





François-Xavier Martin Revisited:

*Louisiana Views on Codification,
Jurisprudence, Legal Education and Practice*

By Prof. Olivier Moréteau

On March 21, 1810, François-Xavier Martin, then judge in the Territory of Mississippi, was transferred to New Orleans to sit on the bench of the Superior Court of the Territory of Orleans. Five years later, in 1815, he would begin a 31-year tenure as one of the very first judges of the Louisiana Supreme Court, leaving the court in 1846, the year of his death.

Portrait of François-Xavier Martin. Image provided by the Louisiana Supreme Court.



He was appointed as a federal judge by James Madison in 1809, just after the new President's inauguration. He spent less than one year in Biloxi before moving to New Orleans where he resided until the end of his life.

Martin was 48 years old when he arrived in New Orleans. The story of his fascinating life is well documented.¹ A summary of his formative years helps understand how French-born Martin turned into an American printer and self-taught 18th century jurist, later to be celebrated as the "Father of Louisiana Jurisprudence"² for his judicial contribution to the unique identity of the Louisiana legal system in the early 19th century. His mastery of both the civil and the common law traditions and his understanding of the convergence of both systems regarding underlying principles and sources of the law make him an inspiring model for the 21st century, well worth being revisited as the Louisiana Supreme Court commemorates its Bicentennial. He indeed epitomizes clear Louisiana views on codification, jurisprudence, legal education and practice.

A Self-Taught Jurist

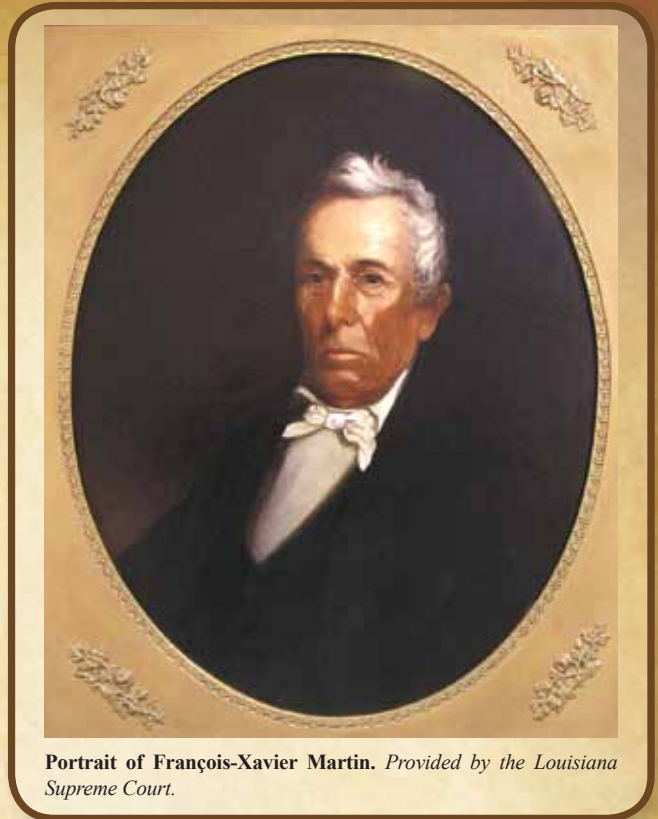
François-Xavier Martin was born in Marseilles, France, on March 17, 1762, into a wealthy merchant family. As the third son, he was destined to become a priest. He had received a solid liberal education and knew Latin and Italian. He was 17 when he left France. He would not become a priest, though his lifestyle would be akin to that of a monk: an austere bachelor, living very simply, spending as little as possible. He sailed to Martinique where his uncle had a flourishing business, provisioning the French fleet. When his uncle sold the business to retire in France, Martin sailed to America. He spent 1782-83 in New York, unsuccessfully attempting to recover a family debt that would have helped him create a business. He enrolled in the Continental Army in Virginia during the final years of the American Revolution, but was dismissed due to his feeble eyesight. In New Bern, N.C., Martin survived on odd jobs, teaching French and selling old newspapers.

