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The Digest of 1808: Historical Perspectives

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I

We can think of historical memory—the ordering of past events—as falling into three categories. The first includes those events that were famous in their own time as well as in the present. The Louisiana Purchase itself is such an event: momentous in 1803 and certainly well known today. The second category of historical events—again using an example from Louisiana—would be the controversy between Thomas Jefferson and Edward Livingston over the New Orleans Batture: well known in its day, but obscure today except for people with very particular historical interests.

And then there is the example of the Digest (or Code) of 1808. Famous today as the cornerstone of Louisiana’s mixed legal system, it was not highly noticed outside of Louisiana back in 1808 at the time of its adoption. Nationally, it was hardly noticed at all. In 1811, speaking in opposition to the admission of Louisiana into the Union in one of the most memorable speeches in the early Congress, Josiah Quincy of Boston argued that the Constitution did not permit the admission of a state on the other side of the Mississippi, a state peopled by a foreign nation, speaking a foreign tongue, and following strange laws and customs. “It was not for these men that our fathers fought.” As Quincy declared: “It was not for them this Constitution was adopted. You have no authority to throw the rights and liberties, and property of this people, into a ‘hotch-pot’ with the wild men of the Missouri, nor with the mixed,

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though more respectable race of Anglo-Hispano-Gallo Americans, who bask on the sands, in the mouth of the Mississippi. I make no objection to these from their want of moral qualities or political right. The inhabitants of New Orleans are, I suppose, like those of all other countries, some good, some bad, some indifferent. . . . But,” he concluded, “I oppose this bill from no animosity to the people of New Orleans, but from the deep conviction that it contains a principle incompatible with the liberties and safety of my country. . . . The bill, if it passes, is a death-blow to the Constitution.”¹ Josiah Quincy had mined every source for his Constitutional arguments against Louisiana’s admission, but notably absent is any reference to the Redaction of 1808 whose enactment, had it come to his attention, surely would have figured large in his lengthy discourse on the floor of the House.

This is not to say that the code (or Digest) of 1808 was totally ignored. In one instance, the notice came indirectly in an article that can be called the “barbarous yoke” encyclical. This was a piece that allegedly first appeared in a Paris newspaper and then was picked up and reprinted by *La Lanterne Magique*, a highly politicized fly-by-night journal that had a brief half-life in New Orleans in 1808. Entitled “French Views with Respect to Louisiana” the complete text is as follows:

“The Province of Louisiana, though separated for the present, from the GREAT EMPIRE, by a certain concurrence of events, continues to evince the highest veneration for all our political institutions. To avoid the barbarous yoke of a Gothick system of jurisprudence called the common law of England, the principles of the civil law have been expressly and exclusively adopted as the basis of a new code which is shortly to be promulgated in that Province. M. Louis Moreau Lislet, a French jurisconsult, has the honour of digesting this code; which in fact is a paraphrase of the Napoleon code.

We regret to miss, in this digest, that admirable combination of principles, and perspicuity and elegance of style, which distinguish this grand work of the most eminent geniuses of our nation. We presume that Mr. Moreau thought it necessary to disguise the glorious plagiary, lest he might excite the national jealousies of his new fellow citizens. And he has disguised it effectually. So flattering a compliment to his native country, however, deserves our highest commendation, particularly as his labours

1. Josiah Quincy, Speech Against the Admission of New States, Debates, 11th Cong., 3d Sess., at 524-42 (Jan. 14, 1811), reprinted in 4 THE ANNALS OF AMERICA 283, 538, 542 (1968).

will tend to preserve in that colony, for some time longer, the practice of those laws which it is our interest TO FIND THERE.²

A number of Federalist newspapers, most notably *The Repertory* of Boston but others around the country as well, reprinted the “barbarous yoke” piece in order to bolster the Federalist argument that the purchase of Louisiana had been a dangerous and improvident mistake and that Louisianians were preparing for the day when they would return—or be returned—to France. And this was just a few short years after some New England Federalists, including Boston’s Josiah Quincy, had seriously advocated something called the Northern Confederacy, a scheme that contemplated northern secession from the Union in part because of the Louisiana Purchase.³

The *Connecticut Herald*, another Federalist newspaper, provides a further example of the notice taken of the Digest’s enactment. The *Herald* reprinted in full the speech of John Hughes, the Louisiana representative to the Orleans territorial legislature from Ouachita Parish, given in March, 1809. In his address to the legislature—the same body that had enacted the Digest the previous year—Hughes fulminated against the early admission of Louisiana then under debate. But he also took note of the recently adopted civil digest this way:

The imperfect knowledge which the tribunals and their officers had of the Spanish laws which remained in force on the taking possession of this country, was made the pretence for the introduction of a new code; and that code is not the ancient law of the territory, of which it purports to be a digest, but almost verbatim *the new system of France—the Napoleon Code*.⁴

As the editors of the *Herald* concluded in an editorial footnote to the reprint of Hughes’ speech: “It is a lamentable fact that the civil law now in force in this territory is not a digest of the ancient laws of Louisiana, but of the present imperial law of France.”⁵ Both documents—the “barbarous yoke” piece and the Hughes address—provide interesting evidence that the Louisiana civil digest was perceived by contemporaries as having been largely patterned after the French *Code Civil*.

2. THE REPERTORY (Boston), Mar. 24, 1809.

3. Kevin M. Gannon, *Escaping “Mr. Jefferson’s Plan of Destruction”*: *New England Federalists and the Idea of a Northern Confederacy, 1803-1804*, 21 J. EARLY REPUBLIC 413-43 (2001).

4. CONNECTICUT HERALD, May 16, 1809, at 2.

5. *Id.*

II

Distance and remoteness shrouded Louisiana in mystery in the early years of the nineteenth century. Added to that were the numerous barriers to travel and the impossibility of easy communication between New Orleans and the population centers of the United States far to the east. There is no better description of this than that of Henry Adams in his *History of the Jefferson and Madison Administrations*. On the division of the west from the east, this is what Adams had to say in one of the opening paragraphs of his great work:

The entire population, both free and slave, west of the mountains, reached not yet half a million; but already they were partly disposed to think themselves, and the old thirteen States were not altogether unwilling to consider them, the germ of an independent empire, which was to find its outlet, not through the Alleghanies to the seaboard, but by the Mississippi River to the Gulf. Nowhere did eastern settlements touch the western. At least one hundred miles of mountainous country held the two regions everywhere apart.⁶

To these elemental geographic conditions must be added the strategic vulnerability of New Orleans in the era following the Purchase—a problem not fully resolved until the Battle of New Orleans in early 1815.⁷ Located on the “island of Orleans,” in 1803 the city of

6. HENRY ADAMS, *THE UNITED STATES IN 1800* 112-13 (Cornell Paperbacks, 1955; 1974). Adams continued:

Nearly every foreign traveler who visited the United States during these early years, carried away an impression sober if not sad. A thousand miles of desolate and dreary forest, broken here and there by settlements; along the seacoast a few flourishing towns devoted to commerce; no arts, a provincial literature, a cancerous disease of negro slavery, and differences of political theory fortified within geographical lines,—what could be hoped for such a country except to repeat the story of violence and brutality which the world already knew by heart, until repetition for thousands of years and wearied and sickened mankind? Ages must probably pass before the interior could be thoroughly settled; even Jefferson, usually a sanguine man, talked of a thousand years with acquiescence, and in his first Inaugural Address, at a time when the Mississippi River formed the Western boundary, spoke of the country as having “room enough for our descendants to the hundredth and thousandth generation.” No prudent person dared to act on the certainty that when settled, one government could comprehend the whole; and when the day of separation should arrive, and America should have her Prussia, Austria, and Italy, as she already had her England, France, and Spain, what else could follow but a return to the old conditions of local jealousies, wars, and corruption which had made a slaughter-house of Europe.

For a recent effort to restore Adams to his rightful place in American historiography, and to correct some of the misconceptions that still bedevil interpreters of this pioneer of the historical profession, see GARY WILLS, *HENRY ADAMS AND THE MAKING OF AMERICA* (N.Y. 2005).

