

Civil Law's Influence on American Constitutionalism

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“[W]e are not so strict as our mother country,
in our attachment to everything in the Common Law”

- Joseph Story, 1828¹

Introduction

A nation's public law describes and limits what government may do. An important subset of public law is constitutional law, the country's most fundamental rules on the bounds of government power. Today, constitutions are almost always embodied in a written document, and the content of their provisions focuses on the rights of the people against the state. The simple idea that a nation's constitution should be written down is an American innovation. Because, at the time of its birth, the United States of America was a confederation of independent states seeking to establish a unitary government in the wake of a revolutionary war, its constitution addressed not only the rights of the people as against a new national government, but also how to manage relations between it and multiple state governments, and between the United States and foreign states. The power of the state governments owing to independence at the framing of the Constitution was so strong that it did not come to significantly regulate the several states' power over people within their own borders until after the American Civil War (1861-65).

Another innovation of American constitutionalism was judicial review: the adoption of a national court with ultimate authority to decide whether ordinary laws are consistent with a higher law embodied in the written constitution. But it is an anomaly of the institution of judicial review that it is found nowhere in the words of the U.S. Constitution. It was inferred, instead, from a court's general obligation to decide cases by Chief Justice John Marshall's iconic opinion for the U.S. Supreme Court in the 1803 decision of *Marbury v. Madison*. In fact, the only “judicial power” the *Marbury* Court construed the Constitution to require is its original jurisdiction over “all Cases affecting

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¹ Letter to Sir William Scott (Lord Stowell) (Sep. 22, 1828), *in* 1 Life and Letters of Joseph Story, at 559 (1851).

Ambassadors, public Ministers and Consul, and those in which a State shall be Party.” As I have described elsewhere, such cases implicated sensitive foreign and interstate relations which early Americans viewed as vital to the survival of their new nation. The centrality of judicial review to the Court’s role today makes us forget that the words of the Constitution suggest that resolving disputes affecting foreign ambassadors and among the American states were perceived as the essential roles of the Court.²

Although England had neither a written constitution nor a supreme court with judicial review,³ it was clearly the most important source of American constitutionalism. The power of judges of the common law courts in the seventeenth and eighteenth centuries in the face of royal prerogatives pioneered the modern rule of law. If not for the precedent of English common law, the U.S. Constitution and American-style judicial review would never have existed. These words by Chief Justice Taft in 1925 capture the conventional wisdom:

The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted. The statesmen and lawyers of the Convention who submitted it to the ratification of the Conventions of the Thirteen States, were born and brought up in the atmosphere of the common law, and thought and spoke in its vocabulary. They were familiar with other forms of government, recent and ancient, and indicated in their discussions earnest study and consideration of many of them, but when they came to put their conclusions into the form of fundamental law in a compact draft, they expressed them in terms of the common law, confident that they could be shortly and easily understood.⁴

The Supreme Court-decision centric nature of American constitutional law in the twentieth century has reinforced the sense that American constitutionalism is “common law

² See *id.* The appellate jurisdiction of the Supreme Court, which is the prime jurisdictional enabler of judicial review, is subject to Congressional control under the Exceptions and Regulations Clause. “In all the other Cases,” other than those reserved for the Supreme Court’s original jurisdiction, “the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions and under such Regulations as the Congress shall make.”

³ It does now, although the UK Supreme Court does not have judicial review in the same sense to review Parliamentary legislation for constitutionality.

⁴ *Ex parte Grossman*, 267 U.S. 87, 108-109 (1925). .

constitutionalism.”⁵ It is an approach to law that is inherently incremental and pragmatic with rare seismic shifts, akin to the organic evolution of the common law generally.

But things were not always so. The aim of this Article is to show how the first century of U.S. constitutional jurisprudence and the design and operations of the new national courts were also shaped by the other major Western legal tradition – the civil law. By “civil law tradition” I mean a way of thinking about law and legal institutions rooted in Roman law and developed for the most part on the European continent in the twelfth to nineteenth centuries.⁶ At the time of the American founding (i.e., before continental European codification movements bore fruit), the civil law tradition emphasized canonical texts as ultimate authority (including commentaries as well as formal laws), first principles of law, and rational investigative procedures for discovery of facts by a master or judge. In terms of substantive rules, the civil law tradition was a “legal supermarket”⁷ as befit its continental scope and ancient pedigree. It encompassed Roman imperial law and its mythic republican antecedents, the internal civil law of many European polities, the canon law of the Roman Catholic Church, general commercial law,⁸ maritime and admiralty law, the law of nations, and the law of federalism.⁹ The civil law tradition had a small but important institutional footprint in late eighteenth century England: admiralty courts and church courts were staffed by civilians, and the procedural rules of the Court of Chancery which

⁵ See, e.g., David A. Strauss, *The Living Constitution* 36-49 (2010); *ibid.*, *Common Law Constitutional Interpretation*, 63 U. Chi. L. Rev. 877 (1996).

⁶ Experts in Roman law and civil law may object to this very broad use of the phrase “civil law tradition.” Strictly speaking, “civil law” (*ius civile*) refers to law governing the individual relations of members of a state or commonwealth (*civitas*). Dig.1.1.1; Dig. 1.1.9 (G. Inst. 1). But I hope that they will understand why I have used the phrase rather than more faithful ones like *ius commune* or *ius utrumque* or a full listing of Roman law, civil law, law of nations etc., to reach a modern audience unfamiliar with more accurate nomenclature. Accord John Henry Merryman & Rogelio Perez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* (3d ed. 2007). For a sweeping account of the genesis of the entire Western legal tradition, see Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (1983).

⁷ The phrase was used by Peter Stein in reference to the basic texts of Roman law. See Peter Stein, *Roman Law in European History* 2 (1999).

⁸ For an illuminating recent article on this general commercial law, see Emily Kadens, *The Myth of the Customary Law Merchant*, 90 Tex. L. Rev. 1153 (2012). Kadens’ discussion of how local customs were more often accommodated rather than jettisoned in favor of universal norms mirrors the argument made *infra* Part II.C regarding the *Dred Scott* decision and slavery, about how artful civilians could navigate around presumptively universal principles to justify local customs.

⁹ See *infra* Part I.B.1 discussion of conflict of laws and Bartolus. For a recent account of the origins of the idea and theory of American federalism, see Alison L. LaCroix, *The Ideological Origins of American Federalism* (2010).

administered equity were essentially civilian, owing to the prevalence of bishops among the earliest Chancellors.

Early American national jurists were attracted to this legal order because participating in it could help integrate the agrarian, credit and maritime-trade hungry United States into the global economy, and because it powerfully illuminated how to manage relations and commerce among the quasi-independent American states while establishing the institutional primacy of the national courts and uniform rules for national economic and social integration. Additionally, there was a strong desire to break away from the English legal order in the public sphere—a revolution informed by veneration of Roman republican models, including their laws.

I emphasize at the start that my intent is not to deny the central importance of the common law tradition to American constitutional law. Judicial power is the *conditio sine qua non* of U.S. constitutionalism, and it was indubitably a common law legacy; generally, judges in civil law countries did not have the power to make or shape law. (But civil-law judges of the Admiralty court in England did have such power, and these civil-law courts were crucial models for the U.S. national courts because many of their early public law cases touched upon maritime and foreign affairs.) My intent, rather, is to suggest that applied constitutionalism in the first American century shows the existence of two different mentalities or ways to think about public law and its application—a divergence attributable to the joint influence of the civil law and common law traditions.

The civil law influence consisted of three elements: (1) substantive law, most importantly the civilian sub-disciplines of the law of nations, *lex mercatoria*, and maritime law; (2) civil law procedures, by contrast to the procedural norms of the common law courts; and (3) a jurisprudential mindset favoring first principles and equity over strict adherence to tradition and precedent. Traces of these sorts of civilian influence were quite strongly evident at the start of the Republic and during the antebellum years of national growth, climaxed in the postbellum period, vanished during the golden age of the American common law judge, and resurfaced in the text-originalist jurisprudence of the late Justice Antonin Scalia—the Manchurian candidate of the foreign-law use wars.¹⁰ Adding these periods up, one realizes that

¹⁰ Justice Scalia, in his Tanner Lectures at Princeton University entitled “Common Law Courts in a Civil law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws,” famously criticized the common law model in American legal education and as a method of judging (March 8-9, 1995),

it is the century or so (ca. 1890-1980) where civil law influence was entirely eclipsed that is the anomaly and not the norm in American constitutional jurisprudence. For its century, American constitutionalism exhibited both common law and civil law accents. Indeed, the civilian spirit of American public law has become obscured in large part because the apotheosis of the American common law judge transformed constitutional law into a common law subject.

Grasping this historical diversity of legal influence puts American constitutional law in a different, less nativist light. It also helps us to understand similarities and differences between the civil law and common law traditions generally, and what they might mean for constitutional jurisprudence and practice today, both in the United States and in other countries. I think accounting for civilian influence on the American constitutional order also casts doubt on the importance of precedents in public law jurisprudence, *i.e.*, the hegemony of the common law policy that judicial decisions should “stand by [preceding] decisions” (*stare decisis*); and the reluctance to borrow from outside the common law tradition today.¹¹ At the same time, we also may need to rethink dismissals of modern modes of constitutional jurisprudence that, like the pre-codification civil law tradition, privilege original canonical texts and presume logic-like certainty in first principles (formerly grounded in natural law¹² or “well-established principles of public law,”¹³ now in text or original meanings) as arriviste, unimaginative, or a Thermidorean reaction to the Warren Court rights revolution.

Many U.S. public lawyers (myself included) instinctively feel that our constitutionalism is common law constitutionalism.¹⁴ We read and teach cases and embrace eclectic decision-making sensitive to changing contexts;¹⁵ we do not assign canonical

available at <http://tannerlectures.utah.edu/lectures/documents/scalia97.pdf>. The lectures, and rejoinders by leading academics, were published in Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Amy Guttmann, ed., 1998).

¹¹ As we shall see in the case study of the first civil procedure statute, the American founding group made a conscious choice to reject familiar English and state laws in favor of untested civil law, rebutting the rejoinder that borrowing from outside the common law tradition occurred out of necessity in the absence of organic models.

¹² R.H. Helmholz, *Natural Law in the Courts* (2015).

¹³ *Pennoyer v. Neff*, 95 U.S. 714, 722 (1878).

¹⁴ David Strauss is the modern legal scholar most associated with this view, which is likely shared by a majority of American constitutional law scholars. See David A. Strauss, *The Living Constitution* (2010); *id.*, *Common Law Constitution Interpretation*, 63 U. Chi. L. Rev. 877 (1996). See also Philip Hamburger, *Law and Judicial Duty* (2008).

¹⁵ Common law constitutionalism is inherently eclectic. In deciding cases, judges can consult text, history, policy, morality, etc., in addition to prior decisions which

significance to the words of the Constitution or to favored commentaries like the *Federalist*, and we no longer believe that there are eternal and essential “postulates which limit and control”¹⁶ constitutional jurisprudence. Our favorite heroes are common law exemplars like Holmes, Jackson, Brennan, and Harlan, not judges who pledge allegiance to text and first principles like Black and Scalia. Nor do we draw attention to the self-admittedly civilian spirit of landmark constitutional opinions by great first-century justices like John Marshall, Joseph Story, and Stephen Field. Rediscovering the “civil law constitutionalism” in the country’s first century does not mean that we have to accept it as the right way for constitutional law going forward. But I do think it changes the normative complexion of the debate to suggest that there might have been two right ways in the past.

An appreciation of the civil law’s role in the early Republic also helps us to understand why the national court system was created and how it was initially intended to operate. Today the courts are viewed principally as institutions for the vindication of individual rights, for the enforcement of separation of powers, and for the maintenance of the balance of power between the national and state governments. Grasping other reasons for their design—keeping peace and promoting commerce among the states and with foreign states—enriches our understanding of the courts. Moreover, this enriched understanding has practical doctrinal implications, for instance, in how we are to think about federal common law, *Erie*¹⁷ doctrine and the Rules of Decision Act, and the nature of the national courts’ subject matter jurisdiction.

The backward-looking aspect of the Article is an attempt to recover a lost strand in the history of the Constitution of the United States. The vast majority of constitutional and sub-constitutional public law cases before the Civil War concerned national governmental power: 1) vis-à-vis the states and foreign states or aliens, or 2) regulating interstate relations, not power vis-à-vis

are the most important consideration. *See, e.g.*, David A. Strauss, *The Living Constitution*; Phillip Bobbitt, *Constitutional Fate* (1982). What differentiates common law constitutionalism from the civilian spirit is the prominence of prior cases and the concept of principle as drawn from experience, not as an eternal logical truth.

¹⁶ *Monaco v. Mississippi*, 292 U.S. 313, 322 (1934). Although a twentieth century opinion, the opinion was drafted by Chief Justice Charles Evan Hughes who had substantial experience as a public international lawyer, from which he may have gained civilian sensibilities. *See also* his “civilian” reliance on the public-private distinction in *Crowell v. Benson*, 285 U.S. 22 (1932).

