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Judicial Review in Louisiana: A Bicentennial Exegesis

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JOHN MARSHALL

FRANÇOIS-XAVIER MARTIN

Photo by David Rigamer
Courtesy of Curator's Office
Louisiana Supreme Court Museum

JUDICIAL REVIEW IN LOUISIANA: A BICENTENNIAL EXEGESIS

By 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. 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.*
>
> —François-Xavier Martin

I. *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*. Jefferson doubted the constitutionality of the purchase; John Marshall later sustained it. 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.

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** Law Librarian of Louisiana. Executive Director, Supreme Court of Louisiana Historical Society. Curator, Supreme Court of Louisiana Museum, 400 Royal Street, New Orleans, open to the public. The Museum's exhibit cases walk you through two hundred years of the Court's history, in photographs, portraiture, and memorabilia, from its earliest days in the Cabildo, built under Spanish rule, ca. 1795, to the beaux arts magnificence of the Supreme Court's 1910 building, now restored to its original glory in the heart of the *Vieux Carré*. For a tour, call Georgia Chadwick, 504.310.2402.

We mean judicial control by way of the Great Writ of Habeas Corpus of the Executive Branch, of the Commander in Chief—the judicial root, if you will, of *Boumediene v. Bush*, 553 U.S. 723 (2008), of late, the Supreme Court's condemnation of Section 7 of the Military Commission Act of 2006 as an unconstitutional suspension of the writ of habeas corpus in violation of Article I, Section 9, Clause 2 of the United States Constitution: "The Clause protects the rights of the detained by a means consistent with the essential design of the Constitution. It ensures that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the 'delicate balance of governance' that is itself the surest safeguard of liberty."—per Kennedy, J.—Chief Justice Roberts, joined by Justice Scalia, Justice Thomas, and Justice Alito, dissenting. Another 5-4, split decision. Binding on the President?

II. *LE TEXTE*

ARTICLE VI. SECT. 25. By way of a Bicentennial exegesis we propose assaying the last general provision of Article VI of Louisiana's Constitution of 1812, the lost provision of Louisiana's fundamental law that caught our eye. It is the last of twenty-five "*Dispositions Générales*," to quote the French version. It appears almost as an afterthought.

Here is the text of Section 25, precisely as it appears in the English version of ARTICLE VI. *General Provisions*, **CONSTITUTION** OR *FORM OF GOVERNMENT* OF THE STATE OF LOUISIANA, adopted January 22, 1812, quoted in its elegant simplicity, center-stage, so to speak, echoing down through contemporary legislative, executive, and judicial chambers:

"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*."

III. 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 the time of the Louisiana's Constitution of 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. More recently, Tulane Law School Dean Emeritus Cecil Morgan in his little jewel of a book, THE FIRST CONSTITUTION OF THE STATE OF LOUISIANA (1975), for the Historic New Orleans Collection, draws the reader's attention to "some interesting aspects" of Louisiana's first Constitution that "deserve special mention." He says nothing at all, however, about Section 25. 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; and that *courts*, as well as other departments, are bound by that instrument." The italics, *nota bene*, are John Marshall's. *Marbury v. Madison*, 1 Cranch 137, 180 (1803).

After two hundred 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'ETAT DE LA LOUISIANE."

IV. FRANÇOIS-XAVIER MARTIN, GEORGE WYTHE

Doubtless there was talk of Montesquieu's *Espirit des Lois* in *Vieux Carré* coffee houses 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, reading law endlessly. We can easily imagine François Martin reading George Wythe's monumental opinion in *Commonwealth v. Caton*, 4 Call 5 (1782), 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, 4 Call 8:

> 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.

Call in his report of the case advises: "N.B. It is said, that this was the first case in the United States, where the question relative to the nullity of an unconstitutional law was ever discussed before a judicial tribunal; and the firmness of the judges (particularly of Mr.Wythe,) was highly honourable to them; and will always be applauded, as having fixed a precedent, whereon, a general practice, which the people of this country think essential to their rights and liberty, has been established." 4 Call 21.

Wythe's biography is entitled, GEORGE WYTHE: TEACHER OF LIBERTY (Alonzo Dill, 1979) ("*In observance of the 200th anniversary of the beginning of the teaching of law at the College of William and Mary*, 1779-1979.") Chancellor Wythe also taught constitutional law at the College of William and Mary. For a brief

period of time one of his students at William and Mary was none other than—guess who?—John Marshall.