7. The Battle of New Orleans not only made Andrew Jackson a national hero, but the victory also demonstrated that New Orleans and all of Lower Louisiana could be held as a secure

New Orleans was surrounded on nearly every side by water, and, as such, was exposed to naval or amphibious attack from Spain, or France, or Britain. New Orleans was part of the Gulf Coast and the western anchor of a developing chain of river outlets which connected southwestern settlers in the interior with Caribbean and Atlantic trade.⁸ Indeed, Americans in the Mississippi Territory (which encompassed what later became the states of Mississippi and Alabama) would have gladly exchanged all of Louisiana for Florida in order to guarantee access to the gulf via the Pearl, the Tombigbee, or the Alabama river.⁹ As one resident of the region reported to the President:

[I]t will be best for us to have no more Territory beyond the Mississippi than what is necessary to secure the Navigation; now to *ascertain, extend, establish, and maintain the Frontiers* . . . [of] Louisiana, would be *expensive, troublesome, dangerous and consequently impolitic in the highest degree*. But to obtain east and west Florida, *would be the reverse*.¹⁰

Robert R. Livingston, the minister to France, was specifically instructed by Jefferson and Secretary of State James Madison to acquire New Orleans and Florida.¹¹ Spain had governed West Florida and Louisiana as a single entity with New Orleans as its capital.¹² New Orleans without Florida made no sense and would be difficult, perhaps even impossible, to hold.

The negotiated purchase of New Orleans and Louisiana—without West Florida—came not only as a surprise but as a serious strategic problem.¹³ With West Florida still in Spanish hands most important access routes to the city were, technically at least, under Spanish control. Baton Rouge, eighty miles northwest of New Orleans and occupying the

American possession. It also settled, once and for all, the nagging question of the loyalty of Louisianians to their new sovereign.

8. “New Orleans was a focus of immigration and a center of influence linking the Caribbean with the Mississippi valley” long after the Purchase. See Richard W. Bailey, *The Foundation of English in the Louisiana Purchase: New Orleans, 1800-1850*, 78 AM. SPEECH 363, 368 (2003).

9. On the essential geographic unity of the region, see I.J. COX, *THE WEST FLORIDA CONTROVERSY, 1798-1813: A STUDY IN AMERICAN DIPLOMACY* 1-6 (Baltimore, 1918; 1967).

10. Letter from Thomas M. Potter to Jefferson (Sept. 17, 1804), *reprinted in* JEFFERSON PAPERS (Library of Congress).

11. ALEXANDER DECONDE, *THIS AFFAIR OF LOUISIANA* 110 (N.Y., 1976).

12. A.P. WHITAKER, *THE MISSISSIPPI QUESTION, 1795-1803: A STUDY IN TRADE, POLITICS, AND DIPLOMACY* 29 (N.Y., 1934) (“The geographical unity of Louisiana and West Florida was recognized by their union under the authority of a single governor, with New Orleans as the capital.”).

13. West Florida would remain disputed territory until the American settlers revolted in 1810 and declared an independent republic only to be absorbed first into the Orleans Territory and then into the new state of Louisiana as the Florida Parishes.

last high ground overlooking the Mississippi, was the site of a Spanish fort. This gave to the Spanish the potential to sever communications between the settled part of Lower Louisiana and the rest of the mainland.¹⁴ Spanish naval units patrolled Lake Pontchartrain and could easily fortify Fort Petites Coquilles which guarded the Rigolets, the most important strait connecting the lake and the gulf.¹⁵ Ship Island off the Florida coast was the major staging area for naval operations on the Gulf Coast until the Civil war, but in 1803 Ship Island was in the hands of the Spanish.¹⁶ As to the overland routes from the northeast, principally the Natchez Trace and the Pearl River route, these also had to traverse Spanish West Florida.

Clearly, the Spanish presence all around New Orleans could be troublesome. And while Spanish military power was feeble on a global scale especially after the Franco-Spanish defeat at the Battle of Trafalgar in 1805, Spain was strong enough to assert its interest in and around the island of Orleans. Spain was still a respectable naval power.¹⁷ The Spanish fresh water navy was not inconsiderable. In 1800, it was “essentially a river fleet [whose] chief value lay in [its] ability to cooperate in the defense of the posts on the Mississippi.”¹⁸ In short, “West Florida was necessary for the defense of New Orleans.”¹⁹ When in the summer and early fall of 1806 a Spanish-American military conflict seemed imminent, the United States’ position in all of Lower Louisiana appeared to be in danger of complete collapse.

Secretary of the Treasury, Albert Gallatin, the longest serving treasury secretary in the nation’s history and Jefferson’s principal cabinet advisor on matters having to do with Louisiana, considered West Florida

14. *Id.* at 262; Kenneth Drude, *Fort Baton Rouge*, LOUISIANA STUDIES 259-69 (1968).

15. WILBURT S. BROWN, *THE AMPHIBIOUS CAMPAIGN FOR WEST FLORIDA AND LOUISIANA, 1814-1815: A CRITICAL REVIEW OF STRATEGY AND TACTICS AT NEW ORLEANS* 65 (Univ. of Ala. Press, 1969).

16. One military historian has considered the Rigolets to be “the most strategic spot in Louisiana.” Richard P. Weinert, *The Neglected Key to the Gulf Coast*, 31 J. MS. HIST. 269-301 (1969).

17. WHITAKER, *supra* note 12, at 262.

18. *Id.* at 35-36 (“It was out of the question for such meager and widely scattered [military] forces to defend the province [all of Louisiana] against invasion, and indeed they were not expected to do so. Though they could not maintain Spanish sovereignty, they could at least assert it, and they could preserve order among the king’s subjects. For the latter purpose they were fully adequate. . . . [A]s a police force for a colony of 45,000 inhabitants . . . they were rather impressive.”).

19. COX, *supra* note 9, at 101, 546 (“West Florida rendered New Orleans susceptible to attack by . . . a foreign enemy, and its own weakness was a constant temptation to seize it.”).

even more vital than New Orleans itself.²⁰ With his European background—born and educated in Switzerland, a native French speaker, multi-lingual, and knowledgeable about international affairs—Albert Gallatin was the figure that Jefferson turned to in the days immediately preceding and following the Purchase for advice on how his administration should act. As early as September, 1803, three months prior to the formal delivery and transfer of Louisiana scheduled for December 20th, Gallatin wrote to the president: “Permit me to suggest the propriety of having everything in readiness to take possession of New Orleans.”²¹ Gallatin detailed what military forces were available for deployment should there be doubt as to “whether the prefect and Spanish officers shall be willing to give it up or not.” Only recently, Spain had retroceded all of Louisiana west of the Mississippi to France with the understanding that France would not cede the territory to any third party such as the United States. But Spain did not relinquish control of or its claim to the Floridas. There was, therefore, grave doubt as to what the disposition of the Spanish authorities would be when France handed over all of Louisiana to the Americans. “Although I do not share in the alarm of our ministers,” Gallatin wrote at the time to the President, “I think it wise to be as perfectly prepared as if it had a real ground . . . and to prepare the way with the inhabitants [of New Orleans] so as to meet no opposition from them.” He then continued: “If it shall be found necessary to take possession of New Orleans against the will of the possessors, there can be no doubt of the propriety of occupying at the same time that part of West Florida which we claim. But if New Orleans and West Louisiana shall be yielded without difficulty, the policy of occupying the rest of what we claim against the will of the Spanish officers is a subject which deserves serious consideration.”²²

In a subsequent letter written soon afterwards, Gallatin went into greater detail about the military situation in the southwest as the date for the Louisiana transfer approached:

[If] the Executive shall think it necessary to call any militia or volunteers in that part of the country, it may be confidently relied on that within a fortnight after the reception of the orders by the Executives of Tennessee and Kentucky fifteen hundred horsemen, all of them volunteers and well selected, shall be at Nashville, and then proceed immediately to Natchez,

20. See Letter from Gallatin to Madison (Feb. 7, 1803), *reprinted in* LETTERS AND OTHER WRITINGS OF JAMES MADISON vol. II, at 179-80 (4 vols., Phila., 1865).

21. Letter from Gallatin to Jefferson (Sept. 5, 1803), *reprinted in* THE WRITINGS OF ALBERT GALLATIN vol. I, at 152-53 (3 vols., Henry Adams ed., New York, 1960).

22. *Id.* at 153.

which they may reach within twenty days afterwards at most. About one-third of that number might meet at Nashville a few days earlier, and march across the wilderness within a fortnight, the rest to follow in divisions of two or three hundreds as they met from the more distant parts; which will also be more convenient on account of forage for the horses. . . . All agree that as to the number of men, considering that all the crops are in, the season the most favorable in point of health of the whole year, and the general zeal of the country, five thousand men could be raised at once without any difficulty, and that the only struggle will be for having permission to go.²³

Others besides Gallatin were concerned about the problem. General James Wilkinson, the supreme commander of American military forces in the west—such as they were—who was stationed in New Orleans, warned the Secretary of War that “Every Hour evinces more and more the necessity of a strong garrison here. . . . [O]ur puny force has become a subject of ridicule, and the old women begin to exclaim ‘*quel triste Gouvernement* [sic].”²⁴ Wilkinson feared “for the preservation of our immense Acquisitions in this quarter.” He understood the urgency of the need for additional military support to shore up the tenuous American position in that remote corner of the continent.

