Introduction

Timothy S. Huebner

As I write this, I am returning to full-time college teaching after a four-year stint in administration at my institution, Rhodes College. While administering the academic program at a liberal arts college is challenging and important work, it is certainly not the same as entering a classroom of students, engaging them in the assigned readings, and seeing minds open up to new ideas and perspectives. That particular enterprise—when both the teacher and the students are devoting themselves fully to the task—yields a unique sort of exhilaration. This fall, I am excited to return to teaching a course I have not taught in half a decade, my seminar on the history of the U.S. Supreme Court.

The purpose of these pages is to educate as well. While editing and publishing a journal is not the same as standing in front of a classroom, I would like to think the goals are similar. The *Journal* seeks always to inform, at times to provoke, and at its best to challenge and inspire. It does so by providing deeply researched and compellingly written articles about the history of the most important judicial institution in the world. That's a monumental task—especially at a moment when American civic knowledge is low and partisan polarization is high. Above all, the *Journal* educates its readers by providing perspective—that is, it offers a long view of the trajectory of the Court and of our country.

This issue of the *Journal* is brimming with creative scholarship that offers plenty of perspective. Two biographical studies are included in this issue. Samuel Nelson, the subject of the first, is one of those nineteenth-century justices of whom we often lose sight. There has never been a biography of the New Yorker, and few scholars have examined Nelson's lengthy tenure on the Court, despite the fact that it spanned the crucial years from the antebellum era through Reconstruction (1845–1872). But Nelson is having his moment. Our last issue contained an article on Nelson's views on the rights of Native Americans, while this issue offers William B. Meyer's thoughtful and thorough defense of Nelson's overall record and reputation. The piece begs the question of what other supposedly insignificant justices also need re-examining. William B. Meyer is associate professor of Geography at Colgate University.

The second biographical piece is on William Howard Taft. Although we all know Taft as the only person to ever serve as both president (1913–1917) and chief justice (1921–1930), Walter Stahr brings his considerable

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talents as a biographer to bear on an earlier period in Taft's life—his years in Washington as solicitor general. In doing so, Stahr not only explores the formative years of Taft's career, he also offers insight into the evolving role of the solicitor general, a position established only twenty years before Taft's arrival in the nation's capital. Stahr, who has written best-selling biographies of John Jay, Salmon P. Chase, William Seward, and Edwin Stanton, is currently working on a biography of Taft.

Anyone who has approached the Court has probably noticed the seventeen-foot-tall bronze doors that adorn the front of the building. While the *Journal* has included occasional articles over the years on the architecture and inscriptions relating to the "Marble Palace," we have never published an article focused just on the front doors—until now. Charles R. Eskridge III and Jack DiSorbo provide a comprehensive look at the eight panels contained on the doors, which emphasize the enduring theme of the written rule of law. Eskridge is a judge on the United States District Court, Southern District of Texas, and served as a law clerk to Justice Byron White. Jack DiSorbo served as a law clerk to Judge Eskridge (2020–2021), as well as to Jennifer Walker Elrod (2022–2023) of the United States Court of Appeal for the Fifth Circuit.

This issue begins with an examination of a lawsuit filed in federal district court against ex-President Thomas Jefferson in 1810. The case grew out of Jefferson's presidential order expelling Edward Livington from New Orleans lands and raised both substantive and jurisdictional questions. Personal enmity between the judge hearing the case, Chief Justice John Marshall, and the ex-president, Marshall's distant cousin, only complicated the matter. Jack McKay, a retired partner at Pillsbury Winthrop Shaw Pittman LLP, tells this fascinating and strangely relevant story in rich detail.

As editor, my hope is that readers of the *Journal* greet the arrival of each issue with both anticipation and appreciation—anticipating new perspectives and appreciating the effort that makes this educative enterprise possible. These pages, after all, reflect the dedicated intellectual work of our authors, who labor countless hours researching, thinking, writing, and revising, in order to produce their finished essays. The *Journal* also represents the collaborative efforts of our team: Executive Editor Clare Cushman, Associate Editor Mike Ross, D. Grier Stephenson (who regularly writes "The Judicial Bookshelf"), and the rest of the members of our Board, who offer support in a variety of ways. It continues to be a privilege to engage in this effort to educate the public about the history of the Court. Thanks for reading!

Livingston v. Jefferson and Jefferson v. Marshall—Defending an Ex-President

Jack McKay

"Who . . . can remember, without regret, [Jefferson's] conduct in relation to the batture of New Orleans?" Justice Joseph Story, **Autobiography**.

The scene was dramatic: a former president facing trial before a chief justice he saw as his political and personal enemy, in a lawsuit seeking damages that might bankrupt him. The claim was based on an action the former president took while he was in office, but presidential immunity had not been established. This is the dilemma Thomas Jefferson faced when Edward Livingston (former congressman and future secretary of state) sued him in May 1810 in the United States Circuit Court, District of Virginia, where Chief Justice John Marshall would be the presiding trial judge.[1] The suit arose from President Jefferson's 1807 decision to expel Livingston from the Batture St. Marie, Mississippi River waterfront land in New Orleans.

The suit posed an existential threat to the financially strapped Jefferson but also presented issues of national significance: Does the United States own the full bed of the Mississippi River even when a portion is dry for much of the year? May a former president be sued personally for official conduct while in office? Would John Marshall use this opportunity to take vengeance on his political rival, as Jefferson feared?

Examination of the defense in *Livingston v. Jefferson* provides an unprecedented look into how an ex-president selected and worked with a team of prominent lawyers who faced strategy decisions familiar even today. It also demonstrates that fear of the trial judge drove the legal strategy and led the defendant to employ questionable tactics to protect himself. Finally, seeing the case in its historical context shows that a dispute over a speck of the bed of the Mississippi River had

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an outsized impact on the Jefferson/Marshall relationship and on American law to this day.

The Batture Controversy

Livingston's suit was one chapter in a long battle over title to the Batture St. Marie in New Orleans.

"Batture" comes from the French: land "beaten" by the river or "beach." The Batture St. Marie is now part of downtown New Orleans, but at the time of the Louisiana Purchase it was an open tract, flooded part of the year when the Mississippi River was high but dry when the river was low. During those dry periods, the Batture was used for landing boats, storage, a source of sand and silt for building, and a place of public recreation. Under both the Spanish and French owners of Louisiana prior to the Louisiana Purchase in 1803, public use was unfettered.

Edward Livingston disrupted public access to Batture St. Marie not long after he arrived in New Orleans in 1804. Livingston came south after a disastrous tenure as U.S. Attorney for New York and mayor of New York City (positions he held simultaneously). A clerk in his office had embezzled some $40,000 (about $1M dollars today). Livingston assumed responsibility, confessed judgment in favor of the United States, and set off to New Orleans to make a new fortune and repay the debt.

Livingston arrived in New Orleans less than a year after the transfer of title from France to the United States. He became interested in the Batture as a development site, and in 1806 filed suit on behalf of John Gravier against the City of New Orleans to confirm title to a portion of it. In May 1807, three American judges appointed by Jefferson to the Superior Court of the Territory of Orleans held unanimously that Gravier had good title and that the City of New Orleans had no right to the Batture. A motion for a new trial to permit the city to assert that title was in the United States was denied.[2]

In 1810 Edward Livingston sued former president Thomas Jefferson for having expelled him from Mississippi River waterfront land in New Orleans. Livingston had come to Louisiana after serving as New York Congressman, mayor of New York City, and U.S. Attorney for New York. He went on to represent Louisiana in Congress and to serve as Secretary of State under Andrew Jackson.

After the judgment, Livingston acquired one third of the Batture St. Marie, likely as a contingent fee for his work in establishing title. He began to construct a new suburb on his land, with a levee, canal, and commercial buildings. However, his workers were frequently driven off by local residents, who resisted the assertion of private ownership of land they viewed as public. Violence occurred on several occasions.

The territorial governor, William Claiborne, kept President Jefferson and Secretary of State Madison informed of public reaction to the court decision and to Livingston's development activities. On September 3, 1807, Claiborne wrote Jefferson that he had resorted to conciliatory measures to avoid

"perhaps much bloodshed" and had promised a mob he would send the matter to the President for action. However, Claiborne saw no need for "executive action."[3]

Jefferson took this very local matter quite seriously, with a clear view toward executive action. He received and reviewed an opinion from Pierre Debirgny, the lawyer who represented the city in the Gravier litigation. Debirgny took the position that the Batture was owned by the United States as successor sovereign. The president consulted an encyclopedia that Debirgny had cited, which enabled him to conclude that the Debirgny opinion on title was "able and satisfactory."[4] For confirmation of this view, Jefferson sought a formal opinion from Attorney General Caesar Rodney.

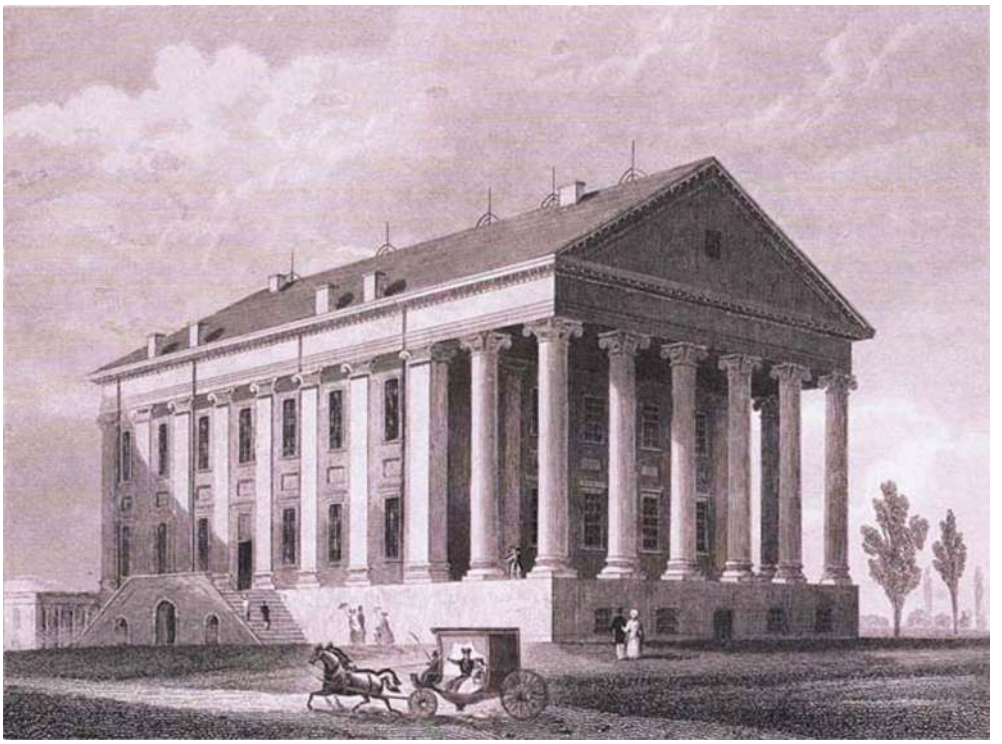
Rodney was presented with a statement of facts from Secretary of State Madison, the Debirgny opinion, and the opinion of the local court that found in favor of Gravier. Jefferson posed two questions as recounted by Rodney: first, does the United States have a claim to the Batture and second, may military possession be taken?[5]

Rodney opined that the United States did have a "claim" to the Batture, based on the Debirgny opinion, which had been endorsed by the United States attorney for Orleans. Rodney included the critical caveat that he presumed the "statement to be correct, as it has been officially furnished." Rodney sanctioned military removal based on the Squatters Act of 1807, which authorized removal of persons occupying federal lands after its effective date of March 1, 1807. Here Rodney relied on a letter from a Jefferson-appointed land commissioner in New Orleans who had said that Livingston's possession post-dated the Act's effective date, a critical and hotly disputed fact.[6]

Armed with the Rodney opinion and his own assessment of the issue, President Jefferson convened a cabinet meeting in November 1807. The cabinet concurred in the removal of Livingston. Jefferson then directed James Madison, as secretary of state, to order the federal marshal in New Orleans to remove all persons who had occupied the Batture since March 1, 1807. However, only Livingston was removed; no other claimant to the Batture or other similar alluvial land was affected. Livingston's workers were barred from continuing development of the Batture on January 25, 1808, even though Livingston had secured an injunction from the Orleans Superior Court that forbade the ouster.

There has been much speculation on why Jefferson took direct action to remove Livingston rather than ordering a suit to establish the title of the United States. Livingston's primary biographer saw the ouster as arising from "personal prejudice" against Livingston flowing from several causes—lukewarm support for Jefferson in the 1800 election; embarrassment arising from the New York embezzlement; Livingston's opposition to Governor Claiborne; and supposed legal interference with efforts to "suppress treason" in New Orleans.[7]

A more likely explanation is that Jefferson made a political calculation that whatever legal risk he took in the ouster was more than outweighed by the opportunity to foster the loyalty of a remote city. New Orleans had been part of the United States for only four years and was peopled by a polyglot population with traditions and laws quite distinct from those of its new owner. The Batture controversy put the cultural differences in stark relief: three American judges, untrained in civil law, had suddenly transformed land that was public under both the Spanish and French authorities into private ownership. According to Governor Claiborne in October 1807, the Batture case had given rise to a "warm Newspaper discussion, which for the present seems wholly to engage the public mind."[8] The controversy was "crudely



The case was heard in the United States Circuit Court for the District of Virginia in Richmond, which held session in the capitol building. Jefferson worried that Marshall's antipathy toward him was so "deeply engraven" that Marshall, the presiding judge, would find him liable in damages.

perceived as a conflict between two diverse legal traditions."[9]

Jefferson's firm conviction that title was in the United States undoubtedly also impelled action. Through years of subsequent legal debate, Jefferson never wavered in his view that French law controlled the question and that French law placed title to such lands in the sovereign. Jefferson saw the court decision that confirmed private ownership, which was based on Spanish law, as so unquestionably wrong that it could simply be ignored.

Furthermore, it is likely that Jefferson had no idea of the firestorm his action would engender. Livingston was relentless. He published papers, obtained opinions from prominent attorneys, filed petitions with Congress, and traveled twice to Washington to meet with the government to try to resolve his title claim. These efforts were unsuccessful. In 1810, he took the bold step of suing ex-President Jefferson in federal court in Richmond for an alleged trespass in the January 1808 ouster.

The Litigation

Dramatis Personae

The litigation brought together an illustrious group:

1. Thomas Jefferson (Defendant)—Third president of the United States
2. Edward Livingston (Plaintiff)—former mayor of New York City, U.S. Attorney for New York, later congressman and senator from Louisiana, and Andrew Jackson's Secretary of State; brother of Robert Livingston who had negotiated the Louisiana Purchase for Jefferson

3. John Marshall (Judge)—Chief Justice of the Supreme Court
4. John Tyler (Judge)—United States District Judge for the District of Virginia; former governor of Virginia and father of President John Tyler
5. John Wickham (counsel for Livingston)—perhaps the leading lawyer in Virginia despite having been captured while fleeing to British-held Charleston during the Revolution and tried for treason but acquitted
6. George Hay (counsel for Jefferson)—U.S. Attorney, son-in-law of James Monroe, and later a United States District Judge for the District of Virginia
7. William Wirt (counsel for Jefferson)—prominent lawyer, later longest-serving attorney general, essayist and biographer
8. Littleton Waller Tazewell (counsel for Jefferson)—Norfolk lawyer, later U.S. senator and governor of Virginia

There were many connections among the lawyers, not surprising because they were all Virginians.

Of the four attorneys on the pleadings (Wickham, Hay, Wirt, and Tazewell), three had participated in the 1807 treason trial of Aaron Burr—Hay and Wirt as prosecutors and Wickham as Burr's lead defense counsel. Tazewell was on the grand jury that had indicted Burr for treason for allegedly plotting to separate the western states from the Union. President Jefferson was intimately involved in that prosecution, recruiting Wirt to join Hay as prosecutor, helping to secure witnesses, and giving direction to Hay as U.S. Attorney. (Jefferson went so far as to send Hay blank pardons to use in obtaining witness testimony). John Marshall sat as one of the two members of the Circuit Court that heard the Burr trial; his rulings on evidence admissible to prove treason led to Burr's acquittal, much to Jefferson's chagrin.

John Wickham was one of the few Loyalists who achieved prominence after the American Revolution. He served as lead counsel to Livingston and was also a close friend of Chief Justice Marshall.

The relationships among the lawyers and judges went far beyond the Burr trial. Chief Justice Marshall and Wickham were close friends and lived near each other in Richmond. Wickham had housed and tutored Tazewell. Wirt trained under Wickham and described him as having a "greater diversity of talents" than any other Virginia lawyer. Tyler and Jefferson had been roommates for a time at William and Mary. Both Wickham and Tazewell had long-running contacts with Jefferson on behalf of his many creditors, and both continued to press him for payment during the Batture litigation.

But the most significant relationship (or lack thereof) was between the defendant and the judge. Jefferson and Marshall were both Virginians and shared great grandparents,[10] but the similarities stopped there. Jefferson was reared in the plantation/slave society of Virginia; Marshall, the oldest of 15 children, was born in a two-room cabin on Virginia's then western frontier. Jefferson attended William and Mary; Marshall had little formal

education. Jefferson studied for three years under Virginia's preeminent legal scholar, George Wythe; Marshall attended only a few of Wythe's lectures after release from military service in the American Revolution. Marshall fought heroically in several battles of the Revolution and was with Washington at Valley Forge; Jefferson, the wartime governor of Virginia, was accused of failure to prepare the state to defend against the British and barely escaped capture at Monticello.

Marshall was a Federalist devoted to Washington and served as President Adam's secretary of state; Jefferson resigned from Washington's cabinet to form the Democratic-Republican party (later shortened to "Republican") and was accused of endorsing a defamatory letter about Washington. Marshall believed in a strong central government; Jefferson was the author of the Kentucky resolutions of 1798 that asserted the right of a state to declare a federal statute unconstitutional and void. Marshall saw the federal judiciary as an essential bulwark against the excesses of democracy; Jefferson viewed the judiciary as a "corps of sappers & miners constantly working under ground to undermine the foundations of our confederated fabric."[11] Marshall established the Supreme Court as the sole judge of the constitutionality of congressional acts in *Marbury v. Madison*; Jefferson thought each of the three branches of government held that power.[12]

It is noteworthy that in the thousands of accessible letters written or received by Jefferson, only eight letters to or from Marshall appear. All are perfunctory, including exchanges confirming the time that Jefferson would take the oath of office at his two inaugurations. Also, Jefferson wrote much more about Marshall than Marshall did about Jefferson. And while Marshall penned criticisms of policy, Jefferson wrote in bitter and highly personal terms about the chief justice.[13] When Jefferson faced the prospect of appearing before Marshall in the Livingston lawsuit, his attacks bordered on the paranoid.

Initiation of Litigation

On May 15, 1810, John Wickham filed a Writ of Trespass on behalf of Edward Livingston in the federal Circuit Court in Richmond. Chief Justice Marshall witnessed the Writ that instructed the U.S. Marshal to take

> Thomas Jefferson a citizen of Virginia if he be found within your District, and him safely keep, so that you have his body before the Judges of the Court of the United States, for the fifth Circuit, in the Virginia District, at the City of Richmond, on the 22nd day of this month to answer Edward Livingston a citizen of the State of New York of a plea of Trespass on the case, Damage One hundred thousand dollars.

The Complaint detailing the grounds for the Writ was not filed until later, and Jefferson did not receive a copy until forwarded by counsel on July 20, 1810. It had eight counts claiming that the January 1808 ouster from the Batture was a trespass. In four of the counts, the trespass was alleged to have been committed by the "said Thomas"; in the other four, the ouster was allegedly caused by the "said Thomas . . . with his servants." Various injuries were claimed, including destruction of equipment, cartloads of dirt, and a levee, in addition to loss of revenue from use of the land.[14]

An award of $100,000 in damages (about $2.5 million in 2023 dollars) would have devastated Jefferson. Jefferson was in debt throughout his life and often pressed by creditors. Inherited debt and spending beyond his means left him with "the gloomy prospect of retiring from office loaded with serious debts, which will materially affect the tranquility of my retirement . . ."[15] A damage award to Livingston would have been the *coup de grace*.

The day after filing, Wickham informed Jefferson of the suit and that he had put

process in the hands of the U.S. Marshal instead of asking Jefferson to accept service, because the case was not of a "private nature." He gave no details of the claim.[16]

The filing was covered by newspapers throughout the East, sometimes with condemnatory language. The *Richmond Enquirer* was suspicious of the reasons to file a suit it saw as frivolous: "It is difficult to say, whether we should feel most indignation or contempt, at this proceeding. . . . Let them catch what they can. But if we mistake not, there is something to be done in this business by way of a *side-wind*—there is to be a top current, and an undercurrent."[17]

The *Trenton True American* took aim at Marshall: "Wickham, the advocate of Burr, has taken out the writ; and Chief Justice Marshall, who let Burr escape, is to try the action." The result cannot be foretold "but we have witnessed already such extraordinary conduct in the federal judiciary, that none of its future decisions, however preposterous and erroneous, can surprise us."[18]

The Choice of Counsel

It did not take Jefferson long to contact his first choice for counsel: Wickham, the man who had filed suit against him. Jefferson saw an opening in Wickham's notice of the suit which said that Wickham had not yet been retained by Livingston for the case and was not certain that he would be so engaged.

By return letter, Jefferson asked Wickham to assist in his defense. He also requested Wickham to advise George Hay and William Wirt that Jefferson would write them shortly to engage them as well.[19] All three men lived in Richmond. Although Wickham told Wirt and Hay of Jefferson's desire to retain them, he declined the representation on the ground that it might appear improper for him to act for the defendant in a suit he had initiated.[20]

Meanwhile, George Hay was actively soliciting the opportunity to represent Jefferson. Hay asked James Monroe (his father-in-law) to offer his services to Jefferson gratis. Monroe acted quickly—the day after receiving the Hay letter, he visited Jefferson to relay Hay's interest. Jefferson was well disposed to the Hay offer and, indeed, told Monroe that he had already asked Wickham to engage Wirt and Hay.[21]

Jefferson wrote directly to Wirt and Hay on May 19, 1810, advising them of the letter from Wickham regarding the suit and of his request that Wickham form a defense team with them. He instructed them to take advantage of any delay that might lead to dismissal and gave them permission to cite his instruction if they were charged with discourtesy.[22]

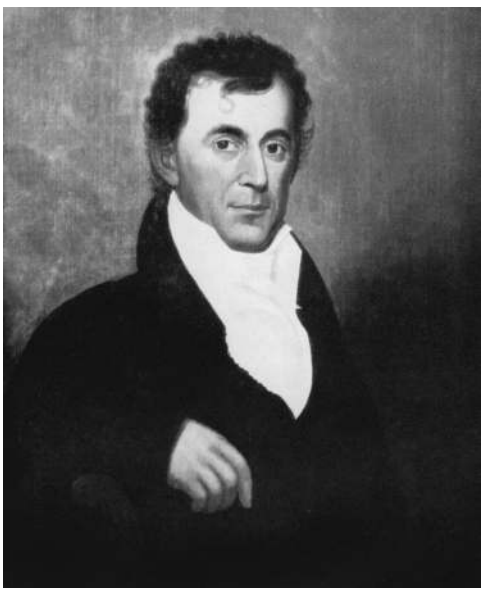
Although Wickham declined a role as Jefferson's counsel, both Wirt and Hay accepted. Wirt did so with "great pleasure," noting that Wickham had told him of Jefferson's interest in hiring him.[23] By this point, Hay had learned that the claim was in trespass and related to the Batture. Hay urged Jefferson to begin to collect documents; if defense counsel demanded "exactness" of plaintiff's counsel as Jefferson had directed, the same would be expected of the defense.[24]

The selection of Littleton Waller Tazewell to join the team was more complicated. Jefferson waited a month after learning of the suit to write Wirt (for "yourself alone"), saying that he strongly favored hiring Tazewell, a Norfolk lawyer, who would be "able either for us or against us." Wirt and Tazewell had practiced together for a time in Norfolk before Wirt moved to Richmond in 1806. Because Wirt knew Tazewell, Jefferson sought his advice.[25] Wirt responded with a positive assessment, describing Tazewell as the "first man at the bar of Virginia" who would represent Jefferson with the "highest animation and fervor." Wirt recommended Tazewell even though Tazewell had been charged as "verging toward federalism."[26]

On June 28, Jefferson asked Tazewell to join the defense team with Wirt and Hay.[27] Hiring Tazewell reflected a decision to opt for talent over personal and political

differences. Tazewell had long represented Jefferson's creditors; indeed, Tazewell had sent a payment demand to Jefferson just a day before he received Jefferson's letter asking to hire him.[28] Tazewell was close to Livingston's lawyer Wickham, had married into a "federalist" family, and had opposed Jefferson's embargo and the election of Madison, Jefferson's political heir.[29] Tazewell accepted the engagement "with pleasure," even though he was not even a member of the bar of the federal Circuit Court where the action was pending and had no other reason to be in Richmond.[30]

Hay welcomed the addition of Tazewell to counter the "phalanx" of lawyers and law experts being assembled by Livingston.[31] However, Tazewell's location in Norfolk made him a bit of an outsider to the team of Wirt and Hay, described by Jefferson as the "gentlemen in Richmond." Tazewell's relative isolation required Jefferson to act as a conduit of communications among counsel, sometimes asking that a letter to his Richmond attorneys be returned so he could send it to Tazewell in Norfolk or copying parts of a letter from Tazewell into a letter to his Richmond lawyers. The extra work was rewarded: Tazewell became a leader of the defense and the lawyer most willing to provide unvarnished advice to his client.



Littleton Waller Tazewell was a Norfolk, Virginia lawyer who had long represented Jefferson's creditors. In choosing him to join his defense team, Jefferson opted for talent over a personal or political connection.

Other than Hay's offer to work for free, there was no discussion of fees with any of the lawyers. Jefferson had been more careful when he was a practicing lawyer. He joined in a public notice by Patrick Henry and others in 1773 that the undersigned would no longer take cases without an upfront payment of half the anticipated fee.[32]

The Choice of Judges

Jefferson not only chose counsel; he also tried to influence the appointment of judges to hear his case or any appeal. That Marshall would be one of the trial judges was certain. Jefferson's focus was on the judge who would sit with Marshall on the Circuit Court and the justices of the Supreme Court who would hear any appeal.

Jefferson's animosity toward Marshall was expressed in bitter, personal terms as he prepared to defend himself. He thought that the *Marbury* decision and Marshall's rulings in the Burr treason trial showed the "plastic nature of law in his hands."[33] He also viewed Marshall, whose "inveteracy is profound," as personally antagonistic toward him, with a "gloomy malignity" that "never will let him forego the opportunity of satiating it on a victim."[34] He perceived Marshall's antipathy toward him as "deeply engraven."[35] Jefferson was certain Marshall would be biased; Livingston's suit was a "persecution" aimed at fortifying his title by a decision from "a judge on whose favor he counts."[36]

Jefferson was openly fearful of Marshall as his judge even though the trespass action would be heard by a jury. He viewed Marshall

as having effectively determined the outcome of the Burr trial despite the presence of a jury in that case. Jefferson predicted that the chief justice's "decisions, instructions to a jury, his allowances and disallowances, and garbling of evidence" would likely necessitate an appeal.[37]

Two timely deaths offered Jefferson opportunities to influence those who might decide his case.

The first was the death of Supreme Court Justice William Cushing of Massachusetts on September 13, 1810. Cushing, a Federalist, was the longest serving justice appointed by George Washington. At the time of his death, the seven-member Supreme Court had a Federalist majority. President Madison could now create a Republican majority on the Court, a longstanding goal of Jefferson. But Jefferson also saw the vacancy as important to him personally because of its implications for the Batture litigation. He characterized Cushing's death as a "fortunate" event timed so as to be a "godsend to me" and "opportune."[38]

The second and more directly relevant death was that of Cyrus Griffin, the District Judge for Virginia. Griffin had sat with Marshall at the Burr trial to make up the Circuit Court and would do the same in the Livingston case.

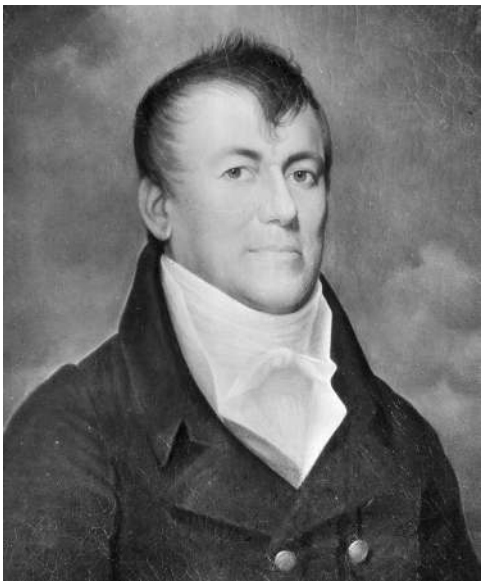
On May 12, 1810, John Tyler, then governor of Virginia, wrote Jefferson about the possibility of being appointed to the District Court. He noted that Griffin was in a "low state of health" and said that he hoped that President Madison would "think of me now and then," and if an opportunity arose, "lay me down softly on a bed of roses."[39]

In reply, Jefferson said that he had already made Tyler's case to Madison and continued his harsh rhetoric about Marshall and the current Circuit Court. Jefferson described the "base prostitution of law to party passions" by Marshall and complained of the "imbecility" of Griffin. In Marshall's hands, "the law is nothing more than an ambiguous text to be explained by his sophistry into any meaning which may subserve his personal malices . . ."[40]

Jefferson had indeed given a strong endorsement of Tyler to President Madison on May 25, 1810, a week after Jefferson had learned of the Livingston suit.[41] Noting that he had heard that Griffin "could not stand it long," Jefferson made the case for Tyler by claiming that Virginia had suffered long enough by having a "cypher" like Griffin on the federal bench, a man who was no "counterpoint to the rancorous hatred which Marshall bears to the government" or to Marshall's "cunning & sophistry within which he is able to shroud himself." Jefferson promoted Tyler as a man with "firmness enough to preserve his independence on the same bench" with Marshall. Moreover, he contended that Tyler should have had the appointment in the first place rather than the "wretched fool" Griffin.[42]

In the same letter to the president, Jefferson raised the suit filed by Livingston. He advised Madison of the litigation and of the likelihood that Jefferson would have to call on members of the administration to help him build a defense. Jefferson closed with another attack on Marshall: his "twistifications in the case of Marbury, in that of Burr, & the late Yazoo case shew how dexterously he can reconcile law to his personal biases; and no body seems to doubt that he is ready prepared to decide that Livingston's right to the batture is unquestionable, and that I am bound to pay for it with my private fortune."

President Madison, who had actually issued the ouster order, not surprisingly rallied to Jefferson's defense. He could not believe that such a suit had been filed and saw a likely change in the Constitution "if the Judiciary should lend itself" to pursuing former government officers. The executive and legislative branches could not be "completely subjected to the Judiciary."[43]



George Hay was the U.S. Attorney for the District of Virginia from 1803 to 1816. He prosecuted (along with William Wirt) Aaron Burr in his 1807 trial for treason. They faced John Wickham, who was Burr's lead defense counsel and now Livingston's counsel.

Griffin conveniently died on December 14, 1810. On January 2, 1811, Madison appointed Tyler as District Judge for Virginia. He was confirmed by the Senate the next day, in ample time to hear the Livingston case. Tyler was unabashed in recognizing Jefferson's role in his appointment, saying that his judgeship was one "I owe to your favor in great measure."[44]

But influencing the makeup of the trial court did not provide enough security. The Supreme Court seat left open by Cushing's death was also an object of Jefferson's defensive efforts. Due to the "partialities of the judge [Marshall], we must carefully retain a right of correcting every opinion he gives, by carrying it before the supreme court."[45] In Jefferson's view, Marshall would let nothing stand in his way "of getting at his victim; my only chance is an Appeal."[46]

Because the justices still held court throughout the circuit over which they presided, the new justice would have to be from New England, where Cushing had resided. Jefferson sought immediately to line up support for Levi Lincoln of Massachusetts, his first attorney general. Jefferson contacted Attorney General Caesar Rodney and Treasury Secretary Albert Gallatin, two men who had served under him and continued under President Madison.[47] Rodney told Jefferson that he had already written the president in favor of Lincoln and that Gallatin agreed with his opinion.[48]

The stage thus set, Jefferson wrote directly to Madison.[49] The death of Cushing was a "circumstance of congratulation" because it gave a chance to reform the judiciary by appointing a successor of "unquestionable republican principles" who would end the Federalist "defiance" that was being exercised through the courts. Jefferson knew that Madison thought "lightly" of Lincoln as a lawyer, and Jefferson himself did not regard Lincoln as a "correct common lawyer." This was not disqualifying; in Jefferson's view there were no great common law lawyers in the Eastern states; the law there was "made up from the Jewish law, a dash of common law, & a great mass of original notices of their own. . . ."

Gideon Granger of Connecticut was a second choice. Jefferson noted that there might be opposition to Granger because of allegations of corruption made against him in 1805. Joseph Story of Massachusetts, who "deserted us" on the Embargo, was dismissed as "unquestionably a Tory" and too young.

Madison nominated Lincoln, as Jefferson suggested, notwithstanding a protest from Lincoln that he could not serve because of failing eyesight. Lincoln promptly declined because of his vision.[50] Madison apparently could not bring himself to appoint Granger, Jefferson's second choice, but instead turned to Alexander Wolcott of Connecticut. Wolcott's nomination failed on a 9–24 vote, even though a majority of the Senate was Republican.

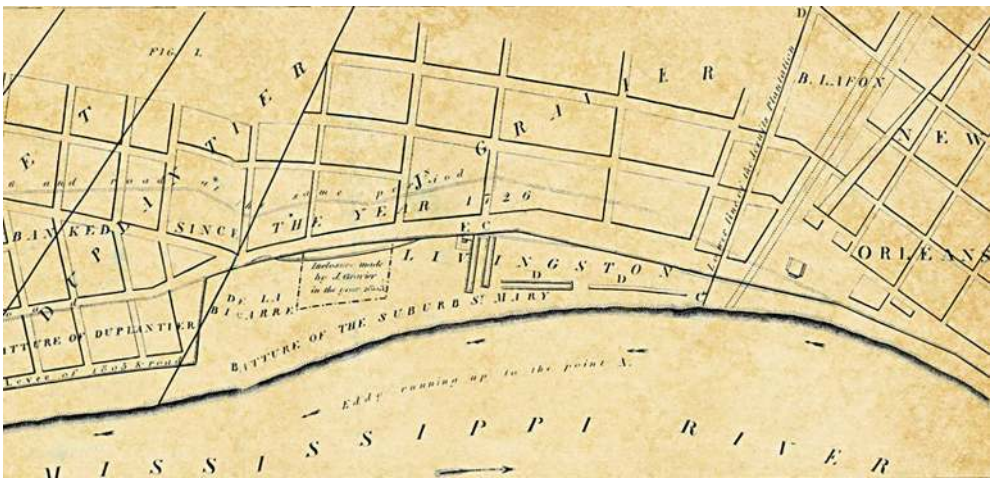
Madison then promptly nominated John Quincy Adams, his ambassador to Russia, a Federalist turned Republican but not on Jefferson's list. Adams was unanimously confirmed but declined the appointment, citing the need to remain in his position and his lack of interest in the law as a profession.[51] With so few Republicans in the Northeast, Madison delayed but finally named Joseph Story, nominally a Republican. Story, at 32, was the youngest member ever to serve on the Supreme Court. He took his seat on November 18, 1811, and went on to participate in some of the most important opinions of the Marshall Court supporting a strong national government. Jefferson's goals of a reliable Republican majority and a justice favorable to him on the Court were not fulfilled.

Influencing Congress

Jefferson's efforts to protect himself were not limited to the courts. He also intervened in Congress. President Jefferson had referred the Batture question to Congress on March 7, 1808, asking for a determination of title. Jefferson noted that the Batture had been claimed by a "private individual" but it is "alleged that title . . . has now passed over to the United States." Pending congressional action on the title question, "measures have been taken, according to law, to prevent any change in the state of things, and to keep the grounds clear of intruders."[52]

Soon thereafter, Livingston traveled to Washington to petition Congress to provide a means to settle the title issue. Upon arriving in the city, he wrote Jefferson asking for a meeting.[53] Jefferson declined on the ground that he was about to leave Washington and was pressed for time. In any event, said Jefferson, any communication should be addressed to the proper department head.[54] In fact, Jefferson proposed a much different reception for Livingston. On the same day that Jefferson declined a meeting with Livingston, he wrote Secretary of the Treasury Gallatin: "if you can possibly have him arrested here for his public debt, the opportunity ought not to be lost."[55]

Livingston and the City of New Orleans filed dueling petitions with Congress on the issue of title. Livingston's petition included a scathing indictment of Jefferson's assertion that he was merely maintaining the status quo. To the contrary, said Livingston, Jefferson had made a "material change" by "the most violent intrusion on private property that has been witnessed in our country."[56]



The portion of the Batture St. Marie claim by Livingston is marked on this 1813 map of New Orleans.

The House debated the Batture matter on 18 legislative days in total; discussion in the Senate was only a fraction of this time. In the House debates, Jefferson was supported as a protector of the people of New Orleans and attacked as an invader of property rights without any due process. The significance of the Batture issue was best captured by the Washington correspondent of the *Richmond Enquirer* who included "the Batture" among "important" matters to be considered in the upcoming session of Congress, along with renewal of the charter of the Bank of the United States.[57]

Congress's first action was to refer the title question to the attorney general for an opinion. In response, Attorney General Rodney chose to interpret the request to be one for an opinion on the best method of resolving the controversy. He suggested two alternatives; neither was ever adopted.

From June 1809–May 1810, three options were extensively discussed in the House: the appointment of commissioners to take evidence; ceding any title in the United States to the City of New Orleans; or authorizing a New Orleans judge to certify the matter to a federal Circuit Court for trial.

Despite the presence of a large Republican majority in both houses, many of the votes taken were extremely close. In March 1810 the House passed a commissioner bill with the Speaker casting the deciding vote after a 63–63 tie. The Senate passed a similar bill a month later, with the vice president breaking a tie.

The commissioner proposal never became law. The House bill called on the commissioners to render an opinion on title; the Senate bill only directed the commissioners to collect evidence. Neither house would accede to the position of the other.

At this point, Jefferson interjected himself in the congressional debate as a facet of his defense. However, his reception in Congress on the Batture issue was uncertain. In September 1810, Jefferson proposed asking Congress to fund defense of the Batture suit. Treasury Secretary Gallatin discouraged that idea, telling him that Livingston had a "strange hold" over many members by reason of his writings on the Batture eviction. Nothing should be presented to Congress until feelers had been put out to be sure such a request would not be met with a "mortifying and dangerous" rejection.[58]

Jefferson withdrew the request and moved to a defensive posture. In November 1810, to show the "rightness" of his position, he sent Virginia Congressman John Epps and Virginia Senator William Giles a paper he had drafted arguing that the United States owned the Batture. (Jefferson's Batture Paper is discussed in detail below.) His goal was to be sure that Congress did not take some action that might impress a jury in his case unfavorably. He wished Congress to leave the matter to "rest as it does till the trial."[59] Jefferson justified his request for assistance by saying it would not have been necessary if the case were before an impartial court. But the "deep-seated enmity" of one judge (Marshall) and the "absolute nullity" of the other (Griffin had not yet died), combined with "precedents from Burr's case," lessened his confidence that he would prevail.

Jefferson admonished Epps and Giles to limit distribution of the Paper to representatives from Kentucky (Johnston and Clay) lest Livingston or his counsel learn of Jefferson's defenses. Jefferson believed that the Kentuckians would support him out of fear that Livingston would eliminate the free landing on the Batture of the thousand Kentucky boats that came down the Mississippi annually.

Jefferson's move was successful. The spring 1810 votes marked the end of congressional treatment of the Batture. Congress was "clear of" the Batture.[60]

Developing a Defense

From the outset, Jefferson had a clear plan for his legal defense: leave the pleadings

to his lawyers while he worked on a defense on the merits to show that title to the Batture was in the United States as sovereign. Jefferson anticipated no role in the preparation of pleadings on the ground that he was just a local trial lawyer: neither he nor the "plain country" judges before whom he had practiced were interested in the "niceties of pleading."[61]

There was substantial merit in Jefferson's self-deprecation about his career as a lawyer.[62] He had practiced law for only eight years, from age 23 to 31. During that time, he appeared in courts from west of the Blue Ridge mountains to Williamsburg. His practice involved mostly real estate and trusts and estates, with at least one notable exception—bringing an unsuccessful freedom suit for a slave.

In August 1774, Jefferson turned his practice over to Edmund Randolph, believing erroneously that his wife's recent inheritance from her father would enable him to devote his time to public service. He never appeared again in court. Certainly, however, in both the Burr treason trial and in the Batture controversy, his legal background was evident.

Despite having delegated pleading to his attorneys, Jefferson was intimately involved with counsel in developing trial strategy. At the same time, he prepared his Batture Paper, an erudite treatise aimed at demonstrating that title to the Batture lay in the United States and that he was justified in removing Livingston. The Batture Paper would provide or highlight the proof needed in any trial on the merits.

During preparation of the defense, Jefferson was in frequent contact with his counsel by mail, and both Wirt and Hay visited Monticello to consult with him. Hay stayed a full two weeks.[63]

The Pleas

An early dispute arose among counsel over whether to assert that there was no federal court jurisdiction over the suit. The Circuit Court had original jurisdiction over diversity actions—suits between citizens of different states. Livingston had alleged that he was a citizen of New York and Jefferson was a citizen of Virginia. However, by the time the suit was filed, Livingston had lived for five years in New Orleans, established a successful law practice, and become a real estate developer.

But New Orleans was in a territory, not a state. In an opinion authored by Chief Justice Marshall, the Supreme Court had already held that citizens of the District of Columbia did not live in a "state" within the meaning of the Judiciary Act.[64] That decision portended a similar result for citizens of territories.[65] If Livingston were a citizen of the Orleans territory and not of a "state," there was no diversity of citizenship and the case could not be heard in a federal court.