¹⁷ *Erie Railroad Co. v. Tompkins* 304 U.S. 64 (1938).

citizens directly.¹⁸ Virtually all were subjects in which civilian sources were more useful than their common law counterparts. For example, the merits question in *Dred Scott v. Sandford*¹⁹ turned on an interstate conflict-of-laws issue on which four Justices discussed at length a thirty-year old opinion by Sir William Scott (Lord Stowell), the best known of the British civilian judges.²⁰ Moreover, of singular importance in the earliest days of the Republic were cases testing the national government's constitutional power to regulate the seas—the “jugular vein” of the new country.²¹ This crucial regulatory power, which was the Commerce Clause power of its day, was vested not in Congress by Article I, but in the national judiciary by virtue of the admiralty and maritime grant of Article III.²² And admiralty and maritime law were staples of the civil law tradition: even in Britain the admiralty courts remained a vital civilian enclave,²³ as Americans well knew from British stratagems to use them to circumvent common law protections in enforcing colonial exactions before the Revolution. As Edmund Randolph, the first U.S. Attorney General once put it, a federal judge in the early Republic had to be not only “a master of the common law in all its divisions” but also a “civilian.”²⁴ And what was *Swift v. Tyson*²⁵ about, other than a migration of the mindset that the federal civilians had cultivated from water to land on the back of diversity jurisdiction?

¹⁸ There are some notable exceptions like *Calder v. Bull*, 3 U.S. 386 (1798), *Marbury v. Madison*, 5 U.S. 137 (1803), *Fletcher v. Peck*, 10 U.S. 87 (1810), and *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819), which are disproportionately read today precisely because their individual rights focus resonates with a modern understanding of public law.

¹⁹ 60 U.S. 393 (1856).

²⁰ See Henry J. Bourguignon, *Sir William Scott, Lord Stowell: Judge of the High Court of Admiralty, 1798-1828* (1987).

²¹ Felix Frankfurter & James M. Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System* 7 (1928).

²² Indeed, Congress's power in admiralty and maritime matters was inferred from the Article III grant of judicial power. “As the Constitution extends the judicial power of the United States to ‘all cases of admiralty and maritime jurisdiction,’ and as this jurisdiction is held to be exclusive, the power of legislation on the same subject must necessarily be in the national legislature and not in the state legislatures.” *Butler v. Boston & S. S.S. Co.*, 130 U.S. 527, 557 (1889).

²³ Part I discusses the efforts of the common lawyers to squeeze out the enclave, using the uncontested power of the common law courts to interpret statutes, including jurisdictional statutes, to expand their courts' jurisdiction. Once overlapping jurisdiction became a reality, admiralty court proceedings could not ensure finality to a prospective plaintiff (called a “libellant”).

²⁴ Edmund Randolph, Report of the Attorney General to the House of Representatives (December 31, 1790), in Maeva Marcus, eds., 4 *The Documentary History of the Supreme Court of the United States, 1789-1800*, 127, 134 (1994).

²⁵ 41 U.S. 1 (1842).

More generally speaking, the civil law tradition at the time of the drafting and ratification of the American constitution (1787 to 1789), before the landmark national codifications in Prussia (1794) and France (1804), was strongly identified with a body of general law.²⁶ It comprised uniform principles of national public laws, rules governing the substance of interstitial interactions (e.g., the law of nations or general commercial law), as well as a uniform framework for procedure and practice in courts across the Continent and even in England (e.g., admiralty courts, church courts). The phrase *ius commune* or “common law” is often used to refer to this trans-boundary uniformity of substantive and procedural law.²⁷ Congress and the judges who staffed the new national courts (then also called “general” courts) were inspired by this civilian theme of a uniform and general body of laws as a way to overcome idiosyncratic state customs and practices, and to make American courts user-friendly to European bankers and merchants. They had the opportunity to make inspiration a reality through the predominance of non-common law causes—admiralty, maritime, and equity—on their dockets.²⁸ The great exemplar of this mentality was Joseph Story: one can trace a sustained campaign to transplant civil law as new national law by reading his opinions and treatises—prize law, admiralty law, law of nations, equity jurisprudence, conflict of laws, general commercial law. To be sure, Lord Mansfield and other English common law judges also absorbed civil law into their domestic law for the aim of national flourishing, but, from an institutional view, the mighty prehistory of the common law courts muted any transformative institutional effects, by contrast to the infant American national courts whose

²⁶ See generally Manlio Bellomo, *The Common Legal Past of Europe, 1000-1800* (Lydia G. Cochran trans., 2d ed. 1995). The uniformity could be illusory in practice, as Kadens has argued. See Kadens, *supra* note XX, at ___. Most likely influenced by nationalism and its legal manifestation in the codification movement, scholarship by academics in the civil law world has only focused attention on the “general” aspect of the civil law tradition in the past few decades. Bellomo’s book is illuminating and seems to be best such work available in English. Although it is the work of an American lawyer and arguably over-reductionist in its treatment, Hal Berman’s *Law and Revolution*, see *supra* note XX, makes much the same argument with a greater emphasis on the religious roots and component of the *ius commune*.

²⁷ See *id.*; for a historical perspective on the *ius commune* in England, see R.H. Helmholz, *The Ius Commune in England: Four Studies* (2001).

²⁸ The Constitution clearly contemplates jury trials in the Supreme Court, and some were held in the eighteenth century under Chief Justice Jay, who professed subordination to the jury even on questions of law. Since the tenure of Chief Justice John Marshall, the instrument of constitutional adjudication has been an authoritative treatise-opinion by the Supreme Court.

identity and operations were shaped by the absorption of civilian habits.²⁹

These first steps in public law jurisprudence produced a path-dependent course in how norms of public law were justified and litigation was conducted, a path with both civilian and common law accents. The pattern was broken only in the aftermath of the Civil War and its trailing Amendments, when individual rights cases came to dominate the constitutional agenda. When this happened, the Supreme Court was thrust from the seemingly neutral public law missions of keeping interstate and international peace and encouraging maritime and cross-border commerce into far more contested issue domains, and the question of its democratic legitimacy became far more important than it had ever been. This led to a reinvigoration of democratic common law institutions like the jury and the prerogative writs, growing reluctance to borrow from foreign sources, and to the production of a substantial corpus of organic decisions mitigating the need to “think like a civilian” by invoking canonical texts (e.g., the Constitution, the Federalist, records of the Constitutional Convention, key ratification debates), general principles of public law, or esteemed treatises to decide cases. Nonetheless, civilian modes of thinking about public law persisted, and we can see many examples of such reasoning in the last decades of the nineteenth century and the first decades of the twentieth.

This article has two parts. The first part surveys antecedents to this study and defines the common law and civil law traditions. These sketches provide a necessary foundation to frame the argument about civilian influence. The second part presents four case studies to illustrate how the civil law tradition influenced American national courts and public law, most importantly its constitutional jurisprudence. The first case study explains how and why the First Congress, in enacting the first federal civil procedure statute (1789), prescribed that “forms and modes of proceeding” in the most important cases on the early federal dockets were to be conducted not according to state law or English law (though both were considered), but “according to the course of the civil law.” The second case study examines the importance of civilian procedures and modes of reasoning in the biggest constitutional cases of the Republic’s first decade—the state sovereign debt cases. The third case study shows how civilian authority and modes of reasoning played an important but unappreciated role in the *Dred Scott* decision. This discussion showcases how the

²⁹ John Langbein expertly tells the story of the modern triumph of the civilian-inflected equity rules of practice over the common law model of civil litigation in *The Disappearance of Civil Trial in the United States*, *supra* note XX.

civilian tradition, through the medium of conflict of laws doctrine, informed the modern law of federalism. The final case study shows how the civilian *mentalité* asserted itself in certain postbellum constitutional decisions through assertions of “principles of public law” as principal bases for holdings, sometimes in preference to prior decisions or the words of the Constitution. *Pennoyer v. Neff* is perhaps the most famous example of this trend, but there were many other decisions in which general principles were deployed, particularly to expand the sovereign powers and immunities of the government. A brief conclusion follows.

I. Framing the Argument

A. Antecedents to this Study

Although this article may be the first attempt to explain the influence of civil law on U.S. constitutionalism, it has antecedents in four strands of existing scholarship. First, there is a small but exceptional literature exploring the general influence of Roman and continental European legal thought, doctrines, and institutions on Anglo-American counterparts.³⁰ Jack Dawson, Charlie Donahue, Dick Helmholz, and Raoul van Caenegem are the pioneers in illuminating connections between the laws and legal institutions of England and the continent in the medieval and early modern period. Scholars focused mostly on civil law influences in private law or procedural law, particularly in the mid-late nineteenth century.³¹ This scholarship is careful not to over-claim civilian influence, emphasizing that American jurists viewed themselves as first and foremost common lawyers. They observe that civilian sources were consulted and applied selectively to systematize and organize doctrines, to fill gaps in the common law, and to add a learned hand in support of decisions derived from common law sources. They also stress the role of Roman law and civil law in legal education both directly and indirectly through the systematization of common law they inspired.³²

Second, there is also outstanding scholarship, mostly by intellectual historians, illuminating the importance of the classical tradition on early American revolutionary and post-revolutionary leaders.³³ These scholars have limned the ideology and intellectual

³⁰ See Daniel R. Coquillette, *The Civilian Writers of Doctors' Commons*, London: Three Centuries of Juristic Innovation in Comparative, Commercial, and International Law (1988); R.H. Helmholz, *Use of the Civil Law in Post-Revolutionary American Jurisprudence*, 66 Tul. L. Rev. 1649 (1992); M.H. Hoefflich, *John Austin and Joseph Story: Two Nineteenth Century Perspectives on the Utility of the Civil Law for the Common Lawyer*, 29 Am. J. Legal Hist. 36 (1985); *id.*, Roman & Civil Law and the Development of Anglo-American Jurisprudence in the Nineteenth Century (1997); Mathias Reimann, ed., *The Reception of Continental Ideas in the Common Law World 1820-1920* (1993); Peter Stein, *The Attraction of the Civil Law in Post-Revolutionary America*, 52 Va. L. Rev. 403 (1966).

³¹ See Reimann, ed., *supra* note XX; W.W. Howe, *Studies in the Civil Law* (1896). , The special cases of former French and Spanish possessions like Louisiana and California also attracted attention.

³² Dice Robins Anderson, *The Teacher of Jefferson and Marshall*, 15 South Atlantic Quarterly 327 (1916); Daniel Coquillette, *Justinian in Braintree: John Adams, Civilian Learning, and Legal Elitism, 1758-1775*, reprinted in Steve Sheppard, ed., *The History of Legal Education in the United States Volume I* (1999).

³³ See Bernard Bailyn, *The Ideological Origins of the American Revolution* (rev. ed. 1992); Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* (1985); J.G.A. Pocock, *The Machiavellian Moment: Florentine*

roots of the American Revolution, with a specific eye to continuity and discontinuity with English antecedents. All of their accounts highlight the real and persistent significance of both continental Enlightenment thinkers and classical models, particularly Roman republicanism,³⁴ in the American revolutionary ethos and mentality. One legal scholar, the late David Bederman, has gone so far as to assert that the Constitution's framers "were as much influenced by the ... experiences of classical antiquity as they were by Enlightenment liberal philosophy and by the exigencies of the struggle against Great Britain."³⁵

Third, there is a growing body of scholarship, including my own, describing the influence of the law of nations on U.S. constitutional jurisprudence.³⁶ All of us frame our arguments as tracing the influence of substantive rules of international law on interpretation of the Constitution and landmark legislation like the Judiciary Act of 1789. With the benefit of hindsight, I realize that we were all looking to history to answer a question that we were posing, and in so doing we did not look carefully enough into what lawyers of the time were actually saying. For instance, in prior work I wrote that the Supreme Court invoked international law when the phrase it actually used was "general principles of public

Political Thought and the Atlantic Republican Tradition (2003); Carl J. Richard, *The Founders and the Classics: Greece, Rome, and the American Enlightenment* (1994); Eran Shalev, *Rome Reborn on Western Shores* (2009); Gordon S. Wood, *The Creation of the American Republic 1776-1787* (1970); *id.*, *The Radicalism of the American Revolution* (1991).

³⁴ Bailyn, *supra* note XX, at 25: "What gripped their minds, what they knew in detail, and what formed their view of the whole of the ancient world was the political history of Rome from the conquests in the east and the civil wars in the early first century B.C. to the establishment of the empire on the ruins of the republic at the end of the second century. For their knowledge of this period they had at hand and needed only, Plutarch, Livy, and above all Cicero, Sallust, and Tacitus—writers who had lived either when the republic was being fundamentally challenged or when its greatest days were already past and its moral and political virtues decayed."

³⁵ David Bederman, *The Classical Foundations of the American Constitution: Prevailing Wisdom* (2008).