As it happened, the transfer of all of Louisiana—minus the disputed territory of West Florida—went off without a hitch. But Jefferson remained convinced that military defenses needed substantial reinforcement if Louisiana was to remain in American hands. Gallatin continued to advocate a military build-up in and around the city. “Observe also that the approaches by Lake Pontchartrain must be defended, as well as those by the Mississippi,” he wrote to Jefferson late in 1806.²⁵ Some months later he advised that “with a moderate force, properly distributed on water and in the forts, which command the navigation, it is the most easily defended place, of equal importance, in the United States.”²⁶ The isolation of New Orleans was one of the most

23. Letter from Gallatin to Jefferson (Oct. 28, 1803), *reprinted in* THE WRITINGS OF ALBERT GALLATIN, *supra* note 21, vol. I, at 163.

24. Letter from Wilkinson to Henry Dearborn (Jan. 11, 1804), *reprinted in* THE TERRITORIAL PAPERS OF THE UNITED STATES vol. IX, at 159 (26 vols., Clarence E. Carter ed., Wash., 1934-1962).

25. Letter from Gallatin to Jefferson (Nov. 16, 1806), *reprinted in* THE WRITINGS OF ALBERT GALLATIN, *supra* note 21, vol. I, at 317.

26. Letter from Gallatin to Jefferson (July 25, 1807), *reprinted in* THE WRITINGS OF ALBERT GALLATIN, *supra* note 21, vol. I, at 344 (“New Orleans, like Savannah and Norfolk, cannot be defended by its population alone. Its defenses in support of gunboats in the river and in the lake, should be strong forts at Plaquemine and St. John. A garrison and forts in the city do not appear to be of any use. If an enemy lands on terra firma, he will take the town and garrison, and we must retake it from the upper country.”).

vexing problems facing Jefferson after 1803. In the remainder of his first term in office and throughout his troubled second term, he returned again and again to this issue of strategic vulnerability and the need to take remedial measures there.

MAP SHOWING THE BORDERS OF THE UNITED STATES AND SPAIN
AFTER THE LOUISIANA PURCHASE

III

Coupled with the on-going problem of exterior exposure was the hair-trigger volatility of the local populations whose reaction to the recent change in sovereignty was still not fully known or understood. Thomas Jefferson came to believe that nothing less than radical demographic change would shore up Louisiana's defenses and solidify America's hold of its grand new possession. To effect such change, Jefferson proposed that Congress adopt a militia scheme that would transplant thousands of Americans to the new territories west of the Mississippi to strengthen the defenses of New Orleans. Albert Gallatin was sympathetic to the idea, and Jefferson consulted with him about it with some frequency. But the plan was first proposed by others. As early as the summer of 1803—following the Purchase but preceding the transfer—none other than Thomas Paine suggested sending “[t]housands and tens of thousands in England and Ireland and also in Scotland” to settle Louisiana. Paine even suggested that the very name—“Louisiana”—be stricken and that all vestiges of French culture and influence could be permanently erased.²⁷ Ephraim Kirby of Connecticut, the compiler of the very first set of state law reports in America and one of Jefferson's early judicial appointments to the Mississippi Territory, observed in 1804 that “a strong American settlement . . . will offer an excellent Barrier against the approach of a foreign enemy at the southwestern point of our territories. Upon any emergency succor might be thrown into New Orleans with more ease from this place (i.e., the Mississippi Territory) than any other.”²⁸ Throughout his First and Second Terms Jefferson continued to advocate the deployment of a strong militia force in the region. The proposal, though never enacted by Congress during his presidency, fitted nicely with Jefferson's general philosophy of relying on militia rather than a standing army while achieving the budgetary retrenchment with a modest federal military establishment which Gallatin strongly favored.

The idea had ripened by 1806. The Administration prepared a bill providing allotments of 160 acres in fee-simple estate to white males

27. THE WRITINGS OF THOMAS PAINE vol. III, at 430-36 (4 vols., M.D. Conway ed., New York, 1894-1896). The final designation of Lower Louisiana as the Territory of Orleans fulfilled Paine's recommendation. The change in nomenclature did not go unnoticed for it was commented upon in the Louisiana Remonstrance (1804). *Remonstrance of the People of Louisiana Against the Political System Adopted by Congress for Them (Dec. 31, 1804)*, in AMERICAN STATE PAPERS, Class X, Misc., I: 396-99, communicated to the House, Dec. 3, 1804, to the Senate, Dec. 31, 1804, Annals of Congress, 8th Cong., 2d Sess., at 727-28.

28. Letter from Kirby to Jefferson (Apr. 20, 1804), *reprinted in* EPHRAIM KIRBY PAPERS (Duke Univ.).

between the ages of eighteen and thirty-five who agreed to reside in the territory for no less than seven years, during which time they would render two years of active service to the regular army. Recruiters would receive grants of 640 acres for every hundred men they brought into the program. The federal government would carry the costs of transportation and settlement.²⁹ Introduced into Congress for the first time by Senator Thomas Worthington of Ohio in March 1806, it was described and summarized by Senator William Plumer of New Hampshire:

The President observed to me that he considered this bill as one of the most important now pending in Congress. That no part of the U.S. was so much exposed as Louisiana—That it was absolutely necessary to provide means for its defense—That near half of its present inhabitants were such that they could not be depended on in case of an invasion. [And] that it would be impolitic and expensive to raise a standing army.³⁰

Jefferson himself described the militia plan to John Dickinson of Pennsylvania in January 1807:

I proposed to the members of Congress . . . the enlisting [of] 30,000 volunteers, Americans by birth, to be carried at public expense, and settled immediately on a bounty of 160 [acres] of land each on the West side of the Mississippi; on the condition of giving two years of military service, if that country should be attacked within 7 years. The defense of the country would thus be placed on the spot, and the additional number would entitle the territory to become a state, would make the majority American, and make it an American instead of a French state. This would not sweeten the pill to the French; but in making that acquisition we had some view to our own good as well as their, and I believe the greatest good of both will be promoted by whatever will amalgamate us together.³¹

But there were other reasons for the militia scheme—Jefferson's Settlement Project—besides security. In fact, Jefferson wanted to completely transform the cultural and legal character of his vast acquisitions, or, as he wrote to Gallatin, "to draw their laws and organization to the mold of ours by degrees as they find practicable

29. A Bill for the Settlement of a Part of the Territory of Orleans; Sketches of parts of a bill for encouraging settlers in territory of Orleans; and Notes on the Bill for the defense of Orleans—all of which appear in manuscript as well as in Jefferson's published writings. See *THE WRITINGS OF THOMAS JEFFERSON* vol. VIII, at 425-27 (10 vols., P.L. Ford ed., New York, 1892-1899); see also E.S. Brown, *Jefferson's Plan for a Military Colony in Orleans Territory*, 8 *MS. VALLEY HISTORICAL REV.* 373-76 (1922).

30. WILLIAM PLUMER'S MEMORANDUM OF PROCEEDINGS IN THE UNITED STATES SENATE, 1803-1807, at 474 (E.S. Brown ed., N.Y., 1923).