Jefferson's lawyers all agreed that lack of diversity could be dispositive and fulfill Jefferson's wish that "it were possible to force it into our state court."[66] Indeed, Tazewell raised the issue early on, in his letter accepting the representation. He thought an argument based on lack of diversity jurisdiction would succeed, but there would be no harm if it did not.[67]

Hay objected to the plea "proposed by Mr. Tazewell" in a letter of July 15, 1810.[68] He had two principal concerns. First, such a technical plea would leave the impression that Jefferson was afraid of a discussion of the merits; a full trial was necessary to secure "public approbation" for Jefferson's conduct in the Batture matter, which "is yet withheld" due to the public's misunderstanding of the facts. Second, such a plea required an oath by Jefferson as to the facts regarding Livingston's citizenship.

Tazewell supported a plea of lack of diversity for a different reason. He thought it would delay the case and allow the public mind, "which is now heated upon this subject, to settle" and thereby increase the likelihood of a "cool and dispassionate" jury.[69]

Five days later, Hay repeated his aversion to winning on a technicality. He had discussed the diversity plea with Wirt, who was inclined to approve it if the difficulty in making affidavits could be surmounted. However, Hay was certain that when Wirt and Tazewell saw the strength of the case on the merits, they would abandon taking refuge in a "technical proposal."[70]

Jefferson ended the debate. He was not willing to sign an affidavit regarding Livingston's citizenship.[71] Lack of jurisdiction based on diversity of citizenship was not raised again among counsel.

Having resolved this issue, Jefferson and his lawyers focused on other approaches to a defense: going to trial; claiming presidential immunity; relying on the well-established "local action" doctrine applicable in trespass suits; or some combination of all three.

Trial on the Merits

Jefferson viewed resolution of the litigation through a full trial as a key objective, not only as a vehicle for personal vindication but also an opportunity to establish a broad principle beneficial to the people of New Orleans—that title to lands like the Batture was held by the United States. This principle was the focus and purpose of Jefferson's scholarly Batture Paper and a theme to which he frequently returned in strategizing with counsel.

Concern for the citizens of New Orleans was less of a factor with counsel. Instead, the need for public vindication of Jefferson's ouster of Livingston drove the debate among them over whether pretrial pleas or a trial on the merits should be the defense strategy. The Batture controversy had played out in the press and in Congress. In the view of counsel, Jefferson had not fared well on either front. George Hay, in particular, wanted the merits resolved, a position he maintained until trial expediency dictated otherwise.

Presidential Immunity

Throughout the litigation, Jefferson maintained that the case against him personally could be readily resolved based on an argument of presidential immunity. He made this point to counsel[72] and to his supporters in government.[73] He saw a need to go forward on the merits only to establish the title of the United States so that the Batture could once again be open to the citizens of New Orleans.

One counsel, Tazewell, argued that immunity should be a focus of the defense because of the importance of the issue to the balance between the judicial and executive branches.[74] Hay had less confidence in an immunity defense. If an immunity plea were "tenable," it could be included in the argument that the ouster of Livingston was authorized under the Squatters Act. [75]

Jefferson's view of the law was simple—he was immune from liability even if he made a mistake as president so long as it was "honest and not imputable at all to that gross & palpable corruption or injustice which makes a public magistrate responsible to a private party. I know that even a federal jury could not find a verdict against me on this head."[76] This would have been a qualified immunity to be established by the particular facts.

At the time there was no law to cite for the immunity of a former president for acts committed while in office.[77] The concept of a broad immunity was first raised in 1833, when Justice Story argued in a treatise that a former president "must be deemed, in civil cases at least, to possess an absolute inviolability for conduct while in office."[78] Jefferson himself had taken a similar position on the need to protect the president while <u>in</u> office when he resisted a subpoena for documents issued by Justice Marshall in the Burr trial.[79] But in preparation of his defense against Livingston, Jefferson did not urge absolute immunity for suits brought after the president left office. Absolute immunity of a former

president from civil suits did not become the law until 1982.[80]

The Local Action Rule

As the common law evolved in England, most lawsuits became "transitory": a defendant could be sued wherever found, regardless of where the wrong had taken place. One notable exception was an action for trespass—unauthorized entry on land of another. Even though a suit for breach of a contract to sell land could be brought anywhere, a trespass action could be brought only in the jurisdiction where the trespass occurred. This "local action" rule was so well established that Hay could not understand why a lawyer as careful as Wickham agreed to prosecute an action in Virginia for a trespass committed in New Orleans; he thought Wickham was also likely at a loss. Attorney General Rodney was of the same view.[81] However, Jefferson opposed raising this defense because it would "place everything under the grip of the judge," and he knew "how the judge will decide it."[82]

Resolution of Conflicting Views

Hay devised a strategy to combine the local action defense with a presentation of the merits of the removal of Livingston: let the court receive evidence on the merits over objection, while reserving the right to raise the local action defense at a later point. This would lay the case open to "public view" without foregoing the benefits that the locality principle "indisputably affords."[83]

Tazewell came around to Hay's strategy. In a letter that Jefferson copied into a letter to Hay, Tazewell took the position that there was no need to plead the local action doctrine at the outset; indeed, he thought it might be improper to do so. Instead, like Hay, he favored relying on objections to evidence about the ouster and raising the locality defense only after an unfavorable verdict. In this way, the merits could be settled without any risk to Jefferson.[84]

In the same letter, Tazewell insisted that if any special pleas were filed, they should include an immunity defense: that the ouster was undertaken by Jefferson as president, with the advice of the attorney general and without malice. Tazewell saw this as a more important question to be settled than title to the Batture.

By this time, Jefferson had found a way to combine a defense of his conduct with both "technical" pleas: raise the merits issue that the United States held title to the Batture by a general denial of Livingston's complaint, which would lead to a trial; rely on executive immunity to protect himself; and use a motion after judgment as a last resort to raise the locality objection.[85] However, Jefferson said he would defer to counsel's decision. As late as January 1811, Jefferson still preferred this strategy.[86]

On January 25, 1811, Hay circulated "rough" pleas drafted by him and reviewed by Wirt, with a request that Jefferson revise and correct.[87] The draft pleas did not include one based on presidential immunity. Hay said Wirt favored such a defense, and if Jefferson agreed with Wirt, Hay would include it. The draft pleas reflected a major change in defense strategy: Hay included a plea based on the "local action" rule, arguing that the court had no jurisdiction because the trespass had not occurred in Virginia. Hay thus opened the door to a pretrial resolution on a "technicality" rather than preserving this defense for a post-trial motion, as Jefferson had hoped.

Hay sent the draft pleas to Tazewell two days after they were sent to Jefferson, expecting Tazewell to approve their substance and return them for Hay to finalize. Instead, to Hay's pleasant surprise, Tazewell revised extensively, putting the pleas in close to final form for filing.[88]

The pleas were filed on February 28, 1811, but with changes to Tazewell's redrafts. Hay explained to Tazewell that he and Wirt

had rejected the idea of holding back the local action defense because an objection to jurisdiction is always raised by a pretrial filing. Furthermore, Hay included the plea based on presidential immunity so favored by Tazewell but rejected Tazewell's suggestion of a plea that Livingston's conduct had created a nuisance on the *bank* of the river. This would have been inconsistent with the defense theory that the land in question was part of the *bed* of the river.

In a letter to Jefferson after the case was over, Tazewell gave a similar account of the discussions of counsel.[89] Tazewell favored a decision on the merits but was most interested in a decision on immunity for presidential actions. For that reason, he favored the strategy Jefferson had proposed of a trial/immunity/local action presentation.

Hay and Wirt concluded, according to Tazewell, that the local action objection could only be raised by a "plea in abatement," one that had to be filed at the outset of the case or was lost. They argued that Jefferson should not be put at risk for abstract political questions or to resolve a title that benefitted only those who seemed to take no interest in the case. In the end, Tazewell had yielded to the Hay/Wirt position that the local action objection could not be preserved until after trial.

Jefferson had left Monticello for his plantation at Poplar Grove on January 27, 1811, and did not see the draft pleas until his return on March 3, 1811, after they had been filed. Jefferson took no issue with the fact that his tripartite strategy had not been implemented. He raised only a question about the allegation that the Batture was part of the bed of the river—did this claim preclude arguing that it was part of the "bank" of the river?[90] Thus Jefferson remained true to his oft-repeated statement that he would defer to the judgment of counsel; indeed, he did not even arrange his travel/work schedule so that he could see final drafts of the pleas.

On March 6, 1811, Hay reported Jefferson's question to Tazewell: should there be a plea based upon the notion that the Batture was part of the *bank* of the river, not the *bed*? Despite having earlier noted that this would be inconsistent with the existing defense theory of the case, Hay asked Tazewell to draw a plea on this topic. Hay confessed that he had joined Wirt in initial opposition to such a plea at least in part from "a determination to differ with you about something." Hay asked Tazewell to draw the plea because Hay was "very weary of drafting pleas in this suit," and Wirt was too ill to undertake the task.[91] However, no such additional plea was ever filed.

The shift to raise the local action/jurisdiction issue before trial came about for two reasons familiar to litigants today. First, Wirt and Hay wanted to guard against a pleading error. As Tazewell told Jefferson, Wirt and Hay did not want to take the risk of losing the ability to rely on the local action doctrine if it were not raised at the outset. The second was the burden of litigation, particularly of defending a case in Virginia where most of the relevant evidence was in New Orleans, a burden specifically noted by Jefferson to Hay and Tazewell.[92]

The Batture Paper

While Jefferson worked with counsel on trial strategy, he devoted scores of hours to his Batture Paper to be used if there were a trial on the merits. That treatise argued that title to the Batture was in the United States as sovereign and therefore Livingston had no title that could support a suit for trespass.

The Batture Paper[93] begins with a thorough recitation of the facts followed by a remarkable summary of ancient law on the ownership of riverfront lands. The facts are used to show that no one had ever thought the Batture could be owned to the exclusion of the public until Livingston arrived. Livingston was fresh from a commercial world

with ships and wharves, so "the fleshpots of Egypt could not suddenly be forgotten in this new land of Canaan." Jefferson recounts how the decision to expel Livingston was reached and justifies it as a public duty that he undertook only after receiving an opinion from the attorney general and a full cabinet meeting.

As a foundation for his argument that the Batture was public land, Jefferson quotes treatises on French, Roman, and Spanish law, along with lengthy translations. He included a description of the Nile, its tributaries, and its flooding (the latter information drawn from "Nilometer" statistics) and a reference to "Hindoo" views on riparian rights. Jefferson's main argument was that the "bed" of a navigable river extends to the high water mark of the river during flood season, and everyone agrees that the bed of a navigable river is owned by the public.

Jefferson concluded with an immunity argument—he had not acted with malice and could not be held personally liable for a mistake. If the law were otherwise, all public servants would have to be judgment-proof paupers. Jefferson believed Livingston knew this to be the law; thus "to what indirect object he may signal with one eye while pretending to look at me, I do not pretend to say."

In preparing the Batture Paper, Jefferson had extensive access to and assistance from the Madison administration at the highest levels. He collected documents about the Batture controversy directly from the Secretaries of State, Treasury and War and repeatedly circulated drafts to President Madison and members of his cabinet. President Madison and Secretary of the Treasury Gallatin provided page by page comments on multiple drafts. Madison challenged both the facts and the format but ultimately approved the final product.[94]

Jefferson's counsel were also active in commenting on the Batture Paper. Wirt noted points he thought Livingston might argue in rebuttal to Jefferson's draft and raised best evidence issues regarding Jefferson's reliance on secondary sources that quoted from key documents. His learned comments include references to Dutch scholars Grotius and Vinnius on the definition of the components of a river. Jefferson made detailed notes on Wirt's comments.[95]

Tazewell challenged Jefferson's argument that alluvions (increments to the shore) belonged to the sovereign under the Customary Law of France: "I am inclined at present to doubt the correctness of the first part of your proposition." Tazewell recalled from his "school-boy days" a statement by Herodotus that the levees along the Nile were considered its banks.[96] Jefferson made extensive revisions in light of the comments of counsel, including modifying his reliance on ownership of the banks of the Nile based on Tazewell's input.[97]

Drafting of the Batture Paper was complete by March 1811, and Jefferson began housekeeping tasks related it: returning documents to the State Department and to James Mather, the mayor of New Orleans, and preparing a list of authorities cited in the paper. The purpose of the list was to obtain counsel's opinion on which authorities were "absolutely indispensable" if his statement were introduced at trial.[98]

Jefferson's notion that the Batture Paper might be introduced at trial was far-fetched given the hearsay problems it would face. Jefferson not only cited many legal treatises but also included quotations from treatises cited in other legal opinions on title to the Batture. Indeed, even while preparing it, Jefferson disclosed that the Paper was not organized in the manner of proof at trial but more for explanation to the public of the Livingston ouster.[99]

Jefferson's counsel would have faced a tough road in presenting to a jury his historical analysis of the ownership of waterfront lands under French, Spanish, Egyptian, and

Roman law and practice. This would have been the stuff of expert testimony, but there is no indication that the Jefferson team consulted with anyone for that purpose, even though Livingston had been circulating opinions of lawyers favorable to him for years. An expert may have been difficult to find; even in the legal opinions on which he relied, Jefferson found troublesome concessions.[100]

Gathering Evidence

While counsel debated the pleas and Jefferson drafted and revised the Batture Paper, Tazewell proved the practical lawyer who focused on gathering evidence to support title in the United States and other arguments that made the ouster of Livingston lawful. He asked Jefferson to prepare a statement of facts to be proved at trial to act as a chart for those gathering evidence. He also suggested that Jefferson begin immediately to procure copies of the authorities cited in the Batture Paper and offered to assist in finding them.[101]

By March 23, 1811, Jefferson had completed a Statement of Facts. He forwarded it to counsel, leaving three blank columns on each page for his attorneys to insert comments or suggestions.[102] Once the list of facts was complete, Jefferson would send it to New Orleans with the deposition subpoenas counsel thought necessary.

The Statement of Facts was lengthy and covered the entire history of Livingston's activities on the Batture. It described the internal deliberations leading to the ouster order, including Jefferson's reliance on an opinion of the attorney general and a "unanimous" decision of the heads of departments that the U.S. Marshal should be directed to remove any person who had taken possession of the Batture St. Marie after the effective date of the Squatters Act. Jefferson directed Hay and Wirt to add their comments and then send the document to Tazewell for his comments before forwarding it to a New Orleans lawyer engaged to collect evidence.

Jefferson recognized the need for depositions to be taken in the presence of Livingston's lawyer to establish essential facts.[103] He located a lawyer headed to New Orleans (James Bolling Robertson) and met with him at Monticello to give him the facts that would need to be proved via deposition. Robertson had completed service as Jefferson's Secretary of the Orleans territory and was returning to New Orleans to practice law.

However, with the burden of collecting evidence in New Orleans clear, Jefferson suggested that Robertson might approach Livingston to enter into a stipulation of facts.[104] This could be accomplished by letting Livingston determine which parts of Jefferson's Statement of Facts were acceptable or asking for a statement of facts from Livingston that could then be "collated" with Jefferson's document.

There is no record that depositions were taken, a stipulation drafted, or that any evidence was collected in New Orleans. Perhaps confidence in the local action defense was so great that it seemed best to await a ruling on that plea before engaging in expensive discovery.

Presentation of the Defense Case

On February 28, 1811, Hay filed a General Plea that the "said Thomas . . . saith that he is not guilty of any of the several trespasses" charged in the Complaint. He also filed a full set of pleas and motions:

1. A Motion to Dismiss five of the eight counts on a variety of legal grounds, including failure to join the "servants" alleged to have acted with Jefferson.
2. A plea that Jefferson was acting as president without any malice toward Livingston and that the expulsion was done "gently and without force."
3. A plea of lack of jurisdiction alleging that the Batture Saint Marie did not lie within the district of

Virginia but instead in the territory of Orleans.
4. Pleas that Jefferson as president acted for the preservation and protection of the property of the United States and because Livingston had interfered with the common use of the bed of the river when water subsided and with the navigation of the river when the river was full.
5. A plea that Jefferson acted lawfully under the Squatters Act of 1807 that was aimed at preventing unauthorized settlements on lands of the United States.[105]

Livingston challenged the plea of lack of jurisdiction, arguing that the case should go forward because Jefferson could not be sued in Orleans territorial courts. Jefferson's counsel then countered that this argument was insufficient as a matter of law.[106]

After substantial delays, the case was argued before Marshall and Tyler in Richmond on December 2–3, 1811. The sole issue was jurisdiction: could a trespass action be brought at any location other than where the trespass occurred? While there is no transcript, it appears from subsequent comments that the advocates were Wickham and Tazewell. Judge Tyler commented on the Wickham presentation in his opinion. And in a letter to Tazewell after the decision, Jefferson noted that he had learned that Tazewell's presentation was one of the finest ever heard.[107]

The choice of Tazewell to argue jurisdiction may have arisen from a recognition of the tensions among Wirt, Hay, and Marshall in the Burr trial four years earlier. In an emotionally charged atmosphere where Burr's counsel had likened the prosecution to bloodhounds, Wirt had expressed surprise at Marshall's "detachment" and "complacency" in response to these attacks. During one argument, Hay had reminded Marshall of another instance where a judge in the "recent past" had taken an important issue from the jury. This was seen as a reference to Justice Chase who had been impeached and acquitted in 1805. [108] Marshall, for his part, had commented in an opinion that the Burr prosecutors appeared to "wish and expect" a conviction of Burr. After court adjourned for the day, Marshall apologized to Hay, saying he had written the opinion in haste and not reviewed it. Somewhat ungraciously, Hay replied that he could see no justification for the Marshall comment and closed the conversation.[109]

No time was wasted for a decision. On December 4, 1811, the case was dismissed for lack of jurisdiction. Judge Tyler wrote an opinion in which Chief Justice Marshall concurred, both saying that the sole issue was whether the court could hear a claim based on a trespass that occurred on land outside the district of Virginia. Each answered no, but with markedly different degrees of enthusiasm.

Tyler's opinion appears a bit dyspeptic, perhaps with good reason.[110] As Tyler later told Jefferson, he suffered at the time from bladder stones, with attacks so painful and frequent that he could barely finish his work on the case. Indeed, the pain caused him to leave Richmond without correcting the opinion before publication. He ended his opinion with a note that he was "too unwell" to respond to all the arguments on jurisdiction and could only register his "decided opinion" in favor of the Jefferson plea of no jurisdiction.

Tyler saw the law on the proper location for a trespass suit as so well settled that he was "entirely at a loss" to understand why any issue was being made. It had long been established in England and America that a trespass action could be brought only where the trespass occurred. This rule was supported by numerous practical reasons: there might be need for a survey; if local witnesses were needed, a distant court would have no power to compel their testimony; and a court in another location could not enforce its judgment if the trespasser ignored it. Moreover, there

was a court of competent jurisdiction in New Orleans to hear the trespass action. If this rule sometimes meant that a trespasser might escape judgment, so be it; this would only be an exception to the good general rule. "The cause must therefore go out of court."

Tyler's opinion included comments on the performance of counsel. While "pleased" with the "ingenuity and eloquence" of Livingston's counsel Wickham, he noted that Wickham had not convinced him at all. Even though Wickham was often able to "make the worse appear the better," Tyler had guarded against his efforts to persuade. Tyler disparaged Wickham's resort to the Law of Nature and Nations as the work of "ingenuous Counsel, never at a loss for argument."[111] Tyler was much kinder to defense counsel, noting that Wickham's efforts had been "met by an Herculean strength of forensic ability" that "sheds a lustre over the bar of Virginia."

In a letter to Jefferson six months after the decision,[112] Tyler made his biases clear. He characterized Tazewell's argument on jurisdiction as "very enlightened and strong." Tyler had just read a published version of the Batture Paper, which he characterized as evidence of Jefferson's ability of "turning whatever you touch to gold." Tyler admitted to having received an outline of Jefferson's Batture Paper before the case came was argued, but said he had sought to avoid any appearance of influence that could be used by the "impudent British faction" aligned with Livingston. It was best to "avoid suspicion even of the Devil and his Imps." Tyler very much wanted to hear the merits of the case, but the question of jurisdiction prevented that.

Tyler also gave Jefferson insight into his dealings with Marshall in reaching their decision. Marshall wanted to carry the case to the Supreme Court by "adjournment on some point or other," but Tyler persuaded him that they should decide the case and let the parties appeal if they were unhappy.[113]

Marshall joined reluctantly.[114] Although chief justice, Marshall clearly denominated his opinion as one concurring in the outcome of the Tyler opinion. He, like Tyler, wrote on December 4, 1811, immediately after argument. Again, like Tyler, he noted that he had avoided any investigation into the case prior to argument, presumably also to avoid any claim of prejudgment or bias.

Marshall traced the development of the law in England from a time when all actions were local and had to be filed where the wrong occurred to a circumstance where most actions were "transitory" and could be brought wherever the defendant was found. An exception to that rule was an action of trespass to land—*trespass quare clausum fregit*—breaking the close. Such an action had long been held in English law to be local and could be tried only in a court with jurisdiction over the land. Marshall said it "would require a hardihood which I do not possess" to ignore the English precedents. "The law upon the demurrer is in favor of the defendant."

But Marshall was not happy with the outcome dictated by precedent. Marshall's opinion can be read (and apparently was read by Jefferson) as characterizing Jefferson as a wrongdoer who had avoided liability only because of a rule that made no sense. Marshall took issue with Tyler's position that a trespass action is peculiarly "local." Suits on a contract to sell land were deemed transitory and could be brought wherever the breaching party was found even though they might require the same "local" conduct that Tyler cited in support of the English rule. Only a "technical" reason could support the local action rule. The question in the case was whether there was jurisdiction over a trespass committed elsewhere when the "trespasser" was a resident of Virginia and before the court. He saw a "total failure of justice" where a trespasser was before the court but would never be found in the district where

the land was located. This outcome "produces . . . a clear right without a remedy." In Marshall's view, Jefferson had won but was in no sense vindicated.[115]

Tazewell wrote his client on the day of the decision: "I am this moment returned from the Capitol where your suit with Livingston has been finally decided—It is dismissed. . . ." George Hay wrote the next day to note the dismissal on the ground of jurisdiction and to urge Jefferson to publicize the defense on the merits that he had prepared.[116]

Jefferson was once again at his Poplar Grove plantation and did not receive the letters until late December 1811. His reaction was quite muted. He acknowledged receipt of Hay's letter telling him that the case had been dismissed but immediately focused on the need to publish his defense to the public.[117]

The formal judgment of the Circuit Court was filed on December 5, 1811, signed by John Marshall. It held, in the quaint language of the time, that "the plt take nothing by his bill but for his false clamour be in mercy" and that the "deft go thereof without day" but with recovery of costs of $22.44.[118]

Even though victorious, Jefferson was neither prompt nor generous in payment to his counsel. On April 12, 1812, he directed his factor to prepare drafts of $100 for each attorney, $2300 in today's dollars.[119] Wirt and Tazewell accepted the payment with thanks. Hay returned his draft marked "cancelled" on April 21, 1812; he had offered his services gratis and remained true to his word.

Despite his earlier desire to be vindicated in court, Jefferson came to see a win as a win. A few months after dismissal of the suit on the basis of the location of the trespass, Jefferson told Hay he was satisfied with the outcome because he had come to understand the difficulties of bringing proof of so many facts from New Orleans to Richmond: considering "the immense volume of evidence to be taken at New Orleans" and the trouble that would have given, "I am well satisfied to be relieved from it. . . ."[120] Jefferson made the same point to Tazewell.[121]

After Tazewell restated his unhappiness that success had come on a technical plea and without resolution of the immunity issue, Jefferson reiterated his concern about the burden of taking evidence in New Orleans. But he added another reason for relief: Jefferson believed that Marshall's rulings in the Burr trial arose from "unfriendly passions toward myself" and had made the defendant (Burr) the prosecutor and the government the defendant. Jefferson saw the same bias continuing to the Livingston trial, with the risk that he would be dragged to another tribunal. These concerns favored "tranquility" over a "contest of gladiators."[122]

Jefferson was wise to accept the victory; a trial on the merits may not have gone his way. Jefferson had already expressed doubt as to the applicability of the Squatters Act of 1807, on which Attorney General Rodney had explicitly relied to justify the expulsion of Livingston.[123] The main contrary argument was that Livingston claimed title from an owner in occupancy long before March 1807. In 1813, the United States District Court for the District of Orleans found that the expulsion was illegal under the Squatters Act in a suit against the U.S. Marshal who enforced the expulsion order. The Supreme Court had ordered that case to proceed to trial over the opposition of the United States, which had sought and won a stay.[124]

Furthermore, Livingston had considerable legal talent on his side on the question of title to the Batture under the laws applicable in the Orleans territory.[125] In 1814, after reviewing Jefferson and Livingston's pamphlets on the controversy, Chancellor Kent of New York, the "Blackstone of American law," wrote Livingston that reading the two documents left no doubt as to the "validity of your title" and the "atrocious injustice you have received."[126] And when the Louisiana Supreme Court decided a title dispute over

a part of the Batture St. Marie in 1819, it treated the issue of private ownership of such alluvial land as a given.[127]

But Livingston was indeed left with a "right without a remedy" after dismissal of his case. Moreover, in addition to the loss in Virginia, Livingston faced ongoing legal battles with the family of the former owner and the city of New Orleans that long deprived him of use of the property. He finally settled in 1820 for a small portion of the Batture.[128]

Efforts at Public Vindication

With no judgment at trial to vindicate his conduct, Jefferson now focused on convincing the public that Livingston's ouster was legal. Publication of the Batture Paper was undertaken purely to justify Jefferson's conduct. Jefferson told Hay that the public had an inaccurate view of the controversy due to Livingston's "squalling as if his throat had been cut."[129]

Jefferson recognized (correctly) that his Batture Paper would appear to common readers as "unnecessarily erudite and pedantic." However, he advised Hay in the same letter that he was "too tired of the subject" to make any revisions.

Wirt received the notice of intent to publish with high praise for the Paper (saying he had never seen "such a union of lightness and solidity, of beauty and power").[130] Tazewell was less fawning. After acknowledging that Jefferson's paper had persuaded him to reverse his position adverse to the claim of the United States to the Batture, Tazewell thought a different organization would have been desirable for mass readers. He also offered a lengthy discussion of how Jefferson had erred in treating the Batture as "alluvial" and not "an accretion" because all agree that the title to an "accretion" is vested in the sovereign.[131]

Jefferson engaged the publishers of the *Edinburgh Review* to publish the Paper; he believed that only that firm could handle the long non-English quotes that he had included. He ordered 250 copies and gave the publisher the right to sell copies for its own account, though he warned that the document was "merely a law argument, & a very dry one."[132]

The Batture Paper was published in pamphlet form in February 1812. Jefferson sent a copy to every member of Congress[133] and to many others, including his lawyers, President Madison, Madison's cabinet, John Adams and Livingston's brother Robert.[134]

But the public discussion was not one-sided. Having lost his effort to establish title by litigation, Livingston published his own lengthy pamphlet in 1813 to refute Jefferson's Batture Paper. Livingston assailed Jefferson's statement of facts, his reliance on French law, and his use of the Squatters Act of 1807 at all and particularly its selective use against Livingston.[135]

Conclusion

Livingston v. Jefferson had impacts far beyond a skirmish over a piece of the Mississippi riverbed.

As a legal matter, the case introduced an oddity into American law that lingers even today. The subject matter jurisdiction of a court is normally a matter of statute.[136] Judge-made rules are not jurisdictional under U.S. law *except* in the case of the local action doctrine as adopted in *Livingston v. Jefferson*. The Supreme Court, relying on the *Livingston* case, described the rule as jurisdictional in *Ellenwood v. Marietta Chair Co.* (1895): "an action for trespass upon land . . . is a local action, and can only be brought within the state in which the land lies."[137]

Most federal circuits follow the rule that the local action doctrine is jurisdictional and is not merely a waivable venue rule specifying convenient locations for a suit. The doctrine has been applied beyond trespass

actions so long as the action is deemed "local" under the law of the state in which the federal court sits.[138] Even Congress's specific abolition of the local action doctrine in the federal venue statute has not undercut its force as a matter of jurisdiction.[139]

From a political point of view, there seems little doubt that the case exacerbated tensions between Marshall and Jefferson, even though Marshall honored precedent and found for the ex-president. Jefferson saw in the opinion Marshall's "personal bitterness against the pursurer of Burr."[140] Marshall thought that his opinion had offended Jefferson with its description of Jefferson as a "trespasser" and its statement that Livingston had "a clear right without a remedy." In later years Marshall attributed Jefferson's attacks on the Supreme Court to animosity generated by his Batture opinion: "The case of the mandamus [*Marbury*] may be the cloak, but the Batture is recollected with still more resentment" and "the Batture will never be forgotten.[141]

In contrast, the Jefferson/Livingston relationship ended amicably. As with John Adams and others, Jefferson in his old age was able to rise above past animosities with Livingston. In March 1824, Livingston wrote President Monroe, asking how he might renew his old relationship with Jefferson. Monroe passed along the inquiry.[142] Jefferson replied that had not a "speck of unfriendly feeling" toward Livingston and that Livingston would be welcome at Monticello.[143] Livingston did write, and Jefferson sent a warm reply with memories of their days working together. A lively correspondence continued until near Jefferson's death in 1826.

The case cast several players in a favorable light. Jefferson's prominent lawyers worked well together, had open dialogue, and overrode the client's desire for a public exoneration in favor of a winning strategy that even the client came to appreciate. And contrary to Jefferson's expectation of bias and vindictiveness, Marshall applied precedent even though it produced a result that was wrong in his view.

The Batture controversy and litigation did not, however, reflect well on Jefferson. His precipitate and perhaps vengeful intervention to oust Livingston after hearing only one side of the controversy and in face of a court order; his desire to have Livingston arrested years after an embezzlement by a clerk; and his involvement in judicial politics to further his cause stand in stark contrast to the image of Jefferson as statesman/philosopher-king. But most damning is the remarkable number of statements of fear and contempt made by Jefferson regarding Chief Justice Marshall. These cannot be dismissed as merely frank talk with friendly correspondents; they border on the irrational. Even Dumas Malone, the premier (and sympathetic) Jefferson biographer concluded that Jefferson "does not appear at this best in the affair."[144]

The Batture litigation brought two prominent political enemies into conflict on a national stage. Jefferson's lawyers helped guide him to victory in *Livingston v. Jefferson,* although without the public vindication that he sought. It is clear, however, that in the long-running Jefferson v. Marshall rivalry, the restrained chief justice won this round over a fearful and censorious ex-president.

ENDNOTES

[1] The Circuit Court had jurisdiction at that time over all diversity actions: that is, suits between citizens of different states. Diversity cases were heard by two judges: the justice in whose circuit the suit was filed (Chief Justice John Marshall) and the District Court Judge for the state of filing (Judge Cyrus Griffin at the time suit was filed).

[2] The complicated legal battles over the Batture St. Marie and the tumult they raised in New Orleans are discussed in detail in William B. Hatcher, **Edward Livingston, Jeffersonian Republican and Jacksonian Democrat** (1940) 144–49, and George Dargo, **Jefferson's Louisiana: Politics and the Clash of Legal Traditions** (1975) 75–84.

[3] William Claiborne to James Madison 3 September 1807, General Records of the Department of State Entry A1–117: Records relating to the Livingston claim to the Batture in New Orleans, 1808–1810

[4] Jefferson to Albert Gallatin 4 November 1807. https://founders.archives.gov/?q=Correspondent%3A%22Gallatin%2C%20Albert%22%20Correspondent%3A%22Jefferson%2C%20Thomas%22&s=1111311111&r=894

For any note herein with a link, the transcribed document is from the Founders Online archive and may be found by right clicking on the link and choosing "open hyperlink."

[5] Caesar Rodney to Jefferson 24 October 1807. https://founders.archives.gov/documents/Jefferson/99-01-02-6643

[6] In his reply to Congressional question, Rodney said he adhered to his 1807 opinion but now acknowledged that it was based on position of the counsel for the City of New Orleans in the Gravier litigation.

[7] Hatcher, **Edward Livingston**, 150–51. There is no doubt that Jefferson was frustrated with Livingston's initial reluctance to take responsibility for the embezzlement in New York. A year after his initial suggestion that a resignation be handled by some "private intimation" had produced no result, Jefferson directed Secretary of the Treasury Gallatin that "there ought to be no further hesitation with E. Livingston."

Jefferson to Albert Gallatin 3 August 1802. https://founders.archives.gov/?q=Correspondent%3A%22Gallatin%2C%20Albert%22%20Correspondent%3A%22Jefferson%2C%20Thomas%22&s=1111311111&r=168

Jefferson to Gallatin 18 August 1803. https://founders.archives.gov/?q=Correspondent%3A%22Jefferson%2C%20Thomas%22%20Correspondent%3A%22Gallatin%2C%20Albert%22&s=1111311111&r=297

[8] Claiborne to Madison 17 October 1807. https://founders.archives.gov/?q=Correspondent%3A%22Claiborne%2C%20William%20C.%20C.%22%20Correspondent%3A%22Madison%2C%20James%22&s=1111311111&r=390

[9] Dargo, **Jefferson's Louisiana,** 80.

[10] Both descended from William Randolph of Turkey Island and Mary Isham of Bermuda Hundred—colonial grandees sometimes referred to as the "Adam and Eve of Virginia."

[11] Jefferson to Thomas Ritchie 25 December 1820. https://founders.archives.gov/documents/Jefferson/03-16-02-0394

[12] Much has been written of the Jefferson/Marshall conflicts. Perhaps the best single source is James F. Simon, **What Kind of Nation** (2003). A work discussing the conflict but with more focus on Marshall is Joel R. Paul, **Without Precedent** (2018).

[13] Marshall told Hamilton that Jefferson was "totally unfit" to be president because of his bias toward the French and because he would weaken the presidency (though preferable to Aaron Burr). John Marshall to Alexander Hamilton 1 January 1801. https://founders.archives.gov/documents/Hamilton/01-25-02-0154

Writing Justice Story in 1821, Marshall described Jefferson as "among the most ambitious, & I suspect among the most unforgiving of men. His great power is over the mass of the people. . . . Every check on the wild impulse of the moment is a check on his own power, & he is unfriendly to the source from which it flows." Marshall to Story 13 July 1821 *William and Mary Quarterly*, vol. 21 (1941),13–14

Marshall did denominate Jefferson the "great Lama of the mountains." Marshall to Story, 18 September 1821 *ibid*. 15.

[14] *Livingston v. Jefferson*, Bill of Complaint and Writ of Process, U.S. Circuit Court Records, Accession 25186, box 21, Ended Cases (Restored) 1806–12 Virginia State Library.

The Complaint, as transcribed, is set out in full as Enclosure: Edward Livingston's Bill of Complaint against Thomas Jefferson, July 1810. https://founders.archives.gov/documents/Jefferson/03-02-02-0463-0002

[15] Thomas Jefferson to Martha Jefferson Randolph 5 January 1808. https://founders.archives.gov/?q=Correspondent%3A%22Jefferson%2C%20Thomas%22%20Correspondent%3A%22Randolph%2C%20Martha%20Jefferson%22&s=1111311111&r=231

Jefferson was likely never out of debt after his wife inherited her father's estate and its debts in 1773. The debt burden was so great that Jefferson in 1826 planned a subscription lottery with Monticello as the prize. A public fundraising effort foundered upon his death on July 4, 1826. Monticello was sold in 1831 after prior sales of enslaved persons, other land and personal property did not discharge the debts of the Jefferson estate. Gaye Wilson, "Jefferson Bankruptcy" *Colonial Willamsburg Journal*, vol. 32 no. 1 (Winter 2010), 63–67.

[16] John Wickham to Thomas Jefferson 16 May 1810. https://founders.archives.gov/documents/Jefferson/03-02-02-0344

[17] *Richmond Inquirer* May 18, 1810

[18] Reprinted in *Rhode Island Republican* June 5, 1810

[19] Jefferson to Wickham 18 May 1810. https://founders.archives.gov/documents/Jefferson/03-02-02-0346

[20] Wickham to Jefferson 22 May 1810. https://founders.archives.gov/documents/Jefferson/03-02-02-0354

[21] James Monroe to George Hay 23 May 1810. https://founders.archives.gov/documents/Jefferson/03-02-02-1001

Monroe held no federal office at this time. He was elected governor of Virginia in 1811 but was in office only four months before becoming Madison's Secretary of State.

[22] Jefferson to William Wirt and George Hay 19 May 1810. https://founders.archives.gov/documents/Jefferson/03-02-02-0348

Although Jefferson had recruited Wirt to join Hay in the Burr trial, Jefferson's micromanagement of that case was exercised through Hay, the U.S. Attorney.

The Burr trial is one of the most fascinating and most discussed in U.S. history. For a brief but entertaining summary, see R. Kent Newmeyer, "Burr versus Jefferson versus Marshall," *Humanities* vol. 34 no. 3 (2013). Newmeyer includes the anecdote that after Wickham accused Hay of being a puppet of Jefferson in the prosecution, Hay took the first step toward a duel, but none occurred.

[23] Wirt to Jefferson 24 May 1810. https://founders.archives.gov/documents/Jefferson/03-02-02-0360

[24] Hay to Jefferson 25 May 1810. https://founders.archives.gov/documents/Jefferson/03-02-02-0361.

Hay asked Jefferson to excuse his handwriting; he was "writing on my knee while I am listening to an argument."

[25] Jefferson to Wirt 18 June 1810. https://founders.archives.gov/documents/Jefferson/03-02-02-0415

[26] Wirt to Jefferson 27 June 1810. https://founders.archives.gov/documents/Jefferson/03-02-02-0428

[27] Jefferson to Littleton W. Tazewell 28 June 1810. https://founders.archives.gov/documents/Jefferson/03-02-02-0429

[28] Tazewell to Jefferson 3 July 1810 with enclosed statement. https://founders.archives.gov/documents/Jefferson/03-02-02-0434-0001

Enclosure: Littleton W. Tazewell's Statement of Balance Due fr . . . (archives.gov)

While defending Jefferson, Tazewell continued to make demands for payment on behalf of creditors. Jefferson replied with the familiar farmer's excuse: falling commodity prices. Jefferson to Tazewell 13 October 1811. https://founders.archives.gov/documents/Jefferson/03-04-02-0181

[29] Hugh B. Grigsby, **Discourse on the Life and Character of Littleton Waller Tazewell** (1860), 12, 57, 46–47.

[30] Tazewell to Jefferson 5 July 1810. https://founders.archives.gov/documents/Jefferson/03-02-02-0436

[31] Hay to Tazewell 24 October 1810 *Tazewell Papers*, Virginia State Library. Two other counsel were considered. Attorney General Rodney "would not do." Philip Norbone Nicholas, Virginia Attorney General, was rejected because Jefferson thought he would always defer to Wirt. Dabney Carr to Wirt, 15 June 1810. https://founders.archives.gov/documents/Jefferson/03-02-02-0409

[32] Frank L. Dewey, **Thomas Jefferson Lawyer** (1986), 83.

[33] Jefferson to Hay 18 June 1810. https://founders.archives.gov/documents/Jefferson/03-02-02-0413

[34] Jefferson to Albert Gallatin 27 September 1810. https://founders.archives.gov/documents/Jefferson/03-03-02-0077

[35] Jefferson to Rodney 25 September 1810. https://founders.archives.gov/documents/Jefferson/03-03-02-0073

[36] Jefferson to Claiborne 11 June 1810. https://founders.archives.gov/documents/Jefferson/03-02-02-0401

[37] Jefferson to Gallatin 27 September 1810. https://founders.archives.gov/documents/Jefferson/03-03-02-0077

[38] *Ibid*.

Jefferson to Rodney 25 September 1810. https://founders.archives.gov/documents/Jefferson/03-03-02-0073

[39] John Tyler to Jefferson, 12 May 1810. https://founders.archives.gov/documents/Jefferson/03-02-02-0337

[40] Jefferson to Tyler 26 May 1810. https://founders.archives.gov/documents/Jefferson/03-02-02-0365

[41] Jefferson to Madison 25 May 1810. https://founders.archives.gov/documents/Madison/03-02-02-0435

[42] Jefferson's scathing comments about Griffin were partisan and unduly harsh. Griffin was educated at the University of Edinburgh and at Middle Temple in London. He served in the Continental Congress and was the last president of Congress under the Articles of Confederation. Washington appointed him District Judge in 1789.

[43] Madison to Jefferson 4 June 1810. https://founders.archives.gov/?q=Correspondent%3A"Jefferson%2C%20Thomas"%20Correspondent%3A"Madison%2C%20James"&s=1111311111&r=1846

Madison offered an analysis of Livingston's likely arguments: the Squatters Act was either unconstitutional or did not apply and its inapplicability was so clear that there could not have been an error of judgment.

[44] Tyler to Jefferson 17 May 1812. https://founders.archives.gov/documents/Jefferson/03-05-02-0045

[45] Jefferson to Hay 1 August 1810. https://founders.archives.gov/documents/Jefferson/03-02-02-0474

[46] Jefferson to Rodney, 25 September 1810. https://founders.archives.gov/documents/Jefferson/03-03-02-0073

[47] *Ibid*.; Jefferson to Gallatin 27 September 1810. https://founders.archives.gov/documents/Jefferson/03-03-02-0077

[48] Rodney to Jefferson 6 October 1810. https://founders.archives.gov/documents/Jefferson/03-03-02-0092

[49] Jefferson to Madison 15 October 1810. https://founders.archives.gov/documents/Jefferson/03-03-02-0106

[50] Levi Lincoln to Madison 20 January 1811. https://founders.archives.gov/documents/Madison/03-03-02-0149

[51] John Quincy Adams to Madison 3 June 1811. https://founders.archives.gov/documents/Madison/03-03-02-0378

[52] **American State Papers** Public Lands: vol. 2 (1834), 10.

[53] Edward Livingston to Jefferson 5 May 1808. https://founders.archives.gov/documents/Jefferson/99-01-02-7967

[54] Jefferson to Livingston 6 May 1808. https://founders.archives.gov/documents/Jefferson/99-01-02-7974

[55] Jefferson to Gallatin 6 May 1808. https://founders.archives.gov/documents/Jefferson/99-01-02-7972

[56] **American State Papers** Public Lands: vol. 2, 7,11.