Martin was hired by James Davis, one of the few printers in the Carolinas. In no

time, he surpassed his master. He saved money to buy his own press and started a profitable printing and publishing business. He published books on subscription, almanacs and a weekly newspaper, *The North Carolina Gazette* (1786-97). The *Gazette* focused on events in France, especially during the French Revolution. He translated and published popular French novels, continuing to do translation work later in life.³

Martin printed legal forms and published treatises on North Carolina law. Justice of the Peace handbooks were popular at the time, and plagiarism was commonplace. Judges and attorneys needed small books they could carry by their saddle when riding from town to town. Martin wrote or copied and published several law books; he came to be known as an honest businessman. Piracy of books was probably needed in those days because of the scarcity of information. He published collections of English statutes and English law reports of the 17th century, the first ones to be printed in the United States. He also published the first collection of North Carolina cases (1796).

He found a copy of the famous *Traité des obligations* by the French legal scholar Robert Pothier (first published in Orléans in 1761) and published an English translation in 1802.⁴ According to legend, Martin set the type as he translated rather than using a handwritten draft.⁵ However, the translation is of great quality.⁶ Featuring both Roman law and French customary law, this book had a great influence on the drafting of the French Civil Code. Available in English, the book also inspired learned common law judges during the 19th century on matters not previously addressed by English courts.



Portrait of François-Xavier Martin. Provided by the Louisiana Supreme Court.

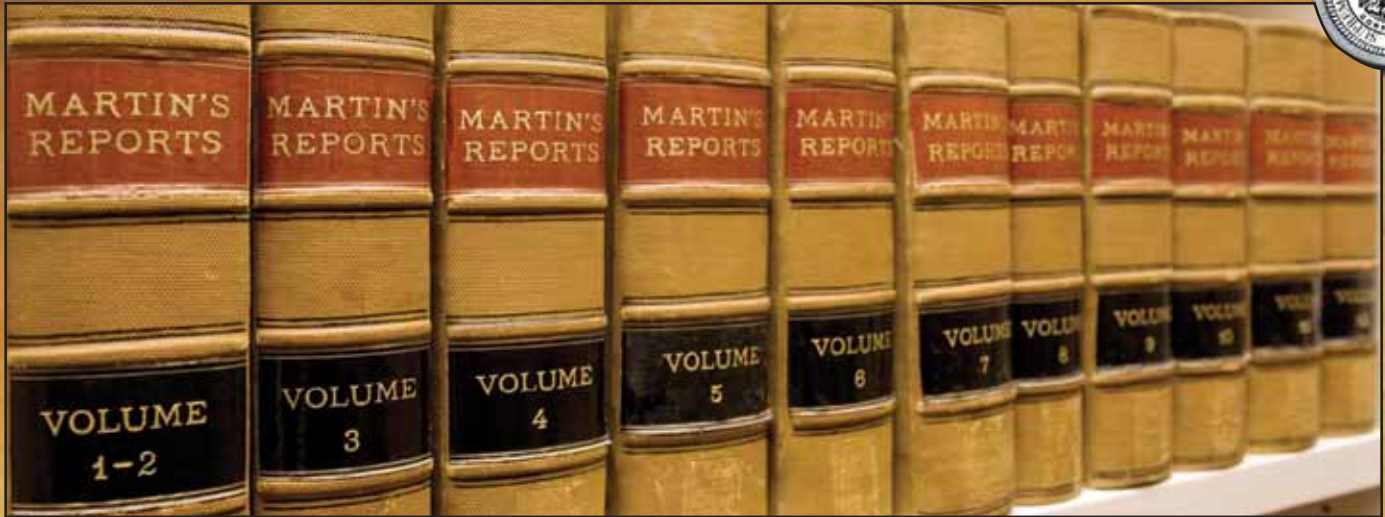
This work gave Martin grounding in the civil law tradition, years before he came to Louisiana. He indeed had received no legal education or training before leaving France.

In 1803, Martin planned to publish a Digest of all reported cases in the United States, showing a unitary vision of the common law that he shared with Judge Joseph Story. The plan failed due to a shortage of subscriptions,⁷ and the idea of a general common law was to be later defeated.⁸ It can be difficult to make business with futuristic views, but Martin unknowingly predicted the National Reporter System, Lexis and Westlaw.

