

The Code of Practice of 1825: The Adaptation of Common Law Institutions

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I. INTRODUCTION

Louisiana's transformation from civil law bastion into mixed jurisdiction was accomplished in the first few years of the nineteenth century.¹ During the eighteenth century, first French and then Spanish colonial policies required regulation of Louisiana society in accordance with laws generally applicable to possessions in the New World. In

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1. For pertinent background, see *Shael Herman, The Louisiana Code of Practice (1825): A Civilian Essay Among Anglo-American Sources*, 23 TUL. EUR. & CIV. L.F. 51 (2008).

1803, about a century after the settlement of New Orleans, the Louisiana Purchase launched the territory's Americanization process. From its outset, the process was marked by political wrangling between Thomas Jefferson's appointees, who sought to replace the territory's civil law with the common law, and local lawyers who distrusted the appointees and steadfastly resisted Jefferson's program. The most notable emblem of local resistance, the Digest of 1808, regulated the citizenry's private relationships until 1825.

In 1812, Louisiana acquired statehood; and in 1825, the state legislature resolved to strengthen the state's civil law foundations by replacing the Digest with a comprehensive set of enactments. An avowed goal of the new legislation was to take account of the state's French and Spanish legal inheritance as well as newly applicable American norms. Like the French legislative plan, the Louisiana counterpart contemplated five separate codes, including a civil code patterned after the Code Napoleon of 1804. Because French revolutionary doctrine located legislation at the apex of legal sources, the decision to codify state laws advertised the character of the state's legal heritage as overtly as many of the institutions that the codes would embrace. But Louisiana, now a new member of a republic whose laws were inspired by English jurisprudence, was also bound by the supremacy of the national constitution and federal statutes. These national norms required state lawmakers to respect constitutionally authorized common law institutions such as jury trials and prerogative writs, the themes of our study.

Perhaps Louisiana lawmakers could have shown respect for these institutions by following a number of other states that had left elaboration of these institutions to judges on a case-by-case basis. Instead, the lawmakers decided to incorporate into the Code of Practice² titles a number of common law institutions. If Louisiana lawyers were to embrace a specific rule or institution, then a code was the ideal place to locate and elaborate it. Though their legislative mandate nowhere suggested the result, the drafters elaborated black letter regulation of

2. The *Projet* of the Code of Practice appeared in a bilingual version with English and French texts on facing pages and it was republished in 1937 as *A Republication of the Projet of the Code of Practice of Louisiana of 1825*, in 2 LOUISIANA LEGAL ARCHIVES 1-182 (1937). As enacted, the Code of Practice of 1825 did not deviate materially from the *Projet*. Because the provisions in the *projet* of the Code of Practice were not numbered, we identify articles by their numbers in a version of the enacted Code of Practice. CODE OF PRACTICE IN CIVIL CASES FOR THE STATE OF LOUISIANA WITH THE STATUTORY AMENDMENTS FROM 1825 TO 1866 INCLUSIVE (J.O. Fuqua ed., 1867) [hereinafter FUQUA EDITION].

common law institutions for an improbable civilian audience who had sought to avoid them at all costs.

II. HABEAS CORPUS A TEMPLATE FOR INCORPORATING OTHER PREROGATIVE WRITS

As Edward Livingston had observed, English statutes authorizing habeas corpus applied in the other states at the time of their independence. By contrast, because specific common law institutions were not in force in Louisiana, it was uncertain whether these institutions could have constituted part of the state's law unless they were expressly adopted. By codifying the writ of habeas corpus, the drafters also prepared a prototype that could be generalized to the other writs. According to Livingston, Louisiana law had never defined the writ, detailed its enforcement, or prescribed penalties for disobeying it. A similar lack of definition and detail justified codification of the other prerogative writs and regulation of jury trials. Ironically, President Jefferson's program for adopting the common law may have intensified Louisiana lawmakers' resolve to codify its procedural laws. Civilian veneration for codification assured that local lawyers would only be satisfied by black letter regulation of common law institutions, if it were presented organically in a code. In Max Weber's terms, the "logical and formal rationality" of a codification would provide legal institutions the best insulation against erosion of the common law's incoming tide. Regulation of common law institutions in the Code of Practice (CP) could give the institutions a dignity equal to that accorded civilian institutions. At a time when regulation of these common law institutions consisted of uncodified materials scattered in English treatises and abridgments, the Louisiana drafters seized an unusual opportunity by presenting them in codified form.

III. QUO WARRANTO

Code of Practice article 867:

This is an order rendered in the name of the state, by a competent court, and directed to a person who claims or usurps an office in a corporation, inquiring by what authority he claims or holds such office.

Code of Practice article 868:

This mandate is only issued for the decision of disputes between the parties, in relation to the offices in corporations, as when a person usurps the character of mayor of a city, and such like. With regard to offices of a public nature, that is, which are conferred in the name of the state, by the

governor, with or without the consent of the senate, the usurpations of them are prevented and punished in the manner directed by the penal code.

Originating in a thirteenth-century statute of King Edward I, the writ of quo warranto directed an alleged usurper of a royal office or privilege to show by what warrant he maintained his claim.³ A statutory writ for testing the validity of feudal franchises, quo warranto arose, according to Jenks, “in the great Statute of Gloucester of 1278, which initiated the sweeping reforms of the English Justinian.”⁴ In using the term “franchises,” Jenks referred to liberties that granted private persons royal rights such as holding a particular kind of court. Called the English Justinian because of his imperial ambitions, Edward I was enabled by means of quo warranto proceedings to consolidate control over subjects whose power had grown by means of delegations of certain royal functions. Absent the warrant for a delegated function by virtue of a real or supposed charter, or by long prescription, the subject’s privilege, office, or franchise could be withdrawn.

Both Coke and Bacon had extensively studied the writ of quo warranto, and their works figured in the libraries of Livingston and Moreau Lislet.⁵ In Blackstone’s eighteenth-century conception of quo warranto, a private individual might commence the proceeding by means of an information that identified the usurper and the office in question.⁶ Despite this difference in preliminary measures, however, the aim of the information was to compel a person to explain the authority by which he claimed an office, liberty, or franchise. Blackstone traced the writ’s use

3. STATUTE OF QUO WARRANTO 1290. Holdsworth has described the quo warranto writ as “in the nature of a writ of right for the king against persons who claimed or usurped any office, franchise, liberty, or privilege . . . of the crown, to inquire by what authority they maintained their claim, in order to have the right determined.” 1 W. HOLDSWORTH, *HISTORY OF ENGLISH LAW* 229 (7th ed. 1956-66) (quoting SELWYN, *NISI PRIUS* 1143 (1842)). For the early history of the writ of quo warranto in English law, see DONALD W. SUTHERLAND, *QUO WARRANTO PROCEEDINGS IN THE REIGN OF EDWARD I* (1963); Helen Cam, *The Quo Warranto Proceedings Under Edward I, in LIBERTIES AND COMMUNITIES OF MEDIEVAL ENGLAND* (1963); T.F.T. PLUCKNETT, *LEGISLATION OF EDWARD I*, at 38-50 (1949); J.H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 145 (4th ed. 2002).