[57] *Richmond Enquirer* December 21, 1809.

[58] Gallatin to Jefferson 10 September 1810. https://founders.archives.gov/documents/Jefferson/03-03-02-0040-0001

[59] Jefferson to John Wayles Eppes and William B. Giles 12 November 1810. https://founders.archives.gov/documents/Jefferson/03-03-02-0140

[60] *Virginia Argus* December 25, 1810.

[61] Jefferson to Hay 3 March 1811. https://founders.archives.gov/documents/Jefferson/03-03-02-0305

[62] For a full description of Jefferson's law practice see Dewey, **Thomas Jefferson Lawyer**.

[63] Irving N. Brant, **James Madison: The President** (1936), 165 (quoting letter from James Garnett to John Randolph 16 September 1810).

Jefferson to Hay 1 August 1810. https://founders.archives.gov/documents/Jefferson/03-02-02-0474

[64] *Hepburn & Dundas v. Ellzey*, 6 U.S. 445 (1805).

[65] The Supreme Court later held explicitly that there was no diversity jurisdiction where one party was a citizen of a territory. *Corporation of New Orleans v. Winter*, 14 U.S. 91 (1816).

[66] Jefferson to Hay 1 August 1810. https://founders.archives.gov/documents/Jefferson/03-02-02-0474

[67] Tazewell to Jefferson 5 July 1810. https://founders.archives.gov/documents/Jefferson/03-02-02-0436

[68] Hay to Jefferson 15 July 1810. https://founders.archives.gov/documents/Jefferson/03-02-02-0451

[69] Tazewell to Jefferson 5 July 1810. https://founders.archives.gov/documents/Jefferson/03-02-02-0436

[70] Hay to Jefferson 20 July 1810. https://founders.archives.gov/documents/Jefferson/03-02-02-0463-0001

[71] Jefferson to Hay 1 August 1810. https://founders.archives.gov/documents/Jefferson/03-02-02-0474

[72] *Ibid*.

[73] Jefferson to Gallatin 16 August 1810. https://founders.archives.gov/documents/Jefferson/03-03-02-0006

[74] Tazewell to Jefferson 27 September 1810. https://founders.archives.gov/documents/Jefferson/03-03-02-0079

[75] Hay to Jefferson 25 January 1811. https://founders.archives.gov/documents/Jefferson/03-03-02-0253

[76] Jefferson to Gallatin 16 August 1810. https://founders.archives.gov/documents/Jefferson/03-03-02-0006

[77] See Chief Justice Warren Burger concurring in *Nixon v. Fitzgerald*, 457 U.S. 751, 758 (1982), noting that the only case he could find on the immunity of a former president in a civil suit was *Livingston v. Jefferson*, where the issue was not reached.

[78] Joseph Story, **Commentaries on the Constitution of the United States** vol. 3 (1833), 418.

[79] Jefferson to Hay 20 June 1807. https://founders.archives.gov/documents/Jefferson/99-01-02-5784

[80] Absolute immunity in civil suits brought against an ex-president became the law in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982). Fitzgerald sued President Nixon after Nixon left office, claiming that Nixon had ordered his firing in retaliation for congressional testimony. Nixon's claim of absolute immunity was rejected by the lower courts. The Supreme Court reversed, holding in a 5–4 opinion by Justice Lewis F. Powell that the president was absolutely immune from damage suits for actions taken while president. Justice Byron R. White, in a strident dissent, argued that the decision "places the President above the law." 457 U.S. at 766.

[81] Hay to Jefferson 1 June 1810. https://founders.archives.gov/documents/Jefferson/03-02-02-0380

Rodney to Jefferson 8 June 1810. https://founders.archives.gov/documents/Jefferson/03-02-02-0396

[82] Jefferson to Hay 18 June 1810. https://founders.archives.gov/documents/Jefferson/03-02-02-0413

[83] Hay to Jefferson 15 July 1810. https://founders.archives.gov/documents/Jefferson/03-02-02-0451

[84] Tazewell to Jefferson 27 September 1810 copied into Jefferson to Hay 7 October 1810. https://founders.archives.gov/documents/Jefferson/03-03-02-0093

[85] Jefferson to Hay 11 November 1810. https://founders.archives.gov/documents/Jefferson/03-03-02-0139

[86] Jefferson to Rodney 20 January 1811. https://founders.archives.gov/documents/Jefferson/03-03-02-0239

[87] Hay to Jefferson 25 January 1811. https://founders.archives.gov/documents/Jefferson/03-03-02-0253

[88] Hay to Tazewell 1 March 1811 *Tazewell Papers*, Virginia State Library.

[89] Tazewell to Jefferson 15 May 1812. https://founders.archives.gov/documents/Jefferson/03-05-02-0038

[90] Jefferson to Hay 3 March 1811. https://founders.archives.gov/documents/Jefferson/03-03-02-0305

[91] Hay to Tazewell 6 March 1811 *Tazewell Papers*, Virginia State Library.

[92] Jefferson to Hay 12 April 1812. https://founders.archives.gov/documents/Jefferson/03-04-02-0495

Jefferson to Tazewell 12 April 1812. https://founders.archives.gov/documents/Jefferson/03-04-02-0497

[93] The Batture Paper as later published may be found at https://play.google.com/books/reader?id=xa56yY2r1zcC&pg=GBS.PA2&printsec=frontcover

[94] Jefferson prepared at least seven drafts of the Batture Paper, most of which were reviewed by members of the Madison administration. President Madison saw a short first draft, a much longer second draft, and a final draft.

He, Treasury Secretary Gallatin and Attorney General Rodney approved the latter by March 4, 1811. Rodney to Jefferson 4 March 1811. https://founders.archives.gov/documents/Jefferson/03-03-02-0311

Madison's page by page comments included a caution that Jefferson's draft implied a "more elaborate inquiry into the law than was then made" in 1807. He found that the inclusion of so many authorities on one point obscured the substance and described the discussion of Roman law as "erudite and curious" but not on point. James Madison's Notes on Thomas Jefferson's Statement on the Batture Case 10-13 August 1810. https://founders.archives.gov/documents/Jefferson/03-02-02-0493

Gallatin was the most helpful. He supplied a "sketch" of the case that included a thorough analysis of the facts, of the law on the sovereign's rights and of the likely arguments that Livingston would make based on his published writings. Gallatin to Jefferson 14 July 1810. https://founders.archives.gov/documents/Jefferson/03-02-02-0448-0001. Gallatin's notes are at https://founders.archives.gov/documents/Jefferson/03-02-02-0448-0002. Gallatin commented extensively on a later draft, this time focusing on how some of Jefferson's arguments might be used against him. Gallatin to Jefferson 10 September 1810. https://founders.archives.gov/documents/Jefferson/03-03-02-0040-0002

[95] Wirt to Jefferson 9 August 1810. https://founders.archives.gov/documents/Jefferson/03-02-02-0492

Thomas Jefferson's Notes on William Wirt's Comments on the Batture Statement 20 August 1810. https://founders.archives.gov/documents/Jefferson/03-03-02-0019-0002

[96] Tazewell to Jefferson 27 September 1810. https://founders.archives.gov/documents/Jefferson/03-03-02-0079

[97] Jefferson to Tazewell 22 November 1810. https://founders.archives.gov/?q=Correspondent%3A%22Tazewell%2C%20Littleton%20W.%22%20Correspondent%3A%22Jefferson%2C%20Thomas%22&s=1111311111&r=32

[98] Jefferson to Tazewell, Hay and Wirt 9 April 1811. https://founders.archives.gov/documents/Jefferson/03-03-02-0420-0001

Enclosure: Thomas Jefferson's List of Authorities Cited in Statement on the Batture Case. https://founders.archives.gov/documents/Jefferson/03-03-02-0420-0002

[99] Jefferson to Robert Smith 23 September 1810. https://founders.archives.gov/documents/Jefferson/03-03-02-0065

Jefferson to Gallatin 27 September 1810. https://founders.archives.gov/documents/Jefferson/03-03-02-0077

[100] Jefferson to Tazewell 22 November 1810. https://founders.archives.gov/documents/Jefferson/03-03-02-0159. (Moreau "like Thierry, he gives up nearly as much as he gains for us.").

[101] Tazewell to Jefferson 29 December 1810. https://founders.archives.gov/documents/Jefferson/03-03-02-0198

[102] Jefferson to Wirt and Hay 23 March 1811 with enclosed Statement of Facts in the Batture Case. https://founders.archives.gov/documents/Jefferson/03-03-02-0368-0001

https://founders.archives.gov/documents/Jefferson/03-03-02-0370

[103] Jefferson to James Mather 21 March 1811. https://founders.archives.gov/documents/Jefferson/03-03-02-0364

[104] Jefferson to Hay 31 August 1811. https://founders.archives.gov/documents/Jefferson/03-04-02-0106

[105] *Livingston v. Jefferson*, 15 F. Cas. 660 (1811).

[106] *Ibid*.

[107] Jefferson to Tazewell 12 April 1812. https://founders.archives.gov/documents/Jefferson/03-04-02-0497

[108] Simon, **What Kind of Nation**, 239, 251.

[109] Hay to Jefferson 14 June 1807. https://founders.archives.gov/documents/Jefferson/99-01-02-5755

[110] 15 F. Cas. 660. https://founders.archives.gov/documents/Jefferson/03-04-02-0239-0002

[111] We know from Marshall's opinion that Wickham argued that a Virginia law directing that a jury could be drawn from "bystanders" at the courthouse had abrogated the local action doctrine in Virginia. The Federal Judiciary Act of 1789 adopted the state mode of selecting jurors. 1 Stat. 73, Sec. 29. Virginia permitted the sheriff to choose jurors from "bystanders." Brent Tarter and Whyte Holt, "The Apparent Political Selection of Federal Grand Juries in Virginia, 1789–1809" *The American Journal of Legal History*, vol. 49 no. 3 (July 2007), 257–83. If the case would be heard by a Circuit Court jury that included "bystanders" at the Richmond courthouse, the site of the trespass was irrelevant. Marshall dismissed this argument on the ground that the jurisdiction of federal courts arose solely from the Constitution and federal laws no matter what the effect of the bystander statute in state courts.

[112] Tyler to Jefferson 17 May 1812. https://founders.archives.gov/documents/Jefferson/03-05-02-0045

[113] Under the Judiciary Act of 1802, on any question, the matter could be certified to the Supreme Court decision.

[114] 15 F. Cas. at 663. https://founders.archives.gov/documents/Jefferson/03-04-02-0239-0003

[115] Likely in response to the holding in *Livingston v. Jefferson*, the Virginia General Assembly in 1816 passed legislation providing that "all actions of trespass quare clausum fregit may hereafter be sued and proceeded in the court . . . in which the defendant resides or may be found. . . ." Had this statute been in place a few years earlier, the *Livingston* case might have been decided differently. Under the Judiciary Act of 1789, federal courts applied the "laws of the several states" as rules of decision. 1 Stat. 92 Sec. 34.

[116] Tazewell to Jefferson 4 December 1811. https://founders.archives.gov/documents/Jefferson/03-04-02-0239-0004

Hay to Jefferson 5 December 1811. https://founders.archives.gov/documents/Jefferson/03-04-02-0246

[117] Jefferson to Hay 28 December 1811. https://founders.archives.gov/documents/Jefferson/03-04-02-0280

[118] Dismissal of Livingston v. Jefferson: Decision of United States Circuit Court, 5 December 1811. https://founders.archives.gov/documents/Jefferson/03-04-02-0239-0005

[119] Jefferson to Patrick Gibson 12 April 1812. https://founders.archives.gov/documents/Jefferson/03-04-02-0494

[120] Jefferson to Hay 12 April 1812. https://founders.archives.gov/documents/Jefferson/03-04-02-0495

[121] Jefferson to Tazewell 12 April 1812. https://founders.archives.gov/documents/Jefferson/03-04-02-0497

[122] Tazewell to Jefferson 15 May 1812. https://founders.archives.gov/documents/Jefferson/03-05-02-0038

Jefferson to Tazewell 19 June 1812. https://founders.archives.gov/documents/Jefferson/03-05-02-0117

[123] Jefferson to Gallatin 27 September 1810. https://founders.archives.gov/documents/Jefferson/03-03-02-0077 (Batture may not be within the scope of the 1807 Act but "in defence against a spadassin it is lawful to use all weapons.")

Rodney to Jefferson 24 October 1807 (Under the Act of 1807, "I am of opinion that military force may be employed by the President to remove from these lands any persons who may have taken possession of them since the passage of the law." https://founders.archives.gov/documents/Jefferson/99-01-02-6643

[124] *Livingston v. D'Orgenois* 11 U.S. 577 (1813); Claiborne to Jefferson 14 August 1813. https://founders.archives.gov/documents/Jefferson/03-06-02-0324-0001("Honorable mr Hall, Judge of the District of Louisiana, has decided, the dispossessing of mr Livingston of the Batture, by order of the late President to be illegal, & he directs the Plaintiff to be reinstated in his possession").

[125] See opinions collected at https://lasc.libguides.com/ld.php?content_id=15609143

[126] James Kent to Edward Livingston, 13 May 1814 reprinted in Charles H. Hunt, **Life of Edward Livingston** (1864), 181.

[127] Mary Ann Wegmann, "200 Years of Louisiana Supreme Court History: The Batture Cases," *New Orleans Historical.* https://neworleanshistorical.org/items/show/802; *Morgan v. Livingston*, 6 Mart. (o.s.) 19 (1819).

[128] In an effort to settle disputes with the City of New Orleans over public access, Livingston made a series of offers, all of which were refused. In the end, he agreed to a new public market on the Batture and a wide public road adjacent to it. In return he obtained marketable title to a portion of the Batture two blocks deep and eight blocks long. Law Library of Louisiana, "The Batture Controversy: Legal Dispute over the Batture-Compromise." https://lasc.libguides.com/c.php?g=314753&p=2558887

[129] Jefferson to Hay 28 December 1811. https://founders.archives.gov/documents/Jefferson/03-04-02-0280

[130] Wirt to Jefferson 15 April 1812. https://founders.archives.gov/documents/Jefferson/03-04-02-0503

[131] Tazewell to Jefferson 15 May 1812. https://founders.archives.gov/documents/Jefferson/03-05-02-0038

[132] Jefferson to Ezra Sargeant 3 February 1812. https://founders.archives.gov/documents/Jefferson/03-04-02-0364

[133] Jefferson to Patrick Magruder and Samuel Otis 26 March 1812. https://founders.archives.gov/documents/Jefferson/03-04-02-0471

[134] Jefferson's Non-Congressional Distribution List for Batture Pamphlet 19 April–13 June 1812. https://founders.archives.gov/documents/Jefferson/03-04-02-0515

[135] Edward Livingston, **Answer to Mr. Jefferson's Justification of His Conduct in the Case of the New Orleans Batture** (1813). https://www.google.com/books/edition/An_Answer_to_Mr_Jefferson_s_Justificatio/WvouAAAAYAAJ?hl=en&kptab=getbook

[136] *Bowles v. Russell*, 551 U.S. 205, 211 (2007).

[137] *Ellenwood v. Marietta Chair Co.*, 158 U.S. 105, 107–08 (1895).

[138] See 14D Wright, Miller, Cooper, Freer, *Federal Practice and Procedure* § 3822 (2013); *see also* cases summarized in *Eldee-K Rental Properties, LLC v. DIRECTV, Inc.*, 748 F.3d 943 (9th Cir. 2014). (California federal court had no subject jurisdiction over California unfair competition claim regarding installation of equipment on apartment buildings located in Connecticut).

[139] *Id.* at 949. 28 U.S.C. §1391(a)(2) ("proper venue for a civil action shall be determined without regard to whether the action is local or transitory in nature").

[140] Jefferson to Tyler 17 June 1812. https://founders.archives.gov/documents/Jefferson/03-05-02-0112

[141] Marshall to Story 13 July 1821 and Marshall to Story 18 September 1821. *William and Mary Quarterly*, 13–15.

[142] Monroe to Jefferson 22 March 1824. https://founders.archives.gov/documents/Jefferson/98-01-02-4132

[143] Jefferson to Monroe 27 March 1824. https://founders.archives.gov/documents/Jefferson/98-01-02-4144

[144] Dumas Malone, **Jefferson and His Time: The Sage of Monticello** (1981), 93.

Samuel Nelson and Judicial Reputation

William B. Meyer

When he submitted his resignation from the Supreme Court of the United States on November 28, 1872, Associate Justice Samuel Nelson closed a record of judicial service that fell only a little short of a half-century in length. Appointed a New York State circuit judge in April of 1823, at the age of thirty, he became an associate justice of the New York Supreme Court of Judicature in 1831 and its chief justice in 1836. He left in February, 1845 to accept a seat on the High Bench, with duties divided between Washington D.C. and the Second Circuit, which consisted of New York, Connecticut, and Vermont. Nelson's entire judicial career exceeded by several months in duration that of another famously long-serving jurist, one much better remembered today: Oliver Wendell Holmes, Jr., who joined the Massachusetts Supreme Judicial Court in December 1882 and retired from the Supreme Court in January, 1932.

Holmes' ninetieth birthday in 1931 and his resignation a year later evoked nationwide choruses of tribute.[1] In the near-century that has elapsed since, his stature has been largely maintained and even enhanced. In contrast, few twentieth- and twenty-first-century legal historians have had much praise for Samuel Nelson, when they have had anything to say about him at all. He has never been the subject of a full-length biography, nor until very recently even of a detailed scholarly article.[2] Nelson's life and work have been chronicled and analyzed chiefly in works of reference and in passing comments in histories of the Court.

What this historiographical snubbing seems to imply, that scholars have regarded him as essentially insignificant, some have stated explicitly. He appears on none of the lists of the great or outstanding justices in Supreme Court history.[3] The most comprehensive recent ranking of past justices, based on a survey of expert opinion, placed him squarely in the "average" category, excluding him from the company of the "great" or

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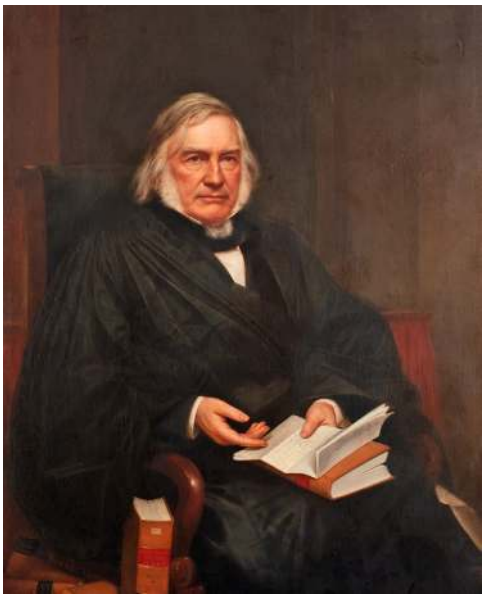
"near-great."[4] Allan Nevins described him as "plodding" and David Currie, at least on constitutional questions, as "an unimpressive plodder."[5] For Philip Kurland, Nelson chiefly proved that length of judicial service did not necessarily translate into historical importance.[6] Timothy Hall concluded in 2001 that Nelson had "a long but wholly unexceptional career as a U.S. Supreme Court justice" and that "his impact on the course of American law was negligible"; he was "mediocre" and "only a minor footnote to the events over which he failed to exert any significant influence."[7] Bernard Schwartz classed him and the rest of the antebellum Court, other than Benjamin R. Curtis and Roger B. Taney, as "ciphers" and "nonentities."[8] A more recent writer has granted that Nelson was "a capable lawyer" possessing "technical fluency," but found him nonetheless merely "a model of adroit mediocrity."[9] More positive modern estimates still have mostly the ring of faint praise. Nelson was "a competent, capable jurist, but not highly visible";[10] though "[b]y no means outstanding on the Court," he performed "diligently and perceptively" during "almost three decades of dedicated and able service";[11] he "walked straightly in the settled paths of the law";[12] he was "a stable, sound, and unspectacular judge."[13] "[A] hardworking but never a dominant member," another historian concluded, "he did not leave a deep impression on the history of the Court."[14]

Even if they were accepted as accurate, these—at best—tepid assessments of Nelson's work would not disqualify him from closer attention. Regardless of how they are valued and ranked, the careers of even the most obscure justices can be profitably examined for a number of reasons: a better understanding of the outcomes of cases that their votes, even if not their arguments, contributed to decide, of the ways judicial quality develops or fails to develop, and of the relation of judges' philosophies to their personal characteristics and social backgrounds.[15] But the prevalent disparagement of Nelson as a judge may itself be open to question on other grounds. It is not always clear how full a study of his work informed the comprehensively lukewarm or negative assessment thrown off by a particular historian. The absence of any broad overview of his career leaves much room for doubt. There is even more room for doubt in another quarter: the criterion or criteria of judicial stature that the unenthusiastic modern responses to his work may presuppose.



Samuel Nelson sat on the Court for 27 years (1845–1872) but has never been the subject of a full-length biography.

Sources of Judicial Reputation

How much respect, or how much attention or neglect, particular justices of the past receive from legal and political historians is highly influenced by the concerns prevalent in the historians' own day, which may not have seemed the most important ones in that of the justices or to have carried the same implications that they now do.[16] History, Carl Swisher wrote in 1949, "rewards and punishes judges like men in other walks of life not only for their brilliance, their industry, and their

integrity but for being right or wrong—with right and wrong being determined by the code of the age of the historian."[17] The reputation and the esteem that past judges enjoy today, Jack M. Balkin argued in 2002, necessarily depend on how accurately their visions of the future they expressed correspond to what future legal commentators themselves have found desirable.[18]

Nelson's best-remembered opinion by far concurred in the outcome in the *Dred Scott* case, a fact that has done him little good in the eyes of twentieth- and twenty-first-century observers. The same is true of his next-most-discussed pronouncement from the bench, his dissenting opinion in the *Prize Cases* (1863), taking issue with emergency powers claimed by the Lincoln administration to suppress the Southern rebellion. In many other cases, Nelson defended a dual federalism that, though far less incendiary than slavery or the conduct of the Civil War, has long since ceased to guide the judicial reading of the Constitution. It is hardly surprising that he has not struck later commentators as a wise or far-seeing judge or a model to be emulated. But it does not follow that his legal reasoning was faulty in the era in which it was made.

Moreover, when a judge's actions are measured by the yardstick of their relevance to present-day concerns, some odd reversals are likely to occur, and indeed have done so. In the early 1940s, the Court relied heavily on the *Prize Cases* majority opinion, from which Nelson dissented, to uphold a blanket wartime curtailment of the liberties of Japanese-American citizens, in what is now generally regarded as one of its most deplorable decisions.[19] It did the same in the 1960s and 1970s in repeatedly refusing to enjoin actions taken by the government during the massive but undeclared war waged in Southeast Asia under a doctrine of broad presidential powers. Several justices would cite Nelson's dissent in questioning the legality of those actions.[20] The opposition of Nelson and several of his Supreme Court colleagues to loyalty oaths following Appomattox took on a novel political coloration during the Cold War. Conformity to law and precedent, or a declaration of the supremacy of federal over state law, or any other broad and abstract doctrinal position carries a radically different ideological charge depending on when the currently prevailing precedents were laid down or what implications a particular stance now holds. If contemporary relevance and policy preferences are the tests of legal merit, past judges will bob up and down in perceived stature as old doctrines encounter new circumstances of which the judges themselves could have had no idea.

Perhaps that is what is bound to happen. The question of how prevailing reputations actually arise and are maintained or altered is a sociological one. To say that lawyers and legal scholars typically do, and perhaps always will, rely on certain considerations in regarding judges of the past as great or deplorable or insignificant, as heroes or villains or nonentities, may be perfectly correct even if those considerations are dubious or downright indefensible. But whether these criteria of judgment are valid, and what results valid criteria would produce, are separate questions that might generate quite different answers if posed.

To say that what should matter most in ranking past judges is not the social significance of their decisions, immediate or delayed, but the degree to which they changed the law itself, may at first appear to be a recipe for a more accurate and objective assessment, less distorted by extraneous considerations. In fact, it merely opens the door to other distortions. For when it is employed, judges who deeply respected precedent and sought primarily to decide cases according to the legitimate expectations of the parties in the case at hand through painstaking analysis of the law that existed at the time it arose will fall

into undeserved oblivion more readily than ones of equal gifts and accomplishment who espoused and practiced a more self-assertive approach.[21] This bias may be implicit and even unconscious as well as overt. Though they may not be openly stated or even recognized as criteria of evaluation, such labels as "creative," "original," and "path-breaking" possess almost inescapably positive connotations; ones like "conventional," "dutiful," and "imitative" carry a negative and dampening charge. A widely used standard for outstanding judicial merit is that of "greatness."[22] That such greatness is evidenced, as it is in some other fields, by impact and influence, by leaving things different from the way they were before, may seem to go without saying. The assertion that a judge imposed a novel and individual vision upon the law is normally an accolade. The implied if not explicit message is that the greatest judge is the one who most unsettles legal doctrine. A modern historiographical overemphasis on constitutional cases, which for much of the Supreme Court's history were a relatively minor part of its workload, is a corollary of that assumption, for such cases offer the most opportunity for such unsettling on a large scale.

Justice Oliver Wendell Holmes, himself a jurist of nearly undisputed distinction, sometimes made this criterion a measure of judicial quality. John Marshall's primacy among American judges, Holmes proposed, was grounded in a series of decisions "which have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law." "The men whom I should be tempted to commemorate," he observed more generally, "would be the originators of transforming thought." Eulogizing a onetime colleague on the Massachusetts Supreme Judicial Court, Holmes praised him as having been one of those whose work "controls the future from within by shaping the thoughts and speech of a later time."[23] Leading legal historians have concurred. Bernard Schwartz wrote in 1995 that in his own assessments of Supreme Court justices, "greatness is virtually synonymous with influence on the law." The figures he deemed outstanding were ones who "all employed the authority of the ermine to the utmost."[24]

Judicial Quality and the Rule of Law

Using this basis for valuation begs what may be the essential question: whether an individual vision or an innovative response, however original and however successfully imposed by a judge, was a legally justified one. As Lawrence Solum has warned, an emphasis on such characteristics as fame, influence, and novelty may distort more than they illuminate assessments of judicial quality. He has proposed instead a threefold test, consisting of the absence of such disabling "vices" as corruption, ill-temper, and stupidity; "lawfulness," or regard for the rule of law; and the possession of sound practical wisdom that can identify the rare and exceptional cases where lawfulness itself requires a departure from the literal letter of the law. Solum deliberately and explicitly excluded the qualities of originality and influence, regarding them as irrelevant to, and possibly even at odds with, jurisprudential excellence, because of their potential for conflict with the prime virtue of lawfulness. "The excellent judge is a *nomimos*, who follows the law rather than making it. . . . The very best judges are experts at avoiding originality. And the very worst judges may be the most original. Very bad judges may use the cases that come before them as vehicles for changing the law, transforming the rules laid down into the rules that they prefer. This kind of results-oriented or legislative judging may produce many original propositions of law and hence a high citation rate, but this is a measure of judicial vice and not judicial virtue." Originality, as Solum argued,

is something to be eschewed unless it is unavoidable. "Judges who believe in the rule of law will strive to follow precedent rather than evade it."[25]

Innovation will sometimes be necessary in order to decide a case where existing materials give no clear guidance. But to treat it as a merit in itself is to take a questionable view of the judge's role. To the extent that Solum's cautions are disregarded, and judges are esteemed for displaying creativity and originality and disparaged for not doing so, those who have most carefully given priority to different and at least equally defensible ideals will receive less than their due. Two legal scholars have suggested that those who adhered to a conception of their proper role as "restrained, principled, and deeply respectful toward precedent" have been undervalued except when such a stance happened to lead to results ideologically congenial to those doing the valuing. They saw such a conception of the judicial task exemplified in modern times in the work of the second Justice John M. Harlan and subsequently, and still more consistently, in that of Justice David Souter. They added that, contrary to a frequent assumption, such adherence to the rule of law did not carry any inherent right-wing implications. It was flouted by conservative Chief Justice William H. Rehnquist's "abstract political theorizing, relative disregard for the facts of the case at the bar, and disrespect for judicial precedent," and upheld by Justice Souter, generally classified as moderately liberal.[26] Justice Byron White, often criticized for the supposed philosophical incoherence of his jurisprudence, or of its results, has been defended in similar terms by a onetime United States Solicitor General who declared him "the most consistent member of the Supreme Court in the only respect in which consistency really matters: fidelity to the constitutional duty to decide individual cases in accordance with the facts and applicable law."[27] A rigorous application of these criteria might well repopulate the pantheon of the best American judges.

Those who have tried to define the rule of law have repeatedly emphasized a number of essential components. What the law allows and forbids must be reasonably clear in advance, so that people can conform their behavior to its demands and not be penalized for conduct that they did not know was prohibited. It must be universal, applying to all and not only to some while exempting others, and applying as much to public officials as to others. These two requirements are best met by law that consists of rules, stated in a general form, framed in terms accessible to all, promulgated prior to any conduct that might be brought under their sanctions, and enforced without regard to persons. They must emanate from a recognized or recognizable lawmaking authority, generally accepted as the legitimate one in a particular society, the one whose dictates in other matters—including the empowerment of the judges themselves as its agents–are routinely treated as law. The manner of their enforcement, finally, must also be public and lawful. The agents applying them must, if called upon to do so, justify their actions as conforming to what a reasonable person would agree was stipulated by the law in that case, and an opportunity must be afforded for arguing the contrary.[28]

If such is the rule of law, it may be infringed in a number of ways. A judge deciding a case may substitute a new understanding of what the law required for one that was generally recognized beforehand. Such a substitution violates the legitimate expectations of the parties in the case and thereby the requirements of regularity, prospectivity and publicity. It also abuses judicial power by usurping the powers of the recognized makers of law—decisions by previous judges in common-law cases, by legislators in statutory ones, and by drafters and ratifiers in constitutional matters. Similarly, a judge who hands down a decision without publishing a

Justice Nelson rode the Second Circuit, which consisted of New York, Connecticut, and Vermont. He would return to his law office in Cooperstown, NY (pictured) on visits home.

reasoned and credible explanation of how it follows from previous authoritative statements of the law—or, if they are lacking, from other compelling rationales—disregards a fundamental demand. Those who allow favor or dislike toward one of the parties in a case, or preferences in matters of public policy, to sway a decision also behave lawlessly. And whether motivated by institutional prudence or by policy preferences, judges who refuse to exercise the authority they possess to enjoin plainly extralegal actions transgress the bounds no less than those whose interventions exceed their authority.

Certain questions can be asked and answered that offer useful information for characterizing and comparing appellate judges. Have they avoided repeatedly stretching credibility with forced and implausible interpretations of precedents or of statutory or constitutional language, and attempted to distinguish instead of ignoring legal materials that run contrary to the conclusion reached? Have they maintained the same doctrinal stance across cases representing a variety of subject matters and interests, rather than varying it with the extralegal details of the case, and followed clear precedent even when it led to results at odds with their own partisan or policy preferences? How have expert contemporaries, especially practicing lawyers, assessed the accordance of their actions on the bench with existing law? And though posterity's view may be distorted for other reasons, in some ways it provides illumination that was not available before. Did a particular judge join in decisions that can be seen in hindsight to have been improperly motivated, hastily taken, or poorly thought out? As Holmes famously observed in 1904, some cases, because of their immediate practical or political importance, "exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend."[29] Resistance to

such pressure is a good measure of respect for the rule of law.

Such respect is rarely possible to identify conclusively through the analysis of a single case, which is likely to be essentially debatable from the very fact that it was appealed. It can become clearer if one looks at a judge's responses to multiple cases and compares them with those of others in the same era. "Although disregard for the rule of law can be masked by clever opinion writing," Solum observed, "a persistent pattern of lawlessness is truly difficult to conceal."[30] It can most reliably be detected, as can its opposite, over the course of an entire judicial career and by examining the cases heard in the context of their day. The grounds on which a conscientiously lawful judge decided them will slip out of view as time advances. A close adherence to their demands as they were then understood is a quality more likely to be recognized and appreciated by a judge's contemporaries than by posterity.

The tributes paid to Nelson upon his retirement and his death emphasized not any doctrines that he had successfully pioneered, but, above all, his trustworthy and convincing handling of the individual cases that came before him. While lauding his integrity, impartiality, patience, good temper, profound and varied legal knowledge, and love of justice, the *Central Law Journal* kept its highest praise for another quality: "His judgment was almost unerring, and was noted for its breadth and soundness." He was, the *Journal* concluded, "a great judge . . . great in the power to decide correctly, according to the principles which the courts and legislature have established for the settlement of judicial controversies."[31] The *New-York Daily Tribune* called attention to his "grand common sense" coupled with "a stern, unfaltering resolve to administer justice with an even hand."[32] The *New York Times* opined that "that quality of mind which enables him to surely strip off the outside husk, lay hold of the real essential point of a case, and swing the controversy thereon as upon a pivot, is akin to genius." As "significant testimony to the correctness of the judicial perceptions" Nelson applied in his work, it pointed to the exceptionally low rate of reversal of his circuit decisions by the Supreme Court, indicating the Justice's "trained sagacity, honest sense, and unequaled experience in the ascertainment of legal truth."[33] Like the *Central Law Journal*, a committee of the Second Circuit bar, while citing many of the departing judge's admirable qualities, placed the most weight on what it called "a judgment of unsurpassed soundness."[34] The New York state bar declared: "you have at all times enjoyed the confidence of your professional brethren, of the litigants who were before you, and of the public, to an extent never exceeded by any judge who has presided in a court in which our language was spoken, or in which the great principles of constitutional liberty were respected and enforced."[35] What these assessments imply is that to an unusual degree, Nelson scrupulously decided the controversies that came before him as the law dictated. How do the best-known parts of his judicial record square with this interpretation?

Dred Scott and Substantive Due Process

The first test of Nelson's record on the bench must be *Dred Scott v. Sandford*, his response to which was a model of adherence to the rule of law. Unlike Justice Robert C. Grier, a fellow Northern Democrat, he resisted the intrusion of extralegal considerations. Both men were subjected to behind-the-scenes pressure from the incoming president to legitimate the opinion for the Court delivered by Chief Justice Roger B. Taney by agreeing to at least one of its major and highly questionable assertions, pressure to which Grier succumbed but to which Nelson did not.[36] Concurring in the result,

he did so in an opinion that among the nine delivered in the case—the two dissents included—was, in John P. Frank's words, "the only one justifiable on precedent."[37] It was thus the only one that heeded the demands of the rule of law by proposing to decide the case according to preexisting expectations. The dissents by Justices John McLean and Benjamin R. Curtis convincingly exposed the weakness of Taney's arguments. They differed from Nelson's opinion in asserting the power of the federal courts to review a matter generally understood at the time to be governed exclusively by state law. On this point, their arguments were unconvincing and were recognized as such by the two most qualified contemporary legal commentators on the case, whose conclusions, moreover, did not stem from partisanship, for both were free-soil Republicans.[38]

By declining to join in Taney's opinion, Nelson disassociated himself, and not for the first time, from a dubious doctrinal claim that it advanced. The chief justice, without denying that Congress had some power under the Constitution to enact laws for the national territories, asserted it did not extend to ones prohibiting slavery. He maintained that such laws, the 1820 Missouri Compromise among them, violated the Fifth Amendment's Due Process Clause:

> an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified by the name of due process of law.

The passage amounted to a declaration of the right of the courts to inquire into the reasonableness and policy of any laws that carried a penalty for their infringement, as well as into the procedures by which an infringement was determined and punished, though only the latter fell under the commonsense meaning of the constitutional limitation. Justice Curtis, in dissent, correctly characterized it as an attempt to amend the Constitution by judicial fiat for political reasons, and as objectionable as the attempt "[t]o engraft on any instrument a substantive exception not found in it."[39]

Taney's argument represented an early statement of the most important novelty in American constitutional law to emerge during the nineteenth century, the one that came to be known as substantive due process.[40] The due process provision in the Bill of Rights, applied to the states in 1868 by the Fourteenth Amendment, was generally understood at first to guarantee adequate and proper legal procedure before such a deprivation occurred. Over time, however, it acquired a second meaning through judicial decisions that held that the substance, and not merely the improper enforcement, of some laws could violate the guarantee, because they infringed on rights grounded in either the law of nature or historical tradition that lay beyond the government's legal reach. Because it rested with the judges to decide just what those unenumerated rights were, substantive due process facilitated the imposition of judicial policy preferences under the guise of constitutional interpretation. That the doctrine has any firm foundation in the Constitution or in other legitimate sources of law has never been clear.[41] What has always been clear is that its acceptance makes it much more feasible for judges to promote their own policy preferences than its rejection does.

When substantive due process made one of its first recognizable appearances, in the early 1840s in a decision by the New York Supreme Court, it was in the face of a penetrating critique of it by Nelson, the earliest important one offered in a dissenting opinion by an American appellate judge.[42] *Taylor v.*

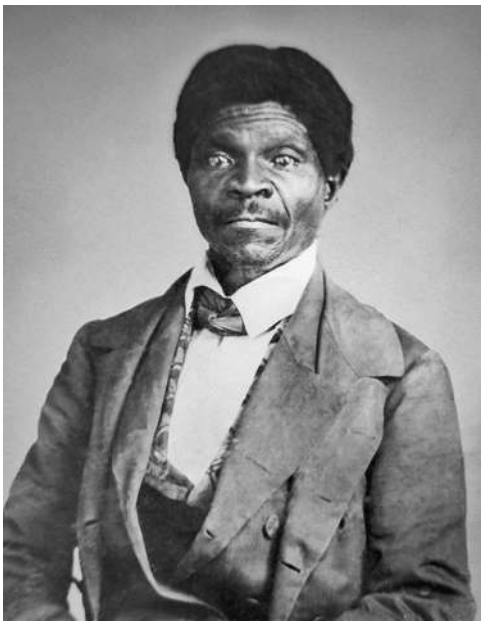
Porter involved a challenge to a New York statute that predated the American Revolution. It established a uniform procedure by which the state could take one person's land by eminent domain in order to create a "private road" usable only by another landowner, when a local jury found such a taking to be necessary to provide access to the lands of the second owner. The statute levied on the latter the cost of compensating the first owner for the taking. Speaking for himself and his fellow Democrat Esek Cowen, Justice Greene C. Bronson first denied that the statute fell within the power of eminent domain as authorized by the New York Constitution, converting as it did private property, not to public, but only to another private use. He next declared it equally inconsistent with two guarantees stated in the same document: that individuals could be deprived of their rights and privileges, which he argued included the property that they owned, only through "the law of the land" and through "due process of law." The act, Bronson maintained, failed these tests, because such an encroachment on the rights of private property exceeded the bounds of what could legitimately be considered law or due process. If a certain outcome was wrong, as he considered that the use of eminent domain to create private roads was, then "a statute passed for the purpose of working the wrong" did not make it legal. Such a statute was itself invalid.[43]

Chief Justice Nelson offered an array of cogent objections to Bronson's claims. The challenged statute, he pointed out, had been in operation for seventy years, and "[i]ts constitutionality has never before, so far as I know, been doubted." Those facts, he thought, created a strong presumption that it contravened no fundamental principles of law or right. He added that invalidating the statute would leave New York an anomaly, as not only the only state in the Union, but the only government in the world, lacking the power that it conferred, a further reason to doubt its unconstitutionality or its inconsistency with universal legal principles. He offered several plausible reasons why the legislature might reasonably have authorized the laying out of private roads through such a general act when other means of access were unavailable. It might have deemed them necessary to develop the state's lands, or it might have seen them as essential to permit individuals to exercise their public rights and discharge their public duties, whether as voters, jurymen, or members of the militia, without committing trespass. Previous decisions by the New York courts, Nelson pointed out, had explicitly left it up to the legislature to determine what kinds and degrees of benefit to the public did or did not justify the exercise of eminent domain, and a Pennsylvania court had recently rejected an argument similar to the one made by the plaintiff in *Taylor*.[44]

The 1843 decision carried strong partisan overtones. It was handed down in the midst of controversy over the future of New York's large manorial landholdings, which were under challenge by the "Anti-Rent" tenants' movement. The state's Whig leaders had urged the solution of extinguishing manorial tenures by taking and transferring title to the tenants through eminent domain, with compensation to be paid to the landlords by the tenants or by the state. The ruling in *Taylor* rendered that solution unavailable, a motive that may have figured in the actions of the majority. If so, it was an extralegal consideration that Nelson eschewed the temptation to take into account.[45] Bronson's decision also reflected, at a more general level, the political philosophy and policy preferences of its author, as an antebellum Democrat deeply committed to minimal government and the rights of private property and hostile to Whig measures seen as threatening to both. That Nelson, another Democrat who largely shared Bronson's political views, nonetheless refrained in this case from imposing them suggests his respect for the limits of his

role as a judge. A legal historian of the Anti-Rent controversies has favorably contrasted his "self-denying approach to judicial review" to the actions of his two colleagues on the Court. The latter's work, *Taylor v. Porter*, would be much invoked by later decisions that developed the concept of substantive due process as a restraint on legislative power.[46]

By declining to concur in Taney's rejection of the Missouri Compromise Act, Nelson implicitly refused to accept the former's assertion of the doctrine as he had dissented from Bronson's similar reasoning in 1843. The objections he raised in the earlier case applied equally well in 1857 to Taney's denial of a congressional power that similarly had long been accepted and exercised. And his objections in *Taylor*, citing the long-standing acceptance of New York's private roads statute, anticipate what has become a widely accepted limitation on the reach of substantive due process, confining it to matters "deeply rooted in this Nation's history and tradition."[47] History and tradition amply validated both New York's use of the takings power and Congress's authority to legislate on slavery in the national territories.



While Nelson voted with the majority in *Dred Scott v. Sandford* (1857), he rested his concurrence on politically neutral ground. Above is a photo of Dred Scott, who unsuccessfully sued for his freedom along with his wife, Harriet, and two daughters.