³⁶ See William S. Dodge, Michael D. Ramsey & David L. Sloss eds., *International Law in the U.S. Supreme Court: Continuity and Change* (2011); Thomas H. Lee, *Making Sense of the Eleventh Amendment: International Law and State Sovereignty*, 96 Nw. U. L. Rev. 1027 (2002); *id.*, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 Colum. L. Rev. 830 (2006); *id.*, *The Supreme Court of the United States as Quasi-International Tribunal: Reclaiming the Court's Original and Exclusive Jurisdiction over Treaty-Based Suits by Foreign States against States*, 104 Colum. L. Rev. 1765 (2004); Anthony J. Bellia Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. Chi. L. Rev. 445 (2011); Sarah Cleveland, *Our International Constitution*, 31 Yale J. Int'l. L. 1 (2006); Stewart Jay, *The Status of the Law of Nations in the Early American Law*, 42 Vand. L. Rev. 819 (1989); Gerald L. Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 Am. J. Int'l L. 82 (2004).

law.”³⁷ Nor did I comprehend that early Americans understood the law of nations, or “natural law as applied to the conduct of sovereigns” as it was described in their favorite law-of-nations treatise by the Swiss Emmerich (Emer) de Vattel principally as a branch of civil law. True, English common law absorbed the law of nations as well, but it was a very small part of the common law. Lord Mansfield’s opinions (as Chief Justice of King’s Bench, a common law court) and William Blackstone’s brief remarks on the subject in the *Commentaries* are the principal English common law sources on the law of nations consulted by the American founding group, but both sources were dwarfed by the sophistication and breadth of treatment of the subject in continental treatises, particularly the ones from the republican Low Countries such as Vattel and Huber’s treatise on conflict of law, with which early American republicans felt an ideological and political affinity. Furthermore, because of the importance of admiralty and maritime jurisdiction in the early Republic, early American jurists looked often to the English civilians of the admiralty court, most notably Lord Stowell.

Fourth, because of the well-known connections between the American Revolution and the Scottish Enlightenment, there have been studies of Scottish influence on American political thought and legal institutions.³⁸ Scotland had courts and laws rooted in the civil law tradition, and it was formally independent from England until the acts of union in the early eighteenth century. Moreover, a number of important American founders were educated in Scotland including constitutional framer and Supreme Court justice James Wilson and John Witherspoon, the clergyman and college president who emigrated at age forty-five to the United States where he taught and mentored James Madison.³⁹

³⁷ Thomas H. Lee & David L. Sloss, *International Law as an Interpretive Tool in the Supreme Court: 1861-1900*, in Dodge, Ramsey, & Sloss eds., *supra* note XX, 124, 155, quoting *Fong Yue Ting v. United States*, 149 U.S. 698, 704–05 (1893).

³⁸ Perhaps the leading chronicler of this influence is the prolific and provocative historian Garry Wills. See Garry Wills, *Explaining America: The Federalist* (1981); Garry Wills, *Inventing America: Jefferson’s Declaration of Independence* (1978). See also David Thomas Konig, *The Second Amendment: A Missing Transatlantic Context for the Historical Meaning of “the Right of the People to Keep and Bear Arms,”* 22 *Law & Hist. Rev.* 119 (2004); R.H. Helmholz, *Scots Law in the New World: Its Place in the Formative Era of American Law*, in 52 *The Stair Soc’y, Miscellany Five* 169 (Hector L. MacQueen ed., 2006); C. Paul Rogers III, *Scots Law in Post-Revolutionary and Nineteenth-Century America: The Neglected Jurisprudence*, 8 *Law & Hist. Rev.* 205 (1990); David M. Walker, *The Lawyers of the Scottish Enlightenment and Their Influence on the American Constitution*, 1988 *Jurid. Rev.* 4.

³⁹ For example, Jim Pfander and Daniel Birk have argued that Scotland’s hierarchical judicial system, which was more insulated from Parliament than the English courts, may have been the model for the

What has been missing in prior scholarship is an effort to unify the different themes into an overarching argument about how the civil law influenced the design and growth of American public law and the national courts that were principally tasked with interpreting and implementing it. The primary focus of the important contributions of Dick Helms and Peter Stein on civil and Roman law influences on early American substantive law is on private law in state and national courts, not public law subjects like the law of nations and prize law. Nor do they connect such influence with the early American obsession with Roman republicanism identified by intellectual historians like Bernard Bailyn and Gordon Wood. On their part, the historians have documented the “radicalism” of the American Revolution and its Roman republican roots, but they have not interrogated how the hostility to English models corresponded to a pull toward continental European models, and might have been cashed out in American national legal institutions. And the legal scholars who have written about the influence of the law of nations and of Scottish law on American constitutional law and the national courts have not connected this influence with the larger civil law tradition or the ideological debt to Roman republicanism. Finally, no one has shed light on the extent to which the procedural rules established for the new national courts in 1789 explicitly and implicitly borrowed from the civil law.

B. Two Traditions

By “tradition” I mean a way of thinking about law. This part sketches the basic contours of the civil law and common law traditions as they were likely understood by American jurists of the late eighteenth and nineteenth centuries. In so doing, I have been careful to reconstruct only what they had access to and knew at the time, and have explicitly flagged instances in which my explanation relies on later evidence. In general, I was surprised to learn how literate early American lawyers were in the classics and continental legal practices and how much they knew about English legal history—the greater danger is likely that they knew more than I have managed to learn. Furthermore, the sketches are drawn with an eye to setting a baseline for my main argument about the relevance of the civil law tradition to the genesis and early evolution of American public law, principally constitutional law.

design of the U.S. national judiciary in Article III of the Constitution. James E. Pfander & Daniel D. Birk, *Article III and the Scottish Judiciary*, 125 HARV. L. REV. 1613 (2011).

As such, they are necessary oversimplifications, for which I beg the indulgence of comparativists and historians. Nevertheless, I do believe that they are faithful representations of the two traditions and the fundamental differences between them during the late eighteenth and nineteenth centuries.

1. Civil Law Tradition

The popular understanding of the civil law tradition⁴⁰ associates it most with codification, but this is not an accurate view of what the tradition was at the time of the American founding, before the national codifications on the continent. The conventional view is natural given that the most prominent ancient and modern markers of the tradition are the promulgations of Justinian's Code in the 530s and of Napoleon's *Code civil des Francais* in 1804. But the civil law tradition is—and was—much more than codification, specifically from 1787 to 1803, the crucial years between which the U.S. Constitution was made and John Marshall baptized judicial review. As we shall see, a jurist can be civilian in spirit without thinking it necessary to capture all of a polity's relevant laws in a comprehensive writing.⁴¹ A good example of this is the modern public international lawyer whose *mentalité* remains very much that of the civilian lawyer despite the absence of comprehensive codification on the international plane.

Nor is it necessary to confine understanding of the civil law tradition solely to the subject matter of the private law rights of citizens as against other citizens within a domestic jurisdiction. The phrase “civil law” is a literal translation of the Latin words *ius civile* connoting one's rights as citizens, originally of the Roman republic. And it is also true that the canonical texts of the Byzantine and French emperors were chiefly efforts to promulgate rules governing the private law sphere of relations among citizens of the relevant polity, and not the rights of citizens vis-à-vis the state.⁴² Public law was but an afterthought to both emperors. But if we are to understand the phrase “civil law tradition” as identifying a way of thinking about law based on Roman law, then it is more than fair to include other important subjects elaborated upon by influential Roman and civilian jurists. For instance, Roman law encompassed both the *ius civile* (rights of and among

⁴⁰ The best survey treatment of the tradition remains John Henry Merryman & Rogelio Perez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* (3d ed. 2007). On Roman law, see Edward Gibbon, *The Decline and Fall of the Roman Empire*, Chapter XLIV: Idea of the Roman Jurisprudence (Hans-Friedrich Mueller ed., Modern Library 2003) (1788); Peter Stein, *Roman Law in European History* (1999); Alan Watson, *The Spirit of Roman Law* (1995); Hans Julius Wolff, *Roman Law: An Historical Introduction* (1951); Paul du Plessis, *Borkowski's Textbook on Roman Law* (4th ed. 2010); Andrew Riggsby, *Roman Law and the Legal World of the Romans* (2010).

⁴¹ Cf. Joseph Story's interaction with the American codification movement, including his *Encyclopedia Americana* entry on codification, and his comments in *Life and Letters* about codification in Massachusetts.

⁴² Of course both Rome and France of the times were large empires and so the concept of citizenship was different than what it is today.

citizens) and the *ius gentium*, literally translated as the “law of nations” but better understood as connoting the rights of alien (non-Roman) tribes or peoples within and without Rome’s jurisdiction. One’s status as a citizen or alien led to differing rights and obligations under law. To take a famous example, the *ius civile* came to prohibit incest between an uncle and a niece, while the contemporaneous *ius gentium* permitted it as to non-Romans within the Empire.⁴³ The *ius gentium* also extended to the rights of alien peoples outside of Rome’s jurisdiction both amongst themselves and in their dealings with Rome and Romans. This sense of the term was closer in meaning to the early modern usage of the “law of nations.”

Roman law (and the civil law tradition) was also understood to apply to the laws of the high seas, once again outside of Roman jurisdiction. The seas were not only essential to commerce (and war) among peoples from all over the world; they also could not be regulated by a sovereign’s laws in the same way as land, even as between Roman citizens. Accordingly, the laws of the seas were recognized as something separate from civil law in the narrow sense of citizens’ law, but they were also addressed in Justinian’s Code, and jurists of the civilian tradition applied the same techniques to articulate and organize that body of law as they did the civil law. Beyond the seas and the strictly foreign parts of the *ius gentium*, Justinian’s Code covered a few other “public” or non-private law topics, such as some limited articulation of rights and duties of Roman officials, and church-state relations.⁴⁴

A few words should be said here about the history and structure of Justinian’s Code, which came to be known as the *Corpus Iuris Civilis* (“body of civil law”).⁴⁵ It was not a code, strictly speaking, but rather a set of four canonical texts: *Institutiones*, *Digesta*, *Codex*, and *Novellae*. With the exception of the *Novellae*, these texts were compiled in the 530s by a team of jurists on the orders of the Emperor Justinian who sought to consolidate the choking multitude of laws and commentaries in the Roman Empire at the time.⁴⁶ As such, the *Corpus* has always been understood not to be an accurate manifestation of Roman law as it existed in the Roman Republic venerated by the American

⁴³ Gibbon, *supra* note XX; *see also* Dig. 23.2.68.

⁴⁴ *See, e.g.*, Dig. 1.1.1 (*publicum ius in sacris, in sacerdotibus, in magistratibus constitit*, “public law covers religious matters, the priesthood, and state officers”); Dig 1.9.1–12 (“senators”); Dig 1.11.1 (“prefects of the praetorian guard”). *See also* Jean Domat, *The Civil Law in its Natural Order together with the Public Law* (William Strahan, trans. 1720) 2 volumes [1697].

⁴⁵ The title itself is a neologism coined in the late sixteenth century.

⁴⁶ Wolff, *supra* note XX, at 163.

founders. In terms of content, the *Corpus* does include formal laws like imperial replies to certified legal questions (the *Codex* and the *Novellae* which was a supplement to the original *Codex*), but its largest portion consists of a hodgepodge of interpretations snipped from treatises accepted as authoritative in the centuries before Justinian's mandate. This Byzantine scrapbook is called the *Digests* or the *Pandects*, and it, more than anything else, is what Roman law means to lawyers educated in the civil law world, even today. It is unfortunate that Roman law is only rarely taught in the United States. Understanding even the basics is intellectually rewarding, provides vivid Pompeii-an snapshots of quotidian life at the time,⁴⁷ and gives deep insight into the civilian mind and how it resembles and differs from the mind of the common lawyer.

The bewildering sprawl of the *Digests* contrasts with the systematic quality of the one remaining part of the *Corpus* to be described, the *Institutions*, also known as the *Elements*. This is because the *Institutions* were intended to be used an elementary textbook for law students, not as a legal supermarket like the *Digests*. Its tri-partite division of subject matter into persons, things, and actions, and four-volume format is the ultimate model for many systematic law treaties, including common law classics like Coke's *Institutes* and Blackstone's *Commentaries*. Justinian's *Institutions* were most likely modeled on an earlier work, the *Institutions* of Gaius, a jurist who lived in the second century A.D. We know this because in 1816, scholars discovered a near-complete overwritten manuscript of Gaius's *Institutions* in Italy, which Justinian's textbook at times tracks word-for-word. Gaius'

⁴⁷ Some examples of *Digest* passages may help to understand what they are like, the legal mindset they suggest, and how they let us peep into ancient life. I have selected one each from Roman analogues to modern contract and torts. In a discussion of the action for rescission, the question is posed whether a slave who occasionally carries on with fanatics uttering what-not is not entirely sound of mind and thus a ground for the owner to sue the one who sold him the slave. Dig. 21.1.1 (*si servus inter fanaticos non semper caput jactaret et aliqua profatus esset an nibilo minus sanus videretur*). The answer of the jurist Vivian is no, because mental disabilities, unlike physical ones, are difficult to agree upon, although an exception might be had where a physical ailment causes a mental one, in which case a seller may be liable if he should have said something but didn't. In a discussion of legal liability for injuries (*lex Aquilia*), a case is posed in which some folks were playing ball when it was hit hard and knocked the hand of a barber who slit the throat of the slave he was shaving. Who should bear the costs of the accident: the barber or the slave (owner)? (Interestingly, the ballplayers are not considered potentially liable.) It depends, answers the jurist Ulpian, on whether the barber had set up in a place where games were customary or where there was lots of traffic. But even if the barber's stool was in a dangerous place, it doesn't seem so wrong to say that the slave has no one to blame but himself. Dig. 9.2.11 (*ubi ex consuetudine ludebatur vel ubi transitus frequens erat, est quod ei imputetur: quamvis nec illud male dicatur, si in loco periculoso sellam habenti tonsori se quis commiserit, ipsum de se queri debere*).

interpretations also constitute one of the most-favored sources excerpted in the *Digests*. Since the demise of the Republic was relatively recent when Gaius was writing, his *Institutions* give a better sense of what Roman republican law was like.