4. Edward Jenks, *The Prerogative Writs in English Law*, 32 *YALE L.J.* 523, 527 (1923). Plucknett paraphrased Bracton’s observation that the defendant in a writ of quo warranto was in a sense also a plaintiff, because he had to make out his claim to a franchise, and thus the writ was his writ of right. PLUCKNETT, *supra* note 3, at 40. To defend his franchise the defendant would customarily plead his right by virtue of a royal grant or by long user. Though Edward I’s comprehensive survey of inferior jurisdictions had mixed success, he managed to prevent “acquisition of future franchises on the strength merely of successfully assuming them.” *Id.* at 40.

5. Mitchell Franklin, *The Libraries of Edward Livingston and Louis Moreau Lislet*, 15 *TUL. L. REV.* 401 (1940-41).

6. BAKER, *supra* note 3, at 145.

as an instrument for correcting municipal irregularities to officers of Charles II and James who, according to Jenks, “had set the kingdom in a blaze by . . . a Quo Warranto tour among the Puritan boroughs.” The official tour led to a policy of packing corporations that excluded Whig candidates from municipal office, despite passage of the Toleration Act in 1689.⁷

A confusion of mandamus with quo warranto seems to have arisen from the events that Jenks narrated. After the Glorious Revolution, Chief Justice Holt relied upon a writ of mandamus to return municipal officers to their elective posts.⁸ In 1616, Sir Edward Coke had used the writ of mandamus in an election dispute in Plymouth, in which the “mayor and commonalty were bidden to restore James Bagg to the office of capital burgess, from which he was unjustly amoved.”⁹ If the court deemed a complainant’s grievance against a usurper sound, it was to issue a “peremptory writ” (the presence of this term in CP regulation of mandamus suggested that it had long been in regular use). “In other words the . . . Chief Justice . . . [took] the King’s prerogative into his own hand and use[d] it against a recalcitrant body professing to act under a Crown charter.”¹⁰

A. *Quo Warranto in Early United States Cases*

Transposed to an American setting, the writ of quo warranto enlarged the English writ’s scope by empowering tribunals to analyze and adjust relationships among public officials and coordinate governmental branches. This is not to say that the writ called for a direct suit by one branch of government against another; for such an action could raise a delicate question of separation of powers. But large questions of governance and administration were often submerged in issues of seemingly narrow compass. In recognition of this fact, a judge in an early United States opinion praised the writ of quo warranto as a device suited to taming the “spirit of jealousy” between the federal and state governments.¹¹

In the early years of the Republic, American judges often combed through English legal histories for insights into cases brought before

7. Jenks, *supra* note 4, at 530-31. By exempting from certain penalties “their Majestyes Protestant Subjects who dissented from the Church of England,” this act gave freedom of worship to nonconformists, i.e. Protestants who rejected the teaching of the Anglican church. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Commonwealth of Pa. v. Dallas*, 4 U.S. 229, 1801 U.S. LEXIS 112 (1801).

them. The continuity of English and American legal experiences with the writ of quo warranto was illustrated in the celebrated decision of *Trustees of Dartmouth College v. Woodward*.¹² Though a lengthy analysis of the case is beyond the scope of our study, suffice it to say for the present inquiry that the case addressed the legality of the New Hampshire legislature's revocation of a charter establishing Dartmouth college. The court ruled that such legislative action unconstitutionally impaired the obligations undertaken in the charter. Daniel Webster, in his arguments before the Supreme Court on behalf of the plaintiffs, recalled that during the reign of Charles II, the writ of quo warranto was invoked to accomplish forfeiture of city charters. But, contended Webster:

Even in the worst times th[e] power of Parliament to repeal and rescind charters was . . . not often exercised. The illegal proceedings in the reign of Charles II were under color of law. Judgments of forfeiture were obtained in the courts. Such was the case of quo warranto against the City of London. . . .¹³

Ambiguities in a state constitution could occasionally prompt an inquiry into the suitability of the writ of quo warranto for a particular claim. If parties occasionally misunderstood the nature of the action, a court might dismiss it for want of jurisdiction or because the parties lacked standing. In *Respublica v. Wray*,¹⁴ for example, the Pennsylvania attorney general filed an information in the nature of a writ of quo warranto against Wray to test a claim that he had procured an appointment as county treasurer with the illicit motive of promoting his candidacy for sheriff. According to the attorney general's argument, Wray's appointment as treasurer was conditioned on his promise that he would promptly resign the post. Initially wondering if the Pennsylvania constitution's reference to an "information"¹⁵ encompassed both a criminal indictment upon information and a quo warranto writ, the United States Supreme Court concluded that the writ of quo warranto was a proper vehicle for the inquiry.

12. 17 U.S. 518, 1819 U.S. LEXIS 330 (1801).

13. Trs. of Dartmouth Col. v. Woodward, 17 U.S. 518, 1819 U.S. LEXIS 330. The decision provided a surprising bridge to French legal history as well. At note 22, a justice discussed whether French doctrine authorized forfeiture without cause of the French East India charter. The justice concluded that such a forfeiture could not be accomplished.

14. 3 U.S. 490, 1799 WL 784 (1799).

15. The association of quo warranto with an information may be traceable to an English practice; though quo warranto was originally intended as a royal weapon, a private individual, by the process of "informing" a royal official of an alleged usurpation, could apply for the writ. "Informations" became unpopular after the Restoration, and were definitely checked at the Revolution, but the information in the nature of a quo warranto became during the eighteenth century a procedure available to ordinary citizens. Jenks, *supra* note 4, at 528.

*Wallace v. Anderson*¹⁶ involved an information for a writ of quo warranto to try the defendant's title as principal surveyor of Virginia military bounty lands north of the Ohio river. Noting that the action was brought by consent of the parties, the court concluded that the quo warranto was inappropriate. At this time, said the court, only the government could have brought the action; the parties could not confer jurisdiction on the court by mutual consent. Accordingly, the Supreme Court (Marshall, J.) dismissed the action for lack of jurisdiction.