Later writers have routinely labeled Nelson as "pro-Southern" or "proslavery" or a "doughface," "a Northern man with Southern principles." Had he truly been so, however, there is no reason he would not have gone along, as Justice Grier did, with much of the substance of Taney's opinion in *Dred Scott* instead of concurring with the result on politically neutral grounds. Nor is there much support elsewhere in his judicial record for these characterizations. On circuit duty, Nelson instructed grand juries on their duty to enforce the Fugitive Slave Acts of 1793 and 1850, as did every antebellum federal judge, including his strongly antislavery Supreme Court colleague, John McLean. As they recognized, it was their obligation under their oath of office to apply the laws that the legislative branch had enacted.[48] An 1834 opinion of Nelson's for the New York Supreme Court denied the state's power to interfere in the enforcement of the federal Fugitive Slave Act. Its reasoning was indistinguishable from that of Justice McLean in his dissent in the federal case of *Prigg v. Pennsylvania* in 1842. Both agreed that congressional power in the area was exclusive. McLean's chief objection to the majority opinion in *Prigg*, in the words of a modern historian, "was the apparent agreement among the justices that a state could not punish kidnapping as an offense" in these particular instances.[49] Nelson in his New York opinion of 1834 took the existence of that right for granted: "if a freeman was taken," he observed, the captor "would be answerable like any other trespasser or kidnapper" under state law.[50]

Nelson was regarded in his home town of Cooperstown, New York as a particular friend of its small Black community.[51] He retired before hearing any of the cases

occasioned by the federal civil rights acts passed following the Civil War.[52] That he was not unsympathetic to their goals was attested by one reliable observer. In 1872, Frederick Douglass's Washington-based daily newspaper *New National Era* wrote approvingly:

> Justice Nelson, of the United States Supreme Court, is a Democrat in theory but not in practice. He resides at Cooperstown, New York, and on his way home last summer greatly confounded the aristocratic dining room of an Albany hotel by ordering a plate for his colored servant at the same table with himself.[53]

Emergency Powers and the Rule of Law

Nelson's second-most-famous opinion for the federal Supreme Court again insisted strictly on the rule of law. In the *Prize Cases* in 1863, he wrote for himself and three other dissenters against a decision upholding broad presidential authority to declare and enforce a blockade by condemning vessels taken in violation of it.[54] Their position rested on the Constitution's exclusive grant to Congress of the power to declare war.[55] As it would not even if accepted have seriously impaired the Union's war effort, the dissent did not constitute an attempt to thwart that effort. Nelson's opinion concerned only the fate of vessels captured between President Lincoln's announcement of a blockade on April 19, 1861 and its declaration by Congress in July of that same year, the latter of which he accepted as sufficient to legalize confiscations made from then onward (though not, as Congress had also tried to do, to legalize the earlier ones *ex post facto*). Nelson argued for himself and the other dissenters that the government could not invoke the recognized laws of warfare to condemn seized vessels if it did not comply with them itself. The majority opinion, he pointed out, conflated war as a state of fact with war as a legally declared state of affairs, asserting powers that arose only under the latter in a case where only the former existed.

> [T]he question is what constitutes war in a legal sense, in the sense of the law of nations, and of the Constitution of the United States? For it must be a war in this sense to attach to it all the consequences that belong to belligerent rights. . . . [B]efore it can exist in contemplation of law, it must be recognized or declared by the sovereign power of the State, and which sovereign power by our Constitution is lodged in the Congress of the United States.[56]

Nelson's interpretation of war powers in 1863 chimed with the stance he had taken on circuit in 1850 in *Harmony v. Mitchell*, though the earlier case grew out of the Mexican War, which was as closely associated with a Democratic administration as the Civil War was with a Republican one. He instructed the jurors that an officer could blamelessly seize private property only in a pressing military emergency, but not, as the defendant had done, merely to help meet the needs of an expedition he was planning.[57] They responded with a substantial award for the claimant, which the Supreme Court upheld on appeal, endorsing Nelson's jury charge in the process.[58]

On two notable occasions, Nelson's stance in a case where, as a stickler for the law's dictates, he entered a solitary dissent won an authoritative later vindication. He demurred from his Supreme Court colleagues' decision upholding the condemnation of *The Circassian*, a British-owned ship seized on a voyage to New Orleans several days following the city's surrender to Union forces, an event which, Nelson argued, had terminated the blockade of that port.[59] The ship's owners filed a claim before the international

Nelson is pictured with Justices Samuel F. Miller and Nathan Clifford at left and Chief Justice Salmon P. Chase at right. While Miller, like Nelson, was an advocate of deference and restraint, he was less successful at avoiding judicial overreaching when his preferences were deeply engaged.

commission set up by the 1871 Treaty of Washington to hear cases growing out of the relations of the United States and the United Kingdom during the Civil War. Rejecting the Court's conclusions, the commission made an award of compensation.[60]

In 1863, Nelson was the sole member of the Court to affirm its jurisdiction to hear the case of *Roosevelt v. Meyer*, a wartime challenge to the federal government's recently assumed power to issue paper money and clothe it with the status of legal tender for preexisting debts.[61] In 1871, the Court acknowledged that the majority had erred on an elementary legal point in disclaiming jurisdiction.[62] It may have done so out of mere inadvertence, or it may have acted prudentially in choosing not to hear a politically sensitive case under the emergency conditions of wartime, but neither reason is consistent with a careful regard for the law.[63] Had the Court in 1863, moreover, held the Act unconstitutional, as it eventually did in 1870, it would only have sustained the reasoning of several leading Republicans in Congress who refused to accept the assurances of their party's Secretary of the Treasury, Salmon P. Chase, that it was both lawful and necessary. They included Representative Justin Morrill, later chair of the House Ways and Means Committee; Senator William Pitt Fessenden, who would eventually succeed Chase as Treasury Secretary; and Senator Jacob Collamer, a highly regarded legal authority.[64] Senator John Sherman of Ohio, another future Secretary of the Treasury and the Republican Party's chief financial expert in Congress for more than three decades, supported the Act, but added: "When I feel so strongly the necessity of this measure, I am constrained to assume the power, and refer our authority to exercise it to the courts." "Our arguments," he again observed, "must be submitted finally to the arbitration of the courts of the United States."[65] A hearing invited by such a respected figure, such as Nelson proposed

to give the question in 1863, could hardly have been considered overbearing judicial interference.

In these cases, as in *Dred Scott*, Nelson resisted better than did most of his colleagues on the bench the temptation to let extralegal considerations control his rulings and interpretations. Although on the basis of too small a sample to permit any very confident generalization, he emerged from a study of Supreme Court behavior toward precedent published in 1999 as the only member of the Taney and Chase courts more prone than not in subsequent cases to follow decisions that originally went counter to his own views.[66] On circuit, he obediently applied the *Prize Cases* decision to later blockade confiscation suits that it controlled.[67] In two important disputes in American Indian law, he insisted on the rights that New York tribes were guaranteed under federal treaties.[68] Notwithstanding his party's resistance to the Republican Congressional program of Reconstruction in the states of the defeated Confederacy, in a decision of great importance handed down in 1868 he refused to impede that program. His opinion in *Georgia v. Stanton* defined the matter before the Court as a "political question" unrelated to the legal rights of persons or property, and therefore lying outside its authority under the doctrine set out in *Luther v. Borden* in the 1840s.[69]

Dual Federalism and Constitutional Interpretation

Where questions of justiciable rights did arise, Nelson steadily and impartially adhered to what Edward Corwin would later dub "dual federalism" as the best model for understanding and regulating federal-state relations under the Constitution. Dual federalism held that the powers of the national government were those that had been explicitly granted to it for the accomplishment of certain equally specified and limited purposes. It differed both from a doctrine of state sovereignty that became increasingly popular in the antebellum South and from a nationalistic attribution of inherent powers to the central government by analogy with the constitutions of other countries. It regarded the states as having retained the powers that they had not ceded to the federal government, and although the latter was supreme and sovereign within its designated spheres of activity, so too were the former in all others which did not significantly intersect or overlap with those of federal authority.[70] The derivation of federal from state citizenship, which Nelson upheld and Taney disregarded in *Dred Scott*, reflected this understanding of the union.

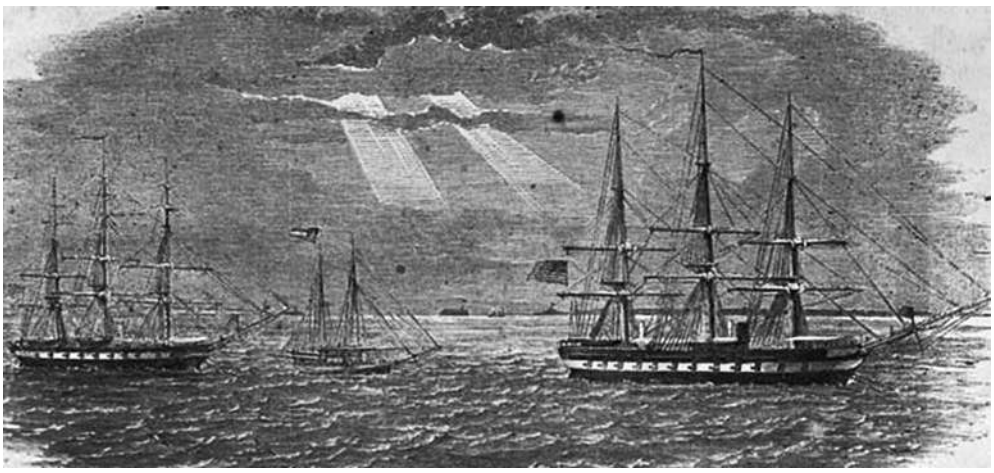
Nelson wrote for the Court in a number of cases in upholding federal powers against ill-founded challenges by states.[71] He just as vigorously resisted encroachments in the opposite direction, as he did in *Collector v. Day* (1870).[72] Denying the power of the federal government to tax the income of a state judge, he presented the case as analogous to an earlier one announced in 1842 that had denied the states the power to tax the income of a federal employee,[73] as well as to the reasoning of Chief Justice Marshall in *McCulloch v. Maryland* in 1819.[74] Marshall had ruled that the states could not interfere with instrumentalities established by the federal government and necessary and proper for the execution of its powers, specifically by taxing the Bank of the United States. The rationale for the 1842 decision had been similar: that a state tax on an activity of the federal government would violate the supremacy of each sovereignty within its designated sphere of action. There was, Nelson reasoned in 1870, a "reciprocal immunity" that forbade the challenged tax by the federal government on the same grounds. The Constitution's division of the powers of the federal and state governments required that each be protected against potentially destructive encroachment by the other. Nelson

gained the assent of a strong majority for this position, even though all but one of his colleagues by then had been appointed by Republican presidents more favorable to national power than to states' rights. As the outcome of the case suggests, even in the aftermath of the Civil War, there was little warrant for understanding the relations of the states with one another and with the federal government in any terms other than those of dual federalism, a model strongly suggested by the wording of the Constitution and one that continued to hold sway in judicial thought during Reconstruction and beyond.[75]

The dual federalism expressed in *Collector v. Day* also informed Nelson's stance in several other cases in which he was not so successful in persuading his colleagues but in which he displayed a greater consistency than some of them did. The Court's eventual acceptance of the 1862 Legal Tender Act in *Knox v. Lee*, after having held it unconstitutional in *Hepburn v. Griswold*, entailed a considerably broader view of implied federal powers. So did *Veazie Bank v. Fenno* (1869), accepting a prohibitive federal tax on the notes issued by state banks, laid with the avowed intention not of raising revenue but of driving those notes out of circulation to create a single national currency.[76] In both *Hepburn* and *Knox*, Nelson had the company of Chief Justice Salmon P. Chase and Associate Justices Nathan Clifford and Stephen J. Field, all of whom nonetheless sided with the majority in *Veazie*, in his dissent in which he was joined only by Justice David Davis, who was on the other side in the *Legal Tender Cases*. It is not apparent what reasons other than policy preferences could have governed these justices in taking such mutually inharmonious positions.[77]

Nelson Among His Peers

That Nelson has been underestimated by historians is suggested by an enviable distinction he enjoys, that of having resisted particularly well the most ill-advised judicial actions to occur during his time on the bench. Not only did he protest, as early as 1843, against the rise of substantive due process, but by declining to accept it and Taney's other main assertions in *Dred Scott* and merely concurring in the outcome on much narrower grounds, he stood apart from a rash decision famously termed by Charles



Nelson dissented from the majority in the Prize Ship Cases (1863) taking issue with emergency powers claimed by the Lincoln administration to suppress the Southern rebellion. Above the ships *Vandalia, Arthur Middleton, and Roanoke* blocked the port of Charleston in 1861.

Evans Hughes one of "three notable instances" in which "the Court has suffered severely from self-inflicted wounds."[78] Nelson likewise demurred in the second of Hughes' three instances, when in *Knox v. Lee* in 1871 a Supreme Court with two new members overturned its own *Hepburn* decision made the preceding year, a reversal damaging to the tribunal's public pretensions to determine only questions of law and not ones of policy.[79] Hughes' third example was the striking down of a federal income tax in 1895. It occurred in the face of precedents that seemed to place the tax's constitutionality beyond a reasonable doubt and under circumstances suggesting that the narrow 5–4 majority was produced by a change of side by a single justice. Nelson was one of only two justices to sit in more than one of these three cases, and the only one not to join in the Court's self-damaging opinion in any of them. Justice Field also dissented in 1871, but he was part of the anti-income-tax majority in 1895.

On the whole, Nelson's more celebrated contemporaries on the Court displayed a less consistent regard for the law than he did. Taney's political and personal predilections showed in the excesses of *Dred Scott*. McLean's and Chase's ill-concealed presidential ambitions affected the credibility of their actions whether or not they affected the actions themselves, particularly Chase's condemnation of his own previous behavior in the *Legal Tender Cases* at a time when he was courting hard-money Democratic support.[80] Curtis sat too briefly on the Court to leave a substantial paper trail, but his jurisprudence in portions of his *Dred Scott* dissent was distorted by his Whig nationalism. Field aggressively read his policy preferences into the law and played a leading role in articulating the doctrine of substantive due process, from his 1870s dissents in the *Slaughterhouse Cases* and *Munn v. Illinois* onwards.

Justice Samuel F. Miller deserves particular notice. Often depicted as an advocate of deference and restraint, he was more explicit and outspoken than Nelson in denouncing judicial overreaching.[81] Yet was less successful in avoiding it himself when his preferences were deeply engaged. He subordinated *stare decisis* to his personal antipathies in a series of municipal bonding cases, often dissenting alone, and speaking as a disappointed resident of a disappointed Iowa community annoyed at the failure of its speculative corporate investments to bring the hoped-for returns. In 1874, he wrote for the Court in striking down a state law permitting such investments on the grounds of its inconsistency, not with any identifiable constitutional provisions, but rather with "[t]he theory of our governments" and with "the essential nature of all free governments."[82] His largely sympathetic modern biographer has described Miller's decisions in these cases, as well as more generally, as governed by policy convictions and practical outcomes rather than by obedience to text or precedent.[83] Another leading legal historian, though a champion of the rule of law and in general an admirer of Miller, described the justice as "a strong judge with unusually great abilities and little respect for the law," spoke of his "bouts of lawlessness," and included him among "some of the most assertive Justices of the century [who] openly proclaimed their independence from the written Constitution."[84]

It is not clear how such a characterization, if accepted as accurate, can be reconciled with a high estimate of the subject's performance as a judge. No obvious occasions for it emerge from Nelson's record on the Supreme bench, on which he sat for only a year less than Miller did. The former's respect for the rule of law compares favorably to that of his most subsequently esteemed contemporaries. If that quality were regarded as more important than all others, as it reasonably might be, his judicial stature would not merely rival but exceed theirs. Self-effacement before the law is arguably a more desirable quality in

a judge than self-assertion, even though it is less likely to capture the attention of historians. It is a quality that Nelson in particular exemplified. Carl Swisher's 1974 estimate of his work, quoted earlier, may or may not have been intended as high praise, but it can be read as such: that he was "a stable, sound, and unspectacular judge."[85] Nelson's record, examined closely, similarly justifies a rare positive appraisal by another historian: "Far less has been written about this quietly competent jurist than his more flamboyant and controversial judicial brethren. This omission probably says more about Supreme Court observers than it does about Justice Nelson."[86]

ENDNOTES

[1] Silas Bent, **Justice Oliver Wendell Holmes: A Biography** (New York: The Vanguard Press, 1932), ch. 18; G. Edward White, **Justice Oliver Wendell Holmes: Law and the Inner Self** (New York: Oxford University Press, 1993), 462–66.

[2] Laurence M. Hauptman, "Justice Samuel Nelson and the Seneca Indians," *Journal of Supreme Court History*, vol. 48 (2023), 7–30; William B. Meyer, "The Best Answer? Justice Nelson's Concurrence in *Dred Scott v. Sandford*," *American Journal of Legal History*, forthcoming. Richard H. Leach, "The Rediscovery of Samuel Nelson," *New York History*, vol. 34 (1953), 64–71, consists mostly of a sample of previously unpublished letters of the justice, with little commentary or analysis. The most substantial account of Nelson's entire life and career is a brief essay by Frank Otto Gatell, "Samuel Nelson," in **The Justices of the United States Supreme Court 1789–1969: Their Lives and Major Opinions**, vol. 2, ed. Leon Friedman and Fred L. Israel (New York: Chelsea House, 1969), 817–29.

[3] Charles Evans Hughes, **The Supreme Court of the United States: Its Foundation, Methods and Achievements: An Interpretation** (New York: Columbia University Press, 1928), 58; Felix Frankfurter, "The Supreme Court in the Mirror of Justices," *University of Pennsylvania Law Review*, vol. 105 (1957), 783; John P. Frank, **Marble Palace: The Supreme Court in American Life** (New York: Alfred A. Knopf, 1958), 43–44; Bernard Schwartz, "Supreme Court Superstars: The Ten Greatest Justices," *Tulsa Law Journal*, vol. 31 (1995), 93–159.

[4] William D. Bader and Roy M. Mersky, **The First One Hundred Eight Justices** (Buffalo, NY: William S. Hein & Co., 2004), 26–29.

[5] Allan Nevins, **The Emergence of Lincoln**, vol. 1 (New York: Charles Scribner's Sons, 1950), 103; David P. Currie, **The Constitution in the Supreme Court: The First Hundred Years, 1789–1888** (Chicago: University of Chicago Press, 1985), 280. Currie's blanket dismissal is difficult to understand, as he spoke well of Nelson's opinions in some constitutional cases of considerable importance: see 267–68, 273–75, 317, 337, 353n12, 355.

[6] Philip B. Kurland, "Hugo Lafayette Black: In Memoriam," *Journal of Public Law*, vol. 20 (1971), 360.

[7] Timothy L. Hall, **Supreme Court Justices: A Biographical Dictionary** (New York: Facts on File, 2001), 111, 112, 114.

[8] Bernard Schwartz, **A Book of Legal Lists: The Best and Worst in American Law** (New York: Oxford University Press, 1997), 39.

[9] H. Robert Baker, **Prigg v. Pennsylvania: Slavery, the Supreme Court, and the Ambivalent Constitution** (Lawrence: University Press of Kansas, 2012), 93.

[10] Jonathan Lurie, **The Chase Court: Justices, Rulings, and Legacy** (Santa Barbara, CA: ABC-CLIO, 2004), 32.

[11] Henry J. Abraham, **Justices, Presidents, and Senators: A History of U.S. Supreme Court Appointments from Washington to Bush II**, 5th ed. (Lanham, MD: Rowman & Littlefield, 2008), 86, 103.

[12] Charles Fairman, **Reconstruction and Reunion, 1864–1888**, Part I, Oliver Wendell Holmes Devise History of the Supreme Court of the United States, vol. 6 (New York: Macmillan, 1971), 3.

[13] Carl B. Swisher, **The Taney Period, 1836–1864, Oliver Wendell Holmes Devise History of the Supreme Court of the United States,** vol. 5 (New York: Macmillan, 1974), 221.

[14] Gatell, "Samuel Nelson," 828, 829.

[15] David N. Atkinson, "Minor Supreme Court Justices: Their Characteristics and Importance," *Florida State Law Review*, vol. 3 (1975), 348–59; Bader and Mersky, **The First One Hundred Eight Justices**, 67–72.

[16] William G. Ross, "The Ratings Game: Factors That Influence Judicial Reputation," *Marquette Law Review*, vol. 79 (1996), 401–52; Bader and Mersky, **The First One Hundred Eight Justices**, 49–66; G. Edward White, "Neglected Justices: Discounting for History," *Vanderbilt Law Review*, vol. 62 (2009), 319–48.

[17] Carl B. Swisher, "The Judge in Historical Perspective," *Indiana Law Journal*, vol. 24 (1949), 381–86

[18] Jack M. Balkin, "The Use That the Future Makes of the Past: John Marshall's Greatness and Its Lessons for Today's Supreme Court Justices," *William and Mary Law Review*, vol. 43 (2002), 1321–38.

[19] *Hirabayashi v. United States*, 320 U.S. 81, 91, 93 (1943).

[20] Ludwell H. Johnson III, "Abraham Lincoln and the Development of Presidential War-Making Powers: Prize Cases (1863) Revisited," *Civil War History*, vol. 35 (1989), 222–23; *Mora v. McNamara*, 389 U.S. 934, 937 (1967); *Holmes v. United States,* 391 U.S. 936, 947n9 (1968).

[21] Daniel R. Suhr, "Judicial Cincinnati: The Humble Heroism of Originalist Justices," *FIU Law Review*, vol. 5 (2009), 155–76.

[22] A standard described and criticized by Linda Przybyszewski, "The Dilemma of Judicial Biography or Who Cares Who is the Great Appellate Judge? Gerald Gunther on Learned Hand," *Law & Social Inquiry*, vol. 21 (1996), 135–71.

[23] Oliver Wendell Holmes, "John Marshall" (orig. 1901), in **The Collected Works of Justice Holmes: Complete Public Writings and Selected Judicial Opinions of Oliver Wendell Holmes**, vol. 3, ed. Sheldon M. Novick (Chicago: University of Chicago Press, 1995), 501; "William Allen" (orig. 1891), *ibid.,* 485–486.

[24] Schwartz, "Supreme Court Superstars," 157, 159.

[25] Lawrence B. Solum, "A Tournament of Virtue," *Florida State Law Review*, vol. 32 (2005), 1365–1400 (quotations from 1387, 1393, 1394).

[26] Blaustein & Mersky, **The First One Hundred Eight Justices**, 51n15, 63, 63n73.

[27] Rex E. Lee, "On Greatness and Constitutional Vision: Justice Byron R. White," *Journal of Supreme Court History*, 1993, 5, 9.

[28] These themes are highlighted in a number of standard discussions, notably Lon L. Fuller, **The Morality of Law** (New Haven, CT: Yale University Press, 1964); Robert S. Summers, "The Principles of the Rule of Law," *Notre Dame Law Review*, vol. 74 (1999), 1691–1712; Ronald Cass, **The Rule of Law in America** (Baltimore, MD: Johns Hopkins University Press, 2001); Frank Lovett, **A Republic of Law** (New York: Cambridge University Press, 2016); and Jeremy Waldron, "The Rule of Law," **The Stanford Encyclopedia of Philosophy** (Summer 2020 Edition), Edward N. Zalta (ed.).

[29] *Northern Securities Co. v. United States,* 193 U.S. 197, 401 (1904) (Holmes, J., dissenting).

[30] Solum, "A Tournament of Virtue," 1387.

[31] "The Late Mr. Justice Nelson," *Central Law Journal*, vol. 1 (1874), 2–3.

[32] E.W. Stoughton, "Justice Samuel Nelson: A Merited Tribute," *New-York Daily Tribune*, December 26, 1872, 5.

[33] "Mr. Justice Nelson," *New York Times*, February 13, 1871, 4.

[34] Ross E. Davies, "Pioneer of Retirement: Justice Samuel Nelson," *The Green Bag*, 2d series, vol. 17 (2014), 215.

[35] "Tribute to Judge Nelson," *The Argus* [Albany, NY], January 28, 1873, 2.

[36] Philip Auchampaugh, "James Buchanan, the Court and the Dred Scott Case," *Tennessee Historical Magazine*, vol. 9 (1926), 231–40.

[37] John P. Frank, **Justice Daniel Dissenting: A Biography of Peter V. Daniel, 1784–1860** (Cambridge, MA: Harvard University Press, 1964), 254; see also Paul Finkelman, "Coming to Terms with *Dred Scott*," *Pepperdine Law Review*, vol. 39 (2011), 65; and Meyer, "The Best Answer?."

[38] [Horace Gray and John Lowell], *A Legal Review of the Case of Dred Scott, as Decided by the Supreme Court of the United States, from the Law Reporter for June, 1857* (Boston: Crosby, Nichols and Company, 1857).

[39] *Dred Scott v. Sandford,* 60 U.S. 393, 620 (1857).

[40] A large literature discusses whether and how far Taney's expressions can be equated with substantive due process as the doctrine later developed and whether it was central to his conclusions in *Dred Scott*. Major works affirming both conclusions include Edward S. Corwin, "The Doctrine of Due Process of Law before the Civil War: I," *Harvard Law Review*, vol. 24 (1911), 366–85; Currie, **The Constitution in the Supreme Court,** 271-72; and Max Crema and Lawrence B. Solum, "The Original Meaning of 'Due Process of Law' in the Fifth Amendment," *Virginia Law Review*, vol. 108 (2022), 520.

[41] John C. Harrison, "Substantive Due Process and the Constitutional Text," *Virginia Law Review*, vol. 83 (1997), 493–558.

[42] Taylor v. Porter, 4 Hill & Den. 140 (1843).

[43] *Ibid.,* 141–48.

[44] *Ibid.,* 148–53.

[45] Charles W. McCurdy, **The Anti-Rent Era in New York Law and Politics, 1839-1865** (Charlotte, NC: University of North Carolina Press, 2001), 117.

[46] Authors highlighting *Taylor*'s significant place in this history include Edward S. Corwin, "The Doctrine of Due Process of Law before the Civil War. IV," *Harvard Law Review*, vol. 24 (1911), 463–65; Howard Jay Graham, "Procedure to Substance: Extra-Judicial Rise of Due Process, 1830–1860," *Columbia Law Review*, vol. 40 (1952), 483–500; Wallace Mendelson, "A Missing Link in the Evolution of Due Process," *Vanderbilt Law Review*, vol. 10 (1956), 132–33; Laura Inglis, "Substantive Due Process: Continuation of Vested Rights?," *American Journal of Legal History*, vol. 52 (2012), 459–98; and Crema and Solum, "The Original Meaning of 'Due Process of Law' in the Fifth Amendment."

[47] *Moore v. East Cleveland,* 431 U.S. 494, 504 (1977).

[48] Peter Karsten, "Revisiting the Critiques of Those Who Upheld the Fugitive Slave Acts in the 1840s and '50s," *American Journal of Legal History*, vol. 58 (2018), 291–325.

[49] Baker, *Prigg v. Pennsylvania*, 147.

[50] Jack v. Martin, 12 Wend. 311, 325–26 (1834). Nelson's later opinion in *Nash v. Benedict*, 25 Wend. 644 (1841) likewise assumed the validity of state statutes to punish the kidnapping of free Blacks who had falsely been identified as fugitives. In a famous antebellum case, he provided assistance to a fellow New Yorker in securing the release of Solomon Northup, a free Black man who had been abducted to Louisiana: "The Kidnapping Case," *New York Times*, January 20, 1853, 1; Solomon Northup, **Twelve Years a Slave: Narrative of Solomon Northup, a Citizen of New-York, Kidnapped in Washington**

City in 1841, and Released in 1853 (Auburn, NY: Derby and Miller, 1853), 292.

[51] Ralph Birdsall, **The Story of Cooperstown** (Cooperstown, NY: Arthur H. Crist, 1917), 278.

[52] The first of these cases, *Blyew v. United States*, was heard shortly before Nelson's retirement, but owing to illness he took no part in the decision: Robert D. Goldstein, "*Blyew*: Variations on a Jurisdictional Theme," *Stanford Law Review,* vol. 41 (1989), 500n18.

[53] "News Clippings," *New National Era*, January 11, 1872, 1.

[54] *The Prize Cases,* 67 U.S. 635 (1863).

[55] Currie, **The Constitution in the Supreme Court,** 274; Johnson, "Abraham Lincoln and the Development of Presidential War-Making Powers," 208.

[56] *The Prize Cases,* 689.

[57] *Harmony v. Mitchell,* 1 Blatchf. 549 (1850).

[58] *Mitchell v. Harmony,* 54 U.S. 115 (1851).

[59] *The Circassian,* 69 U.S. 135 (1864).

[60] Mixed Commission on British and American Claims, under the Treaty of May 8, 1871: Memorials, Demurrers, Briefs, and Decisions, #432 (1873).

[61] *Roosevelt v. Meyer*, 68 U.S. 512 (1863).

[62] *Trebilcock v. Wilson,* 79 U.S. 687, 692–693 (1871). There were two dissenters, but neither took issue with the Court on the jurisdictional question.

[63] Dawinder S. Sidhu, "Judicial Modesty in the Wartime Context: *Roosevelt v. Meyer* (1863)," *Journal of Supreme Court History*, vol. 39 (2014), 190–200.

[64] *Congressional Globe*, 37th Congress, 2nd session (1862), 631, 638 (Morrill); 763, 765 (Fessenden); and 767–69 (Collamer). On the last-named, see Allan G. Bogue, **The Earnest Men: Republicans of the Civil War Senate** (Ithaca, NY: Cornell University Press, 1981), 32.

[65] *Congressional Globe*, 37th Congress, 2nd session (1862), 791.

[66] Harold J. Spaeth and Jeffrey A. Segal, **Majority Rule or Minority Will: Adherence to Precedent on the U.S. Supreme Court** (New York: Cambridge University Press, 1999), 62, 65, 70, 72, 291–300.

[67] *The Ship Cheshire and Cargo, Blatchford's Reports of Cases in Prize: Argued and Determined in the Circuit and District Courts of the United States, for the Southern District of New York* 1861–'65 643 (1863); *The Schooner Prince Leopold and Cargo, ibid.,* 647 (1863); *The Bark Pioneer and Cargo, ibid*., 649 (1863); *The Steamer Nassau and Cargo, ibid.*, 665 (1863).

[68] *Fellows v. Blacksmith*, 60 U.S. 366 (1856); *The New York Indians,* 72 U.S. 761 (1867); Hauptman, "Justice Samuel Nelson."

[69] *Georgia v. Stanton,* 73 U.S. 50 (1868).

[70] Edward S. Corwin, **The Twilight of the Supreme Court: A History of Our Constitutional Theory** (New Haven, CT: Yale University Press, 1934), ch. 1; "The Passing of Dual Federalism," *Virginia Law Review*, vol. 36 (1950), 1–24.

[71] See, for example, *Sinnot v. Davenport*, 63 U.S. 227 (1859); *Freeman v. Howe,* 65 U.S. 450 (1860); and *People ex rel. Bank of Commerce v. Commissioners of Taxes*, 67 U.S. 620 (1862).

[72] *Collector v. Day,* 78 U.S. 113 (1870). On the decision's long-standing influence, see Robert Post, "Federalism in the Taft Court Era: Can It Be 'Revived'?," *Duke Law Journal*, vol. 51 (2002), 1527–29. It remained law until overruled by *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466 (1939).

[73] *Dobbins v. Commissioners of Erie County,* 41 U.S. 435 (1842).

[74] *McCulloch v. Maryland,* 17 U.S. 316 (1819).

[75] Michael Les Benedict, "Preserving Federalism: Reconstruction and the Waite Court," *Supreme Court Review*, 1978, 39–79.

[76] *Veazie Bank v. Fenno,* 75 U.S. 533 (1869).

[77] Currie, **The Constitution in the Supreme Court,** 320-21, noted the unexplained contrast between the grounds of *Hepburn* and *Veazie*.

[78] Hughes, **The Supreme Court of the United States,** 50–54.

[79] The reversal was widely denounced in the press: Charles Warren, **The Supreme Court in United States History vol. 3** (Boston: Little, Brown, and Company, 1923), 241–49.

[80] Irwin Unger, **The Greenback Era: A Social and Political History of American Finance** (Princeton, NJ: Princeton University Press, 1964), 174–75.

[81] Most memorably in *The Slaughterhouse Cases,* 83 U.S. 36 (1873) and *Davidson v. New Orleans*, 96 U.S. 97 (1878).

[82] *Loan Association v. Topeka,* 87 U.S. 655, 663 (1874). Justice Clifford protested in dissent: "Unwise laws and such as are highly inexpedient are frequently passed by legislative bodies, but there is no power vested in a circuit court nor in this Court, to determine that any law passed by a state legislature is void if it is not repugnant to their own constitution nor the Constitution of the United States": *ibid.* at 670.

[83] Michael A. Ross, **Justice of Shattered Dreams: Samuel Freeman Miller and the Supreme Court during the Civil War Era** (Baton Rouge, LA: Louisiana State University Press, 2003), 174, 183, 252–53.

[84] Currie, **The Constitution in the Supreme Court,** 357, 454, 455.

[85] Swisher, **The Taney Period**, 221.

[86] Jenni Parrish, "Samuel Nelson," in Melvin I. Urofsky, ed., **The Supreme Court Justices: A Biographical Dictionary** (New York: Garland Publishing Inc., 1994), 338.

William Howard Taft as Solicitor General

Walter Stahr

In August 1889, when President Benjamin Harrison visited Cincinnati, he was greeted by brass bands and cheering crowds. Among those in the presidential party was his former Indianapolis law partner, now the attorney general, William Miller. Welcoming the president at the train station was the Ohio Governor, Joseph Foraker. And among those whom Foraker introduced to Harrison on that day was a young Cincinnati judge, William Howard Taft. Taft wrote to his father that he had only a minute with Harrison, but "quite a conversation" with Miller "on various topics." Foraker was not sure whether the president had even noticed Taft, so he asked. "Oh yes," was Harrison's reply, "what a fine-looking man he is. What a fine physique he has." By modern standards, Taft was overweight—he weighed about two hundred forty pounds—but by late nineteenth-century standards, the former college athlete had a fine physique.[1]

Taft hoped to talk with Harrison because there were rumors that the president was considering him for a vacant seat on the Supreme Court. Taft was not inclined to pay much heed, telling his father that "my chances of going to the moon and of donning a silk gown at the hands of President Harrison are about equal." But a few weeks after meeting Harrison, young Taft heard that Justice John Marshall Harlan had been asking a friend about Taft, because "the President had my name under serious consideration for the vacancy." Taft then wrote to Foraker asking whether he would perhaps write to Harrison. Foraker did so, praising Taft as a "man of exceptional qualities for judicial work. He is well-educated, a thoroughly equipped lawyer, and a judge of some three years' experience, who in that time has given the bar of Cincinnati the highest degree of satisfaction." Foraker's words may have carried more weight because he was not only a lawyer; he was a former judge, having served on the same Cincinnati Superior Court on which Taft now served.[2]

Harrison selected a more experienced judge for the Supreme Court: David J. Brewer,

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at the time a federal circuit court judge based in Topeka, Kansas. But Harrison and Miller still had Taft in mind, and they did not have to be pressed too hard, in January 1890, when the solicitor general, Orlow Chapman, died of pneumonia, to select Taft as his successor.[3]

Although Taft was only thirty-two years old, he already had an impressive resume. He had been second, by a fraction, in the academic rank of his class at Yale College; top of his class at Cincinnati Law School; assistant prosecutor for the state's most populous county; head of Internal Revenue for southern Ohio; and a judge in the Cincinnati Superior Court. He was an active Republican, in a family of Republicans: his father Alphonso had served as war secretary and attorney general in the cabinet of Ulysses Grant; his brother Charles was proprietor and editor of a leading Republican newspaper; his father-in-law, John Herron, was the United States attorney for the Southern District of Ohio.[4]

The *Cincinnati Enquirer* reported that, when news of the nomination arrived in Taft's courtroom, he "received the warm congratulations of the entire bar, without respect to party affiliations." The *Enquirer* attributed the appointment to the efforts of two Republican members of Congress from Ohio, as well as Taft's brother Charles, who had visited Washington a few days earlier. The *New York Sun* said there was "no more deserving young man in Ohio, for he is brilliant, a hard worker, and of high character."[5]

Among the letters of congratulation that Taft received was one from Foraker, for whom the "special feature" of the appointment was that it laid the groundwork for another. "As solicitor general," Foraker wrote, "you will have an opportunity to finish, and round out, the splendid qualifications you already have for a seat on the bench of the Supreme Court. Youth, vigor, and stalwart Republicanism are wanted in that Court, and you will supply all."[6]

The Senate confirmed the Taft nomination in early February. Taft decided to leave his wife Nellie and infant son Robert behind in Cincinnati, at least for the first few weeks, and took an overnight train to Washington. He later dictated, for his wife's memoir, an account of that day:

When President Benjamin H. Harrison came to Cincinnati in 1889, he had the opportunity to size up a young circuit judge named William H. Taft whom he was considering nominating to the Supreme Court. "[M]y chances of going to the moon and of donning a silk gown at the hands of President Harrison are about equal," a skeptical Taft told his father. He was right: President Harrison appointed him solicitor general instead.

> He arrived at six o'clock on a cold, gloomy February morning at the old dirty Pennsylvania station. He wandered out on the street with a heavy bag in his hand looking for a porter, but there were no porters. Then he stood for a few moments looking up at the Capitol and feeling dismally unimportant. . . . He was sure he had made a fatal mistake in exchanging a good position and a pleasant circle at home, where everybody knew him, for a place in a strange

> and forbidding city where he knew practically nobody and where, he felt sure, nobody wanted to know him. He lugged his bag up to the old Ebbitt House and, after eating a lonesome breakfast, he went to the Department of Justice to be sworn in.[7]

After the swearing in ceremony, and a few words with Miller, Taft "went up to inspect the Solicitor General's office." There he found

> the most dismal sight of the whole dismal day. His "quarters" consisted of a single room, three flights up, and bearing not the slightest resemblance to his mental picture of what the Solicitor General's office would be like. The stenographer, it seemed, was a telegrapher in the chief clerk's office and would have to be sent for when his services were required.[8]

Role of the Solicitor General

When Taft arrived in Washington, the position of solicitor general was relatively new: it had existed for only twenty years and only five men held the office before Taft. Congress provided in 1870 that the solicitor general should be "an officer learned in the law," who could serve as attorney general in his absence, and who would (as directed by the attorney general) argue any case in which the government was interested. The committee report said that the solicitor general should be "a man of such learning, ability and experience, that he can be sent to New Orleans or to New York or into any court wherever the Government has any interest in litigation, and there to present the case of the United States as it should be presented."[9]

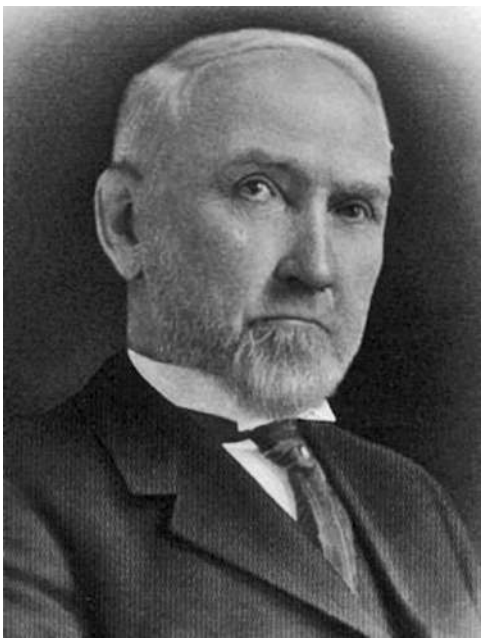
In an overall revision of the federal statutes in 1878, Congress provided that the attorney general and the solicitor general would conduct all federal litigation in the United States Supreme Court; in other words, other federal agencies, such as the Treasury Department, could not file appeals or other papers directly in the Supreme Court; only the attorney general and the solicitor general could do so on their behalf.[10]

This is still true today, but in other ways Taft's role was unlike that of the modern solicitor general.

First, Taft had no legal staff. He had a private secretary, William J. Hughes, but Hughes was a secretary and stenographer, not a lawyer. Taft did his own research, writing, and presentation.[11]

Second, Taft was deputy of the Department of Justice, so he spent much of his time on work other than Supreme Court cases. In May 1890, Taft noted that the

> attorney general has been ill for a week or more and I have been acting attorney general. The novelty wore off in just about a day, and no man will be happier than I shall be



In the 1890s, the solicitor general and the attorney general divided the Supreme Court work, arguing cases together or separately. As attorney general during the Harrison administration, William H. H. Miller (above) worked closely and harmoniously with Solicitor General Taft.

> when he returns to his desk. What with appointments, dilatory officials throughout the country and cranks, one's time is all occupied and nothing is accomplished.

Harrison consulted Taft about judicial and other appointments, and he invited Taft to "call every evening if convenient" at the White House. Taft attended cabinet meetings when Miller was sick or absent, and he researched legal questions for Harrison and other members of the government. Taft also represented the government in at least one court other than the Supreme Court: he handled parts of an important trial in Philadelphia, regarding the proper tariff treatment of hat trimmings.[12]

In modern terms, then, Taft's role as solicitor general combined the roles of the deputy attorney general, the head of the Office of Legal Counsel, and the solicitor general.