What was John Marshall doing in 1812?—the year of Louisiana's sovereignty? We will answer this question later in our Bicentennial Minute Entry.

V. BARON DE MONTESQUIEU, *ESPIRIT DES LOIS*

Professor Jean Brissaud, late professor of legal history in the University of Toulouse, in his heroic book, A HISTORY OF FRENCH PUBLIC LAW (1904) (IX Continental Legal History Series; translated by James W. Garner) (1915), tells us of Montesquieu's theory of separation of powers: "The spirit of independence of our old Parliaments, their opposition to the crown, and the example (which is questionable) of England counted for much in the formation of this theory." But French Public Law severed the Judiciary's head with *La Révolution Française*. "The judges could not meddle in the exercise of legislative power, either by means of orders taking jurisdiction, or by preventing or suspending the execution of laws; nor could they pass upon the constitutionality of laws." Brissaud, § 502. **The Principle of Separation of Powers.**

Assuredly to the delight of Justice Antonin Scalia, Montesquieu insists that the judiciary should restrict itself to applying the laws to particular cases in a fixed and consistent manner, so that "the judicial power, so terrible to mankind, . . . becomes, as it were, invisible" *ESPIRIT DES LOIS*, 1748, 11.6; THE SPIRIT OF THE LAWS, Thomas Nugent trans., New York, Hafner Library of Classics, 1949, p.156.

Ironically, Justice Scalia is hardly invisible on this side of the Atlantic. Judicial review in Louisiana, to be sure, is not one of our French inheritances.

VI. *IL EMPEROR* NAPOLEON, GENERAL ANDREW JACKSON

The Civil Law celebrates legislation, "*c'est mon Code civil*," says Napoleon. True enough. But whence judicial review in Louisiana? What enables a Common Law judge to hold General Andrew Jackson in contempt? Judge Dominick Hall so held. This was the fiery judicial climax of the War of 1812. Hall was the United States District Court judge sitting in New Orleans. Jackson ordered Hall arrested for issuing a writ of habeas corpus challenging the General's declaration of martial law and his arrest of one Louis Louallier, a native of France, a naturalized citizen of the United States, and a member of Louisiana's House of Representatives. Louallier crossed Jackson's sword by publishing a letter to the editor of the *Courier de la Louisiane*. The letter excoriated Jackson's exile of Frenchmen from New Orleans. "MR. EDITOR:—To remain silent on the last general orders, directing all the Frenchmen, who now reside in New Orleans, to leave it within three days, and to keep at a distance of 120 miles from it, would be an act of cowardice, which ought not to be expected from a citizen of a free country; and when everyone laments such an abuse of authority, the press ought to denounce it to the people."

Louallier extolls "the firmness of the magistrates, who are the organs of the laws in this part of the union, and the guardians of public order."

He concludes by saying, "[I]t is high time the laws should resume their empire." "[I]t is time the citizens accused of any crime should be rendered to their natural judges, and cease to be dealt with before special or military tribunals, a kind of institution held in abhorrence even in absolute governments . . . ." Alcée Fortier, A HISTORY OF LOUISIANA (1904), Vol. III, p. 155.

VII. JUDGE F.-X. MARTIN

François-Xavier Martin, one of the "natural judges" to whom Louallier addressed himself, says of General Jackson's

explosive reaction to Louallier's letter: "Man bears nothing with more impatience, than the exposure of his errors, and the contempt of his authority." You can find this universal truth reported in Martin's HISTORY OF LOUISIANA, Vol. II (1829), p. 392; Pelican Publishing Co. Reprint 1975, p. 393.

General Jackson ordered Louallier tried as a spy by court martial. It mattered not that Louallier was a naturalized citizen of the United States and a civilian member of the Louisiana Legislature. It made no difference that Louallier sided loyally with Jackson against the British, who had fled New Orleans. Louallier's letter to the editor was seditious.

Death was the penalty under Jackson's declaration of martial law. Jackson considered New Orleans his military camp. *Inter arma silent leges*, as Cicero says. The General was above the law. He was beyond judicial control, according to the Jurisprudence of the Camp.