B. *Quo Warranto in Early Louisiana Cases*

During the years before adoption of the Louisiana Code of Practice of 1825, the writ of quo warranto figured occasionally in Louisiana decisions. The Louisiana jurisprudence seems to have shared with the federal cases a confusion between mandamus and quo warranto. In *State v. Dunlap*,¹⁷ for example, the Louisiana Supreme Court held that a clerk disturbed in his exercise of an office by a usurper might challenge the latter by quo warranto rather than a mandamus against the judge who had appointed the clerk. In *Hubert v. Auvray*,¹⁸ a case decided after enactment of the 1825 code, Hubert challenged Auvray for wrongly occupying an office as syndic and commissary of police. Ruling for Auvray, the court observed that the plaintiff had failed promptly to fulfill the requirements of the nomination. Furthermore, Auvray, who was by then nominated, had already fulfilled the requirements of the office. According to the judgment, the plaintiff "ought to attribute his disappointment to his own laches."¹⁹ If the mayor had improperly refused the petitioner's request for a commission, then, said the court, the plaintiff could have made judicial application for a writ of mandamus requiring the mayor to issue the commission.

*State v. Knight*²⁰ illuminated an instance of judicial venality in the early years after Louisiana joined the union. To stop a trial judge from hearing a controversy, another judge filed a request for a quo warranto, claiming that he had an interest in the controversy on the ground that he would incur pecuniary damages if he did not entertain the case. The court noted that the proper writ was prohibition, not quo warranto, because the goal of the action was to enjoin the judge from trying a cause pending before him, not to oust the defendant from office. But the court

16. 8 U.S. 291 (1820).

17. 5 Mart (o.s.) 271, 1817 WL 1269 (La. 1817).

18. 6 La. 595 (1834).

19. *Id.*

20. 1 Mart (n.s.) 700, 1823 WL 1436 (La. 1823).

also had an important ethical reason for refusing the judge's application. Said the court tartly:

The most charitable construction, and therefore the most proper one that can be put on this declaration is that the deponent [the judge] supposed that by limiting his jurisdiction it will affect his business and prevent his administering as much justice as he otherwise would. . . . [A]lthough magistrates have fees given them for duties which they discharge at the request of suitors, yet they have not such an interest in trying cases, as will enable them to allege a restraint on their jurisdiction as a pecuniary injury for which they may maintain an action.²¹

IV. WRIT OF PROHIBITION

Code of Practice article 846:

It is an order rendered in the name of the state, by an appellate court of competent jurisdiction, and directed to the judge and to the party suing, in a suit before an inferior court, forbidding them to proceed further in the cause, on the ground that the cognizance of said cause does not belong to such court, but to another, or that it is not competent to decide it.

Long before the writ of prohibition figured in American jurisprudence, it had performed distinguished service in English law as a royal instrument for adjusting jurisdictional claims between rival courts.²² In medieval English law, the writ of prohibition had become celebrated as a device for locating and fixing the boundaries between spiritual and temporal jurisdictions. In a typical dispute, an ecclesiastical court might be seized of a question that rightly belonged to a temporal, i.e., royal court.

According to G.B. Flahiff:

If a litigant, having been sued in an ecclesiastical tribunal, believed the tribunal incompetent to judge the matter, he might ask a royal magistrate to issue in the monarch's name a prohibition forbidding the ecclesiastical court from further cognizance of the case. The royal court would issue a writ of prohibition once it had concluded that the matter litigated before the

21. *Id.*

22. See generally R.H. Helmholz, *Writs of Prohibition and Ecclesiastical Sanctions in the English Court Christian*, 60 MINN. L. REV. 1011 (1976); 1 R.H. HELMHOLZ, *OXFORD HISTORY OF THE LAWS OF ENGLAND: THE CANON LAW AND ECCLESIASTICAL JURISDICTION FROM 597 TO THE 1640S*, at 460-61 (2004). Medieval churchmen took seriously royal writs that interfered with exercise of their spiritual jurisdiction. To protect that jurisdiction, they drew sharp distinctions between spiritual subjects properly in their courts and those properly before the royal courts. Lacking a device analogous to a prohibition for stopping a proceeding in a royal court, an archbishop might rely upon an admonition to the king to look "unto his souls health and utterly to cease from such commandments (i.e. Writs of prohibition)." LYNDWOOD'S *PROVINCIALE* 140 (republished in translation by J.V. Bullard & H. Chalmer Bell eds., 1929) (1432).

church court was temporal, not spiritual. At that point, the matter would be remanded to a royal court and the ecclesiastical proceeding would be halted. Teeth were given to the writ by the subsequent action in the king's court, known as a plea of prohibition against anyone who failed to obey it. If the royal court concluded that the issue belonged to the spiritual realm, then the royal court dismissed the plea for the writ. The ecclesiastical court properly retained jurisdiction and continued the proceeding to judgment.²³

A. *Writ of Prohibition in Louisiana Jurisprudence*

Enshrined in the first amendment of the Constitution, separation of church and state compelled the Louisiana drafters to ignore the traditional medieval rivalry between courts Christian and royal courts. Now locating the rivalry among civil jurisdictions of different degrees, the Louisiana drafters enlarged the scope of the writ in the federal Judiciary Act that authorized a bar to proceedings in admiralty or maritime jurisdiction. According to the Louisiana formulation of the writ of prohibition, if a petitioner for a writ succeeded in the appellate court, then the latter would issue the writ, forbidding the inferior court to “proceed further in the cause, on the ground that the cognizance of said cause does not belong to such court.”²⁴ CP article 851 permitted a trial judge to show that he was competent to hear the matter at bar. In this last case, he might give a written answer to the order,

after which the [appellate] court issuing it shall pronounce finally and summarily on the right of jurisdiction, and if it thinks that the inferior judge is not competent to judge the cause, it shall render its prohibition perpetual, otherwise it shall allow the judge to proceed to the trial and judgment of the case.²⁵

Consistent with English practice of enforcing a writ against a recalcitrant defendant by a contempt sanction, CP article 852 further provided: “If the judge insists on proceeding contrary to the order further in the suit, then he may be arrested and punished by contempt, as well as action for

23. G.B. FLAHIFF, *The Writ of Prohibition to Court Christian in the Thirteenth Century*, 6 *MEDIEVAL STUDIES* 261-62 (1944). According to Blackstone, ecclesiastical or spiritual courts were those “which punish spiritual sins rather than temporal crimes, by penance, contrition, and excommunication pro salute animae.” BLACKSTONE’S COMMENTARIES ON THE LAWS OF ENGLAND bk. IV, ch. 19, § 311, at 2493 (W.C. Jones ed., 1916). For legal questions that might improperly fall into the jurisdiction of one set of courts or the other, see generally R.H. Helmholz, *Assumpsit and Fidei Laesio*, 91 *LAW Q. REV.* 406 (1975); Shael Herman, *Trusts Sacred and Profane: Clerical, Secular and Commercial Uses of the Medieval Commendatio*, 71 *TUL. L. REV.* 869, 874-76 (1997).