31. Letter from Jefferson to Dickinson (Jan. 13, 1807), reprinted in *THE WRITINGS OF THOMAS JEFFERSON*, *supra* note 29, vol. IX, at 8.

without exciting too much discontent.”³² The evidence for this is indisputable. In his very first year as president, with Louisiana already in his sights, Jefferson told James Monroe (the future minister plenipotentiary to France) that “however our present interests may restrain us within our own limits, it is impossible not to look forward to distant times, when our rapid multiplication will expand itself beyond those limits, and cover the whole northern, if not the southern continent, with a people speaking the same language, governed in similar forms, and by similar laws; nor can we contemplate with satisfaction either blot or mixture on that surface.”³³ As he later would put it—somewhat more colorfully—when comparing the two legal traditions then in competition for recognition in Louisiana: “For however I admit the superiority of the civil over the common law code, as a system of perfect justice, yet an incorporation of the two would be like Nebuchadnezzar’s image of metal and clay, a thing without cohesion of parts.”³⁴ Or, as he would write to Gallatin, “If by giving 100 miles square of that country we can secure the rest and at the same time create an American majority before Orleans becomes a state, it will be the best bargain ever made.”³⁵

The perception that the Louisianians were unfit for self-government under the American system was widespread in Washington. Gallatin believed that they “seem[ed] to be but one degree above the French West Indians, than whom a more ignorant and depraved race of civilized men did not exist. Give them slaves and let them speak French (for they cannot write it) and they would be satisfied,” he said. One U.S. senator believed “those people are absolutely incapable of governing themselves” while another simply feared the “They are not yet bound to us by any ties.”³⁶ And Thomas Paine was unrestrained in his contempt for the native Louisianians whom he thought unworthy of rights or powers of self governance until, as he put it, “as you become initiated into the

32. Letter from Jefferson to Gallatin (Nov. 9, 1803) (Gallatin Papers, New York Historical Society).

33. Letter from Jefferson to Monroe (Nov. 24, 1801), *quoted in* ALEXANDER DE CONDE, *THIS AFFAIR OF LOUISIANA* 110 (1976).

34. Letter from Jefferson to John Tyler (June 17, 1812), *reprinted in* THE WRITINGS OF THOMAS JEFFERSON, vol. XIII, at 166 (20 vols., A.A. Lipscomb & A.E. Bergh eds., Wash., D.C., 1904-1905).

35. Letter from Jefferson to Gallatin (Jan. 31, 1807), *reprinted in* THE WRITINGS OF THOMAS JEFFERSON, *supra* note 34, vol. XI, at 145. “Congress . . . sought to secure the region further by flooding the Louisianas with ‘loyal’ American settlers who presumably already understood the benefits of the American Union.” John Craig Hammond, “*They Are Very Much Interested in Obtaining an Unlimited Slavery*”: *Rethinking the Expansion of Slavery in the Louisiana Purchase Territories, 1803-1805*, 23 J. EARLY REPUBLIC 353, 365 (2003).

36. Quotes collected in Hammond, *supra* note 35, at 363-64.

principles and practice of the representative system of government, of which you have yet had no experience, you will participate more, and finally be partakers of the whole.”³⁷

Jefferson’s plan to plant an American majority in the future state of Louisiana never succeeded. The militia scheme came toward the end of his second term, and by then Jefferson had become “a lame duck president.” In addition, even though Jefferson’s political party still dominated the nation and the Congress, events across the Atlantic assumed ever-increasing importance, and they eventually succeeded in undermining Jefferson’s political power and personal influence. The so-called peace of Amiens collapsed in 1803, and by 1807 the Wars of Napoleon were in full force. In addition, through the use of naval force and an economic blockade Jefferson had succeeded in bringing a naval dispute with the Tripolitan States in the Mediterranean to a successful conclusion during his First Term, so that he came to the mistaken belief that a similar approach could be applied when the rights of neutrals were threatened on the high seas. As a result, and at Jefferson’s direction, Congress put into place the policy known as the Embargo which soon developed into a draconian system for stopping American trans-Atlantic shipping altogether. This resulted in widespread commercial depression. New England and much of the eastern seaboard were in abject revolt while Jefferson’s popularity went into freefall. His attempts to enforce the Embargo with the use of the military made him the target of increasing political attack.³⁸ Moreover, other issues diverted Jefferson’s attention and depleted his political resources thereby blocking the completion of the Settlement Project for Louisiana: The Burr Conspiracy and its fallout in 1806/1807, the litigation over the New Orleans Batture after 1807, the ending of the slave trade after January 1, 1808, the volatile status of West Florida, and the growing conflict with Great Britain over impressment and the rights of neutrals were the most salient. In such a climate, an ambitious plan like the militia scheme for territorial Louisiana had no chance of succeeding in Congress. Nevertheless, again and again, Jefferson returned to this idea of transforming Louisiana.

37. Thomas Paine, *To the French Inhabitants of Louisiana (1804)*, reprinted in THE WRITINGS OF THOMAS PAINE, *supra* note 27, vol. III.

38. LEONARD W. LEVY, *JEFFERSON AND CIVIL LIBERTIES: THE DARKER SIDE* chs. 5-6 (Cambridge, Mass., 1963); *see also* DUMAS MALONE, *JEFFERSON THE PRESIDENT: SECOND TERM, 1805-1809* chs. 16, 31-32 *passim* (Boston, 1974).

IV

The Settlement Project was Thomas Jefferson's boldest attempt to institute Anglo-American law in Louisiana. When it failed Jefferson had no choice but to recognize that the laws in force would remain in force. Recognized principles of international law, well known at the time, supported such a policy. As summarized by a leading American treatise published years later but reflecting the state of the law in 1800: "The change of sovereignty does not obliterate the subject-matters of property or obligations. . . . Accordingly, it is held that the municipal private code remains in force . . . in the absence of new laws displacing them."³⁹ Or, as Blackstone had written back in the middle of the eighteenth century, "[I]n conquered or ceded countries, that have already laws of their own, the king may indeed alter and change those laws; but, till he does actually change them, the ancient laws of the country remain [in force]."⁴⁰ The doctrine fit the Louisiana case perfectly since Louisiana had been ceded by France to the United States by treaty. That treaty provided that "the inhabitants of the ceded territory shall be incorporated in the Union of States, and admitted as soon as possible, according to the principles of the Federal constitution, to the enjoyment of all of the rights, advantages, and immunities, of citizens of the United States."⁴¹

The inhabitants of Lower Louisiana were well aware of the terms of the treaty of cession. But the Louisiana Government Act of 1804 vested all legislative power in a governor and council of thirteen notables appointed by the President of the United States with "power to alter, modify, or repeal the laws which may be in force."⁴² All legislative enactments were subject to Congressional oversight. The Act of 1804 had a sunset clause providing for its termination in 1805, but it contained no guarantee of self-government or admission to the union thereafter. Nevertheless, Louisianians perceived the Louisiana Government Act of 1804 as a violation of the treaty of cession even though, in other respects, the act was fully in conformity with customary practice—a territorial government in the first stage of a three-stage process of territorial development.

39. HENRY WHEATON, *ELEMENTS OF INTERNATIONAL LAW* 365 n.4 (G.G. Wilson ed., Oxford, 1866; 1936),.

40. WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* vol. I, at 107 (4 vols., Dublin, 1771).

41. *THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS AND OTHER ORGANIC LAWS OF THE . . . UNITED STATES OF AMERICA* vol. III, at 1364-71 (7 vols., F.N. Thorpe comp., Wash., D.C., 1909).

42. *An Act Erecting Louisiana into Two Territories* (8th Cong., 1st Sess.), *reprinted in id.* at 1364-71.

As soon as the terms of the first Louisiana Government Act became known, a political protest was mounted in New Orleans. Within weeks of the passage of this first organic law, the mayor of New Orleans called for a formal *démarche* to Congress.⁴³ The ensuing agitation focused upon the apparent violation of the cession agreement.⁴⁴ Foremost among the complaints listed in what became known as the Louisiana Remonstrance was the failure of Congress to provide for immediate statehood—“the immediate establishment of the said territory into a free state.” This was a primary concern of the three memorialists who traveled to the District of Columbia bearing the Remonstrance in the fall of 1804.

The Remonstrance was a remarkable expression of an instinct for self-government which was thoroughly unexpected in Washington. In forceful and colorful language, it expressed the deepest longings of native Louisianians:

Persuaded that a free people [i.e., Americans] would acquire territory only to extend the blessings of freedom, that an enlightened nation would never destroy those principles on which its Government was founded, and that their Representatives would disdain to become the instruments of oppression, we calculated with certainty that their first act of sovereignty would be a communication of all the blessing they enjoyed, and were the less anxious to know on what particular terms we were received. . . . [W]e passed under your jurisdiction with a joy bordering on enthusiasm, submitted to the inconveniences of an intermediate dominion without a murmur, and saw the last tie that attached us to our mother country severed with less regret. . . . But we cannot conceal, we ought not to dissemble, that the first project presented for the Government of this country [Louisiana] tended to lessen the enthusiasm which . . . had been universal, and to fix our attention on present evils, while it rendered us less sanguine as to the future.