Meanwhile, Martin had received legal training from a great attorney of North Carolina, Abner Nash, and was admitted to the Bar in 1789. In 1806, he was elected to represent New Bern in the North Carolina state Legislature. He served on the committee charged with the duty of receiving President Washington when he visited the state.

A Judge of Vision

When Martin reached New Orleans in March 1810, he found a world of clashing



Martin's reports on display in the Rare Book Room at the Law Library of Louisiana. Provided by the Law Library of Louisiana.

cultures,⁹ halfway between the New and the Old Worlds, with the heat, smells and sounds of Africa and the Caribbean. Educated people conversant both in French and English were not that many. Martin was familiar with the English and American common law; he was already acquainted with the civil law at least through his translation work. Martin's talents as translator were much in use during the transition period from territorial administration to statehood.

He served as federal judge at the end of the Territorial period, later to be appointed the first Attorney General of the State of Louisiana in 1813. In 1815, he was made a judge of the Louisiana Supreme Court, then composed of three judges. The other two were George Mathews and Pierre Derbigny. In 1837, when Mathews left the Court, Martin served as the chief judge until the day he left the Court in 1846.¹⁰

During his fertile 36 Louisiana years, he developed remarkable views on codification, jurisprudence and legal education.

Codification and Natural Law

The *Digest of the Civil Laws now in force in the territory of Orleans* (1808) was in force when Martin took office, with its French text and English translation. In *The History of Louisiana*, a two-volume book that Martin wrote and published in 1827,¹¹ he regrets that the Digest was not a Code. Praising the two draftsmen, he wrote:

Their labor would have been much more beneficial to the people, than it has proved, if the legislature . . . had given it their sanction as a system, intended to stand by itself, and be construed by its own context, by repealing all former laws on matters acted upon in this digest. Anterior laws were repealed, so far only, as they were contrary to, or irreconcilable with any of the provisions of the new. . . . In practice, the work was used, as an incomplete digest of existing statutes, which still retained their empire; . . . Thus, the people found a decoy, in what was held out as a beacon.¹²

He shows great civilian lucidity and full understanding of what a civil code is by his opposition to the Court's practice of keeping the old laws alive wherever they were not contradicted by the Digest.¹³ He dissented in *Cottin v. Cottin* (1817),¹⁴ where Pierre Derbigny decided that the Digest provision to the effect that "abortive children are such as by an untimely birth, are either born dead, or incapable of living"¹⁵ did not contradict and did not repeal the old Spanish law that said to inherit, the child must live at least 24 hours. This made legal practice extremely complex. Wherever the Digest was found too general or silent (a matter of much debate), one had to dig into ancient Spanish laws (of course, in Spanish), Roman law (of course, in Latin), or comments by

French authors such as Dumoulin, Domat or Pothier (of course, in French, though the latter had been partly translated into English by Martin himself). The rest is history: a Louisiana Civil Code was adopted in 1825, this time with a proper abrogation clause, strengthened in 1828.

Martin was in favor of a clean abrogation clause, as it is the best way to make the law predictable for the citizen to whom it is to be applied.¹⁶ Yet he believed that such a clause would only repeal the positive laws adopted by a legislature.¹⁷ In *Reynolds v. Swain*,¹⁸ a case decided in 1839 when Martin was the chief judge, he said that the Legislature cannot abrogate unwritten law such as natural law or the law of nations:

The repeal spoken of in the code, and the act of 1828, cannot extend beyond the laws which the legislature itself has enacted It cannot be extended to those unwritten laws which do not derive their authority from the positive institution of any people, as the revealed law, the natural law, the law of nations, the laws of peace and war, and those laws which are founded in those relations of justice that existed in the nature of things, antecedent to any positive precept.¹⁹