Third, whereas today the attorney general almost never appears in the Supreme Court, in the 1890s the solicitor general and the attorney general divided the Supreme Court work. The attorney general argued some cases on his own; in other cases the attorney general and the solicitor general divided the oral argument; and the solicitor general argued some cases on his own. In February 1891, for example, Taft wrote to his father that the pending case about the Bering Sea, arising out of disputes there between Britain and the United States, "was of international importance and of course the Attorney General must take part in it. He and I both worked hard on the brief though I wrote the greater part of it and revised it all."[13]

In April, Taft wrote his father that the Bering Sea argument had been postponed because the "Attorney General has had the grippe for ten days or more and the whole work of preparing the brief has fallen on me." Taft and Miller had talked about the possibility that (because of Miller's illness) Taft would handle the entire oral argument. "But I felt—and in talking with the Chief Justice [Melville Fuller] found that he felt—that in a case of such international importance it was proper that the chief law officer of the government should at least be present at the hearing." The justices themselves expected to see and hear from the attorney general in important cases; the solicitor general was still viewed as something of a subordinate.[14]

Fourth, it seems that when Taft arrived, the solicitor general did not have complete control of Supreme Court litigation. In February 1891, Taft wrote his father:

> my predecessors in office did not assume quite the responsibility that I have taken since coming. With Mr. Hughes, my private secretary, I have attempted to take complete control of the Supreme Court business. The docket is kept here, and every paper that comes to the Department with reference to the Supreme Court comes to me. I am responsible for the business and control it. By this you understand that I do not argue all the cases, nor do I act in every case without consultation with the Attorney General. What I mean is that he looks to me to keep the business in hand, and I have a general idea of all the cases that are to be argued in the Supreme Court. Before this system obtained the business was scattered over the Department, and while the Solicitor General was made more or less responsible, he had not the means of meeting that responsibility as fully as I have done.[15]

Fifth, much of the work of the solicitor general's office today is in advising the Supreme Court about which cases are worthy of its consideration. This work takes several forms: reviewing cases decided against the federal government, in the courts of appeal, and deciding in which cases the government

should appeal by seeking certiorari; preparing and filing amicus briefs for or against certiorari, in cases in which the government is not a party; and responding to requests from the Court for the views of the solicitor general (known as Calls for the Views of the Solicitor General) as to whether certiorari is appropriate.[16]

In the 1890s, however, there was very little such work, because the Supreme Court had almost no control over its own docket; litigants in federal courts generally had the *right* to appeal to the Supreme Court. It was only in 1925, when Congress passed legislation suggested and promoted by then Chief Justice Taft, to give the Supreme Court almost complete control over its docket, that the solicitor general's role shifted to include the question of which cases deserve Supreme Court attention.[17]

Nobody referred, in the 1890s, to the solicitor general as the "Tenth Justice" or suggested that he had a "dual responsibility," both to the president and to the Supreme Court.

Miller and Taft joined forces on a high-profile case involving a dispute with Great Britain over seal hunting in the Bering Sea. In 1892, the justices agreed with their argument that it was inappropriate, while diplomatic negotiations were in progress, for the Court to insert itself into an international dispute.

Taft would have found such suggestions odd. Writing to a troublesome official in the revenue office in Cincinnati, Taft declared that "the first duty of a subordinate is courtesy and respect to his superior officer." Taft had no doubt that he owed similar duties to Miller, as the attorney general, and to Harrison, as the president.[18]

Taft as Advocate in the Supreme Court

Up to 1890, when he became solicitor general, Taft did not have much experience in federal courts, and he had more experience deciding cases than in arguing them. Two weeks after he arrived in Washington, Taft wrote his father that he would have to prepare briefs or make arguments in ten cases before the end of the Supreme Court's Term, set for early June.

> Considering that I have had no experience in that court, and am entirely unfamiliar with the rules of practice, that I have very little familiarity with the decisions of the court, and the federal statutes, the prospect of work is rather overwhelming. However, I suppose I can worry through it in some way, though no one will be more conscious than I of the defects of what I do.[19]

Taft was not pleased with his first Supreme Court argument, in a case about whether a federal rape statute applied in the Indian territory of Oklahoma. The justices, it seemed, had already formed their views. "The consequence was that they were not a very encouraging audience, and I did not think I acquitted myself well at all." It was late afternoon, and the justices were tired, and "I did not get the polite attention that I believe every counsel who appears before such a court is entitled to." Taft also "did not find myself as fluent on my feet as I had hoped to. I forgot a great many things I had intended to say and said some things that I need not have said." When the Court's opinion appeared, however, the justices sided with Taft.[20]

Taft's second argument was similar. He reported regretfully to his father that the justices

> seem to think that when I begin to talk that that is a good chance to read all the letters that have been waiting for some time, to eat lunch, and devote their attention to correcting proof, and other matters that have been delayed until my speech. However, I expect to gain a good deal of practice in addressing a lot of mummies and experience in not being overcome by circumstances.[21]

Taft was never easily discouraged. In a letter to a friend, Taft confessed that it was hard to

> change from the easy position of sitting on the bench to the very different one of standing on your legs before it, and I do not find myself at home as I had hoped to do in presenting one side of a case at court. However the fact that I find it difficult, and not particularly agreeable, is evidence that the medicine is good for me.[22]

By February 1891, after a year in Washington, Taft had argued eighteen cases: fifteen had been decided in his favor, two against, and one was not yet decided. "So you see that fortune has been good to me on the whole." His adversary in a recent case, Joseph Choate, one of the leading lawyers of his generation, had praised Taft's presentation. As for the justices, Taft now realized that they did not pay much attention to any of the advocates: "Everyone suffers in the same way. It is the custom of the Bench which I protest, not its treatment of me."[23]

During the two years that Taft was solicitor general, he argued or presented thirty-nine cases in the Supreme Court, and the United States prevailed in all but two of them. By any standard, that is a remarkable record of Supreme Court success.[24]

The McKinley Tariff Case

On the first of October 1890, President Harrison signed into law the McKinley tariff, known for its principal sponsor, House member and future president William McKinley. The law generally increased tariffs on imported goods, to protect American industries and workers; Republicans like Harrison and McKinley favored high tariffs, while Democrats opposed them. The McKinley law allowed free imports of sugar, coffee, tea, and hides, but authorized the president to suspend such free imports, and to collect duties on these products at rates specified in the law, on imports from any country that imposed duties on American agricultural products which the president "may deem to be reciprocally unequal and unreasonable."[25]

Within a few days, lawyers noticed a discrepancy between the bill signed by the president and the bill passed by Congress; the signed bill did not include section 30, regarding tobacco, that was in the version as it passed through Congress. This raised a question: was the bill unconstitutional because it did not comply with the requirement that legislation be passed in identical form by both houses of Congress and signed by the president? The Harrison cabinet, with Taft attending for the absent Miller, discussed this issue, and the next day Taft provided Harrison with a sixteen-page typed opinion letter. Taft was inclined to think that the Court would look at the journals of both houses, and thus feared that the Court might invalidate the tobacco parts of the law, but he expected that the Court would not invalidate the whole tariff law. Taft suggested, however, that Harrison urge a joint resolution of Congress to affirm the law as signed, and to remove any doubt.[26]

Before Harrison could make such a suggestion, however, leading importers in Chicago and New York sued the federal government, seeking to recover amounts they paid in duties under the new law. The importers argued that the law impermissibly delegated legislative power to the president (in the reciprocity section) and violated the constitutional requirements for legislation (with respect to tobacco). The lower courts decided in favor of the government, and the importers appealed to the Supreme Court, where Taft wrote the brief for the government.[27]

The *Chicago Inter-Ocean*, in a front-page article, described Taft's ninety-page brief as "voluminous" but none too long given "the important questions involved." On the discrepancy issue, Taft argued that the best evidence of the text of the law was the version (without section 30) as signed by the speaker of the House, the president of the Senate, and the president himself, in the files of the secretary of state. The Court should not consider other evidence, such as the records of congressional debates, which by their nature were less precise. Moreover, Taft asked rhetorically, "can it be said that because the two Houses approved something in addition to and in connection with what appears in the tariff act as enrolled, they did not approve that which now seems to be the law?" The answer was no. "The soundest public policy, good faith to sixty millions of people who have acted under the law, as well as the financial security of the Government, require that the act shall be sustained if it can be."[28]

On the delegation issue, Taft conceded that Congress could not delegate its legislative power to the executive. But, he argued, Congress had not done this; it had merely delegated to the president authority to ascertain whether foreign nations were providing reciprocity for American agricultural products.

> Congress legislated in the alternative. If the tariffs of the foreign countries are reciprocally reasonable and equal toward the productions of the United States or are made so, then the sugar, hides, coffee, and tea are to come in free; if the foreign tariffs are not so reciprocally equal and reasonable, then certain duties are to be imposed.[29]

The Supreme Court heard oral argument in the tariff cases over the course of three days, in late November and early December 1891. Such multi-day arguments were not unusual at the time and may explain why the justices did not pay as much attention as Taft would have liked. Miller and Taft presented the government's case; three different lawyers (for the three appellants) argued the other side. "Notwithstanding the great importance of the suits," one paper noted, "only a small audience listened to the argument."[30]

In February 1892, when the Supreme Court decided the McKinley tariff case, known as *Field v. Clark*, the justices agreed with Taft on all the issues. On the enactment question, the Court held that the authenticity of the version of the bill signed by the heads of the two houses of Congress and the president was "complete and unimpeachable." On the delegation question, the Court quoted an Ohio decision, saying that the "true distinction" was "between the delegation of power to make law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law." Congress could not delegate the power to make law, but it could delegate the implementation of laws, and could give some discretion to the executive within the law.[31]

When Taft was chief justice, in the 1920s, the Supreme Court faced a similar question, about whether a tariff act improperly delegated legislative power to the President. Writing for a unanimous Court, in *J.W. Hampton Jr. v. United States*, Taft declared that "if Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power." Among other cases, Taft relied on *Field v. Clark*, calling it "a case to which this Court gave the fullest consideration nearly forty years ago."[32]

When Congress passed a law creating the Circuit Courts of Appeal in 1891 and providing for an additional judge for each of the nine circuits, Taft was appointed to the Sixth Circuit. The impetus for the bill came from the overworked Supreme Court's huge backlog of cases, which the justices had a hard time chipping away at while doing double duty on circuit.

The Bering Sea Case

Americans and Canadians both harvested seals in the Bering Sea in the late nineteenth century, but they did so in different ways. The Americans generally went ashore on the small islands, driving and killing young male seals there. The Canadians hunted at sea, spearing seals with harpoons. Americans viewed the Canadian methods as wasteful, since they killed females and young pups, and wounded many more seals than they harvested.[33]

The dispute about the seals played out both in the frigid waters of the Bering Sea, where American revenue cutters sometimes seized Canadian ships, and among diplomats, who debated alternative approaches to protecting and harvesting the seals. Since Britain still handled foreign affairs for Canada, this debate was three-sided, with discussions in Washington, Ottawa, and London. Taft was involved at least once, for he wrote a friend in May 1890 that he was working on "a question of international law, with reference to the seal fisheries up in Bering Sea."[34]

In January 1891, while Miller and Taft were in the courtroom to argue another case, counsel for the Canadian government requested leave to file a petition in the Supreme Court seeking review of an Alaska district court decision arising out of the seizure of a Canadian seal-fishing vessel. Miller and Taft (who had been blindsided by the request) asked for and obtained a two-week period in which to review the petition and file their response. American newspapers viewed the British-Canadian petition as an "affront." The *New York Tribune* predicted that the Court would

> say that the questions raised by the petition are at the present time the subject of diplomatic negotiation; in other words, that another and coordinate branch of the government, the executive, is charged, under the Constitution, with the settlement of a dispute which is essentially a political one and which only incidentally presents a question of law.

Taft's view was similar; "Great Britain has departed from diplomatic courtesy in going by the Executive and State Department to the courts," he wrote to his father, "and I should not be surprised if they go out of the Court with a flea in their ear on this point."[35]

After "working like beavers" for two weeks, Miller and Taft presented the government's side of the case in late January. Joseph Choate and another lawyer argued the British-Canadian side. A few days later, in a very short opinion, the Court granted leave to file the petition, setting an April date for argument on whether the Court should grant the writ of prohibition, to direct the Alaskan district court to take no steps to enforce its decree condemning the Canadian ship.[36]

The Court postponed the oral argument in the Bering Sea case, however, first because of the illness of Attorney General Miller, then because of the illness of Justice Joseph Bradley. The parties finally argued the case in a crowded courtroom in November. In the course of his remarks, Taft hinted that the American and British governments had agreed to resolve the dispute through arbitration. When Justice Horace Gray interrupted to ask for more details, Taft "hesitated to reply, and intimated that perhaps he had revealed more than he (not being a cabinet officer and being authorized to speak only on legal questions) should have done." At this point, according to the newspapers, Miller "substantiated all that the solicitor general had said" and indeed "announced that the government had effected an arrangement."[37]

The Court's opinion in the case, delivered in February 1892, was a complete victory for Miller and Taft. The Court agreed that it was inappropriate, while diplomatic negotiations were in progress, for the Court to insert itself into an international dispute;

the Court also agreed that the attempted collateral attack (by way of a petition for a writ of prohibition rather than a simple appeal) was inappropriate. It took a while, but the result was as Taft predicted; the Court sent the British away with a "flea in their ear."[38]

The Quorum Case

On January 29, 1890, the Speaker of the House, Maine Republican Thomas Reed, caused commotion through a seemingly simple act: he counted, as part of the quorum, Democratic members who were present in the chamber but did not respond to the roll call. Before this time, members could avoid being counted by not answering the clerk's call. This practice meant that, in a closely divided House, the minority could often block bills they opposed. House Democrats were outraged by Reed's revolutionary change. When a Democrat insisted that Reed had no legal right to count him as present, Reed retorted that he was merely "making a statement of fact that the gentleman from Kentucky is present. Does he deny it?" There was laughter and applause from the Republican side of the House.[39]

Reed persisted and prevailed. In mid-February, right at the time that Taft arrived in Washington and started work as solicitor general, Reed and his narrow Republican majority passed a new set of House rules, confirming that it was up to the Speaker to determine whether there was a quorum, and that he could count for these purposes all those present in the House chamber.[40]

In May, the House voted on a minor tariff bill. Only 138 members, less than half, voted in favor of the bill. Speaker Reed, however, then named seventy-four members who were in the House but had not answered the clerk. He thus counted 212 members present, a quorum, and declared that the bill had passed. Predictably, importers challenged the tariff law in court, claiming that it was not valid because there was no quorum in the House.[41]

Taft, in his brief for the Supreme Court, argued that each house of Congress had broad authority, under the Constitution, to set its own rules, including rules about how to count a quorum. The Supreme Court, in a unanimous and oft-quoted opinion, agreed:

> The Constitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained. But within these limitations all matters of method are open to the determination of [each] house, and it is no impeachment of the rule to say that some other way would be better, more accurate, or even more just.[42]

Social Life in Washington

Although Taft was busy with work in the Supreme Court, and of the Justice Department more generally, he had an active social life in Washington. In April 1890, Taft and his wife Nellie were among the guests at the Supreme Court dinner at the White House. Taft reported to his father that they "had a pleasanter time than we expected to have" among the fifty guests, "a very brilliant assemblage." On another evening, Taft attended a "bachelor dinner" hosted by Justice Samuel Blatchford where the other guests included several justices, judges from the local courts, and leading lawyers. On New Year's Day, 1891, Will and Nellie Taft went together to the White House reception, and then Nellie Taft helped Mrs. Miller host a reception at the Miller house. The custom, at this time, was for each member of

the cabinet to host a reception on the first day of the year, and diplomats, legislators, would "make the rounds" of the various receptions. Taft, however, spent the afternoon in his office, "for I was in a hurry to get my briefs done."[43]

Taft had met Justice John Marshall Harlan at least once, when the justice visited Cincinnati on circuit duty, but the two men really got to know one another in 1890, when Taft arrived in Washington. Twenty-five years older than Taft, Justice Harlan had already served thirteen years on the Court. In September 1890, Harlan wrote Taft a note, asking him to come to his house. "I wish to confer with you about a matter of some importance to me." The next day, Harlan wrote Taft again, saying "I want to have another talk with you." Unfortunately, we do not know what this "matter of some importance" was.[44] A few months later, Taft wrote his father that he was busy drafting, at the justice's request, a sketch of Harlan's life for a centennial history of the Constitution. It was hard work, Taft wrote, for it required "examination of a great many cases," but Harlan "had been very kind to me," and "I feel as if anything I could do for him was only repaying the interest he has taken in me since I have been here." The two men would remain close until Harlan's death in 1911.[45]

Taft had cordial if less close relations with Chief Justice Melville Fuller. In April 1890, Taft wrote Fuller to thank him for a gift of Easter lilies. When Fuller's daughter was married, Taft and his wife Nellie were invited only to the church service, not to the reception, so they did not attend. The next day, in the Supreme Court, Fuller sent Taft a note, to say that he had missed seeing the Tafts and "to ask whether there had been any blunder about the invitation." Taft explained and "expressed my pleasure that he should have noticed our absence."[46]

Taft worked closely and congenially with Attorney General Miller. In the summer of 1890, when both Mrs. Taft and Mrs. Miller were away, Taft wrote to Nellie from Miller's house, explaining that he was going to spend the night there, because Miller was suffering from stomach cramps. "I know what it is to be attacked in the stomach at night all alone," Taft wrote, "and even though I could probably do no good the fact of the presence of a friend is reassuring." A few months later, Taft wrote that Miller was "a very satisfactory man to work under. He is positive, direct, and sincere, and expresses his approbation when he feels it and his disapprobation in the same way." In early 1892, on his last day in the office, Taft wrote a warm thank you letter to Miller. "The two years I have spent under you in Washington have been full of pleasure and profit to me. No man ever received more considerate treatment from another than I have from you."[47]

Taft also met, while he was in Washington, Theodore Roosevelt, at the time a member

Nellie Taft opposed her husband accepting the Sixth-Circuit judgeship position. "She thinks it is a sort of shelving for life," Taft told his father. "If it comes to me I shall certainly take it," he continued, "for I like judicial life, and there is only one higher judicial position in the country than that."

of the Civil Service Commission. In August 1891, Roosevelt sent Taft a letter, first posing a legal question for the Commission, then telling him of the birth of his daughter, and then asking: "Can you dine with me, in the most frugal manner, Friday night at 8 o'clock, at 1721 Rhode Island Avenue?" This is the only known letter between the two men, however, during the two-year period that Taft lived and worked in Washington—and both men were careful about keeping copies of their correspondence. Nor did Taft mention Roosevelt in any of his surviving letters to family and friends. So although the two men knew one another, they were not close friends at this point in their lives.[48]

Taft's two years in Washington were hard for him personally. His father and mother were living in San Diego, California, because his father was in poor health. In the spring of 1891, summoned by his mother, Taft went to see his dying father. "I write in the house of impending death," Taft reported to his wife Nellie on May 16, adding that "father's wonderful vitality may continue the struggle for life days longer." Taft was at his father's side when he died on May 21, then returned by train to Cincinnati, for the simple Unitarian funeral service there.[49]

Taft was also separated from Nellie for much of this two-year period. Like most Washington wives at the time, Nellie left in the summer of 1890, spending weeks at a seaside resort in Massachusetts. She left again in the summer of 1891, to go home to Cincinnati to give birth to a daughter, Helen. Nellie and the children remained in Cincinnati, it seems, for the remainder of Taft's time in Washington.[50]

Appointment to the Sixth Circuit Court of Appeals

A few years before Taft arrived in Washington, *Puck* published an image of the "overworked Supreme Court," showing the justices deluged with paper in various cases. The situation was even worse by the time Taft arrived: the Court was about three years behind, with more than 1,800 cases on its docket. Members of the Court and Congress were discussing various options to reduce the workload, including the possibility that the Court would decide some cases by panels of three justices, rather than by the whole Court. One factor slowing the work of the Court was that the justices also had to "ride circuit," sitting as part of the circuit courts around the nation, and thus had less time together in Washington for Supreme Court work. The work of these circuit courts was mainly trial work; there was no general system of intermediate courts between the district courts and the Supreme Court.[51]

In February 1890, the Senate Judiciary Committee requested the views of the Supreme Court on the various pending proposals. The Court responded with a formal letter, endorsing some changes, including the creation of intermediate federal courts, the appointment of additional circuit court judges, and limiting appeals to the Supreme Court, so that diversity cases would not be considered "unless the Court of Appeal, or two judges thereof, certify that the question involved is of such novelty, difficulty, or importance as to require a final decision by the Supreme Court."[52]

Discussion continued until March 1891, when Congress passed a law creating the Circuit Courts of Appeal and providing for an additional judge for each of the nine circuits. A few days after the law passed, Taft wrote to his father that there were many candidates for the nine new federal judgeships, and that some of his Cincinnati friends had already written Harrison, urging him to appoint Taft for the Sixth Circuit—the circuit which included Ohio. "Nellie is very much opposed to my taking it. She thinks it is a sort of shelving for life. If it comes to me I shall certainly take it, for I like judicial life, and there is only one higher judicial position in the country than

that." He thought his chances of the appointment, however, were slight.[53]

A week later Taft listed some of those who were supporting his candidacy, including Miller and Harlan. Explaining why he would accept, in spite of his wife's views, he said: "Federal judgeships like that don't lie around loose, and if you don't get them when you can, you will not get them when you would."[54]

By April, Taft was more hopeful, reporting that McKinley told him, although Harrison would not yet commit to appointing Taft,

> he was inclined in that direction; that he thought my age was an advantage; that I was clear-headed and courageous, and so was the bent of his mind. Of course, he may change his mind and conclude that somebody else is better fitted for the place, or that he wants me to stay here. In any event, I shall be philosophical; but I am sure that the best thing for me is to accept the place if it comes my way.[55]

Nellie remained opposed. Writing to her husband from Cincinnati in July, she said: "Think of your going off on a trip with two cabinet officers! If you get your heart's desire, my darling, it will put an end to all the opportunities you now have of being thrown with the bigwigs."[56]

In December 1891, when Harrison named six judges for the new courts, Taft was his choice for the Sixth Circuit. Many papers praised Taft, with the *Cincinnati Enquirer* saying that "in every capacity he has displayed marked ability, his chief characteristics being his unvarying good nature and his deep sense of fairness. Possessed of a well-balanced mind, his capacity for work is practically unlimited, for behind his mental power is the robust, rugged frame of a giant."[57]

Some of the other nominations, including that of George Dallas for the Third Circuit, were controversial. As a result, the Senate moved slowly, at least by nineteenth century standards, in considering all the nominations. It was not until March 1892 that the Senate confirmed the nomination. "I feel so good over the confirmation," Taft wrote his wife, "and the prospect of seeing you and the babies that I could hurrah for joy."[58]

Conclusion

In 1915, in an article in *National Geographic*, Taft recalled looking in 1890 out of the clerk's window in the Capitol building, at the beautiful

> sweep from the Capitol down to the Monument, thence to the shining bosom of the Potomac beyond, and across to the Arlington hills. That is now a quarter of a century ago, and my love for Washington and my intense interest in securing from Congress the needed legislation and appropriations to bring out its incomparable beauties have never abated.[59]

Taft's knowledge of Washington, in all its curious and contrary ways, started in 1890, when he started his work as solicitor general. Young Taft learned his way not just around the Supreme Court, but also around the halls of Congress and the corridors of the White House. Taft was more than a Supreme Court advocate; he was a senior member of the Harrison administration. Watching President Harrison, advising and talking with him and others in the administration, helped prepare Taft for his own four years in the White House. Watching Chief Justice Fuller, not just in hearing and deciding cases but also in lobbying Congress, helped prepare Taft for his own nine years as chief justice.[60]

ENDNOTES

[1] Taft to Alphonso Taft, Aug. 1889, Taft Papers, Library of Congress, reel 17; Taft to Alphonso Taft, Aug. 1889, Henry Pringle Papers, Library of Congress; *Cincinnati Post*, Aug. 21, 1889; *Washington Evening Star*, Aug. 21, 1889; *Cincinnati Enquirer*, Aug. 22, 1889. The quoted part of the letter is in the Pringle Papers.

[2] Taft to Alphonso Taft, July 20, 1889, Taft Papers, reel 17; Taft to Alphonso Taft, Aug. 10, 1889, *ibid.*; Taft to Alphonso Taft, Aug., 1889, *ibid.*; Taft to Joseph Foraker, Sept. 17, 1889, Foraker Papers, Library of Congress; Joseph Foraker to Benjamin Harrison, Sept. 23, 1889, *ibid.*

[3] *N.Y. Times*, Dec. 5, 1889 (Brewer appointment); *Baltimore Sun*, Jan. 20, 1890 (death of solicitor general); *Cincinnati Enquirer*, Jan. 31, 1890 (Taft appointment).

[4] For Taft's life to this point, see Henry Pringle, The Life And Times Of William Howard Taft (1939).

[5] *Cincinnati Enquirer*, Jan. 31, 1890; *N.Y. Sun*, Jan. 31, 1890; *Pittsburgh Press*, Jan. 31, 1890.

[6] Joseph Foraker to Taft, Jan. 31, 1890, Taft Papers, reel 30.

[7] Helen Herron Taft, Recollections of Full Years, 25 (1914); *Washington Evening Star*, Feb. 15, 1890. For Taft dictating these paragraphs of his wife's memoir, see Taft diary, July 16, 1913, Taft Papers, reel 607.

[8] Taft, Recollections, 25.

[9] Act of June 22, 1870, ch. 150, 16 Stat. 162; Cong. Globe, 41st Cong., 2d Sess. 3035 (1870); *see* Seth Waxman, *Twins at Birth: Civil Rights and the Role of the Solicitor General*, 5 Indiana L.J., 1299–1300 (2000).

[10] Revised Statutes, sections 162, 163 (1878); *see* Charles Fahy, *The Office of the Solicitor General*, 28 American Bar Ass'n J. 20–30 (1942).

[11] Taft to Alphonso Taft, Feb. 10, 1891, Taft Papers, reel 17; William Hughes to Samuel Luccock, May 4, 1891, *ibid.*, reel 463.

[12] Taft to Charles Taft, May 2, 1890, Pringle Papers; Taft to Alphonso Taft, May 6, 1890, *ibid.*; Alphonso Taft to Taft, May 21, 1890, Taft Papers, reel 17 ("call every evening"); Taft to Benjamin Harrison, Sept. 20, 1890, Harrison Papers, Library of Congress; Taft to Benjamin Harrison, Oct. 18, 1890, Taft Papers, reel 463; Taft to Alphonso Taft, Apr. 18, 1891, *ibid.*, reel 17; *Philadelphia Times*, June 7, 1891; Taft to A.L. Spaulding, July 23, 1891, Taft Papers, reel 463.

[13] Taft to Alphonso Taft, Feb. 10, 1891, Taft Papers, reel 17.

[14] Taft to Alphonso Taft, Apr. 18, 1891, *ibid.*

[15] Taft to Alphonso Taft, Feb. 14, 1891, *ibid.*

[16] See David Thompson & Melanie Wachtell, *An Empirical Analysis of Supreme Court Certiorari Procedures: The Call for Response and the Call for the Views of the Solicitor General*, 16 Geo. Mason L. Rev. 237 (2009).

[17] Judiciary Act of 1925, Pub. L. No. 68–415, 43 Stat. 936; see Edward Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 Colum. L. Rev. 1643 (2000); Robert Post, *The Incomparable Chief Justiceship of William Howard Taft*, 2020 Mich. State L. Rev. 68–87.

[18] Taft to Alonzo Meyers, May 2, 1890, Taft Papers, reel 17; see Lincoln Caplan, The Tenth Justice and the Rule of Law (1988); Louis Fisher, *Is the Solicitor General an Executive or Judicial Agent?*, 15 L. & Soc. Inquiry 305 (1990); John McGinnis, *Principle Versus Politics: The Solicitor General's Office in Constitutional and Bureaucratic Theory*, 44 Stanford L. Rev. 799 (1992).

[19] Taft to Alphonso Taft, Feb. 14, 1891, Taft Papers, reel 17.

[20] Taft to Alphonso Taft, Apr. 18, 1890, Pringle Papers; Taft to Hiram Peck, Apr. 26, 1890, Taft Papers, reel 640; *In re Lane*, 135 U.S. 443 (1890).

[21] Taft to Alphonso Taft, May 6, 1890, Pringle Papers.

[22] Taft to Paul Charlton, Apr. 23, 1890, Taft Papers reel 17.

[23] Taft to Alphonso Taft, Feb. 10, 1891, *ibid.*

[24] These numbers are based on a review of reported cases in the United States reports.

[25] McKinley Tariff, Oct. 1, 1890, 26 Stat. 567 (quoted language 612).

[26] Taft to Benjamin Harrison, Oct. 18, 1890, Taft Papers, reel 463; *Pittsburgh Dispatch*, Oct. 24, 1890 (NY importers intend to challenge McKinley Tariff).

[27] *Field v. Clark*, 143 U.S. 649, 672, 693–94 (1892).

[28] *Chicago Inter-Ocean*, Oct. 25, 1891; Solicitor General Brief, *Field v. Clark*, 143 U.S. 649 (1892), quoted language page 43.

[29] Solicitor General Brief, *Field v. Clark*, 143 U.S. 649 (1892), quoted language page 87.

[30] Supreme Court Minutes, Nov. 29–30 and Dec. 1, 1891; *St. Paul Globe*, Dec. 1, 1891.

[31] *Field v. Clark*, 143 U.S. 649, 693–94 (1892).

[32] *J.W. Hampton Jr. v. United States*, 276 U.S. 394, 410 (1928).

[33] Helen Cowie, *Seals, Science and Nations*, British Library Sci. blog (Aug. 25, 2015), https://blogs.bl.uk/science/2015/08/seals-science-and-nations-.html.

[34] Taft to Hiram Peck, May 15, 1890, Taft Papers, reel 640; see Alphonso Taft to Taft, May 21, 1890, Taft Papers, reel 17.

[35] *Chicago Inter-Ocean*, Jan. 14, 1891; *N.Y. Tribune*, Jan. 14, 1891; Taft to Alphonso Taft, Jan. 23, 1891, Taft Papers, reel 17.

[36] Taft to Alphonso Taft, Jan. 23, 1891, Taft Papers, reel 17; *Norfolk Virginian-Pilot*, Jan. 28, 1891; Taft to Alphonso Taft, Feb. 9, 1891, Taft Papers, reel 17; *In re Cooper*, 138 U.S. 404 (1891).

[37] Taft to Alphonso Taft, Apr. 18, 1891, Taft Papers, reel 17; *Sacramento Record Union*, Apr. 26, 1891; *Memphis Appeal-Avalanche*, Nov. 11, 1891; *St. Paul Globe*, Nov. 11, 1891.

[38] *In re Cooper*, 143 U.S. 472 (1891); Taft to Alphonso Taft, Jan. 23, 1891, Taft Papers, reel 17.

[39] *N.Y. Times*, Jan. 30, 1890; James Grant, Mr. Speaker! The Life and Times of Thomas B. Reed, 259–63 (2011).

[40] *N.Y. Times*, Feb. 15, 1890; Grant, Mr. Speaker!, 268–69.

[41] *United States v. Ballin*, 144 U.S. 1, 1–3 (1892).

[42] *Newton Daily Republican*, Nov. 30, 1891 (quoting Taft's brief); *United States v. Ballin*, 144 U.S. 1, 5 (1892). The phrase "fundamental rights" did not yet have the sense it would later have, as the Supreme Court gradually applied the Bill of Rights to the state governments. Here, the Court seems to be referring to "fundamental rights" of legislators that could not be denied by rules.

[43] Taft to Alphonso Taft, Apr. 18, 1890, Pringle Papers; Taft to Alphonso Taft, Jan. 6, 1891, Taft Papers, reel 17.

[44] John Harlan to Taft, Sept. 12, 1890, Taft Papers, reel 17; John Harlan to Taft, Sept. 13, 1890, *ibid.*

[45] Taft to Alphonso Taft, Mar. 31, 1891, *ibid.*

[46] Taft to Melville Fuller, Apr. 10, 1890, Fuller Papers, Library of Congress; Taft to Alphonso Taft, Jan. 6, 1891, Taft Papers, reel 17.

[47] Taft to Nellie Taft, Aug. 27, 1890, Taft Papers, reel 23; Taft to Alphonso Taft, Feb. 14, 1891, *ibid*. reel 17; Taft to William Miller, Mar. 1892, *ibid.*; William Miller to Taft, Mar. 18, 1892, *ibid*. reel 637.

[48] Theodore Roosevelt to Taft, Aug. 19, 1891, in 1 The Letters of Theodore Roosevelt, 334–35 (Elting Morison, ed., 8 vols., 1951–54); cf. Doris Kearns Goodwin, The Bully Pulpit: Theodore Roosevelt, William Howard Taft, and the Golden Age of Journalism, 135–36 (2013).

[49] Taft to Nellie Taft, May 16, 1891, Taft Papers, reel 23; *Cincinnati Enquirer*, May 22 & 29, 1891.

[50] Nellie Taft to Taft, Aug. 18, 1890, Taft Papers, reel 23; Nellie Taft to Taft, July 18, 1891, *ibid*.; Taft to Nellie Taft, Mar. 17, 1892, *ibid*.

[51] Jonathan Sternberg, *Deciding Not to Decide: The Judiciary Act of 1925 and the Discretionary Court*, 33 J. of S. Ct. Hist. 4 (2008).

[52] Supreme Court Justices to Senate Judiciary Committee, Mar. 12, 1890, reprinted in Walter Murphy, Elements of Judicial Strategy, 228–30 (1964).

[53] Act of March 3, 1891, 26 Stat. 826; Taft to Alphonso Taft, Mar. 7, 1891, Taft Papers, reel 17.

[54] Taft to Alphonso Taft, Mar. 18, 1891, Taft Papers, reel 17.

[55] Taft to Alphonso Taft, Apr. 18, 1891, *ibid.*

[56] Nellie Taft to Taft, July 18, 1891, Taft Papers, reel 23.

[57] *Cincinnati Enquirer*, Dec. 17, 1891; *Chicago Tribune*, Dec. 17, 1891.

[58] *St. Louis Globe-Democrat*, Dec. 17, 1891; *Wichita Weekly Eagle*, Jan. 22, 1892; Taft to Nellie Taft, Mar. 17, 1892, Taft Papers, reel 23.

[59] Taft, *Washington: Its Beginning, Its Growth, Its Future*, 28 Nat'l Geographic 221 (1915).

[60] See Lewis Gould, The William Howard Taft Presidency (2009); Robert Post, *The Incomparable Chief Justiceship of William Howard Taft*, 2020 Mich. St. L. Rev. 1.

The Bronze Doors, or A Tribute to the Legitimacy and Endurance of the Written Rule of Law

Charles Eskridge and Jack DiSorbo

Introduction

On October 7, 1935, the Bronze Doors opened for the first time to welcome oral argument in the new sanctuary of the Supreme Court. Established by the Constitution as the court of last resort in the federal legal system, the Court has long seen America's preeminent advocates argue the most trenchant legal issues of the day before the nation's highest judges. Hailed by many as the "Marble Palace," the building befits the institution.

The Bronze Doors at the front entrance stand seventeen feet tall. A much-admired feature, each includes four panels measuring approximately thirty-eight square inches. These were intended as far more than mere decorative flourishes. As described by the United States Supreme Court Building Commission at the conclusion of a decade-long design and building project, "The panels in the main entrance doors are ornamented . . . in high relief . . . to show the history of the law."[1] Thus, the threshold tells an eight-part story of signal moments in the development of law across millennia that inform the design of our judiciary and general government.

But the stories aren't discerned on first glance. Nor have they been told in any considerable detail—and certainly not in any way connecting them as steps along the same path. The aim of this article, then, is to provide that richer background and context. For with rightful appreciation, the Bronze Doors do more than quietly guard the entrance to the Supreme Court. They are a symbolic cornerstone to the building itself, reminding us that the very act of writing down the law, and decisions under the law, is what principally grants legitimacy and endurance to the idea we now understand as the protections guaranteed by the rule of law.

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The Designers and Their Design

In its final report, the Supreme Court Building Commission stated: "The scale of the building is such as to give it dignity and importance suitable for its use as the permanent home of the Supreme Court of the United States."[2] It wasn't always so. For the first one hundred and fifty years of the American experience, the justices held court in the Capitol, in space borrowed from Congress. They even heard cases in a private residence for four years after the Capitol was damaged in the War of 1812. But Congress eventually commissioned what's now one of the nation's classic and most recognizable landmarks.

Chief Justice William Howard Taft served as chairman of the Commission from its inception in 1928 until his untimely death in 1930.[3] He cared deeply about the building's construction, having already resided in another architectural treasure—the White House—as the country's twenty-seventh president. Intimately involved in many aspects of the project, selection of his longtime friend, Cass Gilbert, as the lead architect was perhaps his finest decision.[4]

Gilbert was recognized nationally for Beaux Arts classicism well before this commission. His earlier work included the Alexander Hamilton U.S. Customs House, the Treasury Annex, the Essex County courthouse, a number of churches and libraries, and the state capitol buildings of Minnesota, Arkansas, and West Virginia.[5] Gilbert's own passing in 1934, mere months before completion of the Supreme Court Building, ultimately proved it to be the culmination of all that his skill, learning, and experience could bring to bear. Chief Justice Charles Evans Hughes esteemed it at the time as "the last monumental work of his career," one that "will be a lasting memorial to his great ability, which placed him in the front rank of architects not only of this country but of the entire world."[6]

For his part, Gilbert selected the architectural sculpting firm of John Donnelly, Inc., comprised of the father-and-son team of John Donnelly, Sr. and Jr. This was in many ways an obvious choice, with the elder already Gilbert's close friend and the younger a preeminent sculptor. Gilbert had worked with both previously, and the three were deeply committed to each other. Indeed, Gilbert never really considered hiring anyone else for the project. At one point, several members of the Commission suggested pursuing a competitive bidding process, but an opportune letter to Senator Robert Wagner of New York reminded the commissioners, "Mr. Donnelly is the only architectural sculptor whose models are acceptable to such architects as Cass Gilbert." The project called for utmost quality, said the letter, untethered to concerns over price:

> This, you will see by giving the matter a little thought, is putting what is actually art work on a trade basis, something that is never resorted to in monumental or high-class building. To have the United States Supreme Court building sculpture created on this basis leading architects and sculptors regard as unthinkable. . . . Competition in work of this kind, of course, means that the cheapest and most unqualified competitor is likely to submit the lowest bid and produce the lowest type of work.[7]

Gilbert's trust in the Donnellys was well-placed. Renowned in their own right, they were responsible in New York City alone for sculpting the clock on top of Grand Central Station, the main altar for St. Patrick's Cathedral, and much or all ornamentation and carving at the Federal Courthouse, Riverside Church, and the New York Public Library, to say nothing of their work at many other private buildings and mansions. In the nation's capital, their previous work included much of the exterior sculpting of the National Archives Building and the Department

of Justice. And whether completely accurate or not, the elder Donnelly's obituary in *The New York Times* in 1947 noted that his company "was reported at one time to have done about 90 per cent of all the stone carving work in Washington."[8]

Simply to list the past projects of Gilbert and the Donnellys is to understand that historical grounding was an integral aspect of their work. The new Supreme Court building was no different. Gilbert intended the whole as an homage to legal history, with focus upon the protection of the law as seen in persons and lessons significant to its development. Each of the building's architectural features thus became its own separate project, rich with symbolism and historical allusion. The interrelated statues and carvings placed with the entrance, pediments, great hall, and courtroom friezes are rigorously researched and detailed. The observant visitor will find references to Moses, Hammurabi, Solomon, Confucius, Octavian, Muhammad, Charlemagne, Grotius, Blackstone, and Napoleon—even to the Tortoise and the Hare of **Aesop's Fables**. Also found are the personification of such concepts as *Liberty Enthroned*, *Authority of Law*, *Contemplation of Justice*, *Light of Wisdom*, *Right of Man*, *Justice Tempered by Mercy*, and more.

But even the lesser-seen features and spaces are steeped in legal history. The retention of John Donnelly, Inc. included their design and sculpting of various models for placement throughout and around the building. For example, as subtle medallions affixed to the upper corners of the building's exterior, the Donnellys suggested profiles of Aristotle, Demosthenes, Plato, Cicero, Gaius, Julian, Paul, and Ulpian—with Gilbert ultimately substituting only Hammurabi and Moses for Paul and Ulpian.[9] Likewise, when designing figures for the great Reading Room of the third-floor library, the Donnellys proposed a number of ornamental wood carvings to highlight great English and American judges and legal thinkers, such as Bentham, Blackstone, Bracton, Coke, Bacon, Marshall, Kent, Story, and Holmes.[10] Gilbert eventually preferred that the focus instead be upon Greek and Roman figures, with the final list as rendered by the Donnellys being Draco, Solon, Labeo, Capito, Sabinus, Proculus, Pomponius, Papinian, Paul, Ulpian, Justinian, and Modestinus.[11]

Gilbert and the Donnellys ultimately succeeded in such spectacular fashion that appreciation of the scope and scale of their undertaking is difficult to grasp.[12] But this close attention to detail ensured that a building rich in historical and legal symbolism would upon completion take its own place in the continued development of the rule of law.[13]

The main entrance naturally demanded its own esteemed treatment. This proceeded originally from an elemental, two-page proposal by John Donnelly, Jr. to Cass Gilbert on September 27, 1932.[14] Entitled *Theme for Bronze Entrance Doors*, the Donnellys envisioned two doors, each comprised of four panels:

> The four panels on the left beginning at the bottom present factors or turning points in the history of law in classic times—all of which are typical of all law. . . .
>
> The four panels on the right, also beginning at the bottom, present crucial events in the development of the "Supremacy of Law" in our own system—that supremacy of law of which the Supreme Court and its rulings on the constitutionality of statutes are the embodiment, and which make the Supreme Court the most important tribunal in the world.[15]

Such proposal was in keeping with a long architectural tradition of placing monumental doors of bronze at the threshold of prominent buildings. The original doors of the Pantheon in Rome are among the oldest surviving examples, dating to 126 AD.[16]

Standing twenty-four feet high, its eight panels were no more than decorative renderings. Equally massive, and similarly ornamental, were the Imperial Doors of the *Hagia Sophia* in Constantinople, which date (according to one assessment) to the mid-sixth century.[17]

But doors of this kind later came to adorn many Medieval cathedrals and Renaissance churches, while eventually evolving to include sculpted images that evoke lessons central to what happens within. Perhaps most famous from the Renaissance period are Lorenzo Ghiberti's *Gates of Paradise*, which serve as the east doors of the Baptistery of Saint John in the Piazza del Duomo in Florence. Ten panels depict scenes and figures from the Old Testament—Adam and Eve, Cain and Abel, Noah, Abraham, Issac with Esau and Jacob, Joseph, Moses, Joshua, David and Goliath, and Solomon and the Queen of Sheeba. These are interpreted as "an exposition on faith" that "condense[s] the story of the loss of Paradise and return to it."[18]

Chief among those of the Neo-Classical revival are the *Madeleine Doors* by Henri de Triqueti at the Church of Sainte Marie Madeleine in Paris, dating to 1828. A major influence on Gilbert, merely to see a picture of the famous church is immediately to understand that he drew significant inspiration from the temple section of the building, including its signature doors.[19] Their eight panels comprehend monumental illustration of the Ten Commandments linked to biblical narrative, such as *King David and Bathsheba* (adultery) and *The Banishment of Cain* (murder).[20]

Deployment of bronze doors of such sweep and scope naturally came to America with the building of permanent, metropolitan churches and cathedrals.[21] They also began to grace the thresholds of major national institutions. Perhaps most prominent are the several sets at the United States Capitol. First were the *Columbus Doors* by Randolph Rogers in 1863. These open to the Rotunda and depict scenes from the life of Christopher Columbus. Next came the doors of the Senate and House chambers, designed by Thomas Crawford in the years just before his death in 1857. American sculptor William Henry Rinehart then simultaneously executed both models, with the Senate doors ultimately placed in 1868 and the House doors not installed until 1905. Between them, they depict sixteen scenes from the Revolutionary War and major events in early America, including the first public reading of the Declaration of Independence, the battles of Bunker Hill and Yorktown, and Washington's *post bellum* farewell to his troops in New York and first inauguration as president. The list must also be rounded up to include the *Amateis Doors*, eponymously named for sculptor Louis Amateis in 1903. Depicted are nine scenes focusing on the arts, sciences, and agriculture. Intended for use in the grand resetting of the West Front of the Capitol, they never found a proper home after legislation for the larger project failed. Now occasionally referred to as *The Doors to Nowhere*, they hang in the Crypt, placed directly in front of a solid wall.