24. C.P. art. 846.

25. *Id.* art. 851.

damages in favor of the opposing party.”²⁶ I have not located a Louisiana opinion in which an appellate court prohibited continuation of proceedings in a trial court ; but in an early case, *Cavelier v. Turnbull’s Heirs*²⁷ a trial court of one district issued an order prohibiting execution on property located in the district but affected by a judgment obtained in another district. Though the court did not use the term “injunction,” it noted the problems arising from inconsistent orders issuing from two different courts.

B. Early United States Cases Involving the Writ of Prohibition

During the early decades of the republic, lawyers occasionally pressed the United States Supreme Court for a writ of prohibition to halt a pending proceeding. Sometimes the court responded favorably, as in *United States v. Peters*²⁸ below. At other times, the court might rebuff counsel’s plea, deeming the writ unhelpful to a resolution of the issue at bar. For example, *Slocum v. Mayberry*²⁹ began as a petition filed in a Rhode Island state court by an owner of a vessel’s cargo against a customs collector who had seized the cargo. In the original proceeding, the customs official objected that the state court lacked jurisdiction over the matter, and suggested filing the petition in a federal forum. Analogizing the proceeding to an application for a prohibition writ, counsel for the customs collector argued that a virtue of the writ was avoidance of inconsistent results in two different courts. Here, the Supreme Court refused to halt the state court proceeding because the court appeared properly to have assumed jurisdiction over the claim. Furthermore, the Supreme Court deemed a writ of prohibition unnecessary because the threatened harm was more imaginary than real; according to Justice Marshall, the judgment would have been the same in either court in which the claim was presented.

26. In Fuqua’s Edition, article 852 provided: “If, in contempt of the order, the judge or the party shall proceed any further in the suit, the superior tribunal shall cause them to be arrested, and shall punish them for such contempt, and the opposite party shall have an action for his damages against them.” The changes in the Fuqua Edition are not substantive. For early cases concerning tangentially the writ of prohibition, see *State v Knight*, *supra* text accompanying note 20; *Livingston v. Dorgenois*, 7 Cranch 577 (1813); discussed in Herman, *The Contribution of Roman Law to the Jurisprudence of Antebellum Louisiana, Part II*, 56 LA. L. REV. 257, 286-87 (1996).

27. 8 Mart (o.s.) 61, 1820 WL 1292 (La. 1820).

28. 3 U.S. 121 (1795).

29. 15 U.S. 1 (1817), 1817 WL 2033 (1817).

*United States v. Peters*³⁰ illustrates circumstances justifying issuance of a writ of prohibition. James Yard, the owner of the schooner William Lindsey, commenced in the district court at Philadelphia a proceeding to seize and libel a vessel, the Cassius, commanded by one Samuel Davis. Yard alleged that the Cassius, an armed French corvette, had wrongfully arrested the schooner on the high seas as it sailed toward St. Domingo, and that now the schooner was detained in the Port de Paix, a French territory. In reply to the libel, Davis's counsel asserted that the Cassius was a French vessel in French service, and that the vessel had been arrested in the port of Philadelphia in violation of the law of nations. To halt the libel proceeding in Philadelphia, Davis urged the Supreme Court to issue a writ of prohibition to Richard Peters, the trial judge.

Comparing the American version of the writ with its English counterpart, the United States Supreme Court noted that an appellate court could prohibit a proceeding in admiralty, in much the way that a royal judge could have halted a proceeding in an English ecclesiastical court. The writ could be granted if the original submissions to the court plainly disclosed no jurisdictional basis for entertaining the suit. In this case, the Supreme Court based its issuance of the writ upon the fact that the controversy concerned the laws of capture and prize, and these issues were cognizable exclusively in the courts of France as the captor nation. Because the Cassius was a French naval vessel, the Supreme Court ruled that a French tribunal was the proper forum for the proceedings. To reinforce its ruling, the court noted that the important incidents of the vessel's capture such as the location of witnesses and the site of the damages occurred in a French territory in which the schooner William Lindsey was still detained.³¹

V. MANDAMUS

Code of Practice article 829:

This is an order issued in the name of the state, by a tribunal of competent jurisdiction, and addressed to an individual or corporation, or court of inferior jurisdiction directing it to perform some certain act, belonging to the place, duty or quality with which it is clothed.

Other provisions of the title regulating mandamus refined its scope and purpose. According to CP article 830, mandamus could issue where "the law has assigned no relief by ordinary means, and where justice and reason require that some mode should exist of redressing a wrong, or an

30. 3 U.S. 121.

31. *Id.*

abuse of any nature whatever.” CP article 831 authorized issuance of a writ of mandamus “at the discretion of the judge even when a party has other means of relief, if the slowness of ordinary legal forms, is likely to produce such a delay that the public good, and the administration of justice will suffer from it.”

A. Federal Judiciary Act of 1789 Authorized Writ of Mandamus

Section 13 of the Judiciary Act of 1789 authorized courts “to issue . . . writs of mandamus, in cases warranted by the principles and usages of law.”³² The value of the writ of mandamus was already well appreciated by the time that the Louisiana drafters were appointed to prepare the Code of Practice. The decision of *Marbury v. Madison*, viewed by broad scholarly consensus as the supreme court’s most important landmark opinion, began as a request for a writ of mandamus against the secretary of state, James Madison. A constitutional landmark, the opinion announced the court’s power to review and invalidate a congressional enactment, an issue that the Constitution itself did not address.³³

*B. Background of Marbury v. Madison*³⁴

In the national election of 1800, the Jeffersonian Republicans wrested control of the presidency and both houses of Congress from the Federalist party. Soon to lose political power, the Federalists sought to preserve their influence within the national government by enlarging their control over the federal courts. They sought this goal primarily through the Judiciary Act of 1801, which created a number of judgeships that a lame-duck president John Adams could fill with stalwart federalists. On the eve of Adams’s departure from the presidency, he commissioned several of these stalwarts, including William Marbury, as

32. Judiciary Act of 1789, § 13, ch. 20, 1 Stat. 73. For English background on the writ of mandamus, see BAKER, *supra* note 3, at 147-48.