VIII. JUDGE DOMINICK A. HALL

Not so at all. United States District Court Judge Dominick Hall had the last word—for the moment at least—duly reported in *United States v. Major General Andrew Jackson*, No. 791, United States District Court, District of Louisiana (1815). Jackson's arrest of Hall was held a contempt of court, an unlawful military act against "the firmness of the magistrates." The General was fined a thousand dollars. Later, after his two terms as President of the United States, the United States Congress at the urging of President John Tyler passed legislation reimbursing Jackson in full for the thousand dollar fine he paid, plus interest amounting to $2,700.

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, on line at http://www.laed.uscourts.gov /200th/main.php.

IX. SOURCES OF SECTION 25

1. ALEXANDER HAMILTON. Alexander Hamilton's *Federalist Paper* No.78 is a pretty good place to start. We quote the relevant passage:

> The complete independence of the courts of justice is peculiarly essential in a limited constitution. By a limited constitution I understand one which contains certain specified exceptions to the legislative authority; such for instance is that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

This from the original edition of THE FEDERALIST: A COLLECTION OF ESSAYS, WRITTEN IN FAVOR OF THE NEW CONSTITUTION, AS AGREED UPON BY THE FEDERAL CONVENTION, SEPTEMBER 17, 1787, VOL. II. NEW-YORK: PRINTED AND SOLD BY J. AND A. M'LEAN, NO. 41, HANOVER-SQUARE, MDCCLXXXVIII, p. 292-293.

Hamilton's No. 78 differs slightly, but significantly, from Section 25. Only laws contrary to "the manifest tenor" of the constitution are void.

This allows more flexibility in the joints of legislation and keeps the judges at a deferring distance. James Bradley Thayer of Harvard Law School dubbed this qualification on the scope of judicial review, "The Rule of Clear Mistake." James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129, 144 (1893). Today this rule finds its voice most clearly in, say, Justice Breyer's dissent in *District of Columbia v. Heller*, 554 U.S. 570 (2008), or Chief

Justice Roberts's dissent in *Boumediene v. Bush*, 553 U.S. 723 (2008).

2. KENTUCKY CONSTITUTION OF 1799. Next, it is generally said that the Kentucky Constitution of 1799 is the origin of Section 25. True enough, but our exegesis would emphasize a difference in text that warrants notice. ARTICLE X of Kentucky's Constitution of 1799 is essentially a bill of rights that, through some twenty-seven sections, recites the fundamental rights of citizens, including the "natural and indefeasible right to worship Almighty God according to the dictates of their own consciences" and proclaims "[t]he free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty." Note the latter limitation of free speech: "being responsible for the abuse of that liberty." The Alien and Sedition Acts of 1798 come to mind. Justice Samuel Chase's stiff enforcement of the Sedition Act against James Callender, a friend of Thomas Jefferson in Republican Virginia, is well known.

Callender published a book entitled, THE PROSPECT BEFORE US, in which he called President John Adams a "repulsive pedant, a gross hypocrite and an unprincipled oppressor." Chase presided at Callender's trial; the defense attempted to argue the unconstitutionality of the law.

But Chase, a loyal federalist judge on the Supreme Court, thought the law pristine, pure, and certainly constitutional. On the other hand, Thomas Jefferson thought the Sedition Act pernicious, impure, and patently unconstitutional. As President of the United States Jefferson pardoned Callender on the ground that, in President Jefferson's view, the Sedition Act violated the First Amendment. The President would follow his own legal judgment. Never mind Justice Samuel Chase's opinion. Here is an early instance of inter-branch conflict over constitutional interpretation. We shall recur to this matter in a moment.

3. ARTICLE X. SEC. 28. ARTICLE X of the Kentucky Constitution of 1799 concludes in its last section as follows:

> Sec. 28. To guard against transgressions of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government, and shall forever remain inviolate; and that all laws contrary thereto, or contrary to this constitution, shall be void.

This section's text emphasizes the fundamental rights of the citizen; all laws contrary thereto shall be void. Judicial review, just as Hamilton justified it in No. 78, is aimed at protecting the expressed fundamental rights of the citizen.

4. THOMAS JEFFERSON TO JAMES MADISON (March 15, 1789). Thomas Jefferson is on record to the same effect. Writing to James Madison about the proposed Bill of Rights, he opined:

> In the arguments in favor of a declaration of rights, you omit one which has great weight with me; the legal check which it puts in the hands of the judiciary. This is a body, which, if rendered independent and kept strictly to their own department, merits great confidence for their learning and integrity.

James Madison's support of the Judiciary as a guardian of the proposed Bill of Rights is well known (1 Annals of Congress 457 (1789)):

> If they are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislature or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.