There is no clearer statement in Louisiana jurisprudence that the law is grounded on universal principles. After



all, those who deny the existence of natural law nonetheless recognize the supremacy of human rights and fundamental rights, and are willing to accept that they may only be defined in the context of a case. Whatever the name and wherever such rights receive constitutional support, we accept that judges may strike down legislative provisions unreasonably denying their protection.²⁰ We are willing to accept that positive civil or municipal laws, as defined by Justinian and Blackstone,²¹ are just conducive of local variations.²² The reference to equity and natural law in the gap-filling provision of the Digest and Codes of 1825 and 1870,²³ copied from the French *Projet* and yet abandoned in the French *Code civil*, supports Martin's view, and the omitted reference to natural law in the revised article 4 may be regretted.²⁴

The first judges who sat on the Louisiana Supreme Court were not positivists, and the Louisiana civil law consistently differs from the French in this respect. They show an open-minded view of what the law is. In *Orleans Navigation Company v. Mayor of New Orleans*,²⁵ Mathews (C.J.) stated that in the court's opinion:

... and here it may be observed that, in our view, it is very immaterial whether we named things by the common law or civil law, if the names are proper according to the rules of common sense or common parlance; and it is quite unnecessary, being the same in both systems of law, to enquire whether they have been established by the dictum of a Roman praetor, the edict of an emperor, or denominated by a learned English law writer.²⁶

While this kind of discourse may lead to common law contamination²⁷ and places great confidence into what the judge says,²⁸ it goes beyond the civil law/common law divide and reveals a belief in the universality of the law that prospered in the United States under the influence of Judge Story and would be defeated by *Erie Railroad Co. v. Tompkins*.²⁹

On Jurisprudence

Martin was a true scholar, at ease with

both common law and civil law. He no doubt trusted the work of the Court and had an acute sense of what *stare decisis* means in a common law setting. He also had a clear and 20th century perception of what jurisprudence means in the civil law tradition. It feels as if he had read François Géný more than 80 years before it was written.³⁰ He published the first reports of the cases decided by the Superior Court of the Territory of Orleans and the Louisiana Supreme Court in a set of at least 18 volumes. In the foreword to the Old Series, he wrote:

In matters of practice [the judge] will at times conform himself to what has been already done, though, had there been no determination, he might have suspended his assent. General and fixed rules are in this respect a great *desideratum*. At all events, a knowledge of the decisions of the court will tend to the introduction of more order and regularity in practice, and uniformity in determination.³¹

The foreword emphasizes words like "order," "regularity" and "uniformity" and expresses a clear preference for "general and fixed rules." In *Smith v. Smith*, a case decided in 1839,³² he states that "more than one decision of the supreme judicial tribunal is required to settle the jurisprudence on any given point or question of law." This might be the first expression ever of the doctrine of *jurisprudence constante*. It came under the pen of a judge who appears to be a remarkable comparative law scholar. He understood 100 years before others that the civil law



The granite tomb of François-Xavier Martin in St. Louis Cemetery No. 2 in New Orleans. Photo by Viçenc Feliu, published with permission.

strongly relies on the work of the highest courts, finding their decisions persuasive especially when repeated, yet not regarding one unique decision as a binding precedent.³³

On Legal Education and Practice

Martin wished all attorneys practicing in Louisiana to be trained both in the civil law and the common law. Warren

Billings³⁴ explains that, in 1840, Chief Judge Martin molded a rule of court reforming legal education for prospective attorneys, prescribing the study of over a dozen treatises ranging from theory to practice of the law in general and the law of Louisiana in particular. The list includes Robert Pothier, Jean Domat, Joseph Story, Sir William Blackstone and James Kent.³⁵ This was a *bijural curriculum avant la lettre*, making Martin the grandfather of the present Louisiana State University model, though the grandchild sadly moves away from doctrinal sources.

Martin was a man of immense learning and a great legal mind. There is evidence that he loved arguing by asking questions and mastered the Socratic method. He was compared to Lord Mansfield.³⁶ His Court has been recognized as "one of the ablest courts of last resort in the United States."³⁷ He achieved a lot with limited means, proving that vision can to some extent supplement technical hardship.³⁸ He remained on the bench though totally blind, and yet a lucid chief judge. He left the Court in 1846, as the state Constitution had been changed,³⁹ and died in December that year. The whole bar and bench and many distinguished officials accompanied him to his last abode that may still be visited in St. Louis Cemetery.