33. Livingston personally litigated questions surrounding a writ of mandamus. *Livingston v. Dorgenois*, 7 Cranch 577 (1813), *cited in* Herman, *supra* note 26, at 286-87. A writ of mandamus also figured in *United States v. Peters*, 5 Cranch 115 (1809), *supra* text accompanying notes 30-31; *Ex Parte Bollman*, 4 Cranch 75, 8 U.S. 75 (1807), *discussed in* Shael Herman, *The Louisiana Code of Practice (1825): A Civilian Essai Among Anglo-American Sources*, 12.1 ELEC. J. COMP. L. art. 1, at 19-21 nn. 76-88 (May 2008), <http://www.ejcl.org/121/art121-12.pdf>; *Martin v. Hunter’s Lessee*, 14 U.S. 304 (1816); *Cohens v. State of Virginia*, 19 U.S. 264 (1821); and *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819), *discussed supra* text accompanying notes 12-13.

34. This account is based on J.A. Garraty, *The Case of the Missing Commissions, in* QUARRELS THAT HAVE SHAPED THE CONSTITUTION 7-19 (J. Garraty ed., 1988).

a justice of the peace for the District of Columbia. Probably because Jefferson had instructed Madison to withhold the commission, he did not deliver it to Marbury before President Adams left office.

Thomas Jefferson's inauguration as the third president of the United States took place on March 4, 1801. The new secretary of state, James Madison, fully supported by Jefferson, sought to thwart the federalists' plan by refusing to deliver copies of the commissions to Marbury and several other federalist appointees. Invoking the court's original jurisdiction, Marbury and three other frustrated federalist appointees filed suit against Madison in the Supreme Court. Marbury asked the court to order Madison to show cause why a mandamus should not issue commanding him to deliver the commission. Chief Justice John Marshall, a leader of the federalist party and an opponent of Jefferson and his republican party, had been instrumental in the passage of the Judiciary Act of 1801 which had enlarged the number of judgeships. Justice Marshall concluded that Marbury was entitled to his commission; President Jefferson's administration had wrongly withheld it. But, said the court, it would not issue a writ of mandamus, because the court had no authority to issue it. According to Justice Marshall, the court lacked the authority because the relevant portion of Section 13 unconstitutionally expanded the court's original jurisdiction.

It was conceded that Article III, Section 2, of the Constitution authorized the Congress to regulate the appellate jurisdiction of the Supreme Court. But Justice Marshall concluded that the Congress had no such authority to dictate the scope of the court's original jurisdiction. In *Marbury v Madison*, the court had nullified for the first time an act of congress. The court's assertion of judicial review there went uncriticized, perhaps because the ruling solved a delicate separation of powers problem. Dominated by federalist judges, the court had avoided a confrontation with a Republican president and a Congress now dominated by Republicans. Some scholars have speculated that the precise contours of the writ of mandamus did not seem to present a major policy issue at the time. For if the Supreme Court ruled that it lacked the power to issue a mandamus in its original jurisdiction, no higher authority was likely to disagree.

By denying his court authority, Marshall found a means to flay his enemies without exposing himself to their wrath. The case of the missing commissions passed into history, seemingly a fracas of slight significance. When it was over, Marbury and his frustrated colleagues disappeared into the obscurity whence they had arisen. In the partisan struggle for power between Marshall and Jefferson, the Incident [the facts in *Marbury*] was of

secondary importance. The real showdown came later in the . . . treason trial of Aaron Burr. In the long run, Marshall won his fight to preserve the independence and integrity of the federal judiciary, but generally speaking, the Courts have not been able to exert much influence over the appointive and dismissal powers of the President. Even the enunciation of the Court's power to void acts of Congress wrought no immediate change in American life.³⁵

C. *Mandamus in Louisiana Jurisprudence*

During the years preceding enactment of the Code of Practice, the writ of mandamus appeared occasionally in Louisiana Supreme Court decisions where it might permit correction of a judge's capricious conduct. For example, in *State v. Pitol*³⁶ a trial judge had disregarded a party's objection to evidence. Upon denial of the relief, the applicant sought a writ of mandamus against the judge. Upon the judge's denial of this request, the applicant sought an appeal; the same judge also denied the appeal. Against the judge, the applicant prayed for a rule to show cause why a mandamus should not issue directing him to allow the appeal. Sensitive to the ethical dimension of the judge's denial of relief, the Louisiana Supreme Court wrote:

We cannot refuse our aid to a party who seeks to show that the judge erred in receiving evidence on which he acted. . . . If the belief . . . of correctness of the judgment in the court who pronounced it could justify the judge in refusing to allow an appeal from it, appeals would . . . rarely be allowed. For . . . no judge ever gives a decision which he does not believe to be correct.³⁷

VI. WRIT OF CERTIORARI

Code of Practice article 855:

This also is an order rendered in the name of the state, by a competent tribunal, and directed to an inferior judge, commanding him to send to such tribunal, a certified copy of the proceedings in a suit pending before him, to the end that their validity may be ascertained.

35. QUARRELS THAT HAVE SHAPED THE CONSTITUTION, *supra* note 34, at 19.

36. 12 Mart (o.s.) 485, 1822 WL 1336 (La. 1822). Because a writ of mandamus, when directed to a lower court judge, might resemble a writ of certiorari in its effects, the two writs might be associated in a single proceeding. For another Louisiana case involving mandamus and, incidentally, certiorari, see *Agnes v. Judice*, 3 Mart (o.s.) 182, 1813 WL 773 (La. 1813), discussed *infra* text accompanying note 45.

37. 12 Mart (o.s.) 485, 1822 WL 1336.

Code of Practice article 857:

This mandate is only granted in cases where the suit is to be decided in the last resort, and where there lies no appeal, by means of which proceedings absolutely void might be set aside, as when the inferior judge has refused to hear the party or his witnesses, or has pronounced sentence without having cited him to appear.

English legal historians have traditionally associated the writ of certiorari with the production and certification of judicial records. Blackstone had made this association clear, though his account focused upon review of criminal cases.³⁸ Beyond the conception of the writ as an order to certify judicial records, Jenks found it difficult to generalize about its many uses.