5. *MARBURY v. MADISON*. Every first-year law student can recite Chief Justice Marshall's reasoning in *Marbury v. Madison* in favor of the Judiciary adjudging the constitutionality of

legislation. "Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void." *Marbury v. Madison*, 1 Cranch 137, 177 (1803). But who declares the repugnancy? Says the Great Chief Justice: "It is emphatically the province and duty of the judicial department to say what the law is."

Of course, Jefferson insisted that the Judiciary keep strictly to its own department. He thought John Marshall wandered too loosely into Executive territory in *Marbury v. Madison*.

Jefferson always believed that each branch of government should decide for itself the constitutionality of laws affecting it. In other words, to him Judicial Supremacy was an anathema.

6. MONTESQUIEU. Ironically, judicial review in the American Republic traces itself back ultimately to the Framers' insistence on separation of powers, a morphed version of the Baron de Montesquieu's political theory. Recall Montesquieu considered the judicial power "so terrible to mankind." He had in mind the French Parliaments of the *Ancien Régime.*

After the French Revolution the Parliaments were dissolved. The judges were rendered eunuchs. "Of the three powers above mentioned, the judiciary," said Montesquieu, is "next to nothing." Not so here. George Wythe, John Marshall, François Xavier-Martin—all gave voice to the Judiciary as Guardian of the Ark of the Constitution. In other words, in America the Judiciary is Montesquieu's watchdog—over Separation of Powers, as well as the Bill of Rights. Judicial Review is born of both.

The doctrine of "division of powers," as Montesquieu formulated it, appears as the first Article of Kentucky's Constitution of 1799. Thomas Jefferson was its source, transmitted by James Madison to John Brown to assist in the formation of the Kentucky Constitution. THE PAPERS OF THOMAS JEFFERSON, Julian

P. Boyd ed., Princeton Univ. Press, 1952, Vol. 6, p. 283. In turn, it appears as Article I of Louisiana's Constitution of 1812; they are duplicates. Here is Louisiana's:

ARTICLE 1st.

Concerning the distribution of the Powers of Government.

> SECT. 1st. The powers of the government of the State of Louisiana shall be divided into three distinct departments, and each of them be confided to a separate body of Magistracy viz—those which are Legislative to one, those which are executive to another, and those which are judiciary to another.
>
> SECT. 2d. No person or Collection of persons, being one of those departments, shall exercise any power properly belonging to either of the others; except in the instances hereinafter expressly directed or permitted.

George Wythe justified judicial review in the name of separation of powers. He held an act of the Virginia House of Delegates, a pardon, unconstitutional where Virginia's Constitution required the concurrence of the Senate, which was not forthcoming. *Commonwealth v. Caton* is the taproot of judicial review in the American Republic, as we have unearthed it.

John Marshall himself while a member of Virginia's Executive Council was asked to remove a Justice of the Peace for gross misdemeanors disgraceful to his office. In an opinion signed by the future Chief Justice of the United States, dated February 20, 1783—twenty years before *Marbury v. Madison*—the Executive declared that "the Law authorizing the Executive to enquire into the Conduct of a Magistrate . . . is repugnant to the Act of Government, contrary to the fundamental principles of our constitution, and directly opposite to the general tenors of our Laws." PAPERS OF THOMAS JEFFERSON, p. 280.

So too, judicial review in Louisiana finds root in the first article of the Constitution of 1812, "*Concerning the distribution of the Powers of Government.*"

X. ON READING LAW

What would Justice Antonin Scalia say of ARTICLE VI, SECT. 25? He would insist on reading its text according to its original meaning. We had better repeat the text: "All laws contrary to this Constitution shall be null and void." What this means to us is that all laws contrary to this Constitution are null and void. But this is an exegesis of judicial review in Louisiana, not a review of Justice Scalia and Bryan Garner's new book, READING LAW, THE INTERPRETATION OF LEGAL TEXTS (Thompson/West 2012).

XI. SECTION 25'S TEXT

The text of Section 25 says nothing at all about which organ of government, or perhaps all of them, has the constitutional authority to decree a conflict between statute and Constitution. The text says nothing at all about this. For the answer, we must look elsewhere. Perhaps to history. Perhaps to THE FEDERALIST, favorite reading of Justice Scalia. Perhaps "*Es liegt in der Natur der Sache*," as the Germans say. Or, to repeat Chief Justice John Marshall's exclamation in *Marbury*: "It is emphatically the province and duty of the judicial department to say what the law is." 1 Cranch 137, 177 (1803).