Recounting the revolutionary history of the Americans and the principles that guided the American Revolution and the Constitution, the Remonstrance continued:

Are truths, then, so well founded, so universally acknowledged, inapplicable only to us? Do political axioms on the Atlantic become problems when transferred to the shores of the Mississippi? or are the unfortunate inhabitants of these regions the only people who are excluded

43. Speech by Etienne Boré, New Orleans City Council Records vol. I, no. 1, at 94 (1804).

44. For a close study of the legislative history of the Louisiana Government Act of 1804, see James E. Scanlon, *A Sudden Conceit: Jefferson and the Louisiana Government Bill of 1804*, LOUISIANA HISTORY vol. 9, at 139-62 (1968).

from those equal rights acknowledged in your declaration of independence, repeated in the different State constitutions, and ratified by that of which we claim to be a member? Where, we ask respectfully, where is the circumstance that is to exclude us from a participation in these rights? Is it because we have not heretofore enjoyed them? This, on the contrary, would seem a reason to hasten the communication, to indemnify us by a futurity of freedom, for the years we have been deprived of it, and enable us, experimentally, to compare the blessings of a free Government with the evils of another kind of dominion. . . . We may then again become the victims of false information, of hasty remark, or prejudiced opinion; we may then again be told that we are incapable of managing our own concerns, that the period of emancipation is not yet arrived, and that when, in the school of slavery, we have learned how to be free, our rights shall be restored. . . . If there is force in our reclamations, on the great question of fundamental rights; if we are entitled to legislate for ourselves as a member of the Union, and to establish the forms on which that legislation shall be conducted, by framing a constitution suited to our own exigencies, then no further observations need to be made on other parts of the law, for the right of local legislation implies that of making the alterations we might deem expedient. . . .⁴⁵

But of utmost importance to the Louisiana memorialists was their emphasis upon the restriction placed by the Act of 1804 upon further importations of slaves into the territory:

There is one subject, however, extremely interesting to us, in which great care has been taken to prevent any interference even by the Governor and council, selected by the President himself. The African trade is absolutely prohibited, and severe penalties imposed on a traffic free to all the Atlantic States who choose to engage in it, and as far as relates to procuring the subjects of it from other States, permitted even in the Territory of the Mississippi. It is not our intention to enter into arguments that have become familiar to every reasoner on this question. We only ask the right of deciding it for ourselves, and of being placed in this respect on an equal footing with other States. To the necessity of employing African laborers, which arises from climate, and the species of cultivation pursued in warm latitudes, is added a reason in this country peculiar to itself. The banks raised to restrain the waters of the Mississippi can only be kept in repair by those whose natural constitution and habits of labor enable them to resist the combined effects of a deleterious moisture, and a degree of heat

45. *Remonstrance of the People of Louisiana Against the Political System Adopted by Congress for Them (Dec. 31, 1804)*, *supra* note 27; published in New Orleans in French as *MÉMOIRE PRÉSENTÉ AU CONGRÈS DES ÉTATS-UNIS D'AMÉRIQUE PAR LES HABITANTS DE LA LOUISIANE* (New Orleans, 1804); in English as *Memorial Presented by the Inhabitants of Louisiana to the Congress of the United States* (Wash., D.C., 1804).

intolerable to whites; this labor is great, it requires many hands, and it is all important to the very existence of our country. If, therefore, this traffic is justifiable any where, it is surely in this province, where, unless it is permitted, cultivation must cease, the improvements of a century be destroyed, and the great river resume its empire over our ruined fields and demolished habitations.⁴⁶

When their mission appeared to have failed, the Louisiana memorialists published several advocacy documents which illustrate just how completely Louisianians understood the terms of the cession and the degree of self-government to which it entitled them and that the American government had failed to provide.⁴⁷ Most notable was the speed, focus, and discipline of the Louisiana protestors. Their agitation for immediate change would continue unabated. Louisianians continued to insist upon their political and legal rights with a determination that was as single-minded as it must have been surprising. As noted in an unpublished letter by Joseph Dubreuil de Villars, a Louisiana planter, the Americans had totally misconstrued the political intentions of the Louisianians, and the ideological posture of its people. Dubreuil wrote to a personal correspondent:

It is not unknown here, after reading over Northern public papers, that the ceded territory has been described to Congress as some sort of Tower of Babel, suffering from the confusion of tongues, and the Louisianians as men stupefied by despotism or ignorance, and therefore unable to elevate themselves, for a long time to the heights of a free constitution.⁴⁸

But this was far from the case, for as Dubreuil then observed in referring to the three deputies bearing the Remonstrance to Washington in the winter of 1804:

[T]he Deputies [were] specially instructed to send copies of this memoir to all the legislative bodies of individual States, and to all the printing houses and journalists who have the best reputation and who are most widely known. By this means we would be sure to have as many advocates and supporters with Congress as there may be worthy citizens all over the

46. *Id.* at 399. For a thorough analysis of the importance of this provision of the Louisiana Government Act of 1804 and the objections to it by the Louisiana Remonstrators, see Hammond, *supra* note 35, at 353-80. By expressing opposition to the cessation of the slave trade, and in voicing highly racist beliefs about the nature of whites and blacks, the memorialists were reflecting conventional attitudes that were widespread not only in Louisiana but in much of the South and the rest of the country.

47. REFLECTIONS ON THE CAUSE OF THE LOUISIANIANS RESPECTFULLY SUBMITTED BY THEIR AGENTS (Wash., 1805); ANALYSIS OF THE THIRD ARTICLE OF THE TREATY OF CESSION OF LOUISIANA (n.n., n.p., n.d.).

48. J. Dubreuil, Letter of June 2, 1804, *reprinted in* JOSEPH DUBREUIL DE VILLARS PAPERS (Special Collections, Perkins Library, Duke Univ.).

United States. This last step . . . is perfectly well planned. In absolute governments, the oppression of an individual is really a special evil about which nobody worries, because from the very nature of things, everyman is left alone and is obliged to fight things out for himself, but under Democratic Constitutions the oppression of one individual is necessarily a general evil, because all rights and liberties included therein are in a real and imminent danger, the minute the public authority dares to violate a single one of the rights of even the most obscure of their citizens.⁴⁹

The letter by Dubreuil de Villars is an extraordinary document. It is yet another testament to the political sophistication of the people of Louisiana who fully understood the gulf separating perception and reality in the Louisiana mind and heart at the dawn of its history as an American possession. The Louisiana Government Act passed a year later was, in part, a response to the agitation caused by the Act of 1804. The provision of the Act of 1804 barring slavery from Lower Louisiana was dropped in the revision of 1805 and the sixth article of the Northwest Ordinance, which prohibited slavery, was specifically omitted from the new Louisiana organic law.⁵⁰ This second stage of territorial governance provided for an independent elected legislative assembly that, along with the governor's council, constituted the legislative branch.⁵¹ The rapidity with which Orleans went through these stages of territorial governance—first outlined in the Northwest Ordinance of 1787—showed the efficacy of political protest. Statehood would come in 1812, less than a decade after the Purchase. The expedited treatment that Louisiana received in the period was a product of the political energy (the “*agency*”) that the Louisianians themselves were able to bring to bear.

V

In the first decade of the nineteenth-century Louisianians had been “booted from one corner to another on the field of world politics”⁵² by

49. *Id.*

50. Louisiana Government Act (1805) section 5:

And be it further enacted, That the second paragraph of the said ordinance, which regulates the descent and distribution of estates; and also the sixth article of compact which is annexed to and makes part of said ordinance, are hereby declared not to extend to but are excluded from all operation within the said territory of Orleans.

An Act Further Providing for the Government of the Territory of Orleans (1805), *reprinted in* THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS AND OTHER ORGANIC LAWS OF THE . . . UNITED STATES OF AMERICA, *supra* note 41, at 1372; Hammond, *supra* note 35, at 374.

51. An Act Further Providing for the Government of the Territory of Orleans, *supra* note 50, at 1371-73; *see also* JACK E. EBLEN, THE FIRST AND SECOND UNITED STATES EMPIRES: GOVERNORS AND TERRITORIAL GOVERNMENT, 1784-1912 (Pittsburgh, 1968).

52. WHITAKER, *supra* note 12, at 243.

shifts in political sovereignty—from France to Spain back to France and then to America—all in the short space of a single generation. While considerable uncertainty still lingered as to how permanent Louisiana's newest political arrangement would prove to be, by 1808 it was clear that the Americans were serious about staying. The Burr Conspiracy had shown that New Orleans was not nearly as volatile as once thought while, by 1808, Spanish imperial contraction had demonstrated that its power in the Mississippi Region—despite the dire warnings of such self-serving alarmists as General James Wilkinson—was nothing more than an elaborate *trompe-l'oeil*.⁵³ As to West Florida—the object of America's original and most ardent desire—its final acquisition by force was only two years away, and no one expected Spain to have much to say in the matter.⁵⁴ Finally, the territorial government under William Claiborne's management acted with increasing competence and assurance. In short, “political hegemony” was quickly becoming less the great issue that it had been at first.