The Donnellys extended this tradition to the Supreme Court and personally oversaw the casting of the Bronze Doors by The General Bronze Corporation on Long Island.[22] The recommendations with their original proposal to Cass Gilbert ultimately solidified as, on the left, *Shield of Achilles*, *Praetor's Edict*, *Scholar and Julian*, and *Justinian Code*, and, on the right, *Magna Carta*, *Statute of Westminster*, *Coke and James I*, and *Story and Marshall*. But the Donnellys didn't explain themselves as to these in any great level of detail. Their memo devoted only a spare sentence or two to description of each, all of which are excerpted as an introduction with each panel below. Plainly, though, Gilbert and the Donnellys set out to design doors that capture the sweep of human experience under law. And the overarching theme is unmistakable: the power and permanence of the written rule of law.

I. Shield of Achilles (c. 760 BC)

> The origin of law and custom: The scene on the shield of Achilles: Two men dispute before the elders. Two gold coins rest on a slab of stone, to be given to the old man who speaks the "straightest judgment." This is the most famous representation of primitive law.
>
> John Donnelly, Jr.
> to Cass Gilbert

The Shield of Achilles isn't an epochal moment in the law on par with the likes of Magna Carta. The First Panel instead draws from what's at best a minor reference within the sweep of Homeric tradition. Still, the depiction of the Greek *agora* cast upon that legendary shield is a fitting start to the historical path traced by the Bronze Doors. For with it comes, in the Donnellys' words, evocation of the "origin of law and custom" with formal judicial proceedings at the very beginning of the path toward the rule of law.

As told by Homer, Achilles loaned his armor in the midst of the Trojan War to his childhood friend, Patroclus. But, aided by Apollo, Hector defeated Patroclus and kept the armor as spoils, leaving Achilles defenseless. Thetis, the mother of Achilles, thus appealed to Hephaestus, the mythical blacksmith to the gods, to forge new armor for her son. Hephaestus was also the Greek god of artisans, metalworking, and fire, and the shield he forged for Achilles was said to be resplendent with many detailed inscriptions, including a version of the *agora*.[23]

Agora translates from the Greek as *public forum*, while also referring essentially to a formal process for resolving private disputes.[24] The shield of Achilles notably juxtaposed two cities in this regard—one at peace, the other at war. In the city at peace, young men and women sing and dance at a wedding feast. The citizens respect the process of law, and order holds. In the city at war—being Troy itself—the shield "depicts war, ambush, siege, and death. There is strife even among the besiegers, half of whom want to sack the city while half want to settle for ransom."[25]

Within Homer's telling, the story itself comes in a moment of respite between periods of intense fighting. With the conflict halted, the narrator contemplates themes of war and peace, as reflected in the shield's inscriptions. This is the moment captured by the First Panel. Two men argue before the elders in the Greek *agora* of the city at peace, with the first having killed a kinsman of the second, the second refusing as inadequate an offer of reparation, and the two gold pieces offered on the stone altar between them to go to the elder who enunciates the accepted resolution. And so proceeds to judgment a question on the value of life itself:

> A crowd, then, in a market place, and there
> two men at odds over satisfaction owed
> for a murder done: one claimed that all was paid,
> and publicly declared it; his opponent
> turned the reparation down, and both
> demanded a verdict from an arbiter,

as people clamored in support of each,
and criers restrained the crowd. The town elders
sat in a ring, on chairs of polished stone,
the staves of clarion criers in their hands,
with which they sprang up, each to speak in turn,
and in the middle were two golden measures
to be awarded to him whose argument
would be the most straightforward.[26]

As more directly understood with historical detail, when parties in ancient Greece couldn't settle a dispute, they took it to the public forum. Each would there find an elder to act as arbiter and propose an acceptable settlement on the litigant's behalf. Each elder would take a scepter, indicating it was his turn to speak, and suggest a solution to the dispute. The two elders exchanged and varied proposals, trying to satisfy the parties and vying for the attending crowd's approval. The final resolution was part legal decision and part agreed settlement, requiring not only its agreeability to the two opponents, but also on its support from the crowd with the input and wisdom from the elders—with the prevailing elder also entitled to modest payment.[27]

Whether Homer accurately captured the precise legal character of the scene isn't the point. The ancient process itself is what's important, with the rule of law symbolically defending against an otherwise all-too-human impulse toward revenge and violence.[28]

Many have studied these stories, including William Wirt, the ninth, and to this day longest-serving, attorney general.[29] He alluded to the tension between the cities at war and at peace in his powerful argument to the Supreme Court in *Gibbons v. Ogden*.[30] At issue was a New York law granting a monopoly to New York businessmen as to commerce along New York waters. This incensed navigators in New Jersey and Connecticut, as trade and travel by river among the three states was common. It also threatened to start a monopoly arms race, whereby each would enact similar protectionist measures to the detriment of national unity. A lawsuit brought in New York argued that the law purported to regulate interstate commerce in violation of the Commerce Clause.

Once arrived at the Supreme Court, Wirt argued against the New York law on behalf of the United States. Rather than Homer, he referred instead to Virgil and *The Aeneid*. Recalling the Trojan hero Aeneas, who (as the epic poem goes) would in time be progenitor of the Romans, Wirt said:

> There [Aeneas] saw the sons of Atreus and Priam, and the fierce Achilles. The whole extent of his misfortunes—the loss and desolation of his friends—the fall of his beloved country, rush upon his recollection.
>
> . . .
>
> History is full of the afflicting narratives of such wars, from causes far inferior; and it will continue to be her mournful office to record them, till time shall be no more. It is a momentous decision which this Court is called on to make. Here are three States almost on the eve of war. It is the high province of this Court to interpose its benign and mediatorial influence.[31]

This distillation of order from chaos is a lesson fundamental to the rule of law. In the city at peace, law ensures the regulated resolution of disputes and prevents further violence. By contrast, bloodshed ravages a society bereft of the law's stabilizing effect in the city at war. This by no means suggests

that law *prevents* the commission of wrongs. Crime and recrimination arise from the fallible nature of man and human passion. And so, even murder visits the city at peace in Homer's recitation above. The difference is whether those citizens within each of the cities will trust in and submit to procedures by which to resolve those disputes and to rectify such wrongs.

Long ago written down as a first step in the progress toward the rule of law, the ancient process cast in the First Panel echoes in our litigation procedures to this day. Who should create that law, what form it should take, and what its substance should be, are lessons committed to the succeeding Panels.

II. Praetor's Edict (c. 300 BC)

> The importance of the judges' work. The Praetor publishes his edict establishing judge-made law in Rome.
>
> John Donnelly, Jr. to Cass Gilbert

The Second Panel is another obscure choice, one not widely familiar even to a lawyerly audience. But it addresses an early innovation in the continuity and stability of judicial proceedings—the praetor's edict. With it came a tradition of making permanent society's understanding of the requirements of law simply by writing them down.[32]

The Roman Republic formally commenced in 509 BC with a coup by the wealthy, thus expelling several centuries of rule by a series of kings. There followed a ruling oligarchy comprised of the upper class. The civil laws were first codified by what were known as *the XII Tables*. These prevailed nearly five hundred years with at least intention to guarantee a certain equality among Rome's people. But the Roman Empire also dramatically expanded in size through almost constant war during the second and third centuries BC. The historic procedures, prohibitions, and penalties of the XII Tables then came to be applied with rigidity, often yielding formalistic and inflexible results. In short, the laws were stale, and disparities were widespread.[33]

The office of *praetor* had been established in 367 BC as a very high government position. Elected to annual terms, the praetors initially acted as deputies to *consuls*, who were involved in all governance functions. But the expansion of Rome's territory and military operations required more and more of the consuls' attention, shifting responsibility for the administration of the civil laws to the praetors. And so over time, the praetors began to directly supervise the civil courts that managed the affairs of Roman citizens.[34]

A praetor administered the judicial system without himself being a judge under historical litigation procedure. Even so, praetors began to decide which formulae pertained to certain cases—specifying what must be proven to succeed on a claim in court. In this way, the praetor would determine "whether such claims and defenses involved any right or interest worthy of protection and therefore warranting trial."[35] If so, the litigation would proceed before a judge to adjudicate the merits, often with further guidance and instructions from the praetor. Accordingly, while a

praetor didn't decide the actual winners and losers, his preliminary role substantially affected the citizenry's legal rights.

From there followed the legal innovation of *the praetor's edict*, by which the praetor would explain in advance the rights and remedies recognized in specific circumstances.[36] At the beginning of each year in office, the praetor would write out in red letters on a white board for display in the Forum the laws and orders considered most relevant to the citizens and the pertinent formulae for use. It thus became a public expectation that the praetor would conform to his edict without deviation. What's more, the legal custom was such that successive praetors should conform their edicts with those of the past. Over time, then, a continuous and stable body of law developed that governed the adjudication of legal rights.[37]

This is the "judge-made law" to which the Donnellys refer, with such tradition naturally focusing attention on the importance of precedent in the law. Thus does a praetor in the Second Panel announce his edict, with a Roman soldier standing in watch and support on behalf of the government. But time moves on, taking the law with it. These annual edicts by the praetors are recalled only infrequently with modern jurisprudence, but that isn't to say no influence remains.

One very precise example is the Fifth Circuit's 1961 decision, *Williams v. Employers Liability Assurance Corporation*, addressing an aspect of strict premises liability imposed by Louisiana law. Writing for the panel, Judge John Minor Wisdom observed that strict liability "is a sturdy, ubiquitous, long-lived doctrine that can be traced back to primitive notions of liability based on a person's relation to the thing that causes injury." As proof, he recalled one especially specific edict concerning "Those Who Pour Anything Out or Throw Anything Down." A praetor had authorized a punitive cause of action in such respect:

> The Praetor grants a cause of action: Where anything is thrown down or poured out from anywhere upon a place where persons are in the habit of passing or standing, I will grant an action against the party who lives there for twofold the amount of damage occasioned or done.[38]

The Louisiana law at issue did precisely that—imposed strict liability on the master of a house for things thrown out of it. But it also did no more than that, and the action at hand involved an assault within the defendant's building. The Fifth Circuit thus affirmed the refusal of the district court to give the plaintiff his requested strict-liability instruction, for it manifestly didn't apply.[39]

Another is the quintessential family-law dispute at the heart of the Supreme Court's 1820 decision in *Stevenson's Heirs v. Sullivant*. The putative heirs were children conceived prior to the deceased marrying their mother. When he passed, they sought to inherit from him according to a Virginia legitimization statute. Writing for the Court, Justice Bushrod Washington drew on the historical treatment of bastards, noting that illegitimate children were in early times excluded from inheritance, given then-prevailing definition of *cognate*, or blood relative. But one praetor found that rule to be unduly harsh, and so his edict provided for both legitimate and illegitimate children to be included in the line of succession. The Roman Senate in turn directly confirmed that edict as an acceptable principle "and continued the law of the empire ever afterwards."[40] While *Stevenson's Heirs* didn't ultimately turn on this point, it's no less notable that the Court dedicated nearly three thousand words to drawing upon the Roman historical practice.

The Second Panel, at base, harkens to stability in the law and, indeed, the value of precedent to the citizenry. This is the "importance of the judges' work," as summarized by

the Donnellys. A basic assumption of the legal system—at least in the metaphorical city at peace—is that the public will follow the laws or else submit to lawful penalty. That assumption falters if the citizens don't understand either what the laws are or how they will be administered. The praetor's edict, then, stands for the proposition that the commands and protections of law require precise delineation and publication, and, as thus written, consistent application across time and similar circumstances. Otherwise, there is only malleable prerogative and uncertain discretion.

III. Scholar and Julian (c. 170)

> The importance of the scholar and the advocate. Julian consults and instructs his pupils. The development of the law by the lawyer and scholars.
>
> John Donnelly, Jr.
> to Cass Gilbert

Salvius Julianus was the Roman judge and councilor so steeped in the law that he's sometimes recalled as *Julian the Jurist*.[41] The Third Panel could focus solely upon him and his considerable success in several important public offices. Indeed, his statute resides in front of Rome's Palace of Justice, the structure that houses Italy's court of last resort, the Supreme Court of Cassation. But the Donnellys intended more, and thus Julian "consults and instructs his pupils." Likewise, the Panel's name equally commemorates both *Scholar and Julian*, imparting the intended lesson—the continuity of the law depends upon its learned transmission through education.

Julian lived from approximately 110 to 170 AD. He advanced upwards between many offices, serving as (among others) questor, praetor, consul, and eventually regional governor of several provinces. Yet his public influence derived primarily from his service on the emperor's high council under Emperors Hadrian and Antoninus Pius, who ruled across successive spans from 117 to 161 AD.[42] For it was then that he developed his jurisprudence while presiding as councilor over courts of law and working on special projects of the emperors.

One major undertaking was *the Perpetual Edict*, a project ordered by Hadrian soon after taking power that eventually displaced the praetor's edict as traditionally understood.[43] The Roman Senate had passed a number of moderate reforms to curb the scope of praetors' edicts, owing to the fact that some praetors failed to respect the precedent set by past colleagues, with some going so far as to seek financial and political gain by remaking the law to benefit partisan cohorts. In one famous example, none other than Cicero himself prosecuted the corrupt praetor Gaius Verres. His speeches during the trial are now known as *The Verrine Orations* and widely regarded as a classic denunciation of those who abuse offices of public responsibility.[44]

But praetors on the whole continued to exercise broad discretionary power in the revision and specification of annual edicts. Hadrian charged Julian with preparation of a standard edict form proscribing that power, moving Rome toward systematic and mandatory administrative rules. Once decreed by Hadrian as binding and ratified by the Senate,

the Perpetual Edict finely detailed the substance that future edicts must contain. Though praetors would continue to issue their annual edicts, they did so under constraints limiting their ability to make new law.

Julian's writing of the Perpetual Edict was an epochal moment in Roman legal history, clarifying the bounds of the praetors' power—and so also of the judicial power. But paired with this is his other signal achievement, a report and summary of the law written "for the purpose of expounding *the whole* of Roman law" and with intention that it be the principal reference on civil and administrative legal topics.[45] The *Digest* (or *Digesta*) by Julian was a sweeping legal treatise, ultimately encompassing ninety books. Expansive in coverage, it includes records of thousands of judicial decisions, along with other hypothetical applications. Those decisions were called *responsa*, translating literally as *answers*. But the more equivalent modern understanding of what Julian set forth was the concept of *common law* or *case law*.

Julian's jurisprudence greatly influenced the course of Roman law, thereby establishing legal foundations that carried well into the future. Much of it was incorporated some four hundred years later into the *Digest* of Justinian within the *Corpus Juris Civilis*, a massive Roman law compilation that features in the Fourth Panel. This work also informed the ambitions of many others in the English and American legal traditions. Think of Sir Edward Coke with his **Institutes of the Laws of England** in the seventeenth century, Sir William Blackstone with his **Commentaries on the Laws of England** in the eighteenth century, and Justice Joseph Story with his **Commentaries on the Constitution of the United States** in the nineteenth century. Think, too, of Alexander Dallas and William Cranch, devoting their professional lives to the reporting of decisions by the Supreme Court, now numbering 577 volumes of the *United States Reports*. Reckon also with the modern sweep of many other federal, state, and subject-matter specific reporters—and even onwards now to Westlaw and LEXIS. All of this serves to make the law present, accessible, and understandable for the very reason that it's reduced to writing.

But for all the acclaim due Julian, the Third Panel reserves a paired, eponymous place for Scholar. Americans have long had peculiar interest in the study of law. Edmund Burke recognized this in his **Speech on Conciliation with the Colonies** to Parliament in 1775, wherein he identified six sources from whence "a fierce spirit of liberty" had been kindled in the Colonies. Included in his list were ancestry linked to English recognition of rights; a form of government that evoked representation; religion and its inherent respect of rules, manners, and civility; and a geographic remoteness of situation already requiring a large degree of self-determination. But making the list also was this:

> Permit me, Sir, to add another circumstance in our colonies, which contributes no mean part towards the growth and effect of this untractable spirit. I mean their education. In no country perhaps in the world is the law so general a study. The profession itself is numerous and powerful; and in most provinces it takes the lead. The greater number of the deputies sent to the congress were lawyers. But all who read, and most do read, endeavour to obtain some smattering in that science. . . . I hear that they have sold nearly as many of Blackstone's Commentaries in America as in England. . . . This study renders men acute, inquisitive, dexterous, prompt in attack, ready in defence, full of resources.[46]

Along with Burke, Alexis de Tocqueville recognized legal scholarship in **Democracy in America** as a fundamental part of the American ethos.[47] And education is a virtuous cycle, with benefits multiplying over

time. The attendant understanding of the law by the current generation yields greater appreciation for the rights that government is instituted to protect. But perhaps more important, this focus on legal education implies continuity and meaningful preservation of the rule of law across generations.

It is thus the inclusive gaze upon the student before Julian in the Third Panel that reminds the onlooker that legal knowledge—and respect for the rule of law—doesn't come easily. It requires an exchange between two persons. The first is a wise and authoritative instructor, one able to synthesize the evolution of the law, harmonizing it and drawing general principles from decisions of practical application of the law to particular circumstances. The other is an interested and dedicated student, one actively engaged in learning and internalizing the lessons of history and of elders. To a certainty, passing these lessons on to future generations is just as important as learning and applying those lessons ourselves.

IV. Justinian Code (c. 530)

The gathering together of the results of centuries of growth into a code. Justinian publishes the Corpus Juris.
John Donnelly Jr.
to Cass Gilbert

The Fourth Panel focuses on an era of legal reform under the reign of Justinian I, emperor of Rome from 527 to 565 AD.[48] He directed the creation and distribution of four major legal works during the early years of his rule—known in English as *the Code*, *the Digest*, *the Institutes*, and *the Novels*. Together, these gave rise to one of Rome's most substantive and long-lasting contributions to the modern world, being its body of Civil Law, or the *Corpus Juris Civilis*. Indeed, Edward Gibbon in his exhaustive **The History of the Decline and Fall of the Roman Empire** esteemed the *Corpus Juris* as "a fair and everlasting monument" to Justinian's legacy.[49]

The Panel itself is engraved with dedication to the Code, which the Donnellys noted as a "gathering together of the results of centuries of growth." Justinian directed this compilation of imperial constitutions and statutes in 528. To do so, he appointed an editing commission to aggregate the legal codes of certain of his predecessors, together with laws imposed during Justinian's reign. But he authorized the commissioners as more than just routine editors or rote collators. They were instead charged to omit obsolete material, eliminate redundancies, and add needful and substantive improvements to old sources. With that accomplished, Justinian by order replaced and invalidated all other law with this consolidated and amended material. He then promulgated a revised and updated version in 534, superseding the first. These covered a wide array of legal topics in twelve books, addressing ecclesiastical law, private law, criminal law, administrative law, evidence, remedies, contracts, family law, property, wills, and many others.[50]

The three other works followed in rapid succession, beginning with the Digest in 530 as an edited compilation of prominent legal literature by Roman jurists. Synthesizing these Roman judicial texts was no small feat. Justinian again directed the editing commission to remove superfluous or contradictory

material and make edits or interpolations where the law could be improved. What remained from this consolidation was divided according to subject matter into fifty books on a wide range of legal topics.[51] Justinian understood that the Digest was too difficult and unwieldy for use in legal education. And so he ordered the commission to create the Institutes immediately after as an introductory textbook.[52] Last came the Novels, first published in or around 534, collecting statutes and decrees issued by Justinian during the preparation of the Digest and Institutes and between the enactment of the old Code and the updated version. Justinian would continue to add to this supplement until 565.[53]

The completion of the *Corpus Juris* was the culmination of over a thousand years of judicial writings, imperial edicts, and other Roman legal sources. With it, one uniform body of law then applied to the Roman Empire. But the Ottoman capture of Constantinople in 1453 ended this law in the Eastern Roman Empire, even as feudal law had already displaced it in the West during the Dark Ages.[54] Still, the light of those writings comprising the *Corpus Juris* was kept alive in small spaces, allowing for its eventual rediscovery.[55] Gradually, it became the official law in all of western Europe, save England. Napoleon, for instance, heavily based his *Code Civil des Français* on the *Corpus Juris*, especially the Digest. Like Justinian, Napoleon recognized the enduring importance of these legal reforms, saying toward the end of his life, "My true glory is not in having won forty battles; Waterloo will blot out the memory of those victories. But nothing can blot out my Civil Code. That will live eternally."[56]

Such influence extends to the present day, even to the American legal system. It doesn't require much imagination to hear the deliberate echo of Justinian's work in the project of the *Corpus Juris Secundum* originally brought to print by the American Law Book Company. It also informs the efforts of the American Law Institute with its various Restatements of the Law. And at times, it has provided a useful marker on the path toward proper resolution of matters before the Supreme Court.

Perhaps the most powerful argument bringing Justinian to bear is that of John Quincy Adams in the matter of *La Amistad*. The story is legendary, concerning the nature of rights in their most fundamental sense. Captured by Spanish merchants in western Africa, African families overpowered their would-be masters and took control of the ship when en route to Cuba, traveling onward instead to America. The United States government regarded the Africans as slaves and intended to return them to the Spanish, as urged by Spain itself. Adams, as a former president and leader of the anti-slavery contingent in the House of Representatives, argued on behalf of the families in 1841 once the case arrived before the Supreme Court.[57] Emphasizing what he perceived as the core principle of the Supreme Court, Adams stressed, "I derive consolation from the thought that this Court is a Court of JUSTICE." But the term itself is elusive. For what does *justice* mean in any appreciable way to putative slaves, torn from distant lands and seeking freedom before strangers?

Adams could have turned to philosophy and Cicero, who esteemed justice as "the crowning glory of the virtues" and "the basis of which men are called 'good men,'" with its central aim being "to keep one man from doing harm to another, unless provoked by wrong."[58] Instead, he quoted Justinian:

> Justice, as defined in the Institutes of Justinian, nearly 2000 years ago, and as it is felt and understood by all who understand human relations and human rights, is "*Constans et perpetua voluntas, jus SUUM cuique tribuendi.*" The constant and perpetual will to secure to every one HIS OWN right.[59]

This yearning toward justice had been a subject of contemplation and an object of society for millennia. It's now, of course, prominently emblazoned on the pediments atop both main entrances to the Supreme Court—*Equal Justice Under Law* and *Justice the Guardian of Liberty*. But Adams spoke a century before the building even existed. Even so, citation of Justinian this way came with inherent credibility, anchoring the concept's meaning to law set many centuries removed, while making clear that mere passage of time cannot dilute or fade its promise. In the end, Justice Story spoke for the Court, finding the Africans' case overwhelming. "Upon the whole, our opinion is," he wrote, "that the said negroes be declared to be free, and be dismissed from the custody of the Court, and go without delay."[60]

One mystery of the Fourth Panel does abide, being the identity of the second figure bearing scrolls and standing alongside Justinian. While no direct evidence exists, the original proposal by the Donnellys as excerpted above suggests that this perhaps was one of the commissioners who so carefully sifted hundreds of years of legal records to accomplish Justinian's grand purpose. Or perhaps it was Tribonian, whose portrait is among the twenty-three plaques of "lawgivers" that overlook the chamber of the House of Representatives.[61] His likeness wouldn't be out of place across the street, as he served as Justinian's "master of offices" and was in charge of the *Corpus Juris* project.[62]

Even if unresolved, the mystery itself accords meaning, recognizing law as a collective endeavor. Justinian naturally deserves a singular share of credit. But the monumental achievement that was his *Corpus Juris Civilis* derived in the main from centuries of previous legal authority, long preserved in writing. Even then, the learned efforts of many were necessary to bring forth the great compendium itself, thus laying a principled foundation upon which European, British, and American legal systems would later arise. Viewed this way, the ultimate lesson is that the law proceeds in successive extensions from a historical foundation, reflecting both innovation and accumulated wisdom, with no one having claim to sole authorship.

V. Magna Carta (1215)

> John forced to sign the Magna Carta.
>
> John Donnelly, Jr.
> to Cass Gilbert

Attention now shifts to the right half of the Bronze Doors. And with it, consideration moves beyond classical and ancient legal sources to the constitutional sources of the English and American legal tradition. Magna Carta is first in time, being now understood as a critical inflection point—so much so that the Donnellys found it unnecessary to expand in any way upon its significance. But on that day in 1215, at a field called Runnymede on the River Thames outside of London, it wasn't known that the advent of English constitutional law was at hand, or that its child, American constitutional law, would emerge some 570 years later.[63]

The Bronze Doors as a whole demonstrate that any history depicting the recognition

of rights began much earlier, with Greek and Roman sources. And certainly, a lesson or lawgiver from biblical or other religious sources wouldn't have been out of place within one of the Panels, just as Moses, Solomon, Muhammad, and others each reside within the courtroom friezes. But the Dark Ages were dark for a reason. To the extent that prior expressions of rights existed, they hadn't taken root. And so, in thirteenth century England, the Crown ruled by divine right and absolute prerogative, being in many respects the very law itself. If some monarchs were known for benevolent rule, we know that many were not, and among the worst was an early one, John I, King of England from 1199 to 1216.

John was a harsh and ruthless king. He taxed heavily, quarreled with the church, and constantly engaged England in wars that he always seemed to lose. When the nobles finally had enough and refused further allegiance, John turned his army on them, ultimately losing all support among the people. The Fifth Panel depicts the moment that King John averted civil war by placing his seal upon a unique charter carving out a limited array of sixty-three guarantees from the Crown. Before him stands one of his rebellious Barons with drawn sword. Not shown is the Archbishop of Canterbury, who was also present that day. England at the time was Catholic, and the very idea of limiting royal prerogative this way was so inflammatory that when word reached Rome, Pope Innocent III decreed Magna Carta void and a subject of excommunication.[64]

The Barons likely didn't believe that they were shaking the frame of government to its foundation—they just wanted John to abide by the same customary rights and liberties as did his predecessors. In his celebrated lectures in the late nineteenth century on English constitutional history, Professor Frederic William Maitland observed, "The cry has been not that the law should be altered, but that it should be observed, in particular, that it should be observed by the king."[65] Most of Magna Carta's clauses are thus intensely practical. Rather than sweeping assertions of right, it instead lists items necessary to survive (or more accurately, to pursue happiness) in the higher ranks of feudal life in England—rules respecting fisheries, forestry, dower and inheritance, wine measurements, and the like.[66] And despite the swords, Magna Carta wasn't something claimed by right or even royal duty. To the contrary, John was permitted to state these guarantees as his own generous gift. So he didn't part with much, while remaining absolute over all areas not, at least in some sense, given by him back to the people.

Yet some of his concessions are enforced in England to this day. For instance:

> In the first place, we have granted to God, and by this our present charter confirmed, for us and for our heirs forever, that the English church shall be free, and shall hold its rights entire and its liberties uninjured. . . .
>
> And the city of London shall have all its ancient liberties and free customs, as well by land as by water. Moreover, we will and grant that all other cities and boroughs and villages and ports shall have all their liberties and free customs.[67]

Quite apart from the substance of any particular guarantee, Professor Maitland suggested that "we ought to notice that the issue of so long, so detailed, so practical a document, means that there is to be a reign of law."[68] It is this written enumeration of rights that commenced a constitutional tradition in England ensuring that the Crown would not forget, but must instead observe, its prior gifts. To this day, the Supreme Court pauses at times to note the substantive provisions within our Constitution that trace their origins at least in part to the Great

Charter, including the previous Term in *Tyler v. Hennepin County*.[69] Indeed, our Framers learned this lesson well, eventually preserving our rights under a written Constitution and Bill of Rights where government hasn't the ability simply to forget or ignore them.

But more, quite unwittingly, King John also forever placed himself and his successors within the rule of law. For while one passage may sound unfamiliar at first, it is of signal import when we understand the path it forged:

> No free man shall be taken or imprisoned or dispossessed, or outlawed, or banished, or in any way destroyed, nor will we go upon him, nor send upon him, except by the legal judgment of his peers or by the law of the land.
>
> To no one will we sell, to no one will we deny, or delay right or justice.[70]

There shall be trials, and the King must not act merely by decree, but only *by the law of the land*. So said Magna Carta in the thirteenth century, to which Winston Churchill observed in the twentieth that this was "reaffirmation of a supreme law," and that "here is a law which is above the King and which even he must not break."[71] When Parliament later set Magna Carta into statutory law in the fourteenth century, *by the law of the land* attained a phrasing that has now endured for over 650 years:

> That no Man of what Estate or Condition that he be, shall be put out of Land or Tenement, nor taken, nor imprisoned, nor disinherited, nor put to Death, without being brought in Answer *by due Process of the Law*.[72]

Through to the reign of Henry V in 1422, six successive kings were required to confirm the charter no less than forty-seven times.[73] Could the nobles at Runnymede have imagined the force and scope that *due process of law* would attain from their demand that King John I act only *by the law of the land*? Probably not. But that is the momentum of rights once formally recognized: how far or how fast they will carry isn't known on the first push.

VI. Westminster Statute (1275)

> Publishing of the Statute of Westminster by the chancellor in the presence of Edward I: The greatest single legal reform in our history.
>
> John Donnelly, Jr.
> to Cass Gilbert

The Sixth Panel features the first Statute of Westminster in 1275, promulgated at the behest of Edward I, King of England from 1272 to 1307.[74] This extends the legislative path from prior focus on the Justinian Code, and indeed, Edward is likened at times as the *English Justinian*.[75] Professor Maitland favorably compared the two, noting that Justinian "did his best to give final immutable form to a system which had already seen its best days," whereas Edward "legislated for a nation which was only just beginning to have a great legal system of its own."[76] And Matthew Hale before him observed that "more

was done in the first thirteen years of that reign to settle and establish the distributive justice of the kingdom, than in all the ages since that time put together."[77]

A mere sixty years bridge the time from Magna Carta to Westminster I. It's an oddly brief interval upon the Bronze Doors amidst vignettes that otherwise span well more than two thousand years. But the path forward from 1215 was treacherous. Monarchs tend not toward docility, and King John was a devious man. Having saved his own skin that day at Runnymede, he immediately relaunched his war against those same nobles. Yet as fate (and a fatal bout of dysentery) would have it, he died the next year—as did Pope Innocent and his threat of excommunication. John's nine-year-old son, Henry III, was then required to swear oath to recognition of Magna Carta upon his coronation in 1217, as well as to another amended version in 1225. These began to circulate widely with public recital throughout the lands.[78] Though not intentionally a bad king, Henry's rule proved to be as tumultuous as that of his father, owing to a reputed weak intellect, poor judgment of character, and inability to commit to consistent policy over time. Beginning in 1240, Henry took England into most of two decades at war with Wales, Gascony, and France—followed by the Second Barons' War with his own countrymen from 1263 to 1267.[79]

Those years had seen England descend, if not into ruin, then well along the way. Henry's son, Edward, had set off abroad in Tunisia to join the Crusades in 1270.[80] But when Henry passed in 1272, Edward I was formally crowned king upon his return in 1274. To his credit, Henry had at least allowed Parliament already to commence as an early institution. With his first Parliament during the initial year of his own reign, Edward took an admirably prompt and decisive step toward legal reform, beginning with his appointment of commissioners to inquire of his citizens "'whether lords, or their stewards, or bailiffs of any kind' had committed transgressions or crimes against the king and the community."[81] Upon resounding cry in the affirmative, Edward and Parliament set to work.

The final codification of Westminster I eventually spread over fifty-one separate chapters, but all upon a common theme of stabilizing the domestic chaos suffered by the English people.[82] And so, for example, the statute increased criminal punishments, heightened protections for public proceedings like elections, and placed limits on the authority of royal officers.[83] As noted by Justice David Souter in *Seminole Tribe of Florida v. Florida*, it also "established a writ of disseisin against a King's officers," providing an avenue for redress of harm committed by public officials.[84] One need only take note of Section 1983 of Title 42 to the United States Code, and its familiar mode of civil redress for violations of a citizen's constitutional rights, to hear echoes of these efforts through the modern day.

The Statute of Westminster teaches a number of important lessons—separation of powers, benevolent authority, responsiveness of government to unrest and suffering, detail and precision in the law, and the like. But Edward's conduct itself taught transparency and amplification of the laws. For rather than rest with mere passage of Westminster I, he undertook to thoroughly publicize the statute in his own right. Edward thus ordered written copies distributed to hundreds of sheriffs, bailiffs, and knights throughout the lands, while also having the statute read in full at local courts and marketplaces.[85] It is one such reading and publication in his presence that the Sixth Panel depicts.

This was already a remarkably open position for the Crown to assume, and yet, Edward was just getting started. The Statute of Gloucester then issued in 1278 to deal with the illegal seizure of real property. The

Statute of Wales in 1284 dealt with legal standards and administration in the newly annexed Wales. With 1285 came the Statute of Westminster II and the Statute of Winchester, dealing with gaps in the new common law writs and actions. And finally, the Statute of Westminster III contributed to the end of feudalism by prohibiting tenants from dividing their tenure among multiple subtenants, thereby installing themselves as feudal lords. And as a capstone of monumental proportion, Edward I confirmed Magna Carta again in 1297 in the celebrated *Confirmatio Cartarum*, to which we will return with the Eighth Panel and the power of judicial review.[86]

Westminster I and its related body of laws are an admirable statutory design, for they are a singularly comprehensive *written* achievement with respect to the rule of law. And for the Donnellys, it was this "greatest single legal reform" that warranted inclusion on the Bronze Doors. For all crossing the threshold into the Supreme Court are reminded that the power to create law anew—and then to keep it current—is exclusively a component of the legislative power. True, the justices beyond the threshold contribute to the development of the law through a train of decisions, each applying settled law to the facts of new cases, and thereby creating precedent that typically will control like facts in the future. But returning again to Professor Maitland for the longer view in English legal history, he explains that "judges are not conceived as making new law—they have no right or power to do that—rather they are but declaring what has always been law." As properly understood, then, *common law* is "that which has always been law and still is law, in so far as it has not been overridden by statute or ordinance."[87]

The Framers of our Constitution understood this lesson, such that Article I and its vesting of the legislative power both logically and necessarily precedes the vesting of the executive and judicial powers in Articles II and III, respectively. This perspective of statutory primacy also vests great responsibility. Attentiveness matters—the government should take notice of the legitimate grievances of its citizenry. But so also does responsiveness—the government must follow through on what it observes, if it's to instill belief in the public that those grievances are heard and will be addressed.

VII. Coke and James I (1608)

> Coke bars James I from sitting as a judge in the "Kings Court." The court assumes independence of and by the executive, by law.
>
> John Donnelly, Jr.
> to Cass Gilbert

In tributes during the recent eight hundredth anniversary of Magna Carta, Sir Edward Coke was remembered as its defender—and more, its redeemer—in the seventeenth century. Coke saw power from all sides during a remarkable career lasting fifty-one years. He labored first as Solicitor General and Attorney General to Queen Elizabeth I, a good queen whose royal prerogative he defended. Next, as a judge, justice, and champion of the common law on the Court

of Common Pleas and the Court of King's Bench, he clashed with James I, whose exercise of prerogative he deplored. And last, Coke was a leader of the House of Commons during the early days of Charles I, who threatened to annihilate Parliament's ability to influence policy at all.[88]

His tours of duty through all three branches of government allowed Coke to understand—politically, pragmatically—that in civilized society sovereign power would and must reside somewhere. And he knew that supremacy of the law had seen days exposed to great risk. The Crown was at times cunning, and often brazen, in its expansion of power and overbearing of rights, depending wholly upon the scruples of the person on the throne.

The Seventh Panel captures but the briefest of moments within Coke's middle tenure as judge, recalling his direct assertion to James I that the king had no right to decide cases himself in person. Like so many political struggles for power, the encounter arose from a jurisdictional dispute—here, between the King's Bench and the Ecclesiastical High Commission. The precise historical bounds between the English courts prior to the Enlightenment needn't be fully sketched. It's enough to know that secular and religious cases were intended in earlier times to be resolved in different courts. But temporal and spiritual matters aren't cleanly delimited, and by Coke's day, civil and ecclesiastical courts would at times issue writs, each against the other, seeking to pull cases into competing jurisdictions for resolution.[89]

The depicted confrontation was the culmination of what's known as *Fuller's Case*. Nicholas Fuller was a barrister of Gray's Inn, representing clients against various religious citations with frequent appearances before both the King's Bench and the Court of High Commission. When several of his clients were imprisoned and fined upon refusal to take the religious oath required by the High Commission, Fuller sought writs of *habeas corpus* from the King's Bench, arguing that the High Commission had no legal authority to imprison his clients. But it was the intensity of his invective that provoked crisis upon square assertion "that 'the ecclesiastical jurisdiction was Anti-Christian' and 'not of Christ but of Anti-Christ'; [and] that the power of the Commission was being used to suppress the sacrament and true religion." The High Commission promptly charged Fuller with "slander, schism, heresy, impious error, and the holding of pernicious opinions." Fuller was fined and hauled away to Fleet Prison pending trial.[90]

Fuller petitioned the King's Bench in the ensuing prosecution to issue a writ of prohibition and remove the case from the High Commission. In his view, the crimes for which he had been charged were primarily slander and contempt, and thus being secular were outside ecclesiastical jurisdiction. Coke opposed the blurring and expansion of jurisdictional limits. He believed instead that the common law courts—that is, the King's Bench and the Common Bench—were the proper adjudicative bodies for secular cases for the very reason of their greater procedural rules and independence.[91] And so, at Coke's urging, the King's Bench issued the prohibition on a temporary basis, resolving to consider the issue further.

But James I favored the primacy of ecclesiastical jurisdiction in such matters. Why wouldn't he? He was head of the Church of England and believed strongly that he ruled from a divine right superior to common law, statutory law, and legal convention.[92] And so on behalf of the King, Archbishop of Canterbury Richard Bancroft asserted that "concerning Prohibitions, the King was informed, that when the Queftion was made of what Matters the Eccleſiaſtical Judges have Congnizance . . . the King may himself decide it in his Royal Person."[93] In other words, James I intended to sit personally on the

King's Bench and determine whether jurisdiction over Fuller's prosecution would proceed in the civil or the ecclesiastical courts.

Summoned to Whitehall by the King, Coke personally rebuffed his monarch, barring him from entering the court. He explained that legal controversies "are not to be decided by natural reason," that is, divine prerogative, but rather "by the artificial reason and judgment of law."[94] As observed by Professor Michael McConnell, "By long practice, the separation of the judicial from the executive function" had become "a settled part of the unwritten British constitution."[95] And thus Coke chose not to acquiesce to any disruption by James I of that fundamental separation of power.

Would Coke have survived the day when standing athwart his monarch if making such declaration solely of his own accord? Likely not. But he gathered aid and special force from centuries-old legal authority, quoting preeminent English jurist Henry Bracton, "*Quod rex non debt sub homine sed sub Deo et lege.*"[96] Justice Robert Jackson would later transcribe this from the Latin in *Youngstown Sheet & Tube Co. v. Sawyer*, when harkening to Coke's fortitude in one of the Supreme Court's most famous decisions on executive power. President Harry Truman had asserted authority to seize several steel plants in the midst of the Korean War and a massive workers' strike. In his famous concurrence, Justice Jackson explained that an executive order of that sort was unlawful where unsupported by a legitimate grant of power from Congress:

> We follow the judicial tradition instituted on a memorable Sunday . . . when King James took offense at the independence of his judges and, in rage, declared: "Then I am to be under the law—which it is treason to affirm." Chief Justice Coke replied to his King: "Thus wrote Bracton, 'The King ought not to be under any man, but he is under God and the law.'"[97]

For the Donnellys, it was this assertion of "independence of and by the executive, by law," that warranted Coke's inclusion upon the Bronze Doors. Truth be told, it was his clash twenty years on with James I's son, Charles I, that was perhaps the most harrowing of all Coke's pursuits to enshrine the protections of law in writing. For during his final year of public service as a member of the House of Commons, Coke forced a reconsideration of the overall meaning and promise of Magna Carta. Would the liberties of the English people continue to be *an act of grace* on the part of the King? Or were they to be *a matter of right*, which the subject could demand? The King should have that which the law gives him, and no more, answered Coke. For only the law is absolute, and if sovereign decree determines what to observe and what to ignore in Magna Carta, it weakens what he called the "Foundation of Law, and then the Building must needs fall." "Take we heed what we yield unto," he said. "Magna Carta is such a Fellow, that he will have no Sovereign."[98]

Coke made these arguments to Parliament in favor of the Petition of Right in 1628, which in time proved to be among several early documents loosely comprising the English constitution, including Magna Carta, the Habeas Corpus Act of 1679, and the English Bill of Rights of 1689.[99] It asked Charles I to do a shocking thing—admit that his conduct was contrary to existing laws and promise in writing that he would stop. Taxes would levy only with Parliament's consent, military troops would not be quartered in private homes, and every citizen, guilty or innocent, would have a chance at trial, with bail and *habeas corpus* to empty the prisons of anyone put there arbitrarily. This was a dangerous course, and Coke had seen many of his contemporaries cast to the Tower of London

on secret charge by the King. But the Houses of Lords and Commons stood united, and the people's watchful eye was upon their King. As originally with John and Magna Carta, Charles had little choice but to accede. He is reputed to have responded, "*Soit droit fait comme il est desire*"—let right be done as is desired.[100]

Edward Coke retired the next year and soon passed, after a long life where his self-interest could just as easily have kept him where he started—comfortably aligned with the Crown and to defense of the established order. Instead, he challenged and defied kings, determined as he was to elevate the protections of law. But even when this great lawyer and judge was done, still he was not done. For it was only in his last years, writing the final passages of the final volume of his celebrated **Institutes of the Laws of England—**his own work rivaling that of Julian—that he captured the meaning of his life's example for all judges who would come after him:

> Honourable and reverend judges and justices, that do or shall sit in the high tribunals and courts or seats of justice . . . fear not to do right to all, and to deliver your opinions justly according to the laws; for feare is nothing but a betraying of the succours that reason should afford. And if you shall sincerely execute justice, be assured of three things; first, though some may maligne you, yet God will give you his blessing. Secondly, that though thereby you may offend great men and favourites, yet you shall have the favourable kindnesse of the Almighty, and be his favourites. And lastly, that in so doing, against all scandalous complaints and pragmaticall devices against you, God will defend you as with a shield.[101]

With a word, Sir Coke summoned what it is that we mean by the rule of law. *A shield.* One far removed in time from that of Achilles in the First Panel, true, but all the while being that which protects us and keeps us safe from harm. And the task for the justices beyond the Bronze Doors isn't any easier despite Coke having blazed the forward path—take courage to see and do equal justice to all persons at all times according to the law.