The founding American had a special affection for the law and legal institutions of the Roman Republic. They had limited direct knowledge, but they devoured the secondhand accounts of chroniclers like Livy, Tacitus, Plutarch, Suetonius, but most importantly the lawyer-statesman Marcus Tullius Cicero.⁴⁸ One manifestation of this republican sensibility was the theme of supremacy of law, a theme that Cicero trumpeted.⁴⁹ Legal supremacy in the Roman Republic was embodied not in institutions as in England (i.e., Parliament and the royal courts)⁵⁰ but rather in a written text, the Law of the Twelve Tables (*lex duodecim tabularum*). The Twelve Tables, memorized by Roman schoolboys according to lore, had been born of revolution: the Roman people did not want basic laws of the republic to be unwritten and subject to manipulation at the whim of the aristocracy.⁵¹ For the leading republicans, this did not necessarily mean popular sovereignty—they did not trust plebs in power. But, when confronted with acts by Julius Caesar believed to be beyond the Republic’s laws, they stood up and killed him, a sentiment and act that appealed to early Americans. Patrick Henry voiced the sentiment with typical, vaguely thuggish, flair: “Caesar had his Brutus, Charles the First his Cromwell, and George III may profit by their example.”⁵² It is this imagined Roman republican law rather than real Roman law—the twin laws (*utrumque ius*) of empire and church, that most fired the legal imaginations of the American founders and which they sought to emulate in the design of their national public laws and institutions.

This is an important and recurring theme: the influence on early American jurisprudence of an imagined Roman law of the Republic, free of the imperial and Popish taints of the real thing. Perhaps the best example of this is a sublime passage attributed to a now-lost fragment of Cicero’s *De Re Publica*, quoted by Lactantius, a spiritual guru to the Emperor Constantine.

⁴⁸ Cicero’s publicly minded view of the law, at least according to one eminent legal historian, was not typical of the Roman jurists. Watson, *supra* note XX, at 200.

⁴⁹ See Bederman.

⁵⁰ See, e.g., Roscoe Pound, *The Spirit of the Common Law* (1921).

⁵¹ Wolff, *supra* note XX, at 55–56.

⁵² Carl J. Richard, *The Founders and the Classics: Greece, Rome, and the American Enlightenment* 91 (1994).

*Non erit alia lex Romae, alia Athenis, alia nunc, alia posthac; sed omnes gentes, et omni tempore, una lex, et sempiterna et immortalis, continebit.*⁵³

“There shall not be one law at Rome, another at Athens, one now, another later. But among all peoples and for all time, one law, both eternal and immortal, shall control.”

Lactantius had appropriated the passage to the service of God’s universal law, but Lord Mansfield used it to underscore the desirability of a universal law of maritime commerce.⁵⁴ Joseph Story liked it so much that he used it in landmark opinions concerning the general commercial law of the sea⁵⁵ and of the land.⁵⁶ Neither made reference to the religious nature of the original source, of which at least Mansfield, a noted classicist,⁵⁷ must have been well aware.

But let us resume the story of Justinian’s Code. The *Corpus* was largely forgotten in the West for more than five hundred years. Local customs and barbarized Roman law was “law” for the most part in the interim. In the late eleventh century, the *Corpus* was rediscovered in Northern Italy, sparking a revolution in the study, understanding, and appreciation of what law is and how it could be used as an instrument of governance and human reason. Many of the private law provisions of the *Corpus* were subsequently “received” as the formal law of continental European polities. The sparse public laws aspects of the *Corpus* were also picked apart and applied, playing a key role, for instance, in the formulation of the medieval and early modern law of nations.⁵⁸ But perhaps most important, the rediscovery of the *Corpus* produced a profound shift in how to think of laws—no longer as unwritten or vernacular folk ways, but now as a universal body of reasoned norms set forth and elaborated in canonical written texts. The great project of late medieval and modern civilian jurists was to integrate this ancient, universal, and massive superstructure of laws with local customs through the articulation of transcendent first principles.

⁵³ Lactantius, Inst. Div. 6.8.6, English translation *available at* <http://www.newadvent.org/fathers/07016.htm>. See Elizabeth DePalma Digeser, *The Making of a Christian Empire: Lactantius and Rome* (2012).

⁵⁴ *Luke v. Lyde*, 97 Eng. Rep. 614, 617 (K.B. 1759).

⁵⁵ *DeLovio v. Boit*, 7 F. Cas. 418, 443 (C.C. D. Mass., 1815).

⁵⁶ *Swift v. Tyson*, 41 U.S. 1, 19 (1842).

⁵⁷ C.H.S. Fifoot, Lord Mansfield (1936).

⁵⁸ See *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire* (Benedict Kingsbury & Benjamin Straumann eds., 2010).

The greatest of these European legal entrepreneurs was Bartolus of Sassoferrato (1314-1357) whose timeless ingenuity awed centuries of jurists including Joseph Beale, who translated Bartolus' discourses on conflict of laws into English in 1914.⁵⁹ Bartolus, by encyclopedic and surgical snipping from all over the Byzantine *Corpus*, essentially created the field of conflict of laws as a tool to keep the peace and to promote and regulate commerce among the notoriously fractious Italian city-states of his day. In so doing, Bartolus was not only the father of federalism law, he also set an example of how a jurist could cut from the rich fabric of Roman purple a fitted garment for local everyday wear. His conflict-of-laws doctrine inspired legions of future jurists who faced the exact same problem he did in different contexts, like the Dutch Ulric Huber, whose ambition was to bring harmony to the semi-autonomous provinces of the Dutch Republic during their golden age.⁶⁰ Huber and Bartolus both spoke directly to Justice Joseph Story and to Justice Stephen Field, who had to deal with their own brood of independently minded but united states, giving birth to the American constitutional doctrine of constraints on the *in personam* jurisdiction of the state courts.⁶¹

Conflict of laws doctrine was but an example of the civilian jurists' general enterprise of creatively interweaving the *Corpus* and local customs that continued into the modern era.⁶² The project took different casts in different countries to suit local tastes, but under a common rubric that modern scholars have invoked as a precedent for the legal reunification of Europe.⁶³ Because Justinian and the compilers of the *Corpus* were long since dead, no one could check the work of the Bartolists and call them out if they had drawn the wrong principles from the canonical texts, or used right principles to justify a local custom contrary to the texts—a bad custom (*malus usus*).⁶⁴

⁵⁹ Bartolus on the Conflict of Laws (Joseph Henry Beale, trans., 1914) (ca. 1350). For a critical appraisal of differing views of Bartolus's legacy, including an assessment of Beale's translation, see Nikitas Hatzimihail, Bartolus and the Conflict of Laws, 60 *Revue Hellenique de Droit International* 12 (2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1600774.

⁶⁰ See Jonathan Israel, *The Dutch Republic: Its Rise, Greatness, and Fall 1477-1806* (1998).

⁶¹ See Joseph Story, *Commentaries on the Conflict of Laws* 250, 470 (1834); Geoffrey C. Hazzard, Jr., *A General Theory of State-Court Jurisdiction*, 1965 *Sup. Ct. Rev.* 241 (1965).

⁶² See Bellomo, *supra* note XX; Stein, *supra* note XX, at 88–92.

⁶³ See, e.g., Stein, *supra* note XX, at 130; Merryman & Perdomo, *supra* note XX, at 159.

⁶⁴ This is the reason why Justinian famously and futilely forbade commentaries on the *Corpus* after his death.

For example, Bartolus himself had argued that a Venetian rule requiring three witnesses for a valid will was consistent with the *Corpus*, which prescribed the Roman rule of five witnesses.⁶⁵ How did he manage this? He began by noting that the Romans generally recognized local custom as law where it was not bad, *i.e.*, *malus usus*. He then reasoned that the standard for recognizing a custom as bad was to enquire into the reasons for it and to see if they were reasons disapproved of in the *Corpus*. In this instance, the rationale for the Venetian rule was not to inconvenience busy men of commerce, which was consistent with other rules in the *Corpus* accommodating commercial actors, and therefore the three-witness rule was not *malus usus*. Thus, the Bartolists could reason to almost any result they wanted, notwithstanding theoretical fealty to the canonical texts of the *Corpus*.⁶⁶ Another example of the broad license taken by the Bartolists is illustrated by the maxim *quod omnes tangit ab omnibus approbetur* (“let that which touches all be approved by all.”) which, in the *Corpus*, referred to the rule that the approval of all legal guardians is required before disposition of property belonging to a common ward.⁶⁷ Medieval jurists appropriated the maxim and used it “as a fundamental principle in favour of representative institutions and participation by the people in decisions that concerned them.”⁶⁸

The advent of the Humanists in the late fifteenth century posed a very serious threat to the Bartolists’ free-wheeling method of reconciling (and legitimating) local customs by reference to the canonical texts. The Humanists advocated forensic recovery of the original texts of the *Corpus*, which had become corrupted over the centuries. If it was proven that jurists had derived principles from erroneous texts, then their decisional principles would unravel.⁶⁹ Although the academic Humanists made real progress in their endeavors, practicing lawyers, dominated by the Bartolists, simply ignored their discoveries and continued with business as usual in the courts. The problem posed by the Humanists eventually evaporated with the promulgation of national codifications which replaced the *Corpus* as anchor texts.

As with *in personam* jurisdiction, there are interesting parallels to American constitutional jurisprudence here. Because

⁶⁵ C.6.23.31. See Stein, *supra* note XX, at 75(?).

⁶⁶ Cf., Kadens, *supra* note XX, ___ (noting the illusory universality of the customary law merchant)

⁶⁷ See, e.g., R.C. van Caenegem, *An Historical Introduction to Private Law* 74-75 (1994).

⁶⁸ See *id.*, at 75. See generally Peter Stein, *Regulae iuris: From Juristic Rules to Legal Maxims* (1966).

⁶⁹ Stein, *supra* note XX, at 75–85.

we are dealing with what are essentially fixed canonical texts (e.g., Constitution, *Federalist*, convention and ratification records, etc.) constitutional meanings derived by a Supreme Court composed of text-originalists who are the new Bartolists are difficult to check. But it does not seem realistic to expect that new Humanists (e.g., historians and historically-inclined legal academics) can uncover new or improved canonical texts. Given the difficulty of passing a constitutional amendment to overturn a Court decision,⁷⁰ this all-or-nothing feature of civil law constitutionalism is troubling. Of course, constitutional theorists have made much the same point albeit from a democratic theory perspective, not from a jurisprudential one informed by the civil law tradition.⁷¹

One can imagine how the jurisprudential mindset sparked by the *Corpus* conceived of the deciding of cases in a fundamentally different way from the common law judge. When presented with a specific case, a judge was to seek guidance not from prior cases, but from the canonical texts and the first principles that were teased from them by subsequent juristic scholars like Bartolus, who would advise the judge on how local customs might be accommodated. Having found the relevant scraps of law from the texts as massaged by the general principles and local customs advised by eminent scholars, the judge was to paste them to the facts that he had discovered in the case. Once the judge had performed this mechanical operation (and any appeals exhausted), his work—his “opinion” so to speak—did not matter anymore. Only the texts and principles endured. Future judges were left to consult the canonical texts and first principles as declared by scholars *de novo* to decide a subsequent case, no matter how much it resembled the precedent. It was as if the prior decision had never happened. Thus it was the professor of law who declared law; there was no “path” of the civil law paved by judges.

Rules of law are applied to facts; who determines facts and how was a major point of distinction between the civil law and common law traditions. By the time of the American founding, the common law courts had settled on the allocation of fact-finding to a local jury. Once pleaded to issue, a disputed fact had to be tried to a jury drawn from the county in England where it had arisen.

⁷⁰ It has been done twice in the history of the Republic: the Eleventh Amendment overruling *Chisholm v. Georgia*, 2 U.S. 419 (1793), see *infra* Part II.B, and the Sixteenth Amendment nullifying the result in *Pollock v. Farmers’ Loan & Trust Co.*, 157 U.S. 429 (1895).

⁷¹ See, e.g., Bruce Ackerman, *We The People: Transformations* (2000); Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2d ed, 1986).

The local jury requirement was a particular nuisance for foreign litigants, mitigated, somewhat, by the practice of fictitious pleading that a foreign place was actually in England (e.g., Rotterdam in Middlesex County). Under the so-called “inquisitorial” model of the civil law tradition, however, it was the judge’s job to determine facts.⁷² There was no trial with live witnesses to be cross-examined. Evidence was mostly in written form: by the examination of documents like bills of exchange or of lading, and by records of depositions or interrogatories sworn before the judge or a master or magistrate with a commission to take evidence. Because there was no local jury with knowledge of background information and with the opportunity to observe the demeanor of witnesses at trial, the oaths attesting to the accuracy of documents served a vital verification function in civilian procedure.⁷³ All of this made for a more efficient and universal mode of proceedings capable of resolving disputes over great distances. This was an important advantage of the civil law courts over the common law courts in England—an advantage American lawmakers were well aware of and took into account when making procedural rules for their national courts, as we shall see in Part II.