But “cultural hegemony” was another matter altogether. As explained by the historian, Jackson Lears:

[C]ultural hegemony can . . . reconcile the apparent contradiction between the power wielded by dominant groups and the relative cultural autonomy of subordinate groups Ruling groups do not maintain their hegemony merely by giving their domination an aura of moral authority through the creation and perpetuation of legitimating symbols; they must also seek to win the consent of subordinate groups to the existing social order.⁵⁵

Or, as explained by a literary theorist:

[H]egemony is not only the political process by which a particular group constitutes itself as “the one” or “the majority” in relation to which “minorities” are defined and know themselves to be “other,” but it is

53. Spain's attitude toward the defense of Louisiana was once characterized by Manuel de Godoy, Spain's foreign minister, this way: “*No es posible poner puertas al campo*” [“You can't lock up an open field.”]; WHITAKER, *supra* note 12, at 180; Jerah Johnson, *Colonial New Orleans: A Fragment of the Eighteenth-Century French Ethos*, in CREOLE NEW ORLEANS: RACE AND AMERICANIZATION 47 (A.R. Hirsch & J. Logsdon eds., LSU, 1992) (“Even the military was surprisingly unSpanish.”).

54. By 1804, there was nary a single fortified Spanish post in the entire Mississippi Valley. The garrisons that did exist numbered very few Spanish troops. See WHITAKER, *supra* note 12, at 263 (“[T]he two Floridas together could muster less than two thousand Spanish regulars; . . . Kentucky alone had 30,000 men enrolled in its militia.”).

55. T.J. Jackson Lears, *The Concept of Cultural Hegemony: Problems and Possibilities*, 90 AM. HIST. REV. 567, 568-69 (1985).

equally the process by which positions of otherness may ally and constitute a new majority, a “counterhegemony.”⁵⁶

The concept of “cultural hegemony” has great force when applied to conditions in Lower Louisiana in our period. While the number of new American settlers continued to increase, French was still the dominant language, and the vast majority of the people were French speakers. In fact, a significant “Frenchification” was ongoing at the time of the transfer and continuing thereafter. “In New Orleans in 1800, one quarter of the white population was Spanish, but the Spanish too lived as Frenchmen and, as with the Germans, the French language was the general means of social discourse.”⁵⁷ Many, including such prominent individuals as William Claiborne and Edward Livingston, both of whom having been widowed, married French Creole women—twice in both cases. Moreover, a surge of French-speaking refugees from the island of Saint Domingue reinforced the process of Frenchification following the outbreak of the Haitian Revolution in 1791.⁵⁸ Thousands of refugees sought asylum in New Orleans. From 1791 to 1812, about 15,000 Saint Dominguais settled in Lower Louisiana with most staying in the capital city.⁵⁹ Many came directly from Saint Domingue or via Cuba and Jamaica thus swelling the Francophile population of the Territory of Orleans in the first decade of the nineteenth century.⁶⁰

“New Orleans . . . was ultimately the destination for the largest number of refugees from the Haitian Revolution.”⁶¹ According to Daniel Clark, the American consul in the city at the time of the transfer in 1803, New Orleans numbered 8,056.⁶² By 1810, the Dominguais had more

56. See Lisa Lowe, *Heterogeneity, Hybridity, Multiplicity: Marking Asian American Differences*, in LITERARY THEORY: AN ANTHOLOGY 1031, 1036 (J. Rivkin & M. Ryan eds., Blackwell, 2d ed. 2004).

57. Vernon Valentine Palmer, *Two Worlds in One: The Genesis of Louisiana's Mixed Legal System, 1803-1812*, in LOUISIANA: MICROCOSM OF A MIXED JURISDICTION 23, 29 (V.V. Palmer ed., Durham, 1999); see also Hans W. Baade, *Marriage Contracts in French and Spanish Louisiana: A Study in "Notarial Jurisprudence,"* 53 TUL. L. REV. 3-92 (1979).

58. For a useful overview of the Haitian Revolution, see Laurent Dubois, *The Haitian Revolution and the Sale of Louisiana*, 44 S. QUARTERLY 18-41 (2007); LAURENT DUBOIS, *AVENGEURS OF THE NEW WORLD: THE STORY OF THE HAITIAN REVOLUTION* (Cambridge, Mass., 2004).

59. R.L. Paquette, *Revolutionary Saint Domingue in the Making of Territorial Louisiana*, in D.B. GASPARD & D.P. GEGGUS, *A TURBULENT TIME: THE FRENCH REVOLUTION AND THE GREATER CARIBBEAN* 204, 214 (Ind., 1997).

60. Paul Lachance, *An Empire Gone Awry*, 23 HUMANITIES 17-20 (2002).

61. Ned Sublette, *The World That Made New Orleans: From Spanish Silver to Congo Square* 250 (Chicago 2008).

62. See WHITAKER, *supra* note 12, at 277 n.31 (3,948 whites, 1,335 free blacks, 2,773 black slaves).

than doubled the size of the city to over 17,000.⁶³ Overall, the number of blacks (free people of color and black slaves) exceeded the number of white inhabitants. But French remained the dominant vernacular in a sea of languages and cultures.

United by their Creole language and culture and by their common misfortune, these newcomers from the islands permitted New Orleans to preserve for a few more years its colonial character, its exotic charm, and a life-style similar to that of an island just offshore from the continent, even as thousands of Americans were arriving from the eastern states.⁶⁴

This meant that “Creole political ascendancy, or at least group preservation, seemed assured. . . .”⁶⁵ Even in the 1820s, New Orleans was still perceived as a nearly ungovernable *mélange* of peoples. As Benjamin Latrobe, the pioneering engineer and architect, would observe, “[O]n arrival in New Orleans in the morning, a sound more strange than any that is heard anywhere else in the world astonishes [a stranger]. It is a more incessant, loud, rapid, and various gabble of tongues of all tones than was ever heard at Babel.”⁶⁶

Accordingly, while political hegemony was becoming “closed,” cultural hegemony was still “open”—an area for interaction, accommodation, negotiation, and compromise.⁶⁷ Cultural commitments were not fixed but highly fluid, open-ended, undefined. In Louisiana, despite the growing political power of the Americans, the possibility for the creation of a “counter-hegemony” left a “third space” for the emergence of competing cultural expressions. While political hegemony may get closed off by a dominant over a sub-dominant group—as in the ultimate case of political sovereignty—the sub-dominant (or “subaltern”) group can still assert itself not only through participation in the very

63. *Id.* at 242, 250-51.

64. G. Debien & Rene Le Gardeur, *The Saint-Domingue Refugees in Louisiana, 1792-1804*, in *THE ROAD TO LOUISIANA: THE SAINT-DOMINGUE REFUGEES, 1792-1809*, at 113, 114-15 (C.A. Brasseaux & G.R. Conrad eds., Lafayette, La., 1992).

65. Thomas Fiehrer, *From La Tortue to La Louisiane: An Unfathomed Legacy*, in *THE ROAD TO LOUISIANA: THE SAINT-DOMINGUE REFUGEES, 1792-1809*, *supra* note 64, at 1, 25.

66. Benjamin Henry B. Latrobe (Jan. 12, 1819), *quoted in* Jon Kukla, *A Wilderness So Immense: The Louisiana Purchase and the Destiny of America* 333 (N.Y., 2003). “Linguistic abundance” was the dominant feature of cultural life in New Orleans well into the 1820s and ’30s. See Bailey, *supra* note 8, at 366.

67. Lears, *supra* note 55, at 573-74:

[O]ne might imagine hegemonic cultures placed anywhere on a continuum from “closed” to “open”. In the “closed” version, subordinate groups lack the language necessary even to conceive concerted resistance; in the “open” version, the capability for resistance flourishes and may lead to the creation of counter-hegemonic alternatives. . . . [T]he line between dominant and subordinate cultures is a permeable membrane, not an impenetrable barrier.

institutions of political dominance upon which the architecture of sovereignty itself is built but also by continuing to assert a separate cultural identity. Moreover, the subaltern group has the potential, if not to reverse then at least to arrest the pace and extent of cultural transformation. And if there are many such subaltern groups, these can coalesce and form a united cultural identity thereby finding a place within an emerging “hybrid” culture. In this way, the subjugated group (or groups) effectively resist total domination. Through this process, they are able to achieve recognition, respect, even permanent identification as part of a new cultural hegemony.