VIII. Story and Marshall (1803)

> Marshall delivering the opinion in *Marbury v. Madison*. The Supreme Court defin[itive]ly assumes power to declare statutes void for unconstitutionality.
>
> John Donnelly, Jr.
> to Cass Gilbert

As originally proposed, the Donnellys intended Chief Justice John Marshall as the sole figure featured on the Eighth Panel, handing down *Marbury v. Madison*.[102] The final version instead places him together in conversation with Associate Justice Joseph Story about that most famous of decisions, recognized from the outset as the first formal invocation of judicial review by the Supreme

Court, thus comprehending its authority to judge the constitutionality of congressional legislation. The sculpted discussion didn't occur as the decision came down, of course. It couldn't have, for Justice Story only joined the Supreme Court in 1812, nine years later. But discuss the case they surely did, during an abiding friendship over more than two decades shared on the bench.[103]

"It is emphatically the province and duty of the judicial department to say what the law is." That's perhaps the most oft-quoted phrase from *Marbury*. But it's made only in service of Marshall's framing of a more elemental principle: "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."[104]

This power of judicial review may seem obvious now. And yet, even then it wasn't some recent pretense, newly discovered or imagined. Rather, it was a step along a path entirely within the legal tradition begun by Magna Carta. As noted above, Edward I accepted the *Confirmatio Cartarum* in 1297. This confirmation of the Great Charter strengthened the principle of *higher law* existing beyond any person and above any government—so much so that it included express provision that "if any Judgement be given from henceforth contrary to the Points of the Charters aforesaid by the justices, or by any other our Ministers that hold Plea before them against the Points of the Charters, it shall be undone, and holden for nought."[105]

Sir Edward Coke himself certainly appreciated the meaning and promise of this idea. His famous dictum in *Bonham's Case* in 1610 presaged *Marbury v. Madison* by nearly two hundred years:

> And it appears in our books, that in many cases, the common law will controul acts of parliament, and sometimes adjudge them to be utterly void; for when an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such act to be void.[106]

Nor was judicial review a power unintended under the new Constitution. In *Federalist* No. 78, Alexander Hamilton recognized it explicitly:

> The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.[107]

Chief Justice Marshall was himself the thirteenth appointment made to the Supreme Court. Of his twelve predecessors, at least Oliver Ellsworth, James Iredell, Bushrod Washington, and James Wilson had plainly stated in opinions or elsewhere that the power of judicial review existed and encompassed the ability to declare as void any laws repugnant to the Constitution—with John Blair, Samuel Chase, William Cushing, John Jay, and William Paterson also appearing to assume it.[108] And Alfred Moore had at least considered the subject in detail, having argued as North Carolina Attorney General in the state-court case of *Bayard v Singleton*, famous for being a precursor to *Marbury*.[109]

The decision can itself be found at 5 U.S. (1 Cranch) 137 (1804). The parallel citation means that it's in the first volume reported by William Cranch, who served for nearly fifteen years as the second Reporter of Supreme Court Decisions amidst his own longer term as Judge and Chief Judge of the United States Circuit Court of the District of Columbia. This means by circumstance that the volume includes Cranch's own preface, with his musings on what he perceived as the momentous task before him—one no less daunting than the work of Julian and his *Digest* in the Third Panel. It is of a piece with the lessons that Chief Justice Marshall surely imparted to Justice Story in that moment captured by the Eighth Panel. For Cranch there explains the obligations incumbent upon him as the reporter to provide the written record of decisions—with its importance being primarily to remove what he deemed "that *uncertainty of the law*, which is so frequently, and perhaps so justly, the subject of complaint in this country," being at the time "attributed to the want of American reports." Within his preface also comes this remarkable meditation on restraint and humility in the exercise of the judicial role:

> In a government which is emphatically stiled a government of laws, the least possible range ought to be left for the discretion of the judge. Whatever tends to render the laws certain, equally tends to limit that discretion; and perhaps nothing conduces more to that object than the publication of reports. Every case decided is a check upon the judge. He can not decide a similar case differently, without strong reasons, which, for his own justification, he will wish to make public. The avenues to corruption are thus obstructed, and the sources of litigation closed.[110]

Just over one hundred pages further in, Cranch then reported *Marbury v. Madison*, instantly becoming at its moment in 1803 a signal defense of our constitutional principles against encroachment from the legislative and executive branches of government. It's by now a deeply rooted part of the American legal tradition. The Supreme Court has cited it at least once in 135 of its Terms since handing it down, including all but seven since the conclusion of the Second World War.

The Eighth Panel's inclusion of Justice Story also unmistakably symbolizes a further idea on the rule of law, providing a richer and more nuanced lesson than one conveyed by Chief Justice Marshall standing alone. And that is, the legal principles supporting the Supreme Court—and indeed, the aspirations of the Preamble that are the keystone of the Constitution—must be passed on, each generation to the next. For Marshall and Story both no doubt understood that what fades from memory with the passage of time can be just as menacing an adversary to the rule of law as the actors on stage in a given modern day. Over generations, we discard the lessons of the past, or simply forget them altogether.

In this way, Justice Story undertook in his acclaimed **Commentaries on the Constitution of the United States** to sum up for future legal generations the lessons given to him by Chief Justice Marshall and more. Nearly 250 pages are devoted to the importance and primacy, within its sphere, of the federal judiciary.[111] As to this power of judicial review specifically, Justice Story explained:

> The universal sense of America has decided that, in the last resort, the judiciary must decide upon the constitutionality of the acts and laws of the general and State governments, so far as they are capable of being made the subject of judicial controversy. It follows, that when they are subject to the cognizance of the judiciary, its judgments must be

> conclusive; for otherwise they may be disregarded, and the acts of the legislature and executive enjoy a secure and irresistible triumph.[112]

So that the judgments of the courts may be not disregarded. An abbreviated paraphrase of Justice Story's point, perhaps, but it is one that begins to capture the connecting line between the persons and events celebrated by the Eight Panels, from Greek and Roman tradition through to the English and American constitutional experience. For time has shown that the rule of law depends upon those laws being written down in a considered way, and then improved, taught, learned, and finally handed along, so that each generation may itself renew those protections.

Conclusion

The Bronze Doors were greeted with immediate acclaim upon installation in early 1935.[113] As proof, look no further than to the selection of John Donnelly, Jr. to model the doors for the John Adams Building of the Library of Congress, which would open barely four years later.[114] That later work celebrated deities and cultural heroes associated with the history of the written word. Likewise, the eight, brief scenes depicted by Cass Gilbert and the Donnellys at the Supreme Court fully summon the development of the rule of law, from its earliest stages into a bulwark that stands against tyranny.

In many ways, this span from the Trojan War to *Marbury v. Madison* covers an ineffably long sweep. But insofar as the American experiment takes part, it's of rather recent innovation and understanding. And also of fragility. Preservation of the rule of law requires sustained care and attention over time, fortified by moments and persons of great courage. Seen this way, the Bronze Doors are a testament to an enduring obligation not merely to learn the lessons of bitter experience, but also to record them in our written laws. For only then may future generations hope to survive later challenges worthy of being cast as a Ninth Panel, and a Tenth, and forward into history.

Discernable at the bottom right of the Bronze Doors, in the bottom right corner of the Fifth Panel devoted to Magna Carta, is a faint signature—*John Donnelly*. The adage goes that a picture is worth a thousand words. But in the right hands, the picture surely captures more. Late in his own life, John Donnelly, Jr. provided his own crisp assessment of the Bronze Doors. It's a worthy endorsement, one fully in mind not only of the events rendered on the Eight Panels, but also of their place among those many artistic ventures shared with his father. The final words of appreciation here are thus rightly his:

> *Out of all our monumental projects, spread over two lifetimes, the Supreme Court doors are the only work that we ever signed—that's how important they were.*[115]

ENDNOTES

[1] Final Report of the United States Supreme Court Building Commission, 25 (S. Doc. No. 88, 76th Cong. 1st Sess. 1939).

[2] *Ibid.*, 24.

[3] *See* Lucille A. Roussin, *The Temple of American Justice: The United States Supreme Court Building*, 20 Chap. L. Rev. 53–57 (2017); Earl Warren, *Chief Justice William Howard Taft*, 67 Yale L.J. 353, 360–62 (1958).

[4] *See generally* Cass Gilbert, Jr., *The United States Supreme Court Building*, 72 Architecture 301 (1935); Suzy Maroon, The Supreme Court of the United States (1995); Catherine Hetos Skefos, *The Supreme Court Gets a Home*, Yearbook 1976 Sup. Ct. Hist. Soc'y 25 (1976); Supreme Court Historical Society, *The Supreme Court Past and Present Part III: The Past Fifty Years*, 3 Sup. Ct. Hist. Soc'y Q. 7 (1981).

[5] *See* Cass Gilbert, Life and Work (Barbara S. Christen & Steven Flanders eds., 2001); Sharon Irish, Cass Gilbert, Architect: Modern Traditionalist (1999); Geoffrey Blodgett, *Cass Gilbert, Architect: Conservative at Bay*, 72 J. Am. Hist. 615 (1985).

[6] Final Report of the United States Supreme Court Building Commission, 17.

[7] Letter from Dan Ryan to Senator Robert Wagner (Feb. 23, 1932), John Donnelly, Inc. Research Files, Office of the Curator, Collection of the Supreme Court of the United States.

[8] *See* Jane Emlyn Donnelly McGoldrick, *John Donnelly, Architectural Sculptor*, 33 Hastings Hist. 1, 3–5 (2003); *John Donnelly, 80, Stone Carver, Dies*, N.Y. Times (July 12, 1947).

[9] Letter from John Donnelly, Jr. to Cass Gilbert (Dec. 7, 1931), John Donnelly, Inc. Research Files, Office of the Curator, Collection of the Supreme Court of the United States; Letter from Cass Gilbert to David Lynn (April 19, 1933), John Donnelly, Inc. Research Files, Office of the Curator, Collection of the Supreme Court of the United States.

[10] Letter from John Donnelly, Jr. to Cass Gilbert, *ibid.*, 1–2.

[11] Letter from Cass Gilbert to Matthews Brothers Manufacturing Co. (Apr. 20, 1933), John Donnelly, Inc. Research Files, Office of the Curator, Collection of the Supreme Court of the United States.

[12] Roussin, *The Temple of American Justice*, 57–69 (summarizing symbols throughout the building).

[13] *See* Thomas E. Waggman, *The Supreme Court: Its Homes Past and Present*, 27 A.B.A. J. 283, 288 (1941); Journal of the Supreme Court of the United States, October Term 1935, 1.

[14] Letter from John Donnelly, Jr. to Cass Gilbert (Sept. 27, 1932), John Donnelly, Inc. Research Files, Office of the Curator, Collection of the Supreme Court of the United States.

[15] For a concise summary of the construction and iconography of the Bronze Doors, see David Mason, *The Supreme Court's Bronze Doors*, 63 A.B.A. J. 1395 (1977).

[16] *See* William L. MacDonald, The Panethon: Design, Meaning, and Progeny 12–13 (1976); Siro Cinto et al., Pantheon, Storia e Futuro 29 (2007).

[17] *See* Emerson H. Swift, *The Bronze Doors at the Gate of the Horologium at Hagia Sophia*, 19 Art Bulletin 137, 145 (1973); Emile M. van Opstall, *On the Threshold*, 31, *in* Sacred Thresholds: The Door to the Sanctuary in Late Antiquity (Emile M. van Opstall ed., 2018)

[18] Eloise M. Angiola, "*Gates of Paradise" and the Florentine Baptistery*, 60 Art Bulletin 242, 246 (1978).

[19] Christen & Flanders, Cass Gilbert, 277;

[20] Jonathan P. Ribner, *Henri di Triqueti, Auguste Preault, and the Glorification of Law Under the July Monarchy*, 70 Art Bulletin 486, 491–92 (1988); *see also* 2 Sam. 12 (David and Bathsheba); Gen. 4 (Cain and Abel).

[21] Information for the following two paragraphs comes from the excellent website of the Architect of the Capitol. *See* https://www.aoc.gov/explore-capitol-campus/art/.

[22] Final Report, 13; Donnelly McGoldrick, 4.

[23] Homer, The Iliad bk. 18 ll. 337–427, 459–505 (Robert Fitzgerald trans., Anchor Press 1974).

[24] *See* Michael Gagarin, Early Greek Law 24 (1989).

[25] David Luban, *Some Greek Trials: Order and Justice in Homer, Hesiod, Aeschylus and Plato*, 54 Tenn. L. Rev. 279, 284–87 (1987).

[26] Homer, The Iliad, bk 18 ll 466–79.

[27] *See* Gagarin, 24; Hans Julius Wolff, *The Origin of Judicial Litigation Among the Greeks*, 4 Tradito 31, 40–42 (1946).

[28] *See generally* Theodore Ziolkowski, The Mirror of Justice: Literary Reflections of Legal Crises 23–24 (1997); Wolff, *The Origin of Judicial Litigation* ; Luban, *Some Greek Trials*, 284–87.

[29] *See generally* Galen N. Thorp, *William Wirt*, 33 J. Sup. Ct. Hist. 227 (2008).

[30] 22 U.S. 1 (1824).

[31] *Ibid.*, 184.

[32] *See generally* Fernanda Pirie, The Rule of Laws: A 4,000-Year Quest to Order the World (2021); H.F. Jolowicz, Historical Introduction to the Study of Roman Law (1965); Hans Julius Wolff, Roman Law: An Historical Introduction (1951); T. Corey Brennan, 1 The Praetorship in the Roman Republic (2000).

[33] *See* Pirie, The Rule of Laws, 98–108.

[34] *Ibid.,* 108–09.

[35] Wolff, Roman Law, 73.

[36] *See generally* J.M. Kelly, *The Growth Pattern of the Praetor's Edict*, 1 Irish Jurist 341 (1966); Alan Watson, *The Development of the Praetor's Edict*, 60 J. Roman Stud. 105 (1970).

[37] *See* Pirie, Roman Law, 109.

[38] 296 F.2d 569, 579 (5th Cir. 1961) (quoting S.P. Scott, 3 The Civil Law bk. 9 tit. 3 (1932)).

[39] Ibid., 570, 582; *see* Article 177 of the Louisiana Civil Code.

[40] 18 U.S. 207, 262 n.kk (1820) (citing OEuvres de D'Aguesseau, bk. 7, 391 (1819)).

[41] *See generally* Fritz Schulz, History of Roman Legal Science 126–27, 189–90.

[42] *See* Rudolf Sohm et al., The Institutes: A Textbook of the History and System of Roman Private Law 84–88, 98–101 (3d ed. 1907); Wolff, Roman Law 81, 110–11, 118; Jolowicz, 363–68, 389, 394–95.

[43] *See generally* Bryan Walker, The Fragments of the Perpetual Edict of Salvius Julianus 1–33 (1877); Kaius Tuori, *Hadrian's Perpetual Edict: Ancient Sources and Modern Ideals in the Making of a Historical Tradition*, 27 J. Legis. Hist. 219 (2006).

[44] *See generally* A.W. Lintott, *Cicero on Praetors Who Failed to Abide by Their Edicts*, 27 Classical Q. 184 (1977).

[45] Sohm et al., The Institutes, 98 (emphasis in original).

[46] Edmund Burke, Speech on Conciliation with America (Albert S. Cook ed., 1906) (1775).

[47] Alexis de Tocqueville, 1 Democracy in America ch. 14 (Chicago 2002) (1835).

[48] *See generally* J.A.S. Evans, The Age of Justinian (1996); Timothy E. Gregory, A History of Byzantium, (2005).

[49] Edward Gibbon, 7 The Rise and Fall of the Roman Empire ch. 44 (J.B. Bury ed., 1906).

[50] See A.M. Honoré, *The Backgroud to Justinian's Codification*, 48 Tulane L. Rev. 859 (1974). For apparently the only English translation of the original text, *see* Scott, The Civil Law.

[51] Jolowicz, Historical Introduction to the Study of Roman Law, 490.

[52] *Ibid.*, 452.

[53] *See* A. Arthur Schiller, Roman Law: Mechanisms of Development §§ 12–16 (1978).

[54] *See generally* Cary R. Alburn, *Corpus Juris Civilis: A Historical Romance*, 45 A.B.A. J. 562 (1959).

[55] *See* Quirinus Breen, *The Twelfth-Century Revival of the Roman Law*, 24 Or. L. Rev. 244 (1945).

[56] de Montholon, Récits de la Captivité de L'Empereur Napoléon a Sainte-Hélène 401 (1847); *see also* Charles Summer Lobingier, *Napoleon and His Code*, 32 Harv. L. Rev. 114 (1918).

[57] *See generally* Howard Jones, Mutiny on The Amistad (1987); *see also* Steven Spielberg's *Amistad* (DreamWorks Distributions 1997).

[58] *M. Tullius Cicero, I De Officiis* 20 (W. Miller trans. 1913).

[59] *Argument of John Quincy Adams, Before the Supreme Court of the United States: In the Case of the United States, Appellants, vs. Cinque, and others, Africans, Captured in the schooner Amistad*, reprinted in Yale Law School Avalon Project, https://avalon.law.yale.edu/19th_century/amistad_002.asp.

[60] *In re La Amistad*, 40 U.S. (15 Pet.) 518, 597 (1841).

[61] *See* Relief Portrait of Lawgivers, Architect of the Capitol, https://www.aoc.gov/explore-capitol-campus/art/relief-portrait-plaques-lawgivers

[62] *See generally* M. Honoré, Tribonian (1978); Arthur E.R. Boak, The Master of Offices in the Later Roman and Byzantine Empires (1919).

[63] *Magna Carta* (June 15, 1215), reprinted in Sources of Our Liberties: Documentary Origins of Individual Liberties in the United States Constitution and Bill of Rights 11, 11–22 (Richard L. Perry & John C. Cooper eds., McGraw-Hill rev. ed. 1978). For concise consideration of the events leading to Magna Carta, see Louis Ottenberg, *Magna Charta Documents: The Story Behind the Great Charter*, 43 A.B.A. J. 495 (1957); Robert Aitken & Marilyn Aitken, *Magna Carta*, A.B.A. J. Litig., Spring 2009, 59.

[64] Sources of Our Liberties, 1–4, 9; *see also* Danny Danziger & John Gillingham, 1215: The Year of Magna Carta 257–63 (2003).

[65] F.W. Maitland, The Constitutional History of England: A Course of Lectures Delivered 15 (Herbert A.L. Fisher ed., 1908); *see also* Anne Pallister, Magna Carta: The Heritage of Liberty 2 (1971).

[66] *See* Maitland, Constitutional History of England, 15; George Burton Adams, The Origin of the English Constitution 210 (1986).

[67] *Magna Carta*, cls. 1 & 13; *see also* Adams, Origin of the English Constitution, 211 (as to cl. 1) & 217–29 (as to cl. 13, and related cls. 12 & 14).

[68] Maitland, Constitutional History of England, 15.

[69] 143 S. Ct. 1369, 1376 (2023) (as to Takings Clause of Fifth Amendment, quoting *Magna Carta*, at cl. 18); *see also Timbs v. Indiana*, 139 S. Ct. 682, 687–88 (2019) (as to Excessive Fines Clause of Eighth Amendment, quoting *Magna Carta*, at cl. 14); *Kerry v. Din,* 576 U.S. 86, 91 (2015) (as to Due Process Clause of Fifth Amendment, quoting *Magna Carta*, at cl. 29).

[70] *Magna Carta*, 17 (cls. 39 & 40); *see also* Adams, Origin of the English Constitution, 243–44.

[71] Winston S. Churchill, 1 A History of the English-Speaking Peoples: The Birth of Britain 256 (1956).

[72] 28 Edw. III, ch. 3; *see also* 2 The Statutes at Large, from Magna Carta to the End of the Eleventh Parliament of Great Britain, Anno 1761 at 97 (Danby Pickering ed., 1762) (emphasis added).

[73] Sources of Our Liberties, 23 n.2. These included affirmations by Henry III, Edward I, Edward II, Edward III, Richard II, Henry IV, and Henry V.

[74] 1275, 3 Edw. I ch. 1; *see also* 1 The Statutes at Large, from Magna Carta to the End of the Eleventh Parliament of Great Britain, Anno 1761 at 74–107 (Danby Pickering ed., 1762).

[75] *See generally* Marc Morris, A Great and Terrible King: Edward I and the Forging of Great Britain 116–22 (2015); William Stubbs, On the English Constitution 195–97 (Norman F. Cantor ed., 1966); J.R. Madicott, Edward I and the Lessons of Baronial Reform: Local Government 1258–1280 (1985).

[76] Maitland, Constitutional History of England, 19.

[77] *Ibid.* (citing Matthew Hale, The History of the Common Law of England 152 (4th ed. 1779)).

[78] Sources of Our Liberties, 4 & n. 11; *see also* Adams, 269–83.

[79] *Ibid.*, 284.

[80] *See generally* Michael Prestwich, Edward I, 66–87 (1988); Morris, 85–102.

[81] Morris, A Great and Terrible King, 119 (quoting Madicott, Edward I, 19).

[82] 1275, 3 Edw. I ch. 1; *see also* 1 The Statutes at Large, 74.

[83] 1275, 3 Edw. I ch. II, V, IX, XII–III, XXVI–II; *see also* 1 The Statutes at Large, 78, 80–81, 83, 93.

[84] 517 U.S. 44, 171 (1996) (Souter, J., dissenting).

[85] *See* Morris, A Great and Terrible King, 120–22; Madicott, Edward I, 14–16; English Historical Documents 1189–1327, 397, 409–10 (H. Rothwell ed., 1975).

[86] *See* 6 Edw. I ch. 1 (Gloucester), 12 Edw. I ch. 1 (Wales), 13 Edw. st. 1 (Westminster II), 13 Edw. I st. 2 (Winchester), 18 Edw. I ch. 1 (Westminster III), 25 Edw. I ch. 1 (*Confirmatorio Cartarum*). *See generally* Prestwich, Edward I, 267–97; Morris, A Great and Terrible King, 194–228.

[87] Maitland, Constitutional History of England, 23.

[88] On Coke, James I, and their times, see generally Catherine Drinker Bowen, The Lion and the Throne: The Life and Times of Sir Edward Coke (Reissue ed. 1990); Frederic William Maitland & Francis C. Montague, A Sketch of English Legal History (James F. Colby ed., 1915).

[89] *See* Felix Makower, The Constitutional History and Constitution of the Church of England 384–94 (1895); William Richard Wood Stephens, The English Church from the Norman Conquest to the Accession of Edward I, 48–52 (1901).

[90] Ronald G. Usher, *Nicholas Fuller: A Forgoten Exponent of English Liberty*, 12 Am. Hist. Rev. 743, 747–48 (1907) (quoting Fuller's statements); *see generally Nicolas Fuller's Case*, 12 Co. Rep. 41, 42–45 (K.B. 1607).

[91] Michael McConnell, The President Who Would Not Be King 110, 148 (2020); Achibald Cox, *The Independence of the Judiciary: History and Purposes*, 21 U. Dayton L. Rev. 565, 568 & n.3 (1996).

[92] *See The Trew Law of Free Monarchies*, as set forth in *The Political Works of James I* at 53 (Charles Howard McIlwain ed., 1918) (1616).

[93] Prohibitions del Roy (1608), 12 Co. Rep. 64, 64 (K.B.).

[94] Bowen, The Lion and the Throne, 65, 305.

[95] McConnell, The President Who Would Not Be King, 148.

[96] 2 Bracton on the Laws and Customs of England 2: 33 (George E. Woodbine ed., Samuel E. Thorne trans., Harvard College ed. 1977).

[97] 343 U.S. 579, 655 & n.27 (1952).

[98] William Swindler, Magna Carta: Legend and Legacy 185 (1965).

[99] 1 William Blackstone, Commentaries *124.

[100] Bowen, The Lion and the Throne, 498–99.

[101] 4 Edward Coke, Institutes, *365–66.

[102] *See* Letter from John Donnelly, Jr. to Cass Gilbert (Sept. 27, 1932), John Donnelly, Inc. Research Files, Office of the Curator 3.

[103] *See* Charles Warren, *The Story-Marshall Correspondence (1819–1831)*, 21 Wm. & Mary Coll. Q. Hist. Mag. 1 (1941); An Address by Mr. Justice Story on Chief Justice Marshall (Lawyers' Co-Operative 1901) (1852).

[104] 5 U.S. (1 Cranch) 137, 177 (1803).

[105] 25 Edw. I ch. II; *see* 1 The Statutes at Large, 273–74.

[106] 8 Coke's Reports 107, 118 (1610).

[107] Alexander Hamilton, *The Federalist*, No. 78, in *The Federalist* 522 (Wesleyan 1961) (Jacob E. Cooke, ed).

[108] *See Calder v. Bull*, 3 U.S. (3 Dall.) 386, 386–94 (1798) (Chase, J.); Oliver Ellsworth, *Speech to the Connecticut Ratifying Convention* (Jan. 7, 1788), *in* 4 The Founders' Constitution 232 (Philip B. Kurland and Ralph Lerner eds., 1987); *Calder*, 3 U.S. at 398–400 (Iredell, J.); *Cooper v. Telfair*, 4 U.S. (4 Dall.) 14, 15 (1800) (Washington, J.); *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304 (C.C.D. Pa. 1795) (Paterson, J.); James Wilson, *Comparison of Constitutions, Lectures on Law* (1791), *in* 4 The Founders' Constitution 252; *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 n.* (1792) (describing two *per curiam* circuit-court decisions, with panels that included Jay, Cushing, Wilson, and Blair). *See also* Sources of Our Liberties, 29 & n.24, *citing* Edward S. Corwin (ed.), *The Constitution of the United States: Analysis and Interpretation*, 82d Cong., 2d Sess., 1953, Senate Doc. 170, 556 n.258 (gathering citations to statements of the Framers, including those of Wilson, Rutledge, and Ellsworth); William R. Castro, *James Iredell and the American Origins of Judicial Review*, 27 Conn. L. Rev. 329 (1995) (arguing that most justices believed in the notion of judicial review prior to *Marbury*).

[109] 1 N.C. (1 Mart.) 5 (1787).

[110] *See* William Cranch, Preface, 5 U.S. (1 Cranch) iii (1803).

[111] Joseph Story, Commentaries on the United States Constitution 425–666 (1833).

[112] *Ibid.*, 429–31.

[113] Office of the Curator of the Supreme Court of the Unted States, The Bronze Doors, Information Sheet, https://www.supremecourt.gov/about/bronzedoors_5-7-2018_final.pdf.

[114] Paula Murphy, *The Irish Imprint in American Sculpture in the Capitol in the Nineteenth and Early Twentieth Centuries*, 55 Capitol Dome 31, 40–41 (2018).

[115] The Supreme Court is primarily responsible for attributing this phrase to John Donnelly, Jr. *See* https://www.supremecourt.gov/about/BronzeDoors; *see also* Mason, *The Supreme Court's Bronze Doors,* 1396.

The Judicial Bookshelf

Donald Grier Stephenson, Jr.

Introduction: The Supreme Court as a Metaphor-inspiring Institution.

"[N]o language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas," observed James Madison. "Hence it must happen that however accurately objects may be discriminated in themselves, and however accurately the discrimination may be considered, the definition of them may be rendered inaccurate by the inaccuracy of the terms in which it is delivered." Madison's context was the "arduous . . . task of marking the proper line of partition between the authority of the general and that of the State governments . . ," but his statement applies as well to descriptions of the Supreme Court.[1] Consider the array of metaphors some scholars, justices, and political leaders have employed to convey the nature of the institution, its members, processes, and decisions.

President George Washington expected the Court to be "the Keystone of our political fabric" and "the Chief Pillar" upon which the national government rested.[2] For former president Thomas Jefferson, the federal judiciary had become a "subtle corps of sappers and miners."[3] Kate Chase Sprague, daughter of the sixth chief justice, looked suspiciously at the Court as a shelf where a president might park a political rival.[4] Justice Oliver Wendell Holmes, Jr., likened the Court to "a storm centre"[5] and, even more unpleasantly, its justices to "nine scorpions in a bottle."[6] Not only had the Court "usurped" its power, charged Senator Robert La Follette in opposing the nomination of Charles Evans Hughes as chief justice, but the Court was the "jury box which ultimately will decide the issue between organized greed and the rights of the masses of this country."[7] For Justice Owen J. Roberts, the Court functioned like a dry goods clerk, "lay[ing] the article of the Constitution which is invoked beside the statute which is challenged and . . . decid[ing] whether the latter squares with the former."[8] President Franklin D. Roosevelt, addressing a Democratic dinner in 1937 shortly after the

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launch of his ill-fated Court-packing plan, compared the Court to "an unruly horse on the government gang plow, unwilling to pull with its teammates, the Executive and Congress."[9] The bench could sit "almost as a continuous constitutional convention," commented Attorney General Robert H. Jackson before his appointment as a justice.[10] Alpheus Thomas Mason asserted that the Court was not only both a "palladium of freedom" and "temple and forum,"[11] but "free government's balance wheel"[12] as well. In the eyes of Senator Russell B. Long it behaved "like a professional gambler working with loaded dice."[13] Similarly, according to Justice Ruth Bader Ginsburg, for one unidentified federal judge reflecting on gender discrimination rulings in the 1970s the Court was like "a casino where his colleagues felt like players at a shell game who are not exactly sure there is a pea."[14]

Before joining the Court, Felix Frankfurter portrayed the justices as engineers, directing "a stream of history."[15] Once on the Bench, however, he contended that the Court was "not a super legal aid bureau."[16] The second Justice John M. Harlan's metaphors also stressed what the Court was *not*: neither "a panacea for every blot upon the public welfare, nor . . . a general haven for reform movements."[17]

The justices are both "lions under the throne," claimed Charles P. Curtis (echoing Francis Bacon), and mariners too, "sailing a great-circle course . . . , fixing their position from the stars as well as taking bearings from the headlands."[18] The Court was "[l]ike a jealous Cyclops," insisted Max Lerner, that wished "to rule the domain that it guarded."[19] Martin Shapiro depicted the Court of the early 1930s as a well-fortified "fortress that had been shooting at Democrats for forty years. . . ." By 1940 victorious Democrats faced a choice between "level[ing]" that fortress "so it could never shoot at Democrats again," or turning "constitutional law . . . from a weapon of Republicans to a weapon of Democrats."[20] Less militaristic, Carl Brent Swisher's depictions regarded the Court as a cohort of voyagers "in a search to determine the scope and the limitations of the Constitution" as well as a "rationalizing and synthesizing agency").[21] Others have taken inspiration from the august quarters the justices have occupied since 1935— a "marble palace" according to Todd C. Peppers,[22] and a "marble temple" for David M. O'Brien who, among others, also labeled the Court "a guardian of the Constitution."[23] Similarly, for Chief Justice Hughes, at the laying of the cornerstone in 1932, "[t]he Republic endures and this is the symbol of its faith."[24]

Arguably, most of these metaphors embody a common theme. The Court and its work are not a completed edifice but something very much in progress. The justices are more than caretakers; they are architects and artisans. Yet, the architectural metaphor must not be pressed too far. Now well into in its third century, the Supreme Court's evolution has not proceeded according to some grand design. The Court is less like a gothic cathedral gradually assuming its intended form through decades of labor and more like one of the old rambling farmhouses of the southeastern Pennsylvania countryside, which time and the necessities and preferences of successive generations have configured. Recent books reinforce this point.

John Marshall's Constitutionalism

John Marshall cast such a long shadow across Supreme Court history that he and his chief justiceship have inspired their own metaphoric phrases and descriptions, some of which are reflected in the tittles or subtitles of biographies, articles, or other portrayals. Edward S. Corwin dubbed him a "revolutionist malgré lui"—a revolutionist

in spite of himself.[25] Several decades earlier, Vernon L. Parrington counted him as the "last of the old school of Federalists and the first of the new."[26] For Richard Brookhiser's **John Marshall** (2018) he was "The Man Who Made the Supreme Court," while Joel Richard Paul cast him simply as **Without Precedent** (2018). Leonard Baker's **John Marshall** (1974) proclaims simply "A Life in Law." In **A Chief Justice's Progress** (2000) by David Robarge, Marshall appears almost Bunyanesque as a pilgrim on a major life's journey.

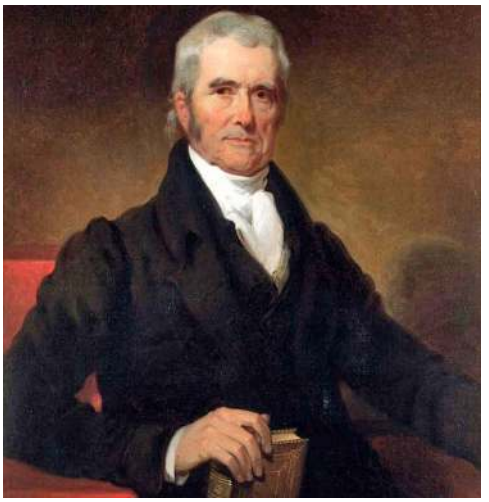
So many characterizations reflect the reality that to write about the fourth chief justice after 1800 has been to write about the Supreme Court just as, with only a few exceptions such as William Johnson and Joseph Story, to write about the Supreme Court in the first third of the nineteenth century has been to write about John Marshall, the individual who is often referred to as "The Great Chief Justice," as if no one else could ever be his equal. Marshall's exalted place in the American pantheon means, therefore, that he has rarely been allowed to stray far from the center of scholarly attention. Alongside more than ten full or partial biographies or Marshall-focused books[27] is a host of more narrowly focused volumes, reams of articles, plus a multitude of other studies in which Marshall's handiwork figures prominently. At the 1955 bicentennial of his birth, one bibliography counted nearly 750 titles.[28] The intervening years may now have pushed that number above one thousand.

To the current count should now be added **John Marshall's Constitutionalism** by Clyde H. Ray, a Philadelphia-based writer and scholar of political theory. His book is a recent entry in the series on American constitutionalism being developed by the State University of New York Press under the general editorship of Robert J. Spritzer.[29]

Surely anyone contemplating comprehensive scholarly writing on Marshall faces a challenge aside from the fact that Marshall's life has been a field frequently tilled. The discomforting truth is that plainly there is so much to Marshall's life so that a writer confronts a list of accomplishments that would fill a modern-day styled resume even before one gets to Marshall's life-defining position on the Court that spanned more than thirty-four years:

- Largely self-taught and educated at home in a family of modest means on the Virginia frontier
- Officer in the Culpepper Virginia Minute Men
- Officer in General George Washington's Army at Valley Forge
- Practicing attorney
- Member of the Virginia state legislature
- Member of the Virginia Convention to ratify the proposed U. S. Constitution
- Minister to France
- Member of the U.S. House of Representatives
- U.S. Secretary of State
- Biographer of George Washington

Biography, however, is a task Ray has left to others, though his compact and tightly written monograph on key elements of Marshall's political thought illustrates that the chief justice's theoretical contributions cannot fully be separated from the lessons he learned from his many life experiences, especially when one remembers that most of Marshall's public service coincided with the formative years of the nation. Moreover, just as Ray necessarily and properly relies in his analysis on the work of other Marshall scholars, no future Marshall scholar can wisely ignore Ray's book. Helpfully, the author has included a Marshall-centered bibliography of 14 pages that follows text of some 108 pages and 30 pages of notes. Missing is a table of cases, with citations, that would have proved useful.



Clyde H. Ray, a Philadelphia-based writer and scholar of political theory, adds to the voluminous literature on Chief Justice Marshall by focusing on his contributions as a political theorist in his new book *John Marshall's Constitutionalism*.

While the familiar moniker "Great Chief Justice" is a reminder for many people that Marshall deserves considerable credit for shaping the Supreme Court into a truly co-equal branch of the national government, the author insists that Marshall's lasting contributions extend well beyond those of nation-fostering and institution-building. For Ray, the political ideas that Marshall wove into his judicial opinions were significant not only for deciding particular cases, but have worked their way into the American mind and national ethos to such a degree that their impact continues.

The author laments, however, that the identification of those ideas with Marshall has become obscured as has his standing as a political thinker. Thus, there has arisen what amounts to a noticeable anomaly between Marshall the jurist and Marshall the political theorist where the former is in the spotlight and the latter remaining in the shadows. Nonetheless, the author admits that some of the reasons why Marshall has often been unnoticed as an important political thinker make sense. First, cases he decided "addressed timely political controversies rather than timeless principles of political theory." Moreover, unlike some other members of the founding generation such as Thomas Jefferson and James Madison, he "did not drink deeply from, the wells of abstract political philosophy." Instead, he was involved more heavily with the "details of disputes, parties, and resolutions," leaving little space "for the detached speculation and high philosophy" in which some contemporaries might have indulged.[30]

Ray's exegesis of Marshall's thinking fruitfully unfolds in four chapters, each of which examines Marshall's opinion in one or more cases: *McCulloch v. Maryland*,[31] *Ogden v. Saunders*,[32] and the "Native American Trilogy"[33] of *Johnson v. M'Intosh*,[34] *Cherokee Nation v. Georgia*,[35] and *Worcester v. Georgia*.[36] Appropriately, it is in the first chapter that the author explores *Marbury v. Madison*,[37] where the book's thesis concerning the centrality of the Constitution in Marshall's thought comes to life. The case, the author insists, was Marshall's "most serious engagement with the notion of constitutional legitimacy."[38] Yet Ray does not overlook that the litigation took place in a hostile partisan atmosphere even more intense than what Americans witness today. "Never was Marshall's position on the Supreme Court more precarious than at this early juncture, and in few instances was he more vigorous in defense of the Constitution's fundamental binding legitimacy."[39]

Thus, to "enter into a discussion of *Marbury*," writes Ray, "is above all to enter into John Marshall's discussion of the fundamental authority of the Constitution." In that opinion, the chief justice did far more than "artfully" dodge a clash with the executive branch by invalidating a section of the Judiciary Act of 1789. He offered "a detailed justification of the fundamental authority of the Constitution, mapping out justifications

familiar if still undeveloped at the time of the decision" regarding the document's "binding authority."[40] Moreover, the opinion in *Marbury* was his "most serious engagement with the notion of constitutional legitimacy."[41]

As illustrated by the two preceding paragraphs, Ray's multiple use of "legitimacy" with respect to Marshall and the *Marbury* opinion is recognition of the novel situation in which the founding generation found itself after having crafted a national government where supreme power rested with "We the People" as the Constitution's Preamble begins. This was the state of affairs recognized by Justice James Wilson in his opinion in *Chisholm v. Georgia*:

> To the Constitution of the United States the term sovereign is totally unknown. There is but one place where it could have been used with propriety. But, even in that place it would not, perhaps, have comported with the delicacy of those who ordained and established that constitution. They might have announced themselves "sovereign" people of the United States: But serenely conscious of the fact, they avoided the ostentatious declaration. . . .
>
> With the strictest propriety, therefore, classical and political, our national scene opens with the most magnificent object which the nation could present. "The people of the United States" are the first personages introduced.[42]

Those "people," however, had established a government under a constitution—that is, not merely a government with power but a government that was to exercise power within the limits imposed by the Constitution. The situation, therefore, entailed opportunity coupled with peril.

Accordingly, for Marshall judicial review was a necessary adjunct to both a written Constitution and a government deriving its power from the people. Yet judicial power, he maintained, did not give the Court any practical or real omnipotence. The Court merely exercised the "judicial power" conferred by Article III of the Constitution and sustained by the principle of separation of powers. "It is, emphatically," Marshall declared, "the province and duty of the Judicial department to say what the law is."[43] The effect, at least in theory, was not to elevate Court over legislature, but rather to make," in Alexander Hamilton's words, "the intention of the people superior to both."[44]

Of course, John Marshall did not "invent" the idea of judicial review. Aside from Hamilton's defense of it in 1788, several early Supreme Court decisions assumed this power, as had some decisions by state supreme courts. Nonetheless, for many, including Ray, *Marbury* may have been Marshall's most important contribution as chief justice. Not only was he the first to articulate a defense of judicial review in a U.S. Supreme Court decision. but as much as anyone he "legalized" the Constitution, treating the nation's fundamental charter as a juridical document—as law—and so a text whose meaning would be discerned in the process of deciding cases. That meaning, in turn, would resolve disputes over allocations of power.

