Judicial Review in Louisiana: A Bicentennial Minute Entry

By Prof. Paul R. Baier and Georgia Chadwick

“This court, and every court in this state, not only possesses the right, but is duty bound, to declare void every act of the legislature which is contrary to the constitution.

— François-Xavier Martin, 1828
Préface: 1812-2012

No scholar of Louisiana’s public law that we can find has trumpeted a “general provision” of Louisiana’s Constitution of 1812 that has since disappeared. This was a long time ago. Louisiana joined the United States of America on April 30, 1812, exactly nine years after the Louisiana Purchase of 1803 — the year of Marbury v. Madison. John Marshall was Chief Justice of the United States in 1812. War with Britain raged. General Andrew Jackson triumphed in the Battle of New Orleans. But the Constitution triumphed over the General. This was the last skirmish of the War of 1812, another Bicentenary to celebrate — or to lament — depending on one’s view of the facts and the law. Here is an early chapter, the earliest we can find, in the annals of judicial review in Louisiana. We mean judicial control by way of the Great Writ of Habeas Corpus of the executive branch, of the commander in chief.

Le Texte

Article VI. Sect. 25. The lost provision is the last of 25 “Dispositions Générales,” to quote the French version. It appears almost as an afterthought: “All laws contrary to this Constitution shall be null and void.” Or, to quote the French version: “Les lois contraires à cette Constitution seront nulles.”

The Lost Provision

Section 25 disappeared from Louisiana’s public law with the adoption of the Constitution of 1845. It has never appeared in any Louisiana Constitution thereafter. Why? We suppose that after a generation on the books, by 1845, it was generally accepted that Louisiana’s fundamental law, voiced by the judiciary, controls the legislative and the executive magistracies. François-Xavier Martin in his painstaking History of Louisiana, From the Earliest Period (Vol. I, 1827; Vol. II, 1829) blithely passes over Section 25 in his detailed description of the provisions of Louisiana’s first Constitution. To us, it jumps off the page. It reminds us of John Marshall’s immortal principle, “supposed to be essential to all written constitutions, that a law repugnant to the constitution is void [. . .] Marbury v. Madison, 1 Cranch 137, 180 (1803).

After 200 years we propose a Bicentennial Minute entry essaying the origin of judicial review in Louisiana. We throw Bicentenary light on what is a vital, yet completely overlooked, now lost, provision of Louisiana’s first “Constitution ou Forme de Gouvernement de L’État de La Louisiane.”

François-Xavier Martin, George Wythe

Doubtless there was talk of Montesquieu’s De l’esprit des lois in Vieux Carré coffeehouses in the founding days of Louisiana’s public law. François Martin, a jurist of indefatigable scholarship, undoubtedly nursed himself on Montesquieu and John Marshall. He hardly slept for all the books he read. He spent his nights preparing his astounding Orleans Term Reports (1809-1812) and his Louisiana Term Reports (1813-1830), to say nothing of his nightly watch reading law tirelessly, endlessly. We can easily imagine François Martin reading George Wythe’s monumental opinion in Commonwealth v. Caton by candlelight in his Vieux Carré lodgings. We are sure he read it. Here is Chancellor Wythe’s renowned passage announcing judicial condemnation of a legislative act:

I shall not hesitate, sitting in this place, to say, to the general court, Fiat justitia, ruat cœlum; and, to the usurping branch of the legislature, you attempt worse than a vain thing; for, although, you cannot succeed, you set an example, which may convulse society to its centre. Nay more, if the whole legislature, an event to be deprecated, should attempt to overstep the bounds prescribed to them by the people, I, inadministering the public justice of the country, will meet the united powers at my seat in this tribunal; and, pointing to the constitution, will say, to them, here is the limit of your authority; and, hither, shall you go, but no further.

Virginia’s Chancellor Wythe also taught law at the College of William and Mary; for a brief time, one of his students was John Marshall.