Consequently, the historical concept of “cultural hegemony” leads inevitably to the idea of “*hybridity*”—a cognitive field most closely associated with modern post-colonial thought. *Hybridity* has been defined as “a fruitful metaphor in the idea of cross-fertilization between . . . constitutive elements . . . [t]he interleaving of practices [to] produce new forms even as older forms continue to exist”⁶⁸—“a positive, resistive force to cultural hegemony.”⁶⁹ The term is most often associated with contemporary writers—most notably Homi K. Bhabha and Anjali Prabhu—who have created a distinctive cultural discourse from a modern post-colonial perspective:

What is theoretically innovative, and politically crucial, is the need to . . . focus on those moments or processes that are produced in the articulation of cultural differences. These ‘in-between’ spaces provide the terrain for elaborating strategies of selfhood—singular or communal—that initiate new signs of identity, and innovative sites of collaboration, and contestation, in the act of defining the idea of society itself. . . . The social articulation of difference, from the minority perspective, is a complex, on-going negotiation that seeks to authorize cultural hybridities that emerge in moments of historical transformation.⁷⁰

Or, as Homi Bhabha explains elsewhere:

[F]or me the importance of hybridity is not to be able to trace two original moments from which the third emerges, rather hybridity to me is the ‘third space’ which enables other positions to emerge. This third space displaces

68. THE POST-COLONIAL READER 184 (Ashcroft, Bill, Gareth & Tiffin eds., London, 1995).

69. ANJALI PRABHU, HYBRIDITY: LIMITS, TRANSFORMATIONS, PROSPECTS 7 (Albany, 2007). “[W]ays in which different cultures encountering one another in contingent historical circumstances transform themselves and each other into new and unforeseeable entities. Such a concern is central to other theories that abound in postcolonial studies as expressed in terms such as *creolization*, *metissage*, *hybridity*, and even *diaspora*.” Anjali Prabhu, *Interrogating Hybridity: Subaltern Agency and Totality in Postcolonial Theory*, in *DIACRITICS* 76, 76 (2005).

70. HOMI K. BHABHA, *THE LOCATION OF CULTURE* 2-3 (N.Y. 1994; 2006).

the histories that constitute it, and sets up new structures of authority, new political initiatives, which are inadequately understood through received wisdom. . . . The process of cultural hybridity gives rise to something different, something new and unrecognizable, a new area of negotiation of meaning and representation.”⁷¹

There is no need to engage here in the complex discourse of post-colonialism in order to apply it to early Louisiana. While this may appear to be anachronistic—post-colonialism being largely a phenomenon of the second half of the twentieth century—it should be recalled that the first truly modern anti-colonial revolution was that which took place on the island of Saint Domingue: the great black revolt led by Toussaint L’Ouverture (1791-1803).⁷² The refugees from that revolt went to other islands and borderlands of the Caribbean, including New Orleans and Lower Louisiana. The “broad and deep influence of revolutionary Saint Domingue” cannot be overemphasized.⁷³ Saint Domingue in the eighteenth century was the richest colony in the Caribbean. It had strong economic, social and cultural ties to the Louisiana settlement throughout the late eighteenth century, and the diaspora of Saint Dominguais following its revolt from colonial French control was very large. The “common wind” of revolutionary ideas emanating from republican France after the Revolution “was stirring people of all colors and statuses in the greater Caribbean” and that certainly included territorial Louisiana.⁷⁴ “The radical French ideals of liberty, equality, and fraternity spread quickly to and through Louisiana and by means of books, newspapers, correspondence, and . . . sailors, merchants and refugees.”⁷⁵

Accordingly, there is a direct link between this first anti-colonial revolt and the events that transpired in the first decade of Louisiana’s history as a U.S. possession. Using the metaphor of the Nigerian novelist, Chinua Achebe, whose great novel, *Things Fall Apart*, describes how the interaction between colonizer and colonized caused a disintegration of indigenous culture in his native Nigeria, we can assert that in Louisiana, things did not “fall apart.” The Civil Digest of 1808

71. *The Third Space: Interview with Homi Bhabha*, in *IDENTITY: COMMUNITY, CULTURE, DIFFERENCE* 207, 211 (J. Rutherford ed., London, 1990).

72. C.L.R. JAMES, *THE BLACK JACOBINS: TOUSSAINT L’OUVERTURE AND THE SAN DOMINGO REVOLUTION* (N.Y., 2d rev. ed., 1989); CAROLYN FLICK, *THE MAKING OF HAITI: THE SAINT DOMINGUE REVOLUTION FROM BELOW* (Knoxville, 1990).

73. Paquette, *supra* note 59, at 205.

74. *Id.* at 216.

75. Kimberly S. Hanger, *Conflicting Loyalties: The French Revolution and Free People of Color in Spanish New Orleans*, in *GASPAR & GEGGUS*, *supra* note 59, at 178, 194.

was one of a number of acts of self-governance that Louisianians achieved in the territorial period of their history. Not only the Digest, but the Practice Act and the Crimes Act of 1805, and even the Black Code of 1806, evidence an extraordinary ability to identify specific legal needs and to act upon them. Other acts of social cohesion, such as the organization of a rudimentary public school system as well the organization of one of the very first urban police forces in the South, the New Orleans “City Guard,” attest to the same instinct for governance.⁷⁶ Even the “free people of color”—separate and apart from the dominating white planter, merchant and professional classes—attempted to reconstitute their own militia guard⁷⁷; they petitioned the courts in legal disputes; and, they mobilized politically for collective action.⁷⁸

Overall, the story of Louisiana in this period is a dramatic tale of energetic self-government manifested by examples drawn from “civil administration, the law, education, religion and the military—institutions and institution-making defined the boundaries of incorporation and exclusion, creating the networks through which people expressed their goals and grievances.”⁷⁹ The potential for fragmentation, discord, and cultural conflict was great even without the Anglo-American influence coming from outside. But instead of breaking apart, the indigenous groups—mostly the French⁸⁰, but also the German, the Spanish, the Irish, the Caribbean, the Creole, and the African—all coalesced around this shared tradition of customary civil law. These groups identified with the old law and were able to see past particular differences. The “ancient laws of Louisiana” (whatever they were) became the signature of an emergent “hybrid” culture. And Louisiana’s geographic position helped to produce a climate for cultural compromise by isolating its new American governors from central command and control in Washington. Such isolation required local American leaders to interact and to compromise across cultural lines in order to achieve social stability. That is why the failure of the militia scheme was so important. It meant that the cultural isolation of the Americans would continue just long enough

76. Peter J. Kastor, *Young Men and Strangers: Institutions, Collaborations, and Conflicts in Territorial Louisiana*, 43 J. OF WEST 13-22 (2004).

77. See “Address from the Free People of Color” to Gov. Claiborne on Jan. 17, 1804, cited in K.S. Hanger, *Conflicting Loyalties*, in GASPAR & GEGGUS, *supra* note 59, at 192.

78. Thomas N. Ingersoll, *Free Blacks in a Slave Society: New Orleans, 1718-1812*, 3d ser., 48 WILLIAM & MARY Q. 173-200 (1991).

79. Kastor, *supra* note 76, at 13.

80. Even the “French” were split into sub-groups: the “foreign French” who emigrated from France, the French speakers native to Louisiana, and the refugees (black and white) from Saint Domingue. See Paul F. Lachance, *The Foreign French*, in CREOLE NEW ORLEANS: RACE AND AMERICANIZATION, *supra* note 53 **Error! Bookmark not defined.**, at 101-30.

for codification to proceed while taking advantage of a unique historical moment—a moment that might not repeat itself.

VI

The Louisiana experience is the great exemplar of the role of *convergence* and *contingency* in human history. As explained by the deconstructionist philosopher, David Wood, *convergence* refers to the fact that “events don’t just happen, they don’t just come from nowhere. They [are] made possible by convergences . . . by various factors coming together and making the emergence of something new possible,”⁸¹ while *contingency* refers to the “vagaries of [the] unpredictable . . . in [human history].”⁸² Not *causation* but *convergence* and *contingency*. These are the historical forces that helped to shape Louisiana’s mixed legal system. There was no inevitability about this. The timing had to be just right. Another few years and the demographics would have been sufficiently altered to make it more difficult to implant the civil law with any kind of permanence. Private civil law triumphed at a critical juncture of European—largely French—socio-cultural hegemony in Louisiana. Within fifty years this strength on the ground would largely disappear, having passed into the hands of the Americans. As Professor Vernon Palmer has concluded:

It is a reasonable conjecture that had the founding period of the legal system been delayed perhaps even twenty years the entire story might have been scripted differently, so rapid was the parallel process of Americanization which in effect raced with Creole efforts to entrench civil law in Louisiana law and constitution. The story of this race against time is the story of the founding of common law and civil law in Louisiana.⁸³

Contrary to the suppositions of astute observers such as Thomas Paine, Albert Gallatin, Thomas Jefferson and many others, Louisianians knew what they wanted, and they knew how to get it. Timing was all. The

81. “Thinking Against the Grain,” An Interview with David Wood (May 29, 2008) 4 (Vanderbilt Univ. Philosophy Dep’t), available at <http://www.vanderbilt.edu/AnS/philosophy/faculty/wood-interview.html>.