The civil law tradition’s top-down approach to judging was not well-suited to cases with atypical facts, which accounted for the key role of equity in its jurisprudence. The very presumption of law’s universality meant that there would be some instances in which its mechanical application could not help but produce an unjust result. It was equity’s job to step in and correct such manifest injustice. Joseph Story believed this concept of equity was of Greek origin: “Aristotle has defined the very nature of equity to be the correction of the law wherein it is defective by reason of its universality.”⁷⁴ Story continued: “In the Roman Jurisprudence we may see many traces of this doctrine, applied to the purpose of supplying the defects of the customary law, as well as to correct and measure the interpretation of the written and positive code.”⁷⁵ Of course, equity was an important player in England too, but it was importantly housed in a different institution—the Court of Chancery, not the common law courts. And, to the late eighteenth-century English common lawyer, it was clear who would win in a conflict between law and equity. As Blackstone put it with typical curmudgeonness: “law, without equity, tho’ hard and disagreeable, is much more desirable for the public good, than equity without law; which would make every

⁷² See Langbein, *supra* note XX, at ____.

⁷³ See Helen Silving, *The Oath*, 68 Yale L. J. 1329, 1343-51 (1959).

⁷⁴ Joseph Story, *Equity Jurisprudence*, I.3; see also 1 William Blackstone, *Commentaries* *61, quoting Grotius quoting Aristotle.

⁷⁵ Story, *Equity Jurisprudence*, I.4.

judge a legislator.”⁷⁶ In theory early American national judges may have agreed with Blackstone, but the reality was somewhat different because the First Congress departed from the English model and granted them both law and equity powers.

Indeed, the English separation of law and equity into separate institutions was altogether foreign to the civil law mind.

One other major point of procedural distinction between the two legal traditions was appellate jurisdiction. At the time of the American founding, the English common law tradition did not have a modern procedure for appeal. “The historic common knew only two institutions that bore some semblance to the present-day appeal. One was the accusation of false judgment leveled against the bench or against the jury, the other was the scrutiny of the record of the case in order to discover a mistake (writ or error and writ of *certiorari*), neither the legal principle nor the facts of the case being at stake.”⁷⁷ By the late eighteenth century, generous constructions of what constituted “error” had enabled more searching scrutiny of the record, but it was by no means appeal in the modern sense. This was in part due to the importance of the local jury, which made the trial the main event. It was also due to the centralized, non-hierarchical character of the English common law courts: the judge of record was necessarily the peer of any reviewing judge with whom he rubbed elbows in the clubbish central courts at Westminster. A different pattern emerged on the continent, where the absence of the jury, the lesser prestige of judges, the distant and “political” subordination of provincial courts to central royal courts and of canonical courts to the papal *curia*, and the much larger size of the continental nation-states combined to establish modern systems of hierarchical appellate jurisdiction by the eighteenth century.

To summarize, in the late eighteenth century, the civil law tradition constituted a way of thinking about law with four key elements. First, the tradition held that law starts with historical canonical texts made to signify a break from an old political and legal order. The texts did not have to be comprehensive codes (e.g., The Twelve Tables); nor did the *Corpus* encompass only formal laws—the *Institutions* were a textbook and the *Digests* were a collection of sanctioned commentaries. An important corollary of this multi-dimensional character of the canonical texts was that the civil law tradition did not entail textualism in the modern

⁷⁶ 1 William Blackstone, Commentaries *62.

⁷⁷ R.C. van Caenegem, Judges, Legislators, and Professors: Chapters in European Legal History 5 (1987).

sense: it made no sense to parse the words of the formal laws when there were myriad interpretations that also shared canonical status. Second, although the texts were the starting points, because they were never updated, the jurists had considerable flexibility in reasoning by analogy to derive first principles to justify local customs. These principles were not Dworkinian moral principles applied by judges across cases (equity, instead, was the safety valve for manifest injustice); they were general principles derived by the sustained reflection of scholars. Third, before the national codifications, the tradition was associated with uniform substantive and procedural rules—a *ius commune* that could be used across borders. Finally, in terms of procedure, the civilian tradition did not glorify the jury but rather embraced rational judge-driven discovery of facts and hierarchical appellate jurisdiction.

2. Common Law Tradition

What follows is a brief sketch of the common law tradition emphasizing: 1) points of distinction with the civil law tradition described above; and 2) details relevant to the analysis of civilian influence on American constitutional jurisprudence in Part II. Although much of it will be familiar to common lawyers, it may be valuable for civil law readers. And, even for a common law audience, it may be useful to recall that the common law tradition entails much more than the simple connotation of judges deciding cases by distinguishing the facts of the case from those in prior decided cases.

The most important thing to realize about the common law tradition was that it was grounded in the national law and courts of an island kingdom which, by virtue of geography, had incubated and evolved in relative isolation over hundreds of years.⁷⁸ The words “common law” refer to the procedures and rules of decision “common” to the royal courts of England established after the Norman Conquest in 1066.⁷⁹ The Crown’s courts decided disputes and redressed grievances between and among English subjects—

⁷⁸ Dick Helmholz is the leading scholar to challenge this view. See, e.g., R.H. Helmholz, *The Ius Commune in England: Four Studies* (2001); R.H. Helmholz, *Magna Carta and the Ius Commune*, 99 U. Chi. L. Rev. 297 (1999).

⁷⁹ See generally J.H. Baker, *An Introduction to English Legal History* (2d. ed. 1979); John Langbein et al, *History of the Common Law: The Development of Anglo-American Legal Institutions* (2009); S.F.C. Milsom, *Historical Foundations of the Common Law* (2d. ed. 1981); Theodore F. T. Plucknett, *A Concise History of the Common Law* (5th ed., 1956); Frederick Pollock & F.W. Maitland, *The History of English Law Before the Time of Edward I*, vols 1 & 2 (2010 reprint of 2d ed. of 1898).

they were countrywide retail-justice providers. The king's provision of justice started out not only as a religio-sacramental obligation; it was good politics from the perspective of Norman kings whose armies were small in number and who sought to win support for their rule over a land peopled by belligerent natives.

There were three significant competitors in the provision of retail justice in medieval and early modern England, but they did not provide countrywide franchises "common" to all Englishmen. Depending on the subject matter of the dispute, English subjects could also try to resolve controversies or obtain redress for wrongs in: (1) the manorial courts of feudal lords (e.g., alleged taking of a neighbor's land), (2) county or village (i.e., of the "hundred") courts (e.g., alleged taking of a neighbor's cow),⁸⁰ or (3) church courts (e.g., alleged taking of a neighbor's wife). More specialized dispute resolution was also offered by guilds and at market fairs (courts of "piepowders"). The jurisdictions of manorial and folk courts were not national in scope because they were naturally limited to the reach of the convening baron, village, county, or city.

Before the Church of England broke from Rome, the English ecclesiastic courts were also primarily local, not national, providers of retail justice.⁸¹ A court was convened by each bishop or archbishop with jurisdiction confined to alleged violations of the canons of the church by members of his own diocese or archdiocese. The subject matter handled by the religious courts overlapped significantly with secular courts in an era when the Church was in a sense a political entity, nearly all residents of England were Church members, and the conception of the religious realm was much more capacious than it is today (e.g., matters of probate; alleging breach of a contract under oath might suffice to bring the suit into church court; anti-usury canons might ground cognizance over debt actions).

Unlike the folk or manorial courts, however, the church courts were local retailers of a worldwide "catholic" organization. A church court in medieval England was similar in form and

⁸⁰ Pollock & Maitland, *supra* note XX, at 47–48. In Anglo-Saxon days, most of the property disputes not involving land were about cows. "Movable property, in Anglo-Saxon law, seems for all practical purposes to be synonymous with cattle." *Id.* at 63. The hundred courts were often influenced by religious officials who were often the most learned in the area. *Id.* at 45.

⁸¹ See generally James A. Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts* (2008); Charles Donahue, Jr., *Law, Marriage, and Society in the Later Middle Ages* (2008); Richard H. Helmholz, *Marriage Litigation in Medieval England* (1974); Brian L. Woodcock, *Medieval Ecclesiastical Courts in the Diocese of Canterbury* (1952).

practice to a church court on the continent. Accordingly, there was a formal right of appeal from diocesan courts to the Court (*curia*) of the Bishop of Rome, and canon law, fortified by the rediscovery and study of Roman imperial law,⁸² set forth universal and uniform procedures and rules. But, in reality, the *curia* rarely exercised its appellate jurisdiction, and Roman-inflected canon law, like the rest of the civil law, countenanced equitable discretion in mitigating the rigor of applying universal rules to local cases.⁸³

After the break from Rome, the English ecclesiastical courts operated under royal, not papal authority. The ecclesiastic courts, insofar as the head of the Church was now the King or Queen *ex officio*, might in theory be called royal courts and therefore newly incorporated into the common law as I have initially defined it. But the reality was that the ecclesiastic courts, long accustomed to applying their own procedures and the substance of canon law as the law of Rome (both in the sense of hierarchical subordination to its bishop and of intellectual indebtedness to Roman secular law), never came to be perceived as common law institutions. To abstract from this important point, the common law tradition came to be strongly identified with legal traditions and institutions believed to be of native English origin, with the principal puzzle being how to integrate the many documented innovations brought by Norman Conquest with pre-existing but largely undocumented Anglo-Saxon traditions. A court system that had for so long applied non-English, Roman law was not a part of the common law, even after the spiritual realm had been merged into the king's justice.

There were two other important courts in addition to the ecclesiastic courts that were not perceived as part of the "common law" tradition because they did not originate as ordinary royal courts and were anchored in non-English legal traditions. The more important of the two was the Court of Chancery,⁸⁴ which originated in the late fourteenth century.⁸⁵ English subjects denied justice in the ordinary royal courts (i.e., the common law courts) could petition the king for equitable relief; the king delegated action on most petitions to the Chancellor, his chief counselor.

⁸² Canon law's debt to Roman law inspired the maxim "the church lives under the Roman law" (*ecclesia vivit lege Romana*).

⁸³ See generally James A. Brundage, *Medieval Canon Law* (1995); R.H. Helmholz, *The Spirit of the Canon Law* (1996).

⁸⁴ Chancery was the King's secretariat, headed by the Chancellor. It pre-existed the Court of Chancery.

⁸⁵ The much-maligned and extinguished Court of the Star Chamber was the equivalent of Chancery as the equity branch in the criminal field, and its power to nullify the criminal jury of one's neighbor-peers was a major fear of the American framing group.

Since the Chancellors from the time of Chancery Court's origin to the sixteenth century were bishops and archbishops schooled in canon law and civil law, Chancery Court naturally adopted the procedural and substantive rules of the *ius commune* in dispensing the increasingly important function of safety-valve relief to growing common law rigidity.

In terms of procedure, the Court of Chancery departed most notably from the common law model in favor of the civil law model in the absence of juries, flexible pleading rules in contrast to the single-issue pleading of common law writs, and exclusive reliance on written, as opposed to live, testimony. As with the civilian courts on the continent, the deposition was a keystone of Chancery Court procedure, but the deposition was cued to the aim of objectively preserving written testimony for the review of the Chancellor and designated masters (like the civil law), not the common law use of preparation for jury trial. Hence, depositions were not taken by parties' counsel in an adversarial proceeding, but rather "taken outside the parties' presence by a court-appointed officer, based on written interrogatories. And this *ex parte* procedure was the primary vehicle for bringing witness testimony before the court."⁸⁶

Chancery Court, despite its civil law origins and procedures, occupied a conceptual split identity: it was not a common law institution, but it was not viewed as civilian either despite the marked civilian strains in its procedural and substantive DNA. This was partly because Chancery's *raison d'être* was to supplement the common law courts to provide a higher quality of king's justice throughout the land. Also, by the seventeenth century, the Court was dominated no more by prelates trained in the canon law but by Chancellors who had practiced in the common law courts. In the eighteenth and nineteenth centuries, some of these Chancellors, despite their common law backgrounds, sought to revive a stagnant equity jurisprudence by borrowing from civil law countries, particularly those that had broken from the Roman church.⁸⁷

⁸⁶ Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 Cornell L. Rev. 1181, 1206 (2005).

⁸⁷ "The jurisprudence of the Court of Chancery, which bears the name of Equity in England . . . is extremely complex in its texture and derives its materials from several heterogeneous sources. The early ecclesiastical chancellors contributed to it, from the Canon Law, many of the principles which lie deepest in its structure. The Roman law, more fertile than the Canon Law in rules applicable to secular disputes, was [often] resorted to by a later generation of Chancery judges, amid whose recorded dicta we often find entire texts from the Corpus Juris Civilis imbedded, with their terms unaltered, though their origin is never acknowledged.

The admiralty courts were the third main non-common law judiciary in England in addition to the ecclesiastic courts and the Court of Chancery. These courts handled three types of business: 1) maritime commerce—the civil or “instance” jurisdiction, since litigation was at the “instance” of private parties; 2) prize cases—adjudicating the legality of maritime captures during war; and 3) maritime criminal law, e.g., the prosecution of piracy. Admiralty law traced its pedigree to non-English sources including the *Corpus* which purported to incorporate the ancient sea laws of Rhodes; the sea laws of the Isle of Oleron, a dependency of Aquitaine; and the general customary law of merchants (*lex mercatoria*). In their early years, the main function of the admiralty courts was to increase foreign maritime commerce and trade by providing dispute resolution in accordance with universal rules and procedures, again of Roman (secular) heritage.⁸⁸ The importance of putting aside reflexive English exceptionalism in favor of universal norms was acknowledged by no less than Lord Mansfield, who was a key player in renovating common law doctrine and jurisdiction so that the common law courts could bring within their monopoly many important commercial cases on the admiralty docket. While Edward Coke,⁸⁹ Mansfield, and other common lawyers were largely successful in this enterprise, the increasing demands of the English overseas empire, its growing maritime trade, and the growth and prowess of its navy,⁹⁰ continued to generate important cases on the admiralty docket, especially prize cases during the American and Napoleonic wars of the late eighteenth and early nineteenth centuries.