II Emperor Napoleon, General Andrew Jackson

The Civil Law celebrates legislation — “c’est mon Code civil,” says Napoleon. But whence judicial review in Louisiana? What enables a common-law judge to hold General Andrew Jackson in contempt? United States District Court Judge Dominick A. Hall of New Orleans so held. This was the fiery judicial climax of the War of 1812. Jackson ordered Judge Hall arrested for issuing a writ of habeas corpus challenging the General’s declaration of martial law. Jackson considered New Orleans his military camp. The General was above the law. He was beyond judicial control, according to the Jurisprudence of the Camp.
Mayor v. Morgan

an echo of John Marshall in Judge Martin’s
trespasser liable in damages. There is plainly
City in execution of the judicial orders, was a
the sheriff, who seized the revenues of the
the writ of mandamus was void. Morgan,
of 1816 in question was constitutional. Thus
with its decisions;” the provision of the Act
judge of the validity of their elections, and
the power to render the City Council the
elections of its members, the district court
of mandamus. Held: The Legislature had
the right to determine the validity of the
elections of its members, the district court
was without jurisdiction to issue the writ
of mandamus. Held: The Legislature had
the power to render the City Council the
“judge of the validity of their elections, and
prohibit courts of justice from interfering
with its decisions;” the provision of the Act
of 1816 in question was constitutional. Thus
the writ of mandamus was void. Morgan,
the sheriff, who seized the revenues of the
City in execution of the judicial orders, was a
trespasser liable in damages. There is plainly
an echo of John Marshall in Judge Martin’s
opinion in Mayor v. Morgan:

This court, and every court in this
state, not only possesses the right,
but is duty bound, to declare void
every act of the legislature which
is contrary to the constitution. The
due exercise of this power is of the
utmost importance to the people, and
if it did not exist their rights would
be shadows, their laws delusions, and
their liberty a dream; but it should be
exercised with the utmost caution,
and when great and serious doubt
exists, this tribunal should give to the
people the example of obedience to
the will of the legislature.

A Bicentennial Minute Entry

We come full circle, back to the future,
back to Cases Argued and Determined
in the Supreme Court of the State of Louisiana,
Eastern District. February Term, 1815, 3
Martin (1813-1815). We mean the clash be-
tween the General and the Judge pre-
viously rehearsed. This time, however,
we draw the legal historian’s attention to
the Minute Book of the Louisiana
Supreme Court. It plainly shows that
Louisiana’s Judge François Martin,
not United States District Court Judge
Dominick Hall, first trumpeted the au-
thority of judicial review in the annals of Louisiana’s
public law.

Here are the facts, a matter of
reported chronol-
ogy.

At the opening of the February Term,
Eastern District, 1815, a commission was read by which François Martin, then
t进ary general of the state, was appointed
a judge of the Supreme Court of Louisiana,
together with a certificate of his having taken
the oaths required by the Constitution and
law, whereupon he took his seat. “The din
of war prevented any business being done,
during this term.” A month later, at the
opening of the March Term 1815, before
the Hon. Pierre Derbigny and the Hon. F.-X.
Martin, the Minute Book shows:

On motion of Mr. Duncan of counsel
for the appellees it is ordered that the
appellant — to show cause on
Monday next the 13th instant —
why the parties should not proceed
in this case notwithstanding the act
passed by the Legislature on the 18th
december last.[]

We quote the minute entry of March 7,
1815. The case is James Johnson v. Duncan
et al. Syndics.

On the same page of the Minute Book ap-
pears the entry of Monday, March 13, 1815:
The parties aforesaid having appeared by
their attorneys in conformity with a rule taken in this case on the 7th
instant & the arguments thereon
being closed the Court took time
to decide.

Next, on the
same leaf of the
Minute Book, this
for Monday, March
20, 1815:
The Court now
delivered their
opinion in writing
on the motion
made in this cause
on the 7th instant
and ordered that
the same be over-
rulled.

What is this case
about?

Martin, J., explains the case in his report,
3 Martin 530. Remember, the din of war
raged. Here is the terse opening of Judge
Martin’s opinion of the Court:

Martin, J. A motion that the Court
might proceed in this case, has been
resisted on two grounds:

1. That the city and its environs
were by general orders of the officer,
commanding the military district, put
on the 15th of December last, under
strict Martial Law.

2d. That by the 3d sec. of an act
of assembly, approved on the 18th of
December last, all proceedings in any
civil case are suspended.
Judge Martin first addresses the argument of General Jackson. Listen to the voice of Louisiana’s Judge François Martin — Bicentennial fireworks on the levee (3 Martin 532-533):

We are told that the commander of the military district is the person who is to suspend the writ, and is to do so, whenever in his judgment the public safety appears to require it: that, as he may thus paralyze the arm of the justice of his country in the most important case, the protection of personal liberty of the citizen, it follows that, as he who can do the more can do the less, he can also suspend all other functions of the civil magistrate, which he does by his proclamation of Martial Law.