Justice Scalia subscribes to judicial review, to be sure, but not the freewheeling nonsense of the Living Constitutionalist Society. We commend READING LAW to our readers.

XII. THE NOTION OF A "LIVING CONSTITUTION"

Justice Scalia condemns the notion of a "Living Constitution." That is to say, a "living organism," one that must evolve with society or else "become brittle and snap." *Reading Law*, p. 410. So speak its advocates. Scalia's response? "*Sed truffa est!*" "But this is nonsense!" To the contrary (*id*., 407-408):

> [I]f the Living Constitution advocates are correct, if the American Constitution should mean whatever each successive generation of Americans thinks it ought to mean, then *Marbury v. Madison* was wrongly decided. The Members of Congress take the same oath to support the Constitution that the Justices do. *Marbury v. Madison*'s holding that the Supreme Court can disregard Congress's determination of what the Constitution requires is firmly rooted in the reasoning that the Constitution is a law, whose meaning, like that of other laws, can be discerned by law-trained judges.

But what of law-trained Presidents? What of a Harvard Law School President who thinks the Affordable Health Care Act constitutional? The Constitution says nothing at all about why Justice Antonin Scalia's legal opinion should trump President Barack Obama's. The Defense of Marriage Act is unconstitutional according to President Obama. He instructed his Attorney General not to defend its constitutionality in court. The Congress of the United States, however, passed the Act. Members of Congress, a majority for sure, presumably judged DOMA constitutional pursuant to their oath to support the Constitution. The Supreme Court has yet to voice its opinion on the question.

XIII. A BLANK SPACE

Our point here is that the text of Section 25, however clear, gets us nowhere. It is a blank space in our Bicentennial inquiry. To be sure, we bow humbly to Justice Scalia's **"2. Supremacy-of-Text Principle":—"The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means."** READING LAW, p. 56.

But ironically, the very power that makes Justice Scalia's opinion trump that of the President, assuming he has four votes for his OPINION OF THE COURT, is nowhere to be found in what the text of Section 25 means. Judicial supremacy comes to life only later, after John Marshall, after *Marbury v. Madison*.

It is clear to us at least, if not to Justice Scalia, that "The judicial Power of the United States," as Article III of the United States Constitution declares it, has *evolved* over time—in fact and in law.

Thomas Jefferson in response to Chief Justice Marshall's subpoena duces tecum in the Burr trial invoked the prerogatives of the Presidency, an early claim of Executive Privilege. He withheld certain documents in the interest of national security. Abraham Lincoln defied Chief Justice Taney's writ. Richard Nixon disgraced the Presidency, but he stiffly yielded to Chief Justice Burger's judicial rejection of his claim of Executive Privilege, a claim that "he and he alone" is the proper one to interpret the Constitution regarding the scope of Executive Privilege. The quotation is from Leon Jaworski's oral argument.

United States v. Nixon, 418 U.S. 683 (1974), if not *Cooper v. Aaron* before it, 358 U.S. 1 (1958), surely settles the question of which of Montesquieu's three branches tops the tree.

XIV. CHIEF JUSTICE JOHN MARSHALL

For our Bicentennial salute to Section 25, we should rather invoke the immortal words of The Great Chief Justice, John Marshall: "In considering this question, then, we must never forget, that it is *a constitution* we are expounding." *McCulloch v. Maryland*, 4 Wheat. 316, 407 (1819). (Justice Scalia quotes this line in READING LAW, but he mistakenly fails to italicize the "a" in John Marshall's "it is *a constitution* we are expounding" (p. 405). *Pardonez nous*, Mr. Justice.

XV. *IL GIUDICE SAPIENTE*

We consider Justice Scalia *Il Giudice Sapiente*—from the Latin "*sapere*," to have taste or flavor; wise; full of knowledge; discerning; often ironical—surely a fit description of the first Roman on the Court. Paul R. Baier, *The Supreme Court, Justinian,*

and Antonin Scalia: Twenty Years in Retrospect, 67 La. L. Rev. 489, 502 (2007).

Justinian himself would admire Justice Scalia. *Il Giudice Justinianus*, another of our terms of endearment for Scalia, J., quotes Justinian's Digest in his book READING LAW (p. 56): *A verbis legis non est recedendum* ("Do not depart from the words of the law").