By the time of the American Revolution, the nationwide franchise of the common law courts had displaced local courts and commanded a near-monopoly of the retail justice business in the land. They had also succeeded in wresting away much of the business of the civilian courts, particularly the lucrative instance jurisdiction of the civilian courts. In Pollock and Maitland’s inimitable prose with reference to an earlier era: “Slowly but surely justice done in the king’s name by men who are the king’s servants

Still more recently, and particularly at the middle and during the latter half of the eighteenth century, the mixed systems of jurisprudence and morals constructed by the publicists of the Low Countries appear to have been much studied by English lawyers, and from the chancellorship of Lord Talbot to the commencement of Lord Eldon’s chancellorship these works had considerable effect on the rulings of the Court of Chancery.” Henry Maine, *Ancient Law* 26 (1861).

⁸⁸ See Steven L. Snell, *Courts of the Admiralty and the Common Law* (2007).

⁸⁹ Edward Coke, *The fourth part of the institutes of the laws of England* 134-47 (1797 ed.) (1641).

⁹⁰ See N.A.M. Rodger, *The Wooden World: An Anatomy of the Georgian Navy* (1996); *id.*, *The Safeguard of the Sea: A Naval History of Britain, 660-1649* (1999); *id.*, *The Command of the Ocean: A Naval History of Britain, 1649-1815* (2005).

becomes the most important kind of justice, reaches into the remotest corners of the land, grasps the small affairs of small folk as well as the great affairs of earls and barons.”⁹¹

The successful spread of a centralized national-court system into the darkest reaches of the island owed much to the common law courts’ adoption of a device that lay at the heart of the competing local courts’ decision-making legitimacy—the jury of one’s peers. All three of the principal common law courts—the Court of Common Pleas, King’s Bench, and the Court of Exchequer, originally moved with the king’s retinue (hence, loosely speaking, one popular etymology of “court”⁹²), but by the fourteenth century, they had been fixed at the palace at Westminster in London.⁹³ How then, could the king (or queen) deliver satisfactory local justice from Westminster at a time where travel was exceedingly difficult? The ingenious solution of English common law relied on the twin pillars of: (1) a highly structured and centralized system of writ pleading and (2) the practice of *nisi prius*, whereby a county jury was polled by judges riding circuit.

The basic rules of proceedings in the common law courts had been set by the end of the thirteenth century and they endured to the end of the eighteenth. An English subject seeking relief from a common law court, such as the Court of Common Pleas, could petition for a writ of action against another subject from the King’s secretariat, the Chancery in London. Roughly speaking, there were two broad groups of royal writs, one addressed to subjects and the other to local officials usually sheriffs. The basic message of every writ addressed to a subject was more or less the same: “you, give it back, or come here and tell me why not.” A writ to a sheriff carried a similar order commanding the recipient to do something or come before the court. Thus, the most famous common law writ, the writ of *habeas corpus ad subiciendum*, boiled down to “you, jailer, produce the body and tell me why you are holding it, so I may do as I see fit.”

Over time, the number of common law writs of action multiplied exponentially to reflect the growing complexity of disputes among Englishmen, and, a successful return on a writ came to turn on whether the plaintiff had selected the writ that was

⁹¹ Pollock & Maitland, *supra* note XX, at vol. 1, 91.

⁹² Plucknett, *supra* note XX, at 142-43.

⁹³ Access to the Court of Common Pleas, the principal common law court during the early medieval period, was so important that one of the provisions of Magna Carta specified that “Common please shall not follow our court, but shall be held in some fixed place.” Cl. 17.

a perfect fit for his case. If the suit might be decided as a matter of law or on the basis of the plaintiff's plea and the defendant's reply to the court's summons, then the court would enter judgment. But if the pleadings in a case pled to a yes-no dispute on an issue of fact, then that question would have to be decided by the verdict of a jury of Englishmen who lived in the county where the alleged stealing had taken place. So, in theory, the king would have to issue another writ to the local sheriff ordering him to summon jurors from the local county to Westminster to render a verdict on the disputed fact at such-and-such a date, and a verdict for the plaintiff would result in a judgment in his favor. The king's justice would have been a failure if it required this sort of mass inconvenience to jurors.

The common law's solution to this great puzzle relied on the *nisi prius* practice of sending national judges to ride circuit throughout England. The writ to the local sheriff ordering him to summon jurors to Westminster would specify a date after when a circuit judge was scheduled to sit in the county where the events of the case occurred. The writ would further specify that the jurors should travel to Westminster unless before then (*nisi prius*) a judge had taken the verdict in the county, which would almost certainly be the case. The verdict, once taken, was reported back to Westminster and judgment made and entered by the clerk of the relevant court. Thus, the core of the king's justice in the common law tradition turned on the juxtaposition of a centralized court of judges and highly formalized writ pleading, with verdicts by local juries taken by judges on circuit. The collocation of the judges at the center helped them foster a collective identity, confer on cases, and keep up their professional skills and knowledge. An understanding of the reality of common law practice in the eighteenth century goes a long way in helping us to understand U.S. constitutional provisions relating to judge and jury, and their implementation in the Judiciary Act of 1789.

By contrast to the civil law tradition, canonical texts did not play the same role as the starting point of adjudication in the common law tradition. The heart of the common law, was, in Henry Maine's words, "immemorial unwritten tradition."⁹⁴ The civilian always started with the canonical texts, but, as we have seen, because the texts never changed, ingenious jurists fashioned decisional rules through the articulation of first principles, the incorporation of local customs, and the invocation of equity where

⁹⁴ Maine, *supra* note XX, at 1.

needed. The common law judge was not as constrained by canonical texts even in theory.

That is not to say that writings were not important; at least three sorts of writings were very important in the common law tradition. First, the rights of English subjects were implicit in the royal writs issued by the common law courts—the king (or queen) was bound to grant them unless the law recognized an exception. Second, landmark documents and statutes were meaningful snapshots of the constitution and useful gap-fillers. As Edward Coke famously observed of Magna Carta: “It was for the most part declaratory of the principal grounds of the fundamental Laws of England, and for the residue it is additional to supply some defects of the Common Law; and it was no new declaration.”⁹⁵ Third, and perhaps most important for present purposes, the growing practice of publishing reports of common law decisions starting in the sixteenth century (initially, just summary notes)⁹⁶ encouraged judges to be more careful about their decisions, which became more sophisticated in reasoning. These circulated among the judges at Westminster; reputation and the respect of one’s peers were earned by those whose samples shined. By the time of the American founding, judicial decisions, had become the heart of the common law tradition, manifested in the policy of *stare decisis*—“to stand by the decisions.” Law requires stability (or at least the illusion of it) so that people have a sense of what they can and cannot do. By the time of the American founding, it was decisional authority that supplied this stability in England, not the texts and principles that prevailed on the continent.

The common lawyers generally looked down upon the English civilians. To start, there was the general English contempt for Roman imperial and ecclesiastical institutions, an association that civilians could not escape given the origins of their discipline. Perhaps most important, there was professional jealousy and competition: the civilians and the common lawyers competed for business, and the English penchant for jurisdictional wooliness

⁹⁵ Edward Coke, 2 *The Selected Writings of Sir Edward Coke* 748 (Steve Sheppard, ed.)

⁹⁶ The initial reporters of common law decisions were private affairs. Coke himself produced 13 volumes of reports of decisions in the three common law courts from 1572 to 1616. Edward Coke, 1 *The Selected Writings of Sir Edward Coke*. Before then, all the way back to the late thirteenth century, records of proceedings in the common law courts and the Court of Chancery were circulated in the Yearbooks, which may have been precursors to today’s law-school student outlines, composed based on observation of proceedings for training purposes. Their authorship is still a mystery.

enabled poaching, both by judges and practitioners.⁹⁷ Furthermore, the profession of law in the common law courts emphasized practice and learning by doing. The civilians, by contrast, learned their law from books at the university, which made them useful for jobs like diplomacy and commerce which required dealings with foreigners. As James I declared in 1610: “It is true, that I do greatly esteem the Civil Law, the profession thereof serving more for general learning, and being most necessary for matters of Treaty with all foreign nations.”⁹⁸ A consequence of this was that notwithstanding their inferior social status in England, civilians were particularly well-suited for trans-border practice. This was a fact that was not lost to founding American lawyers, who did not (entirely) share their English common law counterparts’ contempt for civilians.

The work product of the late eighteenth-century English civilian judges, most notably Lord Stowell, are helpful evidence for proving this Article’s claim of civilian influence on early American constitutional jurisprudence. They were civilians but they were Englishmen like the American founders had been. If I am right about civilian influence, then the American jurisprudence in question should be similar to the opinions of the English civilians in their conceptualization of law and how to apply it. And, as we shall see in Part II, it is remarkable just how much the constitutional opinions of certain Supreme Court justices in the late nineteenth century resembled the opinion of Lord Stowell in an 1827 appeal from the Vice-Admiralty Court of Antigua.⁹⁹ Because the case previewed the issue in the *Dred Scott* decision, Stowell’s opinion was widely read and admired in the antebellum United States.

By way of closing, it merits mention that for all its strengths, there were several drawbacks to using the English common law as a model for the design and implementation of a new public law and new national courts for the United States. First, it was problematic for political reasons. The American people had just fought a war of revolution, and many Americans did not welcome the prospect of creating a new national government armed with the legal institutions of the mother country. Second, there was the question of size. England was

⁹⁷ The common lawyers were the winners in the competition, owing to their ability to claim ultimate authority to interpret statutes, including the jurisdictional statutes of the admiralty court. See Bourguignon, *supra* note XX, at 20–27.

⁹⁸ See Alain Wiffel, “Ius gentium in the practice of the Court of Admiralty around 1600,” in A.D.E. Lewis & D.J. Ibbetson, eds., *The Roman Law Tradition* 119 (1994).

⁹⁹ *The Slave, Grace*, 166 Eng. Rep. 179, 183 (Adm. 1827).

roughly the size of New York, and had a great many more roads than New York did in 1789. The entire United States was of course many times the size of New York, and it was doubtful whether the core procedural strengths of the common law system-- jury, centralized writs, and circuit riding, could be replicated on a national scale, notwithstanding their track records at the state level. Third, the substance of the common law was poor with respect to private and public law subjects of particular importance to the new national government and its courts such as general commercial law, admiralty law, prize law, and the law of nations. The short of it was that the English common law tradition was not a "general" law tradition, which was precisely what the national courts most needed.

II. Four Case Studies in Civilian Influence

The following case studies of civilian influence were chosen with four considerations in mind. First, I selected cases presenting topics and doctrines that would be familiar to a general legal audience today, e.g., the first civil procedure act, *Dred Scott*, personal jurisdiction. For this reason I did not include wartime prize cases, a civilian sphere of public law that was crucial to the early docket of the national courts but now extinct. Second, I have presented cases in which civilian influences are explicit or easy to identify. A third consideration was to choose cases reflecting the different elements of the civil law model described in Part I: (1) canonical texts as ultimate authority; (2) reliance on universal or general principles of public law; and (3) civilian procedures. Finally, case studies of civilian influence were selected from different points in the first century of American public law to illustrate how civilian influence evolved.

Design and Initial Operation of the National Courts

A. The First Federal Civil Procedure Statute

Our story of civil law influence on American constitutionalism begins with founding Americans' veneration of the institutions and values of the Roman Republic. The point has been made so often and so forcefully that it seems unnecessary to remake it here.¹⁰⁰ What is important for present purposes is to figure out whether any influence operated with respect to law and legal institutions, specifically, whether Roman republican institutions and values shaped the public law of the American republic. The task is complicated by the fact that, as noted earlier, the Americans did not have direct access to Roman republican law—the *Corpus Iuris Civilis* was Roman imperial law (only applied directly in the East) and Gaius' *Institutes* would not be discovered until 1816. And so influence cannot be established by citations; nor are citations necessarily helpful in proving inspiration and influence at a more abstract level.

A good place to begin such a proof is a controversy between the Senate and the House of Representatives when the new national government convened for the first time in New York in May 1789. The question was how Congress was to address the President. The Senate, led by Vice President John Adams, preferred "His Highness the President of the United States of

¹⁰⁰ See, e.g., Bailyn, *supra* note XX; Bederman, *supra* note XX; McDonald, *supra* note XX; Shalev, *supra* note XX.