The writ of certiorari in the Register of Writs appears to deal merely with the internal ramifications of the vast system of administration which had grown up out of the Curia Regis of the twelfth century, and whose limbs stretched out like tentacles over the land, appeared to have lost touch with one another. [Unlike writs that start civil proceedings,] certiorari is seldom addressed to the sheriff. Instead the writs go to justices of assize, escheators, coroners, chief justices . . . mayors of boroughs, bidding them send records in their custody or certify the contents thereof. Some of these records were of pending proceedings; and then, what more easy than for the authority to which the record was handed to continue the proceedings itself? . . . There may be cases in which a local or inferior court, though not attempting to exceed its jurisdiction, is manifestly unsuitable as a tribunal for a particular case.³⁹

During the early years of the Republic, the conception of the writ of certiorari identified by Jenks seems to have been the one usually in the minds of American lawyers who requested the writ. Jenks's conception was surely the one attached to certiorari in *Ex Parte Bollman* when counsel for Bollman moved the court "to bring up the record of commitment of his client."⁴⁰ The articles regulating certiorari in the Code of Practice suggest that the Louisiana drafters found the template for the Louisiana version in the traditional English conception of the writ. Over the last two centuries, United States jurisprudence has enlarged the role of the writ beyond that of its English ancestor. Today it is the supreme court's procedural tool par excellence for supervising the evolution of American law.

38. During the reigns of James I and Charles I, the procedure of certiorari was extended generally to administrative bodies with coercive powers. BAKER, *supra* note 3, at 149.

39. Jenks, *supra* note 4, at 529.

40. *Ex Parte Bollman*, 8 U.S. 75 (1807), discussed in Part I of this study, cited in note 33.

Originally authorized in the federal judiciary act,⁴¹ the writ of certiorari has long been familiar to American lawyers as an order issued to a federal appeals court by the United States Supreme Court to certify the record of proceedings in the appellate court. The grant of the writ typically sets the stage for a supreme court review of a lower court judgment for legal error, where there is no appeal as a matter of right. The writ also permits the United States Supreme Court to review for error a judgment of a state supreme court if it concerns a serious federal issue. In 1988, the United States Congress made the United States Supreme Court's appellate jurisdiction almost entirely discretionary by sharply limiting appeals to the court by right and making the discretionary grant of certiorari the usual vehicle for reviewing a lower court judgment. Federal law today authorizes the United States Supreme Court to grant a writ of certiorari to review all cases, state or federal, that raise substantial federal questions. The court's broad latitude in granting and denying writs of certiorari makes it pretty much the master of its own agenda. Depending on the issue at hand, the justices, by granting a writ of certiorari, may broaden the court's role as a policy maker. By denying the writ, the justices may also contract their policy making role, or sidestep issues deemed to pose too great a risk to the court's institutional legitimacy.

A. *Certiorari in Early Louisiana Jurisprudence*

Records of the use of the writ of certiorari in Louisiana jurisprudence began during the transitional period after the Louisiana Purchase when litigation was conducted in the superior court of the Territory of Orleans. In these early cases, certiorari clearly designated an order to an inferior court to produce a record of proceedings and certify it to a reviewing court. The oldest case, decided in 1811, dealt with the writ directly and briefly. Though two other cases decided in 1813 referred to certiorari in passing, their facts and language also make them worthy of mention here.

In the oldest case, *Lozano v. Emerson*,⁴² unusual circumstances seem to have limited the writ applicant to this particular relief. Notably, Edward Livingston was the defendant-applicant's attorney. A trial court had issued a default judgment for money against a defendant who could not attend to defense of the suit because he had fallen gravely ill. Because delays for appeal had already passed by the time that the

41. Judiciary Act of 1789, § 13, ch 20, 1 Stat 73.

42. 1 Mart (o.s.) 265, 1811 WL 1029 (La. 1811).

applicant recovered his health, the writ became the only means of arresting execution against his assets. In the Louisiana Supreme Court, the applicant explained that he had resisted paying the judgment because the plaintiff's "deranged" affairs would make it difficult to recover the money if the applicant prevailed on appeal. So the applicant offered to deposit with the clerk of court the amount of the judgment pending the outcome of the proceedings. The court identified important criteria for granting the writ:

When the merits of the cause are shown to be with the party who seeks for a reconsideration of the case in this court, and it clearly appears that without any laches on his part, and by events not within his control, he has been disabled from praying the appeal in due time, so as to prevent the issuance of the execution, this court will relieve against the accident, if the applicant be ready to place his adversary in as safe a situation as if the application had been made below in due time.⁴³

As Louisiana jurisprudence evolved, it must have become clear that a deserving applicant could not always "place his adversary in as safe a situation as if the application had been made below in due time."⁴⁴ This particular criterion for the writ was relaxed, and the requirement of an indemnity bond became a standard feature of an application for the writ.

The facts of *Agnes v. Judicé*⁴⁵ straddled Louisiana's transition from territory to statehood. The prerogative writ principally at issue in this case was a mandamus; the certiorari was mentioned only in passing. The case reminds us of the complexity associated with establishing national courts in a new state where none had existed, and then staffing those courts with judges whose early careers as attorneys might give rise to conflicts of interest.

When the national courts were established in Louisiana, "some of the judges were taken from the bar and consequently might have to decide cases in which they had formerly been employed as counsel."⁴⁶ To resolve potential conflicts of interest, the Congress enacted legislation that authorized reassignment of cases to courts in neighboring districts. In this instance, a fifth district judicial appointee who had been counsel in a case predating Louisiana's statehood, sought to have the case moved to the second district. His opposing counsel objected to the reassignment of the case. Siding with the judge of the fifth district, the trial judge denied the plaintiff's request for an appeal. The plaintiff then sought a

43. *Id.*

44. *Id.*

45. 3 Mart (o.s.) 182, 1813 WL 773 (La. 1813).

46. *Id.*

writ of mandamus from the Supreme Court to compel the judge to admit the appeal. The rationale of *Marbury v. Madison* prompted an unsuccessful argument that the Louisiana Supreme Court could not issue a mandamus because it formed part of its original jurisdiction, rather than its appellate jurisdiction.⁴⁷ Referring to the English evolution of the prerogative writs, the Louisiana Supreme Court ruled that the power to issue a writ of mandamus was incidental to its other powers. Absent the writ, reasoned the court, an applicant would have no remedy if a lower court denied an appeal.⁴⁸ According to the court, the use of the English names of the writs did not mean that they were “emanations of English jurisprudence nor did they introduce English practice itself into the Louisiana courts.”⁴⁹ The court granted the writ, though it also recognized that the lower court’s refusal of the appeal was not a judgment of any type, never mind a final judgment.

Although the third case, *Laverty v. Duplessis*,⁵⁰ mentioned only in passing the writ of certiorari, it provided a fascinating glimpse into the role of habeas corpus for an alleged alien enemy, in fact an Irishman who claimed American citizenship, during the period of Louisiana’s transition to statehood. Defendant Duplessis, the United States marshal for the Louisiana District, had been ordered to remove enemy aliens into the inland parts of the territory. Duplessis arrested Laverty, a native of Ireland, because the United States was then at war with the king of the United Kingdom and Ireland. When Louisiana was admitted to statehood, Laverty became a citizen of Louisiana by virtue of congressional enactment.⁵¹ A state court ordered him released from confinement on a writ of habeas corpus.