Conclusion

The Universities of Harvard and Nashville awarded Martin honorary doctorates. He was named a foreign member of the Marseilles Academy. He is fondly remembered, in Louisiana and beyond, 203 years after his arrival in New Orleans. May his work keep inspiring new generations of attorneys and judges as our state and its Supreme Court move towards a third century of existence. Martin understood that codes are made for the people, that they do not repeal but must remain connected with natural law,⁴⁰ and must not be manipulated but kept alive by judges educated in both civil law and common law. More so than these words, a simple look at the magnificent bust of François-Xavier Martin at the Louisiana Supreme Court will tell the reader that inspired vision comes from the inside.

FOOTNOTES

1. William Wirt Howe, "Memoir of François-Xavier Martin," in François-Xavier Martin, *The History of Louisiana* (1827, new ed. 1882), reprinted in 2000, pp. xxxi-lxii (written in 1881); Edward Laroque Tinker, "Jurist and Japer, François-Xavier Martin and Jean Leclerc, With a List of their Publications in this Library and Elsewhere," 39 *Bulletin of The New York Public Library* 675-697 (1935); Michael Chiorazzi, "François-Xavier Martin: Printer, Lawyer, Jurist," 80 *Law Libr. J.* 63-97 (1988); Kathy Dugas, "An Immigrant's Journey to Wealth and Power: The Story of François-Xavier Martin," *Louisiana History, The Journal of the Louisiana Historical Association*, Vol. L, No. 3, 321-340 (2009). *See also*, "Remembering François-Xavier Martin," 38 *La. Bar J.* 177 (1990).

2. Chiorazzi, *supra* note 1, at 63 and 77.

3. For more details on Martin as a printer and publisher, see Chiorazzi, *supra* note 1.

4. *Treatise of the Law of Obligations Considered in a Moral and Legal View, Translated from the French of Pothier*, Martin & Ogden, New Bern, N.C., 1802.

5. Howe, *supra* note 1, at xxxiv. Chiorazzi, *supra* note 1, at 77, is silent on this publication.

6. It is unmatched by a later translation: *A Treatise on the Law of Obligations, or Contracts*, by M. Pothier (translated by William David Evans, Philadelphia) (1853).

7. Chiorazzi, *supra* note 1, at 75.

8. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

9. George Dargo, *Jefferson's Louisiana: Politics and the Clash of Legal Traditions* (Rev. ed. 2009).

10. Robert B. Fisher, Jr., "The Louisiana Supreme Court, 1812-1846: Strangers in a Strange Land," 1 *Tul. Civ. L. F.* 1 (1973).

11. François-Xavier Martin, *The History of Louisiana* (1827). This remarkably documented

book, reprinted in 2000, remains a leading source on the history of our state. Citations are to the 2000 edition.

12. Martin, *History of Louisiana*, *supra* note 11, at 344.

13. Olivier Moréteau, "De revolutionibus, The Place of the Civil Code in Louisiana and in the Legal Universe," 5 *J. Civ. L. Stud.* 31 (2012), first published in *Le droit civil et ses codes: parcours à travers les Amériques*, 1 (Jimena Andino Dorato, Jean-Frédéric Ménard & Lionel Smith, eds., Thémis, Montreal, 2011).

14. *Cottin v. Cottin*, 5 Mar. (O.S.) 93 (1817).

15. Digest of 1808, Book 1, Title 1, Article 6 (www.law.lsu.edu/digest).

16. On a citizen-centered approach of the Civil Code, see Robert A. Pascal, "Of the Civil Code and Us," 59 *La. L. Rev.* 301 (1998); Moréteau, "De revolutionibus," *supra* note 13. On a digest-based approach and the confusion it generates, see Vernon Valentine Palmer, *The Louisiana Civilian Experience: Critiques of Codification in a Mixed Jurisdiction* (2005).

17. In the citation above, he refers to a "digest of existing statutes."

18. *Reynolds v. Swain*, 13 La. 193 (1839).