America and the Protector of their Liberties.” The House would have none of it – it smacked too much, like Adams, of English titles and monarchical pretense. The House prevailed.¹⁰¹ Historians Stanley Elkins and Eric McKittrick explain why:

Nor was the outcome, for all the momentary see-sawing, ever in much real doubt. What had governed just about everyone was a principle which gave a strong accent to the ideology of the Revolution: the austere simplicity of the Roman Republic. The imagery of the Latin classics had penetrated their lives, words, thoughts, and acts in endless ways ever since they could remember. The almanacs of the day, with lines from Horace, Virgil, and Ovid, had sung the praises of virtuous husbandry. The chief propagandists of the Revolution had been classical scholars, and had signed their tracts with classical pseudonyms. The non-importation agreements had been supported by the symbolism of Roman frugality and abstinence. The entire literature of the Revolution was permeated with the imagery of republican Rome menaced by the approaching shadow of the Caesars, and it was thus appropriate that in the Constitutional Convention appeal should repeatedly be made to the history of the ancient republics. The very nomenclature of government—“president,” “senate,” “congress”—as well as the official iconography, the mottoes of state, even the architecture would all be heavily Roman.¹⁰²

Did this ubiquitous veneration of Roman republican things affect the making of the laws by the organs given Roman names which came to be housed in Romanesque buildings?

The controversy over what Congress should call the new President was symbolic, but it foreshadowed a more serious debate with legal implications a few months later. One of the first and most enduring enactments of the First Congress was the Judiciary Act of 1789, which was signed into law on September 24.¹⁰³ The statute established the Supreme Court as well as lower circuit and district courts, defined their respective jurisdictions and terms, and provided for court staff—clerks, marshals, and U.S. attorneys. It prescribed that “the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases

¹⁰¹ Washington was addressed as “President of the United States” and the references to “His Highness” and “Protector” were omitted.

¹⁰² Stanley Elkins & Eric McKittrick, *The Age of Federalism* 48 (1993).

¹⁰³ Judiciary Act of 1789, ch. 20, 1 Stat. 73.

where they apply.”¹⁰⁴ The Act also set forth basic rules of evidence¹⁰⁵ and jury selection,¹⁰⁶ but did not otherwise address procedures to be used in the new courts.

The First Congress tackled the vital lacuna in an enactment that was signed five days later, on September 29, 1789. This statute was titled “An Act to regulate Processes in the Courts of the United States.”¹⁰⁷ It originated in the same Senate Committee of the First Congress that had drafted the Judiciary Act. It was most likely drafted by the same person who was the principal architect of the older-sister statute, Senator Oliver Ellsworth of Connecticut, who was later appointed the third Chief Justice of the United States.

The First Process Act has not received the sort of scholarly attention one might have expected for the first federal civil procedure statute. Part of this may be attributable to the fact that the Act was supposed to be temporary. Congress provided that it was to “continue in force until the end of the next Session of Congress and no longer.”¹⁰⁸ The statute proved to be longer lived: the next two congresses ended up voting to continue the 1789 Act, and a new process act was not passed until May 8, 1792.¹⁰⁹ Another reason for the low profile of the statute may be its concision. The entire statute consists of 328 words in three sections. The original Senate bill had been much more detailed, but the Senate had pared it down, ostensibly to prevent undue wrangling with the House.

One major controversy was not averted, however, and it was an echo of the earlier inter-House debate about how to address the President. The original Senate bill of the Process Act had provided “That all Writs & Processes issuing out of any of the Courts of the United States, shall be in the name of the President of the United States of America.”¹¹⁰ Some Senators chaffed at this whiff of the British King’s writs;¹¹¹ such objections were joined by

¹⁰⁴ *Id.* § 34, 1 Stat. 73, 92 (Rules of Decision Act).

¹⁰⁵ *Id.* § 15, 1 Stat. 73, 82 (“power in the trial of actions at law . . . to require the parties to produce books or writings in their possession or power); Section 30 (prescribing uniform “mode of proof by oral testimony and examination of witnesses in open court” and procedures for taking testimony of distant persons)

¹⁰⁶ *Id.* § 29, 1 Stat. 73, 88.

¹⁰⁷ Process Act of 1789, ch. 21, 1 Stat. 93.

¹⁰⁸ *Id.* § 3, 1 Stat. 93, 94.

¹⁰⁹ See 4 DHSC, *supra* note XX, at 121 (May 26, 1790); *id.* at 113 (Feb. 14, 1791).

¹¹⁰ *Id.* at 115.

¹¹¹ Kenneth R. Bowling & Helen E. Veit eds., *Diary of William Maclay and Other Notes on Senate Debates 168* (1988) (September 26, 1789) (“This is only a part of, their old System of giving the President as far as possible every appendage of Royalty.”).

like-minded members of the House. When the bill reached the House, Representative Michael Jenifer Stone of Maryland moved to strike the words “the President of” so that writs would run from the United States in which sovereignty rightfully reposed. A “warm and animated” debate resulted, and the House passed Stone’s amendment by a 25-18 vote.¹¹² But the Senate stuck to its guns upon receiving the amended bill, but so did the House, which voted 28-22 to press the amendment upon return from the Senate.¹¹³ The impasse, on a matter that seems trivial to the modern legal mind, was resolved only when the two Houses agreed not to say anything at all about from whom writs and processes would issue. This resolution punted the fraught issue to the newly created judiciary.¹¹⁴

The incident is instructive in two relevant respects. First, it highlights how much a vocal majority of the founding group was hostile to implementing legal practices redolent of British monarchy. As described in Part I, the royal writ was the key for litigants to unlock the king’s courts and it was framed as a royal command to the defendant or to the sheriff. The whole point of the Revolution had been to slip the yoke of royal commands, and it seemed antithetical to that purpose to substitute the command of a president for that of a king. More generally speaking, a significant segment of the American people had come to despise the political and legal institutions of the country with which they had just fought a bloody and vicious war of separation. It was natural for them to seek other sources of inspiration for designing the revolutionary republic’s governance institutions including its courts. One important such source was the practices of the various United States, but those were also ultimately derived from English common law models. The only other plausible source was the civil law tradition, a component of which was the mythical law of the venerated Roman Republic.

Second, the debate about the First Process Act underscores Elkins and McKittrick’s point about the Roman republican “accent” on the ideology and values of the constitutional framers and ratifiers. To a majority of the House, it was important to make clear that sovereignty resided in the people, even with respect to technical legal matters. The positive pull of Roman republicanism was the complement of the negative push away from the British monarchical formula, and the difference lay in the perceived

¹¹² 4 DHSC, *supra* note XX, at 112

¹¹³ *Id.*

¹¹⁴ The justices of the Supreme Court, in their first term of February 1790, decided that their writs would run from the President of the United States. *Id.*

despotic quotient of the relevant model. What the First Congress likely wanted was some version of the Roman republican formula SPQR (*Senatus Populusque Romanus*--the Senate and the Roman People), perhaps the “People of the United States.” But most of the lawyers in Congress were indoctrinated into the common law mindset in which a writ was a command from the king to a marshal to summon or seize a defendant to appear and explain himself in the king’s court. It was in this sense different from a declaration of independence or a constitution established by the people. It must have been hard for them to grasp the idea of such a command coming from all of the people or an abstract entity like the United States.

The controversy over who originates writs illuminates how Roman republicanism colored the design of the new republic’s legal practices, but it was small beer as compared to another part of the First Process Act which directly invoked the civil law tradition. The statute’s key operative part does not set forth actual procedural rules but rather ordains choices of procedural law for the three categories of cases expected to constitute the main business of the new federal courts: (1) suits at common law, (2) causes of equity, and (3) suits in admiralty and maritime jurisdiction. The latter two categories in fact would come to constitute the lion’s share of the work of the early national courts, which is unsurprising since the state courts had concurrent jurisdiction over all suits at common law. With respect to these equity, maritime, and admiralty suits, the Process Act prescribed that “the forms and modes of proceedings . . . shall be according to the course of the Civil law.”¹¹⁵ As we shall see, it is almost certain that the First Congress was directing national judges to apply the procedural rules then in use in courts of the civil law world.

Before discussing the puzzling provision, we need to deal with the preliminary question of why Congress chose to vest multiple judicial powers in the same court. As discussed in Part I, a fusion of judicial powers in one court (law and equity) was a common feature of the civil law tradition, but it was anathema in England. The common law courts were masters of law, and the Court of Chancery was the dispenser of equity. The splitting into two of the rule-of-law atom was an axiom of the English legal order, utterly foreign to the civil law legal order. The two institutions evolved a long and famous history of mutual suspicion and rivalry, and the English believed that combining them in one

¹¹⁵ Process Act of 1789, ch. 21, § 2, 1 Stat. 93, 93–94

organ would create a monster.¹¹⁶ But that was what the First Congress did, and, in an even greater departure from the English example, they also vested the new national courts with the all-important admiralty and maritime jurisdiction, which had been the separate province of the civilian admiralty courts in England. Was Congress following the civil law model when it did this?

It is unclear exactly why the business of three courts in England was put into one new national court in the United States,¹¹⁷ and so it is hard to say for sure if the founding Americans were influenced by the civilian norm of a unitary court with law and equity powers. Pfander and Birk have read the constitutional extension of “judicial power . . . to all Cases in law and equity” as pointing to a unitary court influenced by the civilian-based Scottish model,¹¹⁸ but that provision does not have to be read to mean that “all Cases in law and equity” requires vesting both law and equity cases in the same court. The First Congress did fuse the powers along with the admiralty power in one court by the First Judiciary Act, and this inspired strong objections based on the English example, including from future Justice Samuel Chase.¹¹⁹ My own view is that Congress may have overridden such objections not out of a desire to emulate the Scottish or civilian model, but because they wanted to save money. Robert Treat Paine, a future justice of the Massachusetts Supreme Judicial Court, had written to Caleb Strong, a member of the Senate committee that originated the bill, “suggest[ing] combining the admiralty and revenue jurisdictions rather than having them referred to separate courts.”¹²⁰ And the fact that the First Congress seems to have thought that they had the discretion to combine or not to combine suggests, contrary to Pfander and Birk’s theory, that Article III’s reference to “Cases in law and equity” is inconclusive on a requirement of unity.

But let us return to the main event of the choices made by the First Process Act. It prescribed two choices of procedural law:

¹¹⁶ Limited border crossings were common, however. For instance, litigants in the common law courts could obtain bills of discovery from Chancery to aid litigation, see Langbein et al., *supra* note XX, at ____, and common law courts developed the doctrine of the “equity of the statute” to gain flexibility in their interpretation of statutes, see John Manning, *Textualism and the Equity of the Statute*, 101 Colum. L. Rev. 1 (2001).

¹¹⁷ See 2 Max Farrand ed., *The Records of the Federal Convention* 428 (rev. ed. 1966) (remarks of Johnson regarding merger of law and equity).

¹¹⁸ Cf. Pfander & Birk, *supra* note XX, at 1666-69 (suggesting that the American framers were influenced by Lord Kames’ exposition of the merits of the Scottish unitary model).

¹¹⁹ See Maeva Marcus and Natalie Wexler, *The Judiciary Act of 1789: Political Compromise or Constitutional Interpretation*, in *Origins of the Federal Judiciary: Essays on the Judiciary Act of 1789* 19 (1992).

¹²⁰ *Id.*

one for the common law side, and one for the admiralty, maritime, and equity sides combined. Before discussing the specific prescriptions, it may be useful to consider the range of possible choices. The First Congress could have: 1) applied state procedural rules; 2) drafted their own procedural rules by statute; 3) allowed the federal judiciary to make their own rules; or 4) adopted the rules of the English courts—common law, equity, and admiralty.

For the law side, the Senate had originally passed a bill prescribing procedural rules (option 2) with a carve-out for state rules as to “executions in actions” and fees,¹²¹ but Congress ended up choosing state rules (option 1). For “suits at common law,” the Process Act declared that “except where . . . otherwise provided” by federal statutes, “the forms of Writs and Executions . . . and modes of process and rates of fees . . . in the Circuit and district Courts . . . shall be the same in each State respectively as are now used or allowed in the supreme courts of the same.”¹²² The choice of state procedural law for suits at law was unsurprising: each of the new states had their own settled common law courts which had evolved particular ways of regulating procedures. The local bar would not have welcomed a new set of rules for actions at law that might be entertained in the general courts too, for instance by virtue of diversity-of-citizenship jurisdiction. This part of the Process Act also tracked the Rule of Decisions Act’s prescription of state substantive law “in trials at common law in the courts of the United States in cases where they apply.”¹²³ This law side of the statute has been the subject of a good deal of judicial and scholarly commentary, most notably for its quixotic static command that the relevant state procedures were those “now used or allowed” in 1789 and implicitly not thereafter.¹²⁴

It is the other choice of procedural law in the First Process Act for equity and admiralty cases that is startling. Both the original Senate bill and the final act did not adopt one of the four logical options suggested above. Instead, as noted above, for “causes of equity, and of admiralty and maritime jurisdiction,” the statute prescribed that “the forms and modes of proceedings . . . shall be according to the course of the Civil law.”¹²⁵ One threshold interpretive question is whether the phrase “according to the course of the Civil law” contemplated reference to the English Chancery Court with respect to equity causes. As we have seen,

¹²¹ 4 DHSC, *supra* note XX, at 115–18.

¹²² Process Act of 1789, ch. 21, § 2, 1 Stat. 93, 93.

¹²³ Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92.

¹²⁴ Process Act of 1789, ch. 21, § 2, 1 Stat. 93, 93.

¹²⁵ *See id.* at 93–94.