In the trial court, Duplessis, the marshal, sought review of the district court’s decision. The Louisiana Supreme Court issued a writ of mandamus [not certiorari] to the district court to allow the appeal and send up the record. It ultimately decided that no appeal would lie to the Supreme Court from the discharge of the prisoner on a writ of habeas corpus. To support this result, the court criticized the Aaron Burr case, where “it was openly declared, that the great and upright magistrate who

47. *Id.*

48. *Id.*

49. *Id.*

50. 3 Mart (o.s.) 42, 1813 WL 757 (La. 1813).

51. Laverty based his claim to citizenship upon *In re Desbois*, 2 Mart (o.s.) 185, 1812 WL 764 (La. 1812). Desbois, though not a citizen of the United States by birth or naturalization, became an American citizen when Louisiana was admitted to the Union. Desbois’s new status was determined by virtue of Article 4, Section 3, of the United States Constitution (citizens of each state admitted to the Union shall acquire status as United States citizens).

preside[d] with so much usefulness and dignity on the supreme bench of the United States, relaxed the law of treason to favor the escape of a powerful criminal.”⁵²

“Disappointed in the magistrate [Marshall’s] ruling, the president of the United States [Jefferson] caused a special message to be sent to congress, enclosing the testimony in the case of Burr, and called their attention to defects of the law.”⁵³ Colorful language in the decision makes a fitting conclusion to our review of the prerogative writs, for the Louisiana Supreme Court, acknowledging a debt to English legal experience, also distinguished its constitutionally limited powers from the far-reaching powers of the King’s Bench.

Blackstone declares it to be the peculiar duty of the King’s Bench to superintend all inferior tribunals, and to enforce the due exercise of the judicial and ministerial powers which the crown or legislature may have invested them with. . . . Does this [supreme] court possess any such authority? From whence is it derived? Is this a court of common law, with remnants of regal prerogatives about it? Or is it a court constituted the other day by a written instrument, in which its powers are defined? There is no analogy between our plain appellate court of limited jurisdiction, and the court of King’s Bench in England, with all its splendid attributes of real sovereignty. That court had original as well as appellate jurisdiction—it was an emanation from the king’s prerogative; it had original jurisdiction in capital offences and misdemeanors of a public nature, tending to a breach of the peace, to oppression, or to any manner of misgovernment. It was the *custos morum* of the nation; it had supreme authority, the king being still presumed by law to sit there, as judge of the court, though he judged by his judges and the proceedings are supposed to be *coram nobis*, that is before the king himself, for which all writs in that court are so made returnable, and not *coram justiciariis nostris*.⁵⁴

VII. TRIAL BY JURY

Since the founding of the Republic, the seventh amendment of the United States Constitution has made the jury trial a hallmark of American procedure. Jury trials take place in both state and federal courts of all fifty states and the District of Columbia. Although there are by now well-established exceptions to this guaranteed right, as a general rule, a party has a right to a jury trial in a great number of different kinds of civil proceedings.

52. 3 Mart (o.s.) 42, 1813 WL 757.

53. *Id.* at 43.

54. *Id.* at 44.

By featuring juries in both civil and criminal proceedings, Louisiana courts began to follow American practice while Louisiana was a territory.⁵⁵ Shortly after Louisiana was admitted to the union, Edward Livingston participated as plaintiff in *Livingston v. Heerman*,⁵⁶ a celebrated batture case tried before a civil jury. The date of the trial is unclear, but remarks by counsel and the court suggest that the trial probably occurred about 1817, five years after Louisiana acquired statehood. Apart from showcasing the lawyers' virtuoso performances on Spanish law, the decision was notable for its comprehensive review of the trial court's management of the civil jury. In their submissions, counsel for the litigants challenged certain findings, special verdicts, and the judge's refusal to charge the jury on several issues. The case report confirmed that the court and counsel were well versed in the etiquette of jury trials and the regulation of special verdicts.

In terms that disclosed familiarity with English sources, the Louisiana court observed:

The object of our statutes was evidently to require juries in certain cases to give special verdicts. If there be anything doubtful in those legislative acts, it may be explained by referring to that system of jurisprudence from which the trial jury is taken. In England it will be seen, 7 Bacon's abridgement 7 &c, that special verdicts very often and no doubt unavoidably contain matters of fact mingled with matters of law.⁵⁷

To assure that Louisiana trial practice conformed with the United States Constitution, the drafters of the Code of Practice detailed the regulation of jury trials in forty-four articles. In view of the discretion accorded judges today in conducting jury trials, a reader might consider such a detailed regulation of juries unnecessary. The code articles disclose features now familiar to American lawyers. The role of the foreman of the jury [chef du jury] was described [CP article 514 et seq.]; jury verdicts were classified as general or special [CP arts 519-521]; the court clerk was to poll the jury by checking each juror's vote individually

55. For civil jury cases before Louisiana acquired statehood, see the following rendered by the superior court for the Territory of Orleans: *Caisergues v. Dujarreau*, 1 Mart (o.s.) 7, 1809 WL 932 (La. 1809) (attacking contract as usurious under Spanish law; jury impaneled to determine lawful interest rate); *Duncan v. Young*, 1 Mart (o.s.) 32, 1809 WL 937 (La. 1809) (impaneling jury to determine facts surrounding protest for nonacceptance of dishonored bill of exchange); *Woolsey v. Cenas*, 1 Mart (o.s.) 26, 1809 WL 947 (La. 1809) (impaneling jury to determine whether money located aboard a brig on Mississippi river and consigned in a bill of lading was subject to writ of attachment); *Parish v. Phillips Syndics*, 1 Mart (o.s.) 61, 1809 WL 949 (La. 1809) (impaneling jury to find in accordance with Spanish law, several facts concerning failure of a partnership and whether mortgage constituted fraud on partnership creditors).

56. 9 Mart (o.s.) 195, 1821 WL 1273 (La. 1821).

57. 9 Mart (o.s.) 656, 1821 WL 1374 (La. 1821).

[CP art 521); jurors were to be selected anonymously by drawing tickets from a box [CP articles 496-7]. CP article 502 permitted juror challenges with or without cause.