19. At 198.

20. The first Constitution of the state of Louisiana, Art. VI, section 25, reads: "All laws contrary to this Constitution shall be null and void." See Paul R. Baier and Georgia Chadwick, "Judicial Review in Louisiana: A Bicentennial Exegesis," 5 *J. Civ. L. Stud.* 7 (2012).

21. Both cited by Martin in his judgment.

22. See Pascal, "Of the Civil Code and Us," *supra* note 16.

23. Louisiana Civil Code 1870, art. 21: "In all civil matters, where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is to be made to natural law and reason, or received usages, where positive law is silent."

24. The reason given in comment (b), "The term 'natural law' in Article 21 of the 1870 Code has no defined meaning in Louisiana jurisprudence," is shameful and wrong.

25. *Orleans Navigation Company v. Mayor of New Orleans*, 2 Mart. (O.S.) 214 (La. 1812).

26. *Id.* at 228.

27. Olivier Moréteau, "Mare Nostrum as the Cauldron of Western Legal Traditions: Stirring the Broth, Making Sense of Legal Gumbo whilst Understanding Contamination," 4 *J. Civ. L. Stud.* 516 (2011).

28. In *Reynolds v. Swain*, Martin concludes "that the legislature did not intend to abrogate those principles of law which had been established or settled by the decisions of courts of justice." As will be seen below, this is not recognition of *stare decisis* (as wrongly understood by Mark F. Fernandez, *From Chaos to Continuity, The Evolution of Louisiana's Judicial System 1712-1862*, 81-88 (2001); see Sean P. Donlan, "Clashes and Continuities: Brief Reflections on the 'New Louisiana Legal History,'" 5 *J. Civ. L. Stud.* 67 (2012)), but of the supremacy of natural law.

29. 304 U.S. 64 (1938).

30. François Géný, *Méthode d'interprétation et sources en droit privé positif, Critical Essay* (1963) (translation of the 2d ed. 1954, by the Louisiana

State Law Institute; the first edition was published in 1899).

31. François-Xavier Martin, "Preface," 1 Orleans Term Reports or Cases Argued and Determined in the Superior Court, at vii (1811).

32. *Smith v. Smith*, 13 La. 441, 445 (1839).

33. As clearly stated by Robert A. Pascal and W. Thomas Tête, "The Work of the Louisiana Appellate Courts for the 1969-70 Term: Law in General," 31 *La. L. Rev.* 185 (1971), the opinion once expressed by the Louisiana Supreme Court that when "the question is not regulated by statute, the law is what this Court has announced it to be" (*Johnson v. St. Paul Mercury Insurance Co.*, 236 So.2d 216 (La. 1970)) is inconsistent with the legislation of this state. In *Pringle-Associated Mortgage Corp. v. Eames*, 254 La. 705, 714, 226 So.2d 502, 505 (1969), the Court had gone as far as saying that a single previous decision construing legislation is obligatory on lower courts (Pascal and Tête, at 187).

34. Warren M. Billings, "The Supreme Court of Louisiana and its Chief Justices," 89 *Law Libr. J.* 449 (1997).

35. Billings, *supra* note 35, at 456.

36. Howe, *supra* note 1, at xlii: "He has been called the Mansfield of the southwest."

37. Howe, *supra* note 1, at xlvi, referring to the period of 1821-33. Howe gives much detail on the man and his life, his being a miser, his neglected looks and dusty home, located 915 Royal St. in New Orleans.

38. In the "Preface" of 1811, *supra* note 32, at iv-v, he wrote: "No one could more earnestly deplore, for no one more distressingly felt, the inconvenience of our present judicial system. From the smallness of the number of the Judges of the Superior Court, the remoteness of the places where it sits, and the multiplicity of business, it has become indispensable to allow a quorum to consist of a single judge, who often finds himself compelled, alone and unaided, to determine the most intricate and important questions, both of law and fact, in cases of greater magnitude . . ." explaining further that "a number of foreign laws are to be examined and compared, and their compatibility with the general constitution and laws ascertained — an arduous task anywhere, but rendered extremely so here, from the scarcity of works of foreign jurists."

39. In 1845.

40. Or fundamental rights, as per the discussion above.

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