Of even greater importance, his opinion in *Marbury* put forth an answer to a question the Constitution implicitly posed but did not answer. The second paragraph of Article VI declares the Constitution to be the "supreme Law of the Land." Yet, who or what or what was to determine the Constitution's meaning or settle constitutional disputes? Marshall's opinion in *Marbury* resolutely assigned that role to the Supreme Court in a context in which Marshall was very much aware of competing answers. Indeed, in the partisan debate over the validity of the Sedition Act of

1798, the Virginia and Kentucky "Resolves" or resolutions insisted that state legislatures should make that judgment on their own. Then debates in Congress in 1802 over the repeal of the Judiciary Act of 1801[45] advanced yet another option: that Congress should be the judge of the constitutionality of its own actions. Against both, Marshall claimed that role for the judiciary.

While Ray's presentation should persuade most readers of Marshall's standing as a political thinker, what may be even more prominent in the book is ample evidence that, alongside his long-standing reputation as a jurist, Marshall's opinions reveal him also to be a great teacher, particularly in light of the circumstances Marshall confronted:

> Marshall was in the thick of the difficult task of legitimizing a nation to a people whose identification and sense of citizenship had hitherto sopped at the boundary points of their respective states. . . . Seen in this light the Marshall Court was not merely engaged in a colloquy with the President, Congress, or state legislatures.[46]

His arguments, Ray maintains, are instead

> pitched beyond political officials entirely, to ordinary Americans who, through reading his opinions, [or perhaps even more likely newspaper accounts of them] might gain a deeper and more detailed understanding of what government under the Constitution entailed. . . . In the conversation between citizens and their representatives about the form and substance of the Constitution, he saw a salutary influence for republican self-government.[47]

Remarkably, Marshall persisted in this teaching "fully aware that many Americans did not share his particular understanding of constitutional government and the powers of the national government."[48]

For many readers of this *Journal*, the author's emphasis on the pedagogical dimension to Marshall's tenure will bring to mind earlier and similar endeavors by the very first justices and other federal judges, as described nearly a century ago by Charles Warren: "[I]t was largely through the charges to the Grand Jury made by these judges that the fundamental principles of the new Constitution and Government and the provisions of the Federal statutes . . . became known to the people."[49]

The continuing importance of Marshall the theorist, the author concludes, is that his "political thought introduces us as readers, as students ourselves of the Constitution, to the fundamental and enduing importance of the rule of law for citizens today." Thus, "in understanding the bases of Marshall's constitutionalism, we may better articulate our own."[50]

Washington's Heir

During his chief justiceship Marshall sat with sixteen colleagues. Of these he served longest with Bushrod Washington (President John Adams' first Supreme Court appointee) and William Johnson (President Thomas Jefferson's first). Justice Washington is now the subject of an eminently readable biography by Gerard N. Magliocca, who teaches in the law school at Indiana University.[51] His **Washington's Heir** is an aptly titled study of George Washington's favorite nephew who inherited Mount Vernon. The book has filled a gap in judicial literature that some readers perhaps did not know existed.

While Johnson merited substantial biographical treatment by Donald G. Morgan nearly seven decades ago,[52] Washington until now has, aside from encyclopedia-styled essays, otherwise been strangely passed over. Indeed, a glance at the extensive biographical bibliography in the last edition of Henry J.

Abraham's classic book on Supreme Court appointments, reveals only two entries for Washington: a book by Horace Binney[53] published in 1858, and a short piece in *Green Bag*, dated 1897. The bibliography on the Court compiled by this author listed only a four-page essay by Gerald Dunne on Washington's slaves.[54] Even the astute Jack W. Peltason in an essay seven decades ago on judicial biography failed to include Washington on his short roster of "unbiographed" justices who nonetheless merited attention. While pointing to some justices not likely "to inspire scholars to devote the time and energy necessary to produce their biographies," he cautioned that it "would be undesirable to develop scholarly one-upmanship in which students are encouraged to find a relatively obscure justice to claim as their own—a vice, so we are told, sometimes practiced by our colleagues in literature to 'discover' some long forgotten writer 'because all the good ones have already been taken.' [T]hat approach," he added, "is still unnecessary for there are major figures" awaiting study. Yet, even as Peltason took a second look, Washington again merited no mention.[55]

Gerard N. Magliocca, who teaches in the law school at Indiana University, has produced the first biography of Bushrod Washington, whose important role on the Marshall Court has been overlooked.

Some students of the Court may have had a first encounter with Washington that was entirely indirect by way of Charles Warren's **The Supreme Court in United States History**. Tucked within a footnote is part of a letter Justice Johnson sent to Thomas Jefferson in 1822 in response to the former president's concerns about John Marshall's influence over his colleagues, particularly in the years soon after Johnson went on the Bench. "I soon . . . found out the real cause," explained Johnson. "Cushing was incompetent, Chase could not be got to think or write, Paterson was a slow man and willingly declined the trouble, and the other two Judges (Marshall and Bushrod Washington) you know are commonly estimated as one judge."[56] (Johnson's letter lacked the parentheses that were apparently inserted by Warren. Morgan's biography of Justice Johnson omits them.)[57]

Johnson's allusion to "one judge" aligns with reasons Magliocca gives for Washington's long-term residency in scholarly obscurity. Referring to his uncle George Washington and his colleague John Marshall, the author surmises that Washington has been overlooked both because "he stood in the shadow of two great men" and "did his best work in the shadows. Like many leaders who come to power after a revolution, the justice was an institutionalist. He wanted to enhance the legitimacy of the Supreme Court as the third coequal branch of government." Accordingly, "much of the time the best way of accomplishing that goal was by way of saying nothing in public and letting Chief Justice Marshall speak for the Court."[58]

Magliocca's narrative includes ample examples of the collaboration between Marshall and Washington after the latter's appointment in 1801, one of which in particular may be unfamiliar to most readers. After Marshall's opinion in *McCulloch v. Maryland* met with

harsh published criticism in Virginia newspapers, the chief justice realized that what mattered most in terms of lasting impact was less the decision itself than acceptance of the reasons articulated in support of the decision. He therefore undertook a systematic defense of his opinion for the Court. In what the author describes as "cloak and dagger" work[59] Marshall relied upon Washington to place his anonymously written pieces in newspapers in the Washington area and in Philadelphia, and when printer errors occurred, as they did, to make sure those were corrected. Magliocca finds this arrangement remarkable for two reasons. First, it appears that neither Marshall nor Washington consulted with any other justice prior to launching this enterprise. Second, Marshall's letters to Washington "indicated that they were both willing to enter the political arena if necessary, although they were cagier about such intervention in 1819 than during their early years on the Court."[60] (Readers who would like more detail on this collaboration should consult the analysis and materials assembled by Gerald Gunther.)[61]

Magliocca believes that in this and other situations Washington worked behind the scenes as a team player, making the successes of the Marshall Court a collective effort and not merely the output of a remarkable chief. One wonders as well whether Washington's reserve was also fostered by poor eyesight. By the late 1790s, he had lost almost all vision in one eye, a development that makes what he did accomplish all the more remarkable. This same affliction led him, as executor of his uncle's estate, to abandon plans for a biography of his uncle and to hand over the task along with access to all the late president's personal and private papers to John Marshall.[62]

Yet, this reticence that seems to have kept him out of the spotlight and much later minimized the attention of latter-day scholars may also have developed early in his public career and on the advice of his uncle George. For instance, upon Bushrod Washington's election to the Virginia House of Delegates, the future president advised his nephew to exercise restraint in public. He cautioned:

> Except in local matters which respect your Constituents and to which you are obliged by duty to speak, rise but seldom—let this be on important matters—then make yourself thoroughly acquainted with the Subject . . . [O]ffer your sentiments with modest diffidence—opinions thus given, are listened to with more attention than when delivered in a dictatorial style. The latter, if attended to at all, although they may force conviction, is sure to convey disgust.[63]

George Washington's correspondence with his nephew, however, could reprove as well as advise. For instance, when Congress was debating legislation that became the Judiciary Act of 1789, Washington wrote his uncle to ask for an appointment as United States attorney for Virginia. The reply was frosty:

> You cannot doubt my wishes to see you appointed to any office or honor or emolument in the new government, to the duties to which you are competent—but however deserving you may be of the one you have suggested, your standing at the bar would not justify my nomination of you as attorney to the Federal district Court in preference of some of the oldest and most esteemed General Court lawyers in your own State, who are desirous of this appointment. My political conduct in nominations, even if I were uninfluenced by principle, must be exceedingly circumspect and proof against

> just criticism, for the eyes of Argus are upon me, and no slip will pass unnoticed that can be improved into a supposed partiality for friends and relatives.[64]

Magliocca's book is rich with such primary materials, themselves the product of extensive research. While one almost always expects a similar comment to apply to a study of a contemporary or recent political figure, the challenges are vastly different for any author where the subject's life and public service, as with Washington, spanned the late eighteenth and early nineteenth centuries. That pre-telegraphic period in which news traveled no faster than the fastest horse presents its own obstacles for any scholar and requires its own special detective skills alongside broad background knowledge. One of those challenges plainly is that the federal judiciary of Bushrod Washington's day was so vastly different from the judiciary of the early twenty-first century. As the author reminds the reader, when Washington joined the Court, the entire federal judiciary consisted of only fifteen district judges and the six justices. The Fourteenth Amendment, which would become the basis of much federal litigation, did not become part of the Constitution until 1868. Furthermore, the restrictions in the Bill of Rights, ratified in 1791, did not apply to the states and would not even begin to apply to them for about a century. In short, today's federal court system and its varieties of litigation would be unrecognizable to anyone from Bushrod Washington's day.

Similarly, no member of today's Court—even in light of Covid, the aftermath of the attack on the Capitol on January 6, 2021, and threats to individual justices—has had to face circumstances even approaching what the justices encountered in 1814 after the British burned the Capitol and the White House. While Stelle's Hotel, where the justices often stayed during Court sessions, escaped destruction, the Court's furniture and other items were lost in the Capitol fire. The Court was thus forced into new quarters, pending reconstruction, repair, and replacement. The situation led Marshall to write Washington about what he might expect. "Can you inform me what provision is made for us? Where and in what room are we to sit?" Consequently, for the next two terms the Court convened in the front parlor of the Supreme Court clerk's house "while the clerk's eight children ran about not keeping quiet during oral arguments."[65]

Washington's Heir consists of twelve numbered chapters plus an introduction and epilogue. The latter is followed by ninety-six pages of notes and a bibliography of fourteen pages. (While the table of cases in the bibliography includes citations, it omits page numbers where the cases are mentioned in the book. Some, but not all, of these cases do appear in the index.) With productive use of primary material there is good balance between what Magliocca relates about Washington's professional life and his personal life. However, the reader would greatly benefit from the addition of a chronology, something essential for a biography of someone with such an active and event-filled life. Also helpful, given the justice's family, would have been a simple genealogy chart. Furthermore, a list with page numbers of the twenty-six halftone figures that reproduce documents and paintings or sketches of persons and places central to the book would have been a useful addition as well.

As they progress through the book, readers soon discover the close overlap between Bushrod Washington's resume and John Marshall's. Aside from their common origins as Virginians, they were born seven years and less than ninety miles apart and in their early years largely educated at home or close by. Each sat for George Wythe's law lectures at the College of William & Mary. Each served in the Continental Army and held a seat in

the Virginia state legislature and in that commonwealth's convention to ratify the proposed federal Constitution. Both engaged in private law practice, and were both involved in about a dozen cases in the Virginia Court of Appeals either together or as rivals. However, Washington received upscale in-office instruction under the guidance of future Supreme Court justice James Wilson in Philadelphia, who also lectured at the University of Pennsylvania. Wilson's fee was 100 guineas, or about $20,000 in today's dollars, a sum equivalent to about one third the annual tuition at the University of Pennsylvania Law School in 2023. However, Wilson's fee may have worked out to be even pricier than it appeared, in that Magliocca notes Wilson was widely known for giving almost no guidance to those who paid to be under his tutelage.[66]

The appointments of both Washington and Marshall to the Supreme Court were similarly interwoven in a way that had lasting importance for the nation. By 1798, George Washington had "strong-armed"[67] both his nephew and John Marshall to run for Congress. Shortly, word reached President Adams of the death of Justice Wilson at the home of Justice James Iredell. Adams wrote Secretary of State Timothy Pickering that he was "ready to appoint either General Marshall or Bushrod Washington. The former I suppose ought to have the Preference."[68] Both were from Virginia and at the time no member of the Court was from that largest of the states. Moreover, given Marshall's success in the XYZ Affair his nomination was expected to receive wide acclaim in an election year. Marshall, however, declined to accept the nomination, perhaps because he might have been unwilling to break his commitment to the former president, or might instead have preferred to wait for an opening in the Court's center chair. Most convincing however, is the income factor. As a member of Congress, he could continue his law practice that brought in probably $10,000 annually at a time when an associate justice's salary was $3,500. However, the question persists whether Marshall as an associate justice would have been named chief justice after Chief Justice Oliver Ellsworth resigned. One also wonders whether as an associate justice in place of Bushrod Washington the leadership qualities he in fact displayed as chief justice would have manifested themselves, with someone else in the center chair. Nonetheless, having declined the nomination Marshall let Pickering know that he preferred the seat go to Bushrod Washington, noting that "I am equally confident that a more proper person could not be named."[69] Washington then accepted a recess appointment in September 1798 and was confirmed by the Senate in December.[70] Joining the Court at age thirty-six, he remains one of only four justices to have begun their service at or under the age of forty.

Like Marshall, Justice Washington owned a substantial number of slaves. As Magliocca emphasizes, he was "dependent on slaves from the day he was born until the year he died." Moreover, by moving his own slaves to Mount Vernon he was "responsible for returning slavery" to the plantation "after his uncle put that evil on the path to extinction there." Yet, the justice was also president of the American Colonization Society, which promoted the resettlement of free blacks to the recently established country of Liberia on the African continent and also counted abolitionists among his closest friends. Yet "he made national headlines for selling enslaved people" to plantations in Louisiana in 1821 and "bitterly rejected the criticism that followed."[71] Moreover, it appears that Washington freed only one slave over the course of his life and that was West Ford, probably his half-brother or perhaps nephew.[72] (In the index West Ford appears under "Washington, West Ford."[73]

With respect to Washington's judicial work, the author allots a full chapter to

Corfield v. *Coryell*,[74] decided on circuit in the eastern district of Pennsylvania in 1825. The name of the case will be familiar to those who recall Justice Samuel F. Miller's opinion for the Court in the Slaughterhouse Cases,[75] the Court's first decision involving the Fourteenth Amendment. In this case New Orleans butchers insisted that a state-imposed monopoly violated, among other provisions, the second sentence of section one which declared "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . . ." For guidance as to the identity of those privileges and immunities, Justice Miller looked for judicial construction of similar language in the first sentence of section 2 of Article IV: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." That search led him to Justice Washington's opinion in *Corfield*.

This litigation stemmed from a statute New Jersey enacted in 1820 that banned the harvesting of oysters from May until September to prevent exhaustion of that resource. During the rest of the year, only state residents were permitted to take oysters from state waters. The plaintiff was a nonresident whose boat was seized and sold by New Jersey officials after he violated the law. His trespass suit rested on two federal constitutional grounds: that the statute intruded on Congress's power from Article I to regulate commerce among the states and the provision quoted above from Article IV.

Initially, Washington advised the jury to rule for the plaintiff on the first ground. Later, however, and after the Supreme Court had issued its ruling on the Commerce Clause in *Gibbons v. Ogden*,[76] the defendant pressed for reconsideration. Reevaluating his initial position, and after showing a draft of his opinion to Justice Story, Washington came to the conclusion that the statute was constitutional after all. Yet it was in dealing with the Article IV issue that his opinion became memorable, even as he concluded that harvesting oysters was not included among the constitutionally protected privileges and immunities:

> The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general

> description of privileges deemed to be fundamental.

At this point, however, Washington's opinion took an unexpected turn: "*to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised*.[77]

Magliocca offers several observations about the *Corfield* opinion. First, it was aspirational in that history did not support some of its claims. Second, the list of rights came principally from common law, not the Constitution of 1787, although some could be inferred from that founding document. Third, the statement on voting rights "though qualified by the word 'may' and by the power of the state to regulate suffrage, was revolutionary. No prior case had said that voting was a basic right of any sort, and no leading political figure took that view."[78]

Fourth, his position on voting was deemed so radical "that even strong proponents of equal citizenship during Reconstruction could not accept Washington's logic. . . ." Only in the twentieth century would "Corfield's ideal approach reality. . . ."[79] Finally, attention paid to Washington's opinion during Reconstruction was rich in irony. The handiwork of this prominent slaveholder and dealer in slaves became a "touchstone for the Congress that enacted the Civil Rights Act of 1866 and proposed the Fourteenth Amendment" that became part of the law of the land in 1868.[80]

Corfield also serves as a reminder that Washington, like all justices until almost the end of the nineteenth century, spent most of their work hours not sitting with the Supreme Court, but holding court on circuit. However, unlike any of his colleagues, Washington's circuit assignment never included his home state, a designation that went instead to fellow-Virginian, the chief justice. Rather, Washington rode circuit in Pennsylvania and New Jersey. The author notes that there is no record of Washington's having taken a personal slave with him to Philadelphia. Had he done so, he would have been subject to the Keystone State's six-month rule that allowed a slaveowner to keep a personal slave for no longer than six months while residing there. The author speculates that Washington may not have taken advantage of this allowance for fear of escape.[81] (This author could find no mention in the book of Washington's having taken a slave into New Jersey. Slavery was not fully prohibited in the Garden State during Washington's tenure and would not be officially and fully abolished until 1865, upon ratification of the Thirteenth Amendment.[82])

Magliocca concludes his book with a question that could be posed about other prominent historical figures: "How should Bushrod Washington's achievements be weighed alongside his personal record on slavery?" The author puzzlingly ventures:

> Perhaps the answer is that we are all George Washington's heirs. Heirs of the soldiers whom he commanded, heirs of the people whom he enslaved, and heirs of the nation that he led. Justice Washington was the first person who was forced to make choices about this complex inheritance. He was not the last. Now these choices fall to all Americans to decide. . . .[83]

Citizen Justice

Sixty-nine years after Bushrod Washington died in Philadelphia in 1829, William Orville Douglas was born in Maine, Minnesota, although he was reared among the mountains in the state of Washington. Named to the Supreme Court at age forty in 1939 as the fourth of Franklin D. Roosevelt's nine additions to the High Court,[84] Douglas sat for thirty-six years until illness forced him into retirement. He thus seized the longevity record from Stephen J. Field, who sat

for thirty-four years. Among justices in the modern era Douglas also holds the dubious distinction of twice being the target of an impeachment effort in the U.S. House of Representatives, the first in 1953 and the second in 1970.[85] Far more positively, Douglas was a prolific writer off the bench, authoring more than a dozen books that ranged from the judicial process and legal subjects to travel, politics, the great outdoors, and autobiography. Indeed, among all justices, probably only Joseph Story matches or exceeds Douglas as an author in terms of number of volumes and pages.[86] Moreover, of justices who have served since World War II, none has surpassed Douglas in terms of a hankering for, and flirting with, the presidency, a tendency that surfaced occasionally amid vocal disclaimers from the mid-1940s to the mid-1950s.

Given Bushrod Washington's public life mainly in the first third of the nineteenth century, most today would easily classify him as a figure from history. With Douglas, by contrast, many who began to follow the work of the Court during Earl Warren's chief justiceship may still regard Douglas almost as a contemporary figure as they recall key Douglas opinions from the 1950s and 1960s. Yet for those whose interest in the Court dates only from the Rehnquist Court or later, Douglas, like Washington may seem a name only from distant past.

Unlike Washington, however, Douglas has long been the focus of scholarly attention. For example, Henry Abraham's bibliography alone lists some thirteen books, including solid biographies by James F. Simon (**Independent Journey**, 1980) and Bruce A. Murphy **Wild Bill** (2003). Articles about Douglas in law reviews and other scholarly periodicals may well number over one hundred.

To the Douglas list should now be added **Citizen Justice** by M. Margaret McKeown,[87] judge on the U.S. Court of Appeals for the Ninth Circuit since 1998, and herself a daughter of the mountain West, a White House fellow in the Carter administration and special assistant to Cecil Andrus, secretary of the interior in the Carter administration. The subtitle she chose leaves little doubt about the thrust of her engaging, comprehensive, readable and timely study: "The Environmental Legacy of William O. Douglas—Public Advocate and Conservation Champion."

McKeown's book unfolds in eleven chapters that are followed by thirty-seven pages of notes and four pages of "Further Reading" that include books both by and about Douglas, although the former grouping of "Selected Books" omits his **Points of Rebellion** (1970). Helpfully, **Citizen Justice** includes twenty-five halftone illustrations that are conveniently listed with page numbers immediately following the table of contents. Moreover, of all books about Supreme Court justices, McKeown's may be unique in that the appendix includes a recipe for cookies—specifically Mardy Murie's Cry Baby Cookies.[88] Grasping the connection of that delicacy with Douglas and Moose Wyoming[89] should especially entice even the laid-back reader to pay close attention. Moreover, in the three pages of acknowledgements, the author impressively credits more than two dozen archives and manuscript collections, demonstrating both that the Douglas trail is long but not quickly or easily explored. While rich in resources, what is missing from the book is a table of cases, with citations.

It is in chapter two that the author begins to explore the duality of and tension between the roles suggested by her title. While the word "justice" suggests the conventional behavior of a member of the Court, "citizen" points to a far more active life in public affairs that would encompass a variety of activities ranging from promotion of various causes and occasional policy interventions to pursuit of appointed or elective office. For Douglas, the question was not a matter of choosing one. Instead, the choice for him was all of the preceding. From his perspective,

the epiphany for citizen apparently dated from *O'Malley v. Woodrough*,[90] a decision by the Supreme Court very soon after Douglas took the judicial oath. *O'Malley*, overturned *Evans v. Gore*,[91] which had come down when the future justice was barely legal age, holding that salaries of federal judges were constitutionally exempt from the federal income tax despite the language of the Sixteenth Amendment. As Justice Felix Frankfurter observed for the majority in *O'Malley*, "To suggest that [a nondiscriminatory income tax] makes inroads upon the independence of judges . . . by making them bear their aliquot share of the cost of maintaining the government is to trivialize the great historic experience on which the framers based the safeguards of Article 3, Section 1."[92]

Douglas maintained three decades later in an interview with CBS journalist Eric Sevareid that after the decision he made a notation of a thought that occurred to him: "Young man, you've just voted yourself first-class citizenship." So, "if you're going to pay taxes like everyone else, that you should be a citizen like everyone else, except that unless the thing you are doing interferes with the work of the court."[93]

McKeown, however, finds Douglas's explanation not entirely convincing:

> It is hard to know whether *O'Malley* actually sparked this sentiment in Douglas or whether only later it became a convenient explanation for his activities. Douglas repeated this pronouncement in the autobiography he wrote much later, but in the diary he kept for the first two years on the court, the case is referenced only in passing and without any mention of his self-proclaimed "first class citizenship."[94]

Indeed, as McKeown intimates, if one decided to redefine the role of a justice, it would not be surprising for the individual to reach for any plausible and convenient justification.

The author's chapter nine—The Backstory of *Sierra Club v. Morton*[95]—provides a dramatic picture of the citizen justice in motion. Indeed, the chapter is so dramatic that this author realizes that the summary presented here fails to do justice to McKeown's multi-faceted account. The case concerned an attempt by the U.S. Forest Service and Disney to develop California's Mineral King Valley (now part of Sequoia National Park) into a ski resort. The Sierra Club sued to block the plan, and the case reached the Supreme Court, triggering what McKeown tags as Douglas's most famous environmental dissent. How Douglas's "dissenting opinion came to be is the story of a cascade of serendipity and good luck, stemming from his long-standing relationship with the Sierra Club and the happenstance of a then unpublished law review article that landed on his desk while the case was pending." Furthermore, the case highlighted

> the jousting among the justices and the ethical tensions surrounding judicial conflict of interest and *ex parte* contacts with the court. Although a slim majority of the court ruled in favor of Walt Disney, in the end the Magic Kingdom of the mountains never materialized. But the notion that trees have standing began to take root.[96]

In the author's convincing assessment, the "case was made for Douglas, and Douglas was made for this case."[97] However, Douglas had remained a life member of the Sierra Club after he resigned from its board in 1961. In December 1970 he "wrote to the president of the Sierra Club to "abdicate his lifetime membership." In this letter Douglas explained that he did "not want to be disqualified in cases which will come before the Court. *I am not thinking of any case in*

Judge Margaret M. McKeown's biography of William O. Douglas, *Citizen Justice*, examines the boundaries of his advocacy in environmental matters and finds he exceeded judicial propriety.

particular. I have not seen one here, nor have I heard of one which is on its way."[98] McKeown writes that the italicized passage "strains credulity." She adds that records show that the justice did check with the clerk's office the day before writing the letter and was given incorrect information. However, the litigation had been going on for several years, the petition for certiorari had arrived before Douglas wrote his letter, and as circuit justice for the Ninth Circuit, "he would almost certainly have been aware of key decisions coming to the Supreme Court from the Ninth Circuit Court of Appeals." More likely, she continues, "knowing the case was coming to the Supreme Court, Douglas wanted to participate, prompting his out-of-the-blue renunciation of the life membership. . . ."[99]

Similarly fascinating is the author's account of how a soon-to-be published law review piece reached Douglas "over the transom" on the day of oral argument and became the basis for his dissent, which he drafted in two hours and echoed its thesis. "Curiously," she writes, "no one raised an ethical concern that sending a targeted legal missive to a single justice while this appeal was pending could be seen as a violation of the rule against *ex parte* (one sided) contact."[100]

As one might expect in a book about Douglas—especially one written by a federal judge—the final chapter ("Lessons and Legacies") offers an assessment of Douglas's version of the citizen justice. "The justice's wide-ranging interpretation of what was 'compatible' with his duties stretched—some

might say eviscerated—notions of judicial propriety." That behavior is in the context of recognition that judicial ethics and norms "are more than feel good declarations of adherence to a professional code. They are integral to the constitutional framework, which depends on judicial independence . . . and confidence in the judiciary."[101] With a timely glance at the present, she cautions that "the challenge comes in striking a balance between isolation and immersion in advocacy to the degree represented by Douglas."[102] Helpfully, the same chapter moves beyond Douglas to include a discussion of contemporary ethics issues involving the Supreme Court. The contrast between Douglas's approach to judicial norms and the sensitivity justices try to observe today is striking.

McKeown's conclusion that Douglas stretched the concept of citizen justice across the boundary of propriety, acknowledges, however, that judges do not arrive on the bench as blank slates but instead as individuals with a lifetime of experience. "Nothing is wrong with a Justice having interests, or even passions, on particular subjects."[103] She then draws a sharp contrast between Douglas on environmental and wilderness disputes and Justice Thurgood Marshall on civil rights and Justice Ruth Bader Ginsburg on gender matters, noting that neither Marshall nor Ginsburg was expected to sit out cases on those subjects. One thinks as well of Justice Hugo L. Black on cases involving Fourteenth Amendment incorporation or those challenging restrictions on speech. "The rub," writes the author, "comes in whether those beliefs are so fundamental and unwavering that they impair a judge's ability to be objective and affirmatively tilt the outcome of a case."[104]

The Jurisprudential Legacy of Ruth Bader Ginsburg

While Justice Ginsburg will continue to be the focus of much scholarly inquiry, probably no book published to date about her matches the breadth of **The Jurisprudential Legacy of Ruth Bader Ginsburg**, edited by Ryan Vacca and Ann Bartow, both of whom teach at the University of New Hampshire School of Law.[105] In assessing the impact of any judge, one looks initially at length of service, and for Ginsburg the tally remains noteworthy: thirteen years on the U.S. Court of Appeals for the District of Columbia followed by twenty-seven years on the Supreme Court, for a total of forty. However, such a sum obscures not only hundreds of cases, but cases ranging across dozens of topics.[106] Ginsburg might well have agreed with Justice Douglas's assessment that "[p]olitics are perishable. The work of the Court is long and enduring."[107]

To explore Ginsburg's judicial legacy, Vacca and Bartow have assembled twenty-five contributors, in addition to themselves, who in turn have written the book's twenty-one chapters. The chapters in turn are preceded by a preface and introductory essay and followed by a conclusion. The book's backmatter includes sixteen pages that list additional resources on Justice Ginsburg and her jurisprudence. These lists include her own publications, transcripts of and interviews with her, books and chapters about her, and films and miscellaneous other materials. In short, the editors have in a short space provided a major research resource, wholly apart from the book's analytical chapters.

For those who associate Justice Ginsburg's judicial career mainly with gender discrimination, this book will be an eye-opener. While gender is hardly overlooked, there is so much more, as the table of contents alone demonstrates. Aside from the expected, there are chapters on bankruptcy, civil procedure, copyright, criminal procedure, the Employment Retirement income Security Act (ERISA), patents, taxation, and voting rights, among other topics. Collectively, the chapters "break[] down the popular version of RBG and spotlight[] the complicated,

***The Jurisprudential Legacy of Ruth Bader Ginsburg*, edited by Ryan Vacca and Ann Bartow, both of whom teach at the University of New Hampshire School of Law, examines the Justice's work in areas as varied as bankruptcy, civil procedure, copyright, criminal procedure, ERISA, patents, taxation, and voting rights.**

nuanced, and sometimes contradictory aspects of her jurisprudence."[108]

From the chapters the editors helpfully have drawn "a handful of observations about Justice Ginsburg's jurisprudential legacy that occur across several legal subject areas."[109] These include evolution—how her views changed over time in some parts of the law. As a second observation, the editors highlight incrementalism, which for them reveals itself both in a preference for sometimes writing narrow opinions "to slowly move [*sic*] the law in her desired direction and acknowledging but not precipitously deciding extraneous legal issues for which she planted analytical seeds for the future."[110] Also present, they note is pragmatism—a tendency in shaping the law to avoid unpredictable outcomes. Accordingly, a posture of judicial restraint emerged as yet a fourth point about her judicial record. In addition, the editors observe a welcome political sensitivity as the Court interacted with other parts of the federal government.

Vacca and Bartow admit, however, that even these themes "don't capture other aspects of Justice Ginsburg's jurisprudence, such as the empathy, humanity, and compassion she displayed in criminal procedure cases" or "the fact that she was always thoughtful in judging the cases before her." They conclude their appraisal with a statement by Ginsburg herself. When an interviewer in 2015 asked the justice how she would like to be remembered, her reply was typically straightforward: to be remembered as "someone who used whatever talent she had to do her work to the best of her ability."[111] While Justice Ginsburg may have inspired no metaphors, she did acquire the moniker "notorious." Furthermore, like predecessor justices explored in the books surveyed in this essay, she left her mark on the Court and American law.

THE BOOKS SURVEYED IN THIS ARTICLE ARE LISTED ALPHABETICALLY BY AUTHOR BELOW

McKeown, M. Margaret. *Citizen Justice: The Environmental Legacy of William O. Douglas—Public Advocate and Conservation Champion.* (Lawrence: University Press of Kansas [Potomac Books imprint], 2022). Pp. xiv, 149. ISBN: 978-1-64012-300-7 (cloth).

Magliocca, Gerard N. *Washington's Heir: The Life of Justice Bushrod Washington.* (New York: Oxford University Press, 2022). Pp. x, 179. ISBN: 978-0-19-094704-0 (cloth).

Ray, Clyde H. *John Marshall's Constitutionalism*. (Albany: State University of New York Press, 2019). Pp. x, 160. ISBN: 978-1-4384-7440-3 (paper).

Vacca, Ryan and Ann Bartow, eds., *The Jurisprudential Legacy of Justice Ruth Bader Ginsburg*. (New York: New York University Press, 2023). Pp. x, 355. ISBN: 978-1-4798-1785-6 (cloth).

ENDNOTES

[1] **The Federalist**, No. 37 (W.R. Brock, ed. (1961), 180.

[2] Letter to John Jay, October 5, 1789, and Letter to John Rutledge, September 30, 1789, in Maeva Marcus and James R. Perry, eds., **Documentary History of the Supreme Court of the United States 1789–1800**, vol. 1 (1985), 11, 21.

[3] Letter to Thomas Ritchie, December 25, 1820, in Paul L. Ford, ed., **The Writings of Thomas Jefferson**, vol. 10 (1899), 170.

[4] Walter Stahr, **Salmon Chase** (2021), 507.

[5] Oliver Wendell Holmes, "Law and the Court," in **Collected Legal Papers** (1921), 292.

[6] Max Lerner, **Nine Scorpions in a Bottle: Great Judges and Cases of the Supreme Court** (1994), dust jacket.

[7] *New York Times*, February 14, 1930, F-14.

[8] *United States* v. *Butler*, 297 U.S. 1, 62 (1936).

[9] Alpheus Thomas Mason, **Harlan Fiske Stone**, (1956), 444.

[10] Robert H. Jackson, **The Struggle for Judicial Supremacy** (1941), x–xi.

[11] Alpheus Thomas Mason, **The Supreme Court: Palladium of Freedom** (1962); "The Supreme Court: Temple and Forum," 48 *Yale Review* 524 (1959).

[12] Mason, "Free Government's Balance Wheel," *The Wilson Quarterly* (Spring 1977), 93.

[13] *New York Times*, March 3, 1960, 14.

[14] Philippa Strum, **On Account of Sex** (2022), 151.

[15] Felix Frankfurter, **The Commerce Clause under Marshall, Taney and Waite** (1937), 2.

[16] *Uveges* v. *Pennsylvania*, 335 U. S. 437, 449 (1948) (dissenting opinion).

[17] *Reynolds* v. *Sims*, 377 U.S. 533, 624–625 (dissenting opinion).

[18] Charles Curtis, Jr., **Lions Under the Throne** (1947), 333.

[19] Lerner, **Nine Scorpions in a Bottle**, 27.

[20] Martin Shapiro, "Chief Justice Rehnquist and the Future of the Supreme Court," in D. Grier Stephenson, Jr., ed., **An Essential Safeguard: Essays on the United States Supreme Court and Its Justices** (1991), 146.

[21] Carl Brent Swisher, **The Supreme Court in the Modern Role** (1958), 6, 65.

[22] Todd C. Peppers, **Courtiers of the Marble Palace** (2006).

[23] David M. O'Brien **Storm Center** (5th ed., 2000), 104, 376.

[24] Building History, **Supreme Court of the United States**, https://www.supremecourt.gov/about/buildinghistory.aspx, last accessed on March 22, 2023.

[25] Edward S. Corwin, "John Marshall, Revolutionist Malgré Lui," 104 *University of Pennsylvania Law Review* 9 (1955).

[26] Stanley I. Kutler, ed., **John Marshall** (1972), 130.

[27] Even an incomplete list would include: Albert J. Beveridge, **The Life of John Marshall**, 4 vols. (1916–1919); Robert K. Faulkner, **The Jurisprudence of John Marshall** (1968); Stanley I Kutler, ed., **John Marshall** (1972); Leonard Baker, **John Marshall: A Life in Law** (1974); Francis N. Stites, **John Marshall: Defender of the Constitution** (1981); Charles F. Hobson, **John Marshall: The Great Chief Justice and the Rule of Law** (1996); Jean Edward Smith, **John Marshall: Definer of a Nation** (1996); Herbert A. Johnson, **The Chief Justiceship of John Marshall** (1997); David Robarge, **A Chief Justice's Progress** (2000); R. Kent Newmyer, **John Marshall and the Heroic Age of the Supreme Court** (2001), Richard Brookhiser, **John Marshall, the Man Who Made the Court Supreme** (2018); Joel Richard Paul, **Without Precedent** (2018).

[28] James Servies, **A Bibliography of John Marshall** (1956).

[29] Clyde H. Ray, **John Marshall's Constitutionalism** (2019), hereafter Ray.

[30] *Id*., 2.

[31] 17 U. S. 316 (1819).

[32] 25 U.S. 213 (1827).

[33] Ray, 8.

[34] 21 U.S. 543 (1823).
[35] 30 U.S. 1 (1831).
[36] 31 U.S. 515 (1832).
[37] 5 U. S. 1 (1803).
[38] Ray, 104.
[39] *Id*., 105.
[40] *Id*., 13.
[41] *Id*., 104.
[42] 2 U. S. 419, at 454, 463. (1793).
[43] 5 U. S. at 177.
[44] **The Federalist**, No. 78.
[45] The act of 1801, which Congress repealed in 1802, (1) relieved justices of the Supreme Court of their circuit-riding duties, (2) created sixteen circuit judgeships (Republicans called those named to these seats "Midnight Judges" because of the timing of the appointments in the last hours of the Adams administration), (3) enlarged the jurisdiction of the circuit courts, and (4) craftily stipulated a reduction in the number of justices, at the next vacancy, from six to five.
[46] Ray, 103.
[47] *Id*.
[48] *Id*., 103–104.
[49] Charles Warren, **The Supreme Court in United States History**, vol. I, 58–59 (rev. ed., 1926).
[50] Ray, 108.
[51] Gerard N. Magliocca, **Washington's Heir** (2022), hereafter Magliocca.
[52] **Justice William Johnson: The First Dissenter** (1954).
[53] Henry J. Abraham, **Justices Presidents, and Senators**, 5th edition, (2008). In Abraham's list of biographical treatments, however, Horace Binney's name appears incorrectly as "R. Binney," *Id*., 418.
[54] D. Grier Stephenson, Jr., **The Supreme Court and the American Republic: An Annotated Bibliography** (1981), 259.
[55] J. W. Peltason, "Supreme Court Biography and the Study of Public Law, in Gottfried Dietze, **Essays on the American Constitution: A Commemorative Volume in honor of Alpheus T. Mason** (1964). 216.
[56] Warren, **The Supreme Court in United States History**, vol. I, 655, n. 1.
[57] **Justice William Johnson: The First Dissenter**, 182.
[58] Magliocca. 2.
[59] *Id*., 112.
[60] *Id*., 42.
[61] Gerald Gunther, ed., **John Marshall's Defense of *McCulloch* v. *Maryland*** (1969), 1–21. It remains a mystery why editors at Stanford University Press did not insist that an index be prepared for this book.
[62] Magliocca, 36.
[63] *Id.*, 27.
[64] *Id*., 28.
[65] *Id*., 104.
[66] *Id*., 12.
[67] *Id*., 40.
[68] *Id*.
[69] *Id*., 42
[70] *Id*., 187, n 42. Because his was a recess appointment, Washington did not have to wait for confirmation by the Senate to begin serving.
[71] *Id*., 118.
[72] *Id*., xi, 159.
[73] *Id*., 279.
[74] 6 Fed. Cas, 546 (C.C. E.D. Pa., 1825). Justice Miller's opinion in the Slaughterhouse Cases gives the date of the Corfield decision as 1823. Magliocca's bibliography lists the date as 1825.
[75] 83 U. S. 36 (1873).
[76] 22 U. S. 1 (1824).
[77] 6 Fed. Cas, at 551–552. Emphasis added by this author.
[78] Magliocca, 138.
[79] *Id*.
[80] *Id*., 130.
[81] *Id*., 119.
[82] On first consideration in March 1865 the New Jersey legislature rejected the Thirteenth Amendment but then ratified the amendment in March 1865.
[83] Magliocca, 159.
[84] The count includes the elevation of Harlan Fiske Stone from associate justice to chief justice.
[85] Joshua E. Kastenberg, **The Campaign to Impeach Justice William O. Douglas** (2019).
[86] See the extensive list of Story's books in Gerald T. Dunne, **Justice Joseph Story and the Rise of the Supreme Court** (1970), 442.
[87] M. Margaret McKeown, **Citizen Justice** (2022), hereafter McKeown.
[88] *Id*., 195.
[89] *Id*., 186.
[90] 307 U. S. 277 (1939).
[91] 253 U. S. 245 (1920).
[92] 307 U. S. at 282.
[93] McKeown, 23.
[94] *Id*.
[95] 405 U.S. 727 (1972).
[96] McKeown, 144.
[97] *Id*., 146.
[98] *Id*., 147, emphasis added by McKeown.
[99] *Id*.
[100] *Id*., 155.
[101] *Id*., 180.
[102] *Id*., 181.
[103] *Id*., 182.
[104] *Id*.
[105] Ryan Vacca and Ann Bartow, eds, **The Jurisprudential Legacy of Ruth Bader Ginsburg** (2023), hereafter Vacca and Bartow.

[106] According to one count of only her Supreme Court opinions, her name appeared on 541 opinions: 306 for the majority, 115 dissents, 90 concurrences, and an additional 30 that are labeled simply as "other." "Opinions Authored by Justice Ruth Bader Ginsburg," https://supreme.justia.com/justice-ruth-bader-ginsburg-cases; last accessed June 29, 2023.

[107] McKeown, 36.

[108] Vacca and Bartow, 309.

[109] *Id*.

[110] *Id*., 310.

[111] *Id*., 312.

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Illustrations

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Page 274, Virginia State Capitol, Library of Virginia.

Page 275, Charles Balthazar Julien Févret de Saint-Mémin painted Wickham in 1808. Engraving on paper. National Portrait Gallery.

Page 278, Littleton Waller Tazewell circa 1815 (possibly) after work by Cephas Thompson.

Page 280, George Hay by Cephas Thompson, 1795, estate of Margaret N. Robins, Newtown Square, Pennsylvania.

Page 281, Map published in **An Answer to Mr. Jefferson's Justification of His Conduct in the Case of the the New Orleans Batture** (1813).

Pages 300, Samuel Nelson, 1864, by Carl B. Brandt. Fenimore Art Museum, Cooperstown. Gift of W.B. Simmonds. Noo86.1957. Photograph by Richard Walker.

Page 304, Law Office of Samuel Nelson. The Farmer's Museum, Cooperstown, NY.

Page, 308, Unsigned photo of Dred Scott taken around the time of his court case in 1857. Library of Congress.

Page 310, Collection of the National Archives. Glass plate circa March-April 1868.

Page 312, The blockade of Charleston, 1861. Library of Congress.

Page 318, *University of Cincinnati Yearbook*, 1900.

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Page 321, *Punch*, January 17, 1891.

Page 324, "Our Overworked Court," by Joseph Keppler, *Puck Magazine*, 1895.

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