The Code of Practice limited the judge's charge to a knowledge of the laws applicable to the cause submitted to them and barred the judge "from commenting on the facts, or even recapitulating them, so as to exercise any influence on their decision."⁵⁸

About sources for regulation of juries, the code drafters were silent. However, a final remark in French [but not English] signals the drafters' intention to familiarize the legal community with jury practices: "We think that we should be extensive [*étendre*] especially regarding matters relative to the procedure before juries, this subject being extremely important and needing to be rendered familiar above all for the inferior courts, such as the parish courts where it [procedure before juries] may not be generally known."⁵⁹ In their comments the code drafters criticized litigants for employing a common tactic of waiting until a court set the trial date to request a jury. The French version of the criticism conveyed more starkly than its English counterpart the drafters' displeasure at the delaying tactic:

"Nous avons cru devoir remédier à l'abus qui résulte du droit illimité que les parties ont de demander un jury en tout état de cause, et dont elles usent souvent pour éluder le jugement en demandant un jury au moment même ou la cause est appelée pour être fixée." ["We have thought ourselves obliged to remedy the abuse resulting from the parties' unlimited right to request a jury in any case and which they often use to elude the judgment by requesting a jury at the very moment that the cause has been called to be fixed for trial."].

To curb "abuses" resulting from the delaying tactic, CP Article 495 required a petitioner to demand a jury within ten days after the defendant had filed his answer on the merits. Article 495 was later changed to require a defendant's jury request before the trial date was set.

Among the three law commissioners, Livingston was likely responsible for the elaboration of jury trials in the Code of Practice. As a congressman during the period 1794-1800, he had championed constitutional protections for all criminal defendants, citizens and aliens alike. In opposition to a proposed act to deprive non-citizens of constitutional protections, he declared on the house floor that "we never

58. CP art. 516.

59. *Id.*

inquire whether a person is a citizen before we give him a public trial by jury.”⁶⁰

Livingston’s draft Penal Code also reinforces our conclusion that his work on regulation of juries in the Code of Practice was crucial for local practice. In the draft penal code, he sought to instruct local lawyers in the virtues of a jury and its interactions with judges. The French version of the preface to the penal code narrated the function of English juries in more detail than the English version. For example, a lengthy footnote in French, not reproduced in English, attributed to English juries a role akin to *vox populi*:

English juries have the right, before dissolving, to make remonstrances with the government on such and such branch of public administration. Thus, . . . a short while ago, a jury expressed a desire that Parliament enact a law to accord to those accused of a felony [capital crimes] the right to be defended on a point of fact by an avocat, as in practices in crimes of high treason and for simple delicts. . . . In a free state, the citizens should have all means of making their opinion known of the progress of the government, and to elevate their voice in favor of reforms needed by the force of circumstances. It is true that the jury departs here from its true duties. It is also true that it does not act as a jury of judgment when it deliberates on these kinds of propositions, but rather as a legal assembly of enlightened citizens from one county, seizing the occasion to submit to the government and to public opinion an expression of their wishes on some branch of administration. . . . Once these addresses have been written down, the chef du jury [foreman] reads them out at the end of the session and delivers them to the judge, president of the assises, who is to transmit them to the government.⁶¹

Livingston’s view of judges also animated a penal code rule, carried over in CP 516, that restricted a judge’s jury charge exclusively to his view of the law. To Livingston, the typical character and career of a judge warranted this restrictive rule:

Judges are generally men who have grown old in the practice at the bar. . . . [The judge] is the organ by which the sacred will of the law is pronounced. Suffer him to overpower the accused with his influence, or to enter the lists with his advocate, to carry on the contest of sophisms . . . and all the wordy war of forensic debate . . . and his dignity is lost: his decrees are no longer considered as the oracles of the law.⁶²

60. GEOFFREY STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME* 563 (2004).

61. *PROJET OF PENAL CODE* 112-13 (1823) (French version, author’s translation).

62. *Id.* at 86.

VIII. UNITED STATES CONSTITUTION AS BOTH SUPREME LAW AND
SAFEGUARD OF STATE LEGISLATIVE AUTONOMY

Because the national constitution both circumscribed and reinforced the Louisiana drafters' latitude in preparing the state's laws, we conclude with brief remarks on the role of constitutions in the missions of the French revolutionary lawmakers and their Louisiana counterparts. The French drafters' mission had been to prepare both a civil code and a constitution for an entire nation; the documents had equal dignity and geographic scope.

By contrast, the Louisiana Civil Code, anchored in the Romanist tradition, would regulate private relations of citizens within a single state of the Union. Unlike its French counterpart, this code was subordinate to a national constitution anchored in the common law. Counterintuitively, at least for a civilian who accorded primacy to substantive law, the Louisiana Civil Code was also subordinated to the Code of Practice. For this latter subordination there was an important reason: By embodying constitutionally sanctioned procedural norms, the Code of Practice left no doubt about the supremacy of the United States Constitution over state laws, even for controversies regulated by the Civil Code. A preeminent role for the Code of Practice assured that all litigation would be conducted in an adversarial process, and often before civil juries, even though the litigants' substantive claims arose exclusively under the Civil Code.

Describing the subordinate relationship between the codes and the Constitution gets at an important dimension of the drafters' work. Assumptions underlying the Constitution's role supply another dimension; for the Constitution left wide latitude for each of the states, including Louisiana, to elaborate its own regulation of private relationships. Exploiting this latitude, Massachusetts, New York, and the other original states of the Union fashioned their laws based upon English common law templates. In Louisiana, the latitude afforded by the Constitution allowed elaboration of laws based upon the civilian heritage bequeathed by the French and Spanish settlers. More than the Civil Code, which was fundamentally a civilian creation, the Code of Practice assured the mixity of the state's legal heritage. From the time of *Marbury v. Madison* onward, the prerogative writs figured in the living law of both the United States and Louisiana. Without these writs, many landmarks in American jurisprudence, as well as important Louisiana cases, would likely have assumed different shapes than they eventually acquired. In judicial pleading and arguments, Louisiana lawyers moved

comfortably between civilian and common law sources. With some effort, United States Supreme Court justices adjusted to the civilian sources whenever the court considered a controversy arising under Louisiana civil law.

IX. THE LAW COMMISSIONERS' TALENTS

In conclusion, we should recognize the gifts of the law commissioners in shaping the Code of Practice. Accomplished jurists who enjoyed the confidence of the local community, the commissioners understood the national and local political realities facing their young state and the intricacies of their drafting assignment. In taking the Code of Practice from original conception to adoption, the drafters' diplomacy seems to have counted as much as their substantive legal knowledge and careful writing. Without these gifts, Livingston, in particular, because he was a New Yorker, might have been suspected as an agent of the national government come to smuggle in common law institutions that the local lawyers had steadfastly opposed a few years earlier. Generally free of demagoguery and cavil, the commissioners' pragmatic course earned the local lawyers' confidence. The texture and character of Louisiana law have been richer for it.