautiful theories.”).

159. See, e.g., *Lewis v. Foster*, Smith Rep. 420, 424 (N.H. 1815) (dealing with the reach of retrospective legislation).

ment of American law, no definitive answer emerges from an examination of the early American cases. Any conclusions must be guarded conclusions. The perils of enthusiasm are all too obvious. The enthusiast must never forget the indisputable fact that, statistically speaking, the civil law played a distinctly minor role in the cases. It was employed, but except in special areas of the law it was not used with anything remotely approaching the frequency of use of the English common law.

Moreover, two persistent difficulties stand in the way of accurate and confident assessment of the influence of the civil law in this country. On the one hand, counting the number of mentions of civilian sources can easily overstate its true influence. Many of the cases invoking civil law sources could have been decided without them. Where the common- and civil-law rules were the same, this must have been so, and even where they diverged the civil law often played a subsidiary role in decision.

On the other hand, the evidence from counting citations may equally understate the true, long-range influence of civil law. Once a civil-law principle had been taken and used in a common-law case, the rule might subsequently be followed simply on the basis of that first case, influencing some succeeding lawyers who have had not the slightest consciousness of the rule's civilian origins. This sort of silent influence clearly happened,¹⁶⁰ and a few American lawyers later recognized that it had happened.¹⁶¹ The sum of it is that the question posed at the start of this Article—what was the real influence of the civil law?—turns out to be a difficult question to answer fairly and completely.

Any full assessment must also take into account the fact of disagreement among lawyers of the period. Some American lawyers followed the “light of the civil law” as a sure guide for their inquiries.¹⁶² Others regarded its use as simple “wandering

160. A clear example comes from the law relating to possession of wild animals. Compare *Pierson v. Post*, 3 Cai. R. 175, 177 (N.Y. Sup. Ct. 1805) (applying law found in and cited from civilian authors) with *Buster v. Newkirk*, 20 Johns. 75, 75 (N.Y. Sup. Ct. 1822) (trover for deer skin; the court holding that “[t]he principles decided in the case of *Pierson v. Post* are applicable here,” without citing the civil law).

161. See, e.g., *Boyd v. Anderson*, 1 Tenn. (1 Overt.) 437, 440 (1809) (referring to Lord Mansfield and stating that “his principles in this respect, were principally derived from the Roman Law”).

162. *Bean v. Smith*, 2 F. Cas. 1143, 1153 (C.C.D.R.I. 1821) (No. 1,174).

into the wilds of antiquity."¹⁶³ All the evidence does not point in an identical direction, and doubtless it is true that choice of whether to invoke the civil law often depended upon which side of a particular case the civil law happened to favor.¹⁶⁴

When these caveats have been entered, however, one conclusion remains undeniable. The American reports from between 1790 and 1825 do show that the admiration for European and classical traditions which was a part of the early American experience in so many other areas of life, also made its way into the case law. Legal practice and intellectual tastes were not wholly separate spheres of life. The civil law was therefore not a purely academic concern in the early American Republic.

163. *Dulany v. Wells*, 3 H. & McH. 20, 49 (Md. 1790).

164. See, e.g., *Bedinger v. Commonwealth*, 7 Va. (3 Call) 461, 464 (1803) (On the legal consequences of a unilateral promise, one counsel argued that the correct interpretation was "the language of reason, and formed part of the Roman law . . . as a principle of universal jurisprudence." The other counsel countered that the nature of a promise should "be understood in the sense at common law; and not according to the opinions of civilians, and the compilers of dictionaries." The case ultimately went off on a jurisdictional point.)

ROMAN-DUTCH JURISPRUDENCE AND ITS CONTRIBUTION TO EUROPEAN PRIVATE LAW†

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I. INTRODUCTION

By the summer of 1574, the Duke of Alba had nearly managed to crush the rebellion of the Netherlands against the Spanish oppression, which had broken out six years earlier.¹ Only

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1. On the history of the Dutch rebellion against the Spanish, see generally HORST LADEMACHER, *GESCHICHTE DER NIEDERLANDE* 34 (1983); GEOFFREY PARKER, *THE DUTCH REVOLT* (1979); and Jan Juliaan Woltjer, *Der niederländische Bürgerkrieg und die*