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**

Busts of François-Xavier Martin, foreground, and John Marshall at the Louisiana Supreme Court Museum. *Photo by David Rigamer, courtesy of curator's office, Louisiana Supreme Court Museum.*

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.

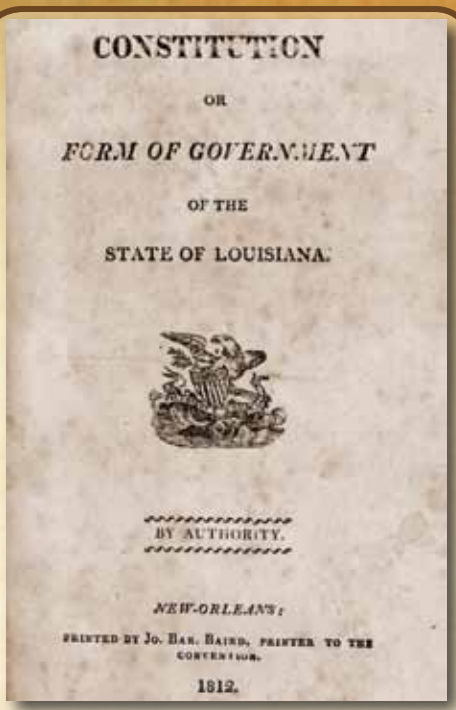
Le Texte

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.*"


CONSTITUTION

OR

FORM OF GOVERNMENT

OF THE

STATE OF LOUISIANA.

BY AUTHORITY.

NEW-ORLEANS:

PRINTED BY JO. HAY. HAIRD, PRINTER TO THE CONVENTION.

1812.

The 1812 Constitution of Louisiana, originally written in French, was printed in English and sent to Washington to satisfy requirements set by Congress for statehood. The eagle is a nod to Louisiana becoming the 18th state of the Union. *Provided by the Law Library of Louisiana.*

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 night watches reading law tirelessly, endlessly. We can easily imagine François Martin reading George Wythe's monumental opinion in *Commonwealth v. Caton*[1] 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, in administering 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.[2]

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.

Il 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.

Judge Dominick A. Hall

Not so at all. Judge Hall had the last word — for the moment at least — duly recorded in *United States v. Major General Andrew Jackson*.[3] Jackson's arrest of Hall was held a contempt of court. The General was fined $1,000.

Here, then, is the earliest chapter in the life of judicial review in Louisiana, recently revisited as a highlight of the Bicentennial of the United States District Court, Eastern District of Louisiana, New Orleans, online at: *www.laed.uscourts.gov/200th/main.php*.

Louisiana's *Marbury v. Madison*

Mayor v. Morgan[4] is Louisiana's *Marbury v. Madison*. François Martin — assuredly, Louisiana's John Marshall — delivered the opinion of the Court. The case: The mayor and City Council of New Orleans refused obedience to a writ of mandamus issued by a court of first instance commanding the mayor *et al.* to seat a person on the Council whose election was drawn into question. An act of the Legislature declared that the City Council "shall be the judge" of the election of its members. Judge Martin reasoned that if the Legislature had the power to grant to the municipal corporation of New Orleans 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.[5]

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 between the General and the Judge previously 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 authority of judicial review in the annals of Louisiana's public law.

The title page of the original Minute Book of the Louisiana Supreme Court. *Photo courtesy of Historical Archives of the Supreme Court of Louisiana, Earl K. Long Library, University of New Orleans.*

Here are the facts, a matter of reported chronology.

At the opening of the February Term, Eastern District, 1815, a commission was read by which François Martin, then attorney 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."[6] 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.'s Syndics*.

On the same page of the Minute Book appears 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 overruled.

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.

Swartwout 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 *Vieux 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!"[8]

End of the Journey

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

The Minute Book of the Louisiana Supreme Court[9] 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.[10] 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 Moréteau 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.
10. Françis-Xavier Martin, *History of Louisiana, From The Earliest Period*, Vol. II (1829), p. 416; Pelican Pub. Co. Reprint 1975, p. 405. The Hill Memorial Library of Louisiana State University holds two original editions of Martin's *History* under lock and key, and under the watchful eye of Elaine Smyth, curator of books. The Law Library of Louisiana holds an original edition of Vol. I of Martin's *History*. The Law Library of Louisiana has recently acquired a copy of Vol. II of F.-X. Martin's contemporaneously written history of the earliest years of Louisiana's sovereignty.

See Eberhard P. Deutsch, "The United States Versus Major General Andrew Jackson," A.B.A. J. 46: 966 (Sept. 1960), for the chronology of the contempt proceedings with New Orleans's precision and scholarship. Mr. Eberhard is identified in the A.B.A. J. as "of the Louisiana Bar (New Orleans)." We commend his home-grown article to the reader.

Paul R. Baier is the George M. Armstrong, Jr. Professor of Law at Louisiana State University Paul M. Hebert Law Center. A graduate of Harvard Law School, he teaches constitutional law. He is in his 40th year of teaching, filmmaking and theater production at LSU. His play, "Father Chief Justice": Edward Douglass White and the Constitution," has been performed in several state and national venues. He is secretary of the Supreme Court of Louisiana Historical Society. (LSU Paul M. Hebert Law Center, Baton Rouge, LA 70803-1000)

Georgia Chadwick, head librarian with the Law Library of Louisiana, earned her BA degree at Newcomb College, New Orleans, and her MA degree at the University of Denver Library Science School. She is the executive director of the Supreme Court of Louisiana Historical Society and curator of the Supreme Court of Louisiana Museum, 400 Royal St., New Orleans (open to the public). For a tour, contact Chadwick at (504)310-2402. (400 Royal St., 2nd Flr., New Orleans, LA 70130-2104)