Justice Scalia considers the evolutionists'—the contemporary constitutional Darwinists'—reliance on Chief Justice Marshall's grand dictum, "it is *a constitution* we are expounding" to be absolute nonsense, at worse an absurdity, at best a canard. "But far from suggesting that the Constitution evolves, its whole point was just the opposite." READING LAW, p. 405.

XVI. EVOLUTION OF JUDICIAL REVIEW

Quite to the contrary, our researches convince us that Section 25's vital significance, its Bicentennial meaning after two hundred years, is not to be found in its text—after all it has disappeared—but in the evolution of judicial review in the American Republic. Section 25 shows that Justice Scalia's horse is dead. It has been withdrawn from *il Palio di Siena*.

Mea culpa, *Il Giudice Justinianus*. But let us move on to other Bicentennial data.

XVII. TREATY OF CESSION, ENABLING ACT

Article III of the Treaty of Cession between the United States of America and the French Republic of April 30, 1803 (8 Stat. 200) contains a promise that the inhabitants of the ceded territory shall be incorporated in the union of the United States, and admitted as soon as possible, "according to the principles of the federal constitution"; the Enabling Act of Congress of February 20, 1811 (2 Stat. 641), authorizes a constitutional convention for the purpose of framing a government and incorporating the citizens

of the Territory of Orleans into a sovereign state. It requires the convention to declare, "in behalf of the people of the said territory, that it adopts the constitution of the United States" and provides further that the constitution to be formed:

> shall be republican, and consistent with the constitution of the United States; that it shall contain the fundamental principles of civil and religious liberty; that it shall secure to the citizens the trial by jury in all criminal cases, and the privilege of the writ of *habeas corpus*, conformable to the principles of the constitution of the United States . . .

We see in the Treaty of Cession and the Enabling Act the inchoate right of judicial review, assuring to the people of Louisiana as their birthright the fundamental principles of separation of powers and of individual rights. *Marbury v. Madison* announced these vital features of the public law of the United States of America on February 24, 1803, a couple of months before the Treaty of Cession and the Enabling Act. To our minds, Article III and the Enabling Act adopt by reference John Marshall's reasoning in *Marbury v. Madison*: "[A]n act of the legislature, repugnant to the constitution is void."

Certainly our research and exegesis suggest that the principle of judicial review implicit in *Marbury*, and perhaps John Marshall's opinion itself, may very well have been on the minds of the Framers of Article VI, Section 25 of Louisiana's Constitution of 1812.

XVIII. LOUISIANA'S *MARBURY V. MADISON*

Mayor v. Morgan, 7 Martin (N.S) 1 (1828), is Louisiana's *Marbury v. Madison*. François-Xavier Martin—assuredly, Louisiana's John Marshall—delivered the opinion of the Court. The case is this. 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 in 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 Acts 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.

We commend Judge Martin's full opinion to the reader as an exemplar of Martin's judicial statesmanship and the power of his judicial poetics.

There is plainly an echo of John Marshall in Judge Martin's opinion in *Mayor v. Morgan*, 7 Martin (N.S.), at 7:

> 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.

XIX. CHIEF JUSTICE JOHN MARSHALL, 1812

What was Chief Justice Marshall doing in 1812? We promised to answer to this question earlier on. The case we have in mind is *State of New Jersey v. Wilson*, 7 Cranch 164 (1812). It is not mentioned in any contemporary constitutional law casebook. We dug it up ourselves by leafing through the pages of 7 Cranch, February Term 1812. This is what legal historians call original research.

Our digging shows the Great Chief Justice adjudging a constitutional claim arising under a Treaty of Cession between certain Delaware Indians and what was then the Province of New Jersey, under a conveyance of land from King Charles 2d, to the Duke of York. These Delaware Indians had claims to a considerable portion of lands in New Jersey. The Act of Cession, August, 1758, relinquished the Indians' claims on condition that the government purchase a tract of land on which they might reside in perpetuity. The Act stipulated that the land to be purchased for the Indians "shall not hereafter be subject to any tax, any law usage of custom to the contrary, in any wise notwithstanding."

Later on, in 1801, the Delaware of New Jersey wanted to migrate from the State to join their brethren in Stockbridge, New York. The New Jersey Delaware obtained an act of the New Jersey Legislature authorizing the sale of their land. "This act contains no expression in any manner respecting the privilege of exemption of taxation which was annexed to those lands by the act, under which they were purchased and settled on by the Indians," recites Chief Justice Marshall in his opinion of the Court. Thereafter in 1803, the year of Treaty of Cession between the United States and the Republic of France, and, coincidently, the year of *Marbury v. Madison*, the land in question was sold.