82. R.L. Schuyler, *Contingency in History*, in 74 POL. SCI. Q. 321, 333 (1959) (emphasis added).

83. Palmer, *supra* note 57, at 27-28; Kastor, *supra* note 76, at 14 (“It was during the territorial period, when local residents suddenly found themselves part of another country and federal officials expressed deep concerns about the fate of the union, that the struggle to create, control, and direct institutions was so profound. Time and again, members of a diverse population turned to these issues in an effort to reshape Louisiana, to define its social character and its relationship to the United States. And all of these people were committed to doing so on their own particular terms.”).

political stars had to be properly aligned, and the energy for effective and concerted action had to be there. With the central administration distracted, weakened, distant and unable to do much about it, Louisianians enacted the Digest (or code) of 1808 when the occasion was right. But the future was still filled with uncertainty. As the “barbarous yoke” encyclical republished by the *Lanterne Magique* declared, a return to France was contemplated by those who still hoped “to preserve in that country, for some time longer, the practice of those laws it is our interest TO FIND THERE.”

* * *

Richard Hofstadter, the Columbia historian, used to say that historians—much like novelists and dramatists—emphasized conflict because it made a far better story than consensus. “Literature . . . traffics in conflict”⁸⁴ and, thought Hofstadter, so do writers of history. In the 1960s Hofstadter became a target for intense historical criticism, but his critics have not always appreciated that he was applying to historical writing and to historiography the same sort of critical sensibility that people like Alfred Kazin and Lionel Trilling, two of Hofstadter’s closest friends, had deployed in the field of letters and literary criticism.⁸⁵

The issue of conflict in history has been raised with respect to Louisiana during the territorial and early statehood period—did it exist or not? There are historians (this one included) who have used words such as “clash” and “conflict” in describing relations between rival groups and competing cultural traditions in the territorial period of Louisiana’s rich history.⁸⁶ Writing from Paris in the early 1820s, Bernard Marigny, descendant of a distinguished line of French Creoles dating back to one of the founders of the city of New Orleans, provided further evidence for this view of the turbulent history of territorial Louisiana:

Called upon twelve years ago to take part in public affairs, I have supported and defended with all my ability and strength the rights and interests of the inhabitants of Louisiana of the same origin as myself. I found myself in the opposing party, and I have never left it. If this system [of opposition] had not been carefully and constantly carried on by Messrs. Blanque, Thierry, and myself, the seat of government would long since have been transferred from New Orleans to Baton Rouge, and the civil laws, by which we are

84. RICHARD POSNER, *LAW AND LITERATURE* 22 (Cambridge, rev. & enlarged ed., 1998).

85. DAVID S. BROWN, *RICHARD HOFSTADTER: AN INTELLECTUAL BIOGRAPHY* (Chicago, 2006).

86. *E.g.*, Joseph G. Tregle, Jr., *Creoles and Americans, in CREOLE NEW ORLEANS: RACE AND AMERICANIZATION*, *supra* note 53 **Error! Bookmark not defined.**, at 131-85; GEORGE DARGO, *JEFFERSON’S LOUISIANA: POLITICS AND THE CLASH OF LEGAL TRADITIONS* (Cambridge, 1975).

[now] governed, annulled and replaced by the famous Common Law of England, a veritable *grimoire*, which, like the languages of Aesop, one can make another say whatever one wishes, to the great detriment of the unfortunate litigant.⁸⁷

Observations such as that provided by the Marigny memoire, support the validity of this “conflict” interpretation. Recent historians have challenged the “conflict approach,” however. These scholars have suggested that while there were, indeed, ethnic and political differences and tensions in Lower Louisiana, such groups were not necessarily battling for political or even cultural control. In fact, in some places and on some issues they worked together on the basis of common interest.⁸⁸ Despite their differences in language, personal background, and political affiliation American immigrants forged marital, commercial, and social alliances with French Creoles. Issues of land acquisition and the availability of slaves provided the material basis for such alliances. The French had the land and the Americans had access to slaves thereby providing a nexus for cooperation and compromise particularly in rural Louisiana. This was particularly true in the parishes away from New Orleans where political, ethnic, linguistic and cultural conflict tended to be more intense.⁸⁹ Thus, these historians conclude, there was consensus as well as conflict in territorial Louisiana.

The central concept of *hybridity* provides a way to resolve this historiographical debate between conflict and consensus. *Hybridity* allows room for conflict but also—in the words of Homi Bhabha, for “collaboration and contestation in the act of defining the idea of society itself—the social articulation of difference, [in] . . . a complex, of on-going negotiation that seeks to authorize cultural *hybridities* that emerge

87. Memoire of Bernard Marigny addressed to his fellow citizens of New Orleans (Paris, 1822), trans. Olivia Blanchard, in Howard-Tilton Memorial Library, Tulane University. John Blanque was a member of the Orleans territorial legislature in the year of the Digest. Thierry was the editor of the *Louisiana Courier* (French and English).

88. A LAW UNTO ITSELF: ESSAYS IN THE NEW LOUISIANA LEGAL HISTORY 1-22 (Baton Rouge, Warren M. Billings & Mark F. Fernandez eds., 2001); see also RICHARD HOLCOMBE KILBOURNE, JR., A HISTORY OF THE LOUISIANA CIVIL CODE: THE FORMATIVE YEARS, 1803-1839 chs. 1-2; see also Paquette, *supra* note 59, at 215.

89. “While migrants depended on French Louisianian residents for access to land, French Louisianians, in turn, relied on newcomer Anglo-Americans for slaves. . . . Thus, a bargain was struck between the two ethnic groups of aspiring planters.” Sarah Russell, *Ethnicity, Commerce, and Community on Lower Louisiana’s Plantation Frontier, 1803-1828*, in 40 LA. HIST. 389, 401-02 (1999); Hans W. Baade, *The Bifurcated Romanist Tradition of Slavery in Louisiana*, 70 TUL. L. REV. 1481, 1481 (1996) (“Spanish law was officially in force in Spanish Louisiana between 1769 and 1803, but . . . French legal folkways continued to prevail locally outside of New Orleans.”).

in moments of historical transformation.”⁹⁰ Louisiana’s mixed legal system is the legacy of such “a moment of historical transformation.” *Hybridity* produced a rich interaction—call it conflict, contestation, or negotiation—from within the mix of languages, cultures and legal traditions that the Americans found in their first true colony.

Thomas Jefferson once thought Lower Louisiana a territory totally different and distinct. As he put it philosophically at the very start of the American occupation: “[I]n a whole composed of parts, no one part must carve for itself.”⁹¹ But Louisiana refused to be a “part of the whole.” It resisted with *energy* and *agency* in a sufficiency of time to transform its legal and its cultural heritage into something genuinely new and decidedly different—a difference that continues to this day. A landmark in American as well as in Louisiana history, the Digest (or Code) of 1808 was by no means inevitable or predetermined. Its enactment was *contingent* upon an alignment and *convergence* of historical forces, a record of events and personalities that could not have been predicted with certainty. In time, Louisiana would be transformed by the inevitable changes which participation in the American federal union would require. But for the moment, Louisianians were able to resist successfully the forces of cultural as well as political and legal hegemony which possession by the United States portended. Thus, the Civil Digest of 1808 was not only a foundational legal document but a constitutive cultural moment in historical time—an effort by the Louisianians to preserve language, culture, and historical memory as well as law. Viewed in this way and through such a lens, the Civil Digest can be better perceived and is best understood.

90. See BHABHA, *supra* note 70, at 2.

91. Letter from Jefferson to Claiborne (Dec. 2, 1804), *reprinted in* THE TERRITORIAL PAPERS OF THE UNITED STATES, *supra* note 24, at IX, 342.