This mode of reasoning varies toto celo from the decision of the Supreme Court of the United States, in the case of Swartout [sic] and Bollman, arrested in this city in 1806 by General Wilkinson. The Court there declared, that the Constitution had exclusively vested in Congress the right of suspending the privilege of the writ of Habeas Corpus, and that body was the sole judge of the necessity that called for the suspension. “If, at any time,” said the Chief Justice, “the public safety shall require the suspension of the powers vested in the Courts of the United States by this act, (the Habeas Corpus act.) it is for the Legislature to say so. This question depends on political considerations, on which the Legislature is to decide. Till the Legislature will be expressed, this Court can only see its duties, and must obey the law.” 4 Cranch 101.

Swartout and Bollman,7 you might surmise, is the voice of Chief Justice John Marshall. Thus, John Marshall is brought home to our Bicentennial table as a surprise guest. The Great Chief Justice is here courtesy of Louisiana’s great jurist François Martin.

It is a nice touch to our way of seeing things that John Marshall and F.-X. Martin’s marble busts face each other, today, after 200 years, guarding the portal to the Louisiana Supreme Court Chamber, fourth floor, 400 Royal St., in the heart of the Fieux Carré — open to the public.

Here is the closing part of Judge Martin’s rejection of Major General Jackson’s claim: “How preposterous then the idea that a military commander may, by his own authority, destroy the tribunal established by law as the asylum of those oppressed by military despotism!”

End of the Journey

We reach the end of our Bicentennial sojourn, a final minute entry.

The Minute Book of the Louisiana Supreme Court7 shows that Judge Martin rendered judgment on Monday, March 20, 1815. On the other hand, the contempt proceedings against Major General Andrew Jackson commenced the next day, March 21, 1815.8 Amazingly, our Bicentennial Minute Entry shows that Judge Martin appears first in the chronology of judicial review in Louisiana.

Judge Martin himself, in his Louisiana Term Reports, appends a note (3 Martin 557) to his report of Johnson v. Duncan et al.’s Syndics. We leave the last word to Reporter F.-X. Martin — his enduring gift to the American Republic: “The doctrine established, in the first part of the opinion of the Court, in the above case, is corroborated by the decision of the District Court of the United States for the Louisiana District, in the case of United States v. Jackson, in which the defendant, having acted in opposition to it, was fined $1,000.” (Our Bicentennial emphasis — corroborated.)

Requiescat in pace, F.-X. Martin.

The full version of Professor Paul R. Baier’s and Georgia Chadwick’s article, titled “Judicial Review in Louisiana: A Bicentennial Exegesis,” was published in a Bicentennial edition of the Journal of Civil Law Studies, Vol. 5, No. 1 (2012), the publication of the Center of Civil Law Studies, Louisiana State University Paul M. Hebert Law Center. The Louisiana Bar Journal thanks Professor Olivier Moretèau with the Center for allowing publication of this excerpt.

FOOTNOTES
1. 4 Call 5 (1782).
2. Id. at 8.
3. No. 791, United States District Court, Dist. of La. (1815), unreported. Judge Hall’s handwritten orders in Andrew Jackson’s contempt proceedings are preserved in digital copy, U.S. National Archives & Records Admin., ARA’s Southwest Region (Fort Worth, TX), ARC Identifier 251606, a cover page and four pages of digital copy of Judge Hall’s rulings. The authors have examined these documents carefully. To their chagrin, there is no written finding of contempt and imposition of a fine of $1,000 by Judge Hall in any manuscript order that we can find.
4. 7 Martin (N.S.) 1 (1828).
5. Id. at 7.
6. 3 Martin V 3 [529].
7. Ex parte Bollman and Ex parte Swartwout, 4 Cranch 75 (1807).
8. 3 Martin at 537.
9. The original Minute Book of the Louisiana Supreme Court, which includes the minute entries in Johnson v. Duncan, is housed in the archives of the Supreme Court of Louisiana, Earl K. Long Library, University of New Orleans. In celebration of the Bicentennial of the Louisiana Supreme Court, the Law Library of Louisiana has had the first two minute books reprinted (Book 1, 1813-1818; Book 2, 1818-1823) and catalogued. They are now available to the public and interested scholars in the Law Library of Louisiana.

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