Next, as you might imagine, the New Jersey Legislature repealed the act of 1758, which had exempted the land from taxation. Held: The Repealing Act "is repugnant to the constitution of the United States, in as much as it impairs the obligation of a contract, and is, on that account, void." And more—per Marshall, C. J. (7 Cranch 167):

> The privilege [of exemption from taxation] though for the benefit of the Indians, is annexed, by the terms which create it, to the land itself, not to their persons. It is for their advantage that it should be annexed to the land, because, in the event of a sale, on which alone the question could become material, the value would be enhanced by it.

In short, in 1812, the year of Louisiana's sovereignty, Chief Justice Marshall was enforcing the Constitution of the United States, *viz.*: "The Constitution of the United States declares that no state shall "pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." Article VI, Section 20 of the Louisiana Constitution of 1812 says almost the same thing: "No *ex post facto* law nor any law impairing the obligation of contracts shall be passed." And, then, we know, there is Article VI, Section 25. We quote its pristine text one last time: "All laws contrary to this Constitution shall be null and void."

Chief Justice Marshall, if we may say so, is an honored guest at our Bicentennial table.

XX. 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 it was Louisiana's Judge François Martin, not United States District Court Judge Dominick Hall, who first trumpeted the authority of judicial review in the annals of Louisiana's public law.

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-Xavier Martin, then Attorney General of the State, was appointed a Judge of the Supreme Court of the State 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." 3 Martin V 3 [529].

A month later, at the opening of the March Term 1815, before the Honorable Pierre Derbigny and the Honorable 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, entitled "An Act . . .

We quote the minute entry of March 7, 1815. The case is *James Johnson v. Duncan et al.'s Syndics*, reported in 3 Martin 530.

On the same page of the Minute Book, appears the minute entry of Monday 13th March 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, our Bicentennial Minute entry appears on the same leaf of the Minute Book, this for Monday, March 20th, 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-Xavier 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, you might surmise, is the voice of 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 two hundred years, guarding the portal to the Louisiana Supreme Court Chamber, fourth floor, 400 Royal Street, in the heart of the *Vieux Carré*—open to the public.

Of course Judge Martin sustained the act of the Louisiana Legislature suspending all judicial proceedings during the War of 1812, against the claim that the act impairs the obligation of contracts (3 Martin, 542, *et seq*.)

> It does not, however, necessarily follow that an act called for by other circumstances, than the apparent necessity of relieving debtors, one of the consequences of which is nevertheless to work some delay in the prosecution of suits, and, consequently to retard the recovery and payment of debts, must always be declared unconstitutional.

One thinks of our contemporary Louisiana Legislature likewise suspending prescription after Hurricane Katrina. Nothing unconstitutional about that.

Now notice, please, that Judge Martin first takes up Major General Jackson's claim that his declaration of Martial Law trumps the Great Writ of *Habeas Corpus*. Why do that? The Legislature has constitutionally suspended judicial proceedings. Why address the General's claim? The answer lies in what scholars call "judicial statesmanship." Chief Justice Marshall's opinion in *Marbury v. Madison* comes to mind. He addressed jurisdiction *last*. So too, Martin.

Here is the closing part of Judge Martin's rejection of Major General Jackson's claim (3 Martin 537): "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!"

★ ★ ★

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

The Minute Book of the Louisiana Supreme Court shows that Judge Martin rendered on Monday, March 20, 1815.

On the other hand—take note ye legal historians—the contempt proceedings against Major General Andrew Jackson, No. 791, commenced the *next* day, March 21, 1815. John Dick, the United States Attorney, was anxious to initiate contempt proceedings against General Jackson; "but Hall insisted on a few days being exclusively given to the manifestation of the joyous feelings, which termination of the war excited. He did not yield to Dick's wishes till the 21st." François Xavier Martin, HISTORY OF LOUISIANA, Vol. II (1829), p. 416; Pelican Publishing Co. Reprint 1975, p. 405. 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* vs. *Jackson*, in which the defendant, having acted in opposition to it, was fined $1000." (Our Bicentennial emphasis—*corroborated*.)

Requiescat in pace, F.-X. Martin.