Chancery had civilian roots, but, unlike the ecclesiastical and admiralty courts, it had evolved a distinct identity by the late eighteenth century. While it is almost certain that Chancery practice would not have been characterized as “common law” procedure, it seems improbable that Congress and early American lawyers would have viewed it as part of “the course of the Civil law.” And so it appears that these words in the Process Act directed the new national courts to use the uniform procedural rules of the civilian courts of continental Europe to govern their “forms and modes of proceeding” in equity (despite the model of Chancery practice), as well as in admiralty.

Why did the First Congress opt for civilian procedures? There is very little evidence on point, and there appears to be only one scholarly analysis. Julius Goebel, the unmatched scholar of early American procedure, posed a theory of negative motive: the choice of civil law was due to postwar hostility against English practice in the Court of Chancery and admiralty courts.¹²⁶ “The Committee had earlier experienced the explosions over adopting English chancery practice during the Judiciary Act debates . . . and it may have been conceived that something less contentious was being tendered.”¹²⁷ English law did seem like the most logical choice: American lawyers knew it, and it promised a benefit comparable to civil law in terms of uniform rules across the states and with Great Britain. State rules, as on the law side, were also plausible in theory, although the more flexible nature of equity made it likely that procedures had evolved greater differences over time among the states. Another problem with using state rules was that there were separate courts of chancery in only five of the then states--Maryland, New Jersey, New York, Virginia, and South Carolina, and their rules were modeled on English chancery any way. Goebel does not shirk from expressing his opinion of the provision for civil law practice actually enacted: he called it “done in haste,” ill advised,” and “unrealistic.”¹²⁸ He believed it was “idle to suppose that the judges or the practitioners . . . were likely to set afoot unfamiliar and untried procedures.”¹²⁹

Goebel is surely correct about anti-English sentiment, but his negative theory may be incomplete because it neglects an important positive motive: the First Congress imported the “course of the civil law” to govern procedures for equity and admiralty suits in federal court because they wanted to encourage continental

¹²⁶ Julius Goebel, Jr., *The Oliver Wendell Holmes Devise History of the Supreme Court of the United States* 534–35 (1970).

¹²⁷ *Id.* at 534.

¹²⁸ *Id.* at 534-35.

¹²⁹ *Id.* at 534.

European merchants to trade and do business with, and lend money to, Americans. Such dealings, especially with denizens of a new revolutionary “republic” run by former freedom fighters led by their general, are always haunted by the specter of unreliable dispute resolution in the developing country’s “courts” if the deals go bad. The state courts, with their partisan juries and arcane procedures of English origin, were notoriously hostile to foreign and out-of-state commercial interests, particularly creditors.¹³⁰

To counteract this reality, Congress tried to make the new general courts as cosmopolitan and user-friendly as possible for European merchants, shippers, and bankers. The Process Act prescribed “forms and modes of proceeding” in equity and admiralty suits “according to the course of the civil law.” And of course there was no jury in equity, admiralty, and maritime causes. By the expansion of equity and admiralty jurisdiction, the national courts could further erode local juries, a concern that animated the saving-to-suitors clause of the admiralty jurisdiction grant.¹³¹ Furthermore, as I have discussed in another article, the Judiciary Act gave foreigners special access to the federal courts for injuries to their persons or properties (alien torts) that Americans did not have.¹³² Finally, in “cases of foreign bills of exchange,” the First Judiciary Act accorded a special right to serve process on a defendant in a district other than where he lived or was served, and for an assignee of a promissory note to sue in federal court even if the assignor could not have.¹³³ These were the earliest examples of special nationwide process rules, which in the present day are limited to federal-question suits,¹³⁴ although a modern analogue would likely be constitutional under the Fifth Amendment, since the defendant would be a U.S. resident with “minimum contacts” to the United States. To my knowledge, neither provision has been examined in any detail, but they are consistent with the theme of

¹³⁰ See Wythe Holt, *“To Establish Justice”: Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 Duke L.J. 1421 (1989).

¹³¹ “[T]he district courts . . . shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction . . . within their respective districts as well as upon the high seas; saving to suitors, in all cases, the right of a common law remedy where the common law is competent to give it.” Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76–77.

¹³² See Lee, *Safe-Conduct Theory*, supra note XX, at ____.

¹³³ “[N]o civil suit shall be brought [in federal court] against an inhabitant of the United States, by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ, nor shall any district or circuit court have cognizance of any suit to recover the contents of any promissory note or other chose in action in favour of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange.” Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 79.

¹³⁴ See Fed. R. Civ. P. 4(k)(2).

preferential treatment and privileges in federal court for foreign merchants and creditors.

This surrendering of the home-field-advantage with respect to procedural rules was the counterpart to the Rules of Decision Act's implicit reservation of decisional rules in equity, admiralty, and maritime suits to federal judicial discretion, since state substantive laws would only supply "rules of decision in trials at common law . . . in cases where they apply."¹³⁵ Those decisional rules would be drawn in large part from the civil law tradition, and thus the use of both the procedural and substantive aspects¹³⁶ of the *ius commune* are evident in the design of the American national courts. This is a very important insight lost in modern scholarship, which analyzes the federal court system with an eye to the modern problems of federalism, separation of powers, and the democratic accountability of Article III judges.

By way of postscript, Goebel was right of course (but he knew that). Lawyers resented the innovation and persisted in settled ways. The provision drew intense fire from the first U.S. Attorney General, Edmund Randolph, who emphatically expressed his concerns in a 1790 report to the House of Representatives:

A diversity of opinion has prevailed on the forms and modes, to be observed in causes of equity and of admiralty and maritime jurisdiction: Whether they are to be according to the mere civil law [*i.e.*, Justinian's *Corpus iuris civilis*], unqualified by the usages of any modern nation, or under limitations. If the untempered severity of the Roman law is to predominate, the rights of property, and of personal liberty, are in jeopardy: Without exhibiting a tedious list of what are termed the substantial and accidental parts of a civil cause, let a few of the most obnoxious forms of the civil law be selected.¹³⁷

Randolph's problems with civilian procedure included its over-reliance on oaths, the relative ease with which arrests could be made and property sequestered, its practice of turning an estate over to a plaintiff to satisfy judgment, and the "insult" to a judge countenanced by automatic grants of dilatory exceptions in proceedings which did not have the event of the trial to enforce a schedule on the litigants and the judge.¹³⁸ These do appear to have

¹³⁵ Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92.

¹³⁶ See Story, Equity Jurisprudence; William A. Fletcher, *General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 Harv. L. Rev. 1513 (1984).

¹³⁷ Randolph's Report, *supra* note XX, at 136.

¹³⁸ See *id.*

been aspects of civil law procedure, and it is impressive that Randolph knew them well enough to criticize real drawbacks of civilian practice vis-a-vis English equity. He proposed replacing civil law procedures with English ones: “It cannot be denied that the nation, whose jurisprudence is the source of our own, presents the best limitations; and that they ought to be adopted, until better shall be devised.”¹³⁹

Notwithstanding Randolph’s criticisms, “forms and modes of proceedings . . . according to the course of the civil law” continued as the law on the books governing equity, admiralty, and maritime suits in federal court for two more years. (What this looked like on the ground is the grist for another article.) When the Second Congress met in October 1791, a revision was high on the agenda. The initial Senate committee wanted to keep it as it was, but the full Senate made a 180-degree reversal and changed it to “state law.”¹⁴⁰ Surprisingly, it was the House which suggested the less state-deferential enacted version: “according to the principles, rules, and usages which belong to courts of equity” or courts of admiralty respectively. The lower courts were given “discretion” to make “alterations and additions” to these rules that they deemed “expedient.” And the Supreme Court was authorized to make “such regulations as [it] shall think proper from time to time by rule to prescribe to any Circuit or district court regarding the same.”¹⁴¹ The formulation was deceptively general, for it allowed lawyers to stick to the American and English procedural rules they knew best.

B. The State Sovereign Debt Cases

Wythe Holt and others have documented the extent to which the creation of the national judiciary was tied up with the desire to provide a more hospitable forum for commercial interests.¹⁴² And we have just seen how the First Congress adopted civilian procedures to encourage European merchants to use the new national courts for dispute resolution. It should be no surprise that the very first case with which the Supreme Court of the United States had to grapple also involved commercial questions of an

¹³⁹ Randolph’s Report, *supra* note XX, at 137.

¹⁴⁰ 4 DHSC, *supra* note XX, at 176–82.

¹⁴¹ An Act for regulating Processes in the Courts of the United States, and providing Compensations for the Officers of the said Courts, and for Jurors and Witnesses, ch. 36, § 2, 1 Stat. 275, 276.

¹⁴² See Wythe Holt, *supra* note XX. For the action on the substantive bankruptcy law side, see Bruce Mann, *A Republic of Debtors: Bankruptcy in the Age of American Independence* (2009).

international nature. But this time the issue was public debt: specifically, sovereign debt that the states had incurred to finance the War of Revolution. The national government, led by Alexander Hamilton,¹⁴³ would eventually implement a political solution by assuming much of the state sovereign debt. But in the meantime, frustrated creditors contemplated their litigation options.

Van Staphorst v. Maryland, the first case to come before the U.S. Supreme Court in its history, showcased the most important constitutional question in the first decade after ratification: whether the Constitution permitted foreign and out-of-state private creditors to adjudicate state sovereign debt cases in the Supreme Court.¹⁴⁴ At issue were two foundations of state sovereignty: (1) their fiscal autonomy, and (2) their political status in the new United States. If the Constitution authorized the Court's jurisdiction, and the Court were to issue a judgment adverse to a state, then payment would draw money out of the state's treasury, which, according to political norms of the time, only its legislature had the power to spend.¹⁴⁵ And, state supporters argued, the very idea that the Court could make a state answer before it on the plea of some out-of-state banker or merchant was not only an insult, but it was also not something the states had agreed to when they accepted the Supreme Court's original jurisdiction over cases "in which a State shall be party."¹⁴⁶

Van Staphorst v. Maryland involved loans to Maryland by two Dutch brothers, Jacob and Nicolaas van Staphorst, who were money lenders in Amsterdam.¹⁴⁷ In March 1781, the Maryland legislature had appointed Matthew Ridley, a British-born

¹⁴³ Davis Rich Dewey, *Financial History of the Early United States* (1902) Alexander Hamilton, *First Report on Public Credit* (1790), available at <http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=002/llac002.db&recNum=382>.

¹⁴⁴ *Van Staphorst v. Maryland*, 2 U.S. 401 (August 3, 1791). See Maeva Marcus ed., *The Documentary History of the Supreme Court of the United States: Suits Against the States 7–10* (1994) [hereinafter 5 DHSC].

¹⁴⁵ See Christine Desan, *Contesting the Character of Political Economy in the Early Republic, in The House and Senate in the 1790s: Petitioning, Lobbying and Institutional Development 178* (Bowling & Kennon eds. 2002).

¹⁴⁶ U.S. Const. Art. III §2. I have argued that the issue was very different when a state was being asked to pay an owed debt by its own citizen—a question that the framers of the national constitution would not have been inclined to address. See Lee, *Making Sense of the Eleventh Amendment*, supra note XX, at ____.

¹⁴⁷ James C. Riley & Pieter J. van Winter, *American Finance and Dutch Investment, 1780-1805, With an Epilogue to 1840* (rev. ed 1977). See also Jan Willem Schulte Nordholt, *The Dutch Republic and American Independence* (Herber H. Rowen trans. 1982).

Baltimore merchant, to go to Europe to secure war loans.¹⁴⁸ Six months later, Ridley arrived in France where he was unsuccessful in obtaining a sovereign-to-sovereign loan.¹⁴⁹ In May 1782, Ridley went to Holland and two months later came to agreement with the van Staphorst for a line-of-credit to Maryland with repayment by annual shipments of a large, fixed amount of tobacco crops. The terms Ridley negotiated were disastrous for Maryland: the contracts pegged tobacco at a very low price and gave the van Staphorst the option of buying any surplus tobacco left over after repayment at the same low price.

Maryland tried for several years to renegotiate their improvident bargain but to no avail. The van Staphorst, acting through an American agent, ultimately sought leave to file suit against Maryland in the U.S. Supreme Court in the February 1791 Term. For Chief Justice John Jay, it was the second time that he was asked to decide the controversy: he had been one of four arbitrators appointed by the parties to resolve the dispute in 1786.¹⁵⁰ The arbitration had been aborted when the Maryland legislature voted to try to negotiate a settlement in 1787.

It is worth pausing for a moment to point out that arbitration was another tool of dispute resolution that early Americans adopted from the civil law tradition. Arbitration was largely dormant in England by the late eighteenth century owing to the primacy of the jury and the common law courts.¹⁵¹ A modern marker of this reality is that when Congress enacted the Federal Arbitration Act,¹⁵² it did so under the admiralty and maritime powers which had been inferred from Article III's grant of

¹⁴⁸ See Kathryn Sullivan, *Maryland and France, 1774-1789* (1936).

¹⁴⁹ See *id.*

¹⁵⁰ The identity of the arbitrators indicates the importance of the dispute in the early American Republic. Maryland picked as its arbitrators Jay, then the Confederation's Secretary of Foreign Affairs, and Robert R. Livingston, Jay's predecessor as Secretary of Foreign Affairs and the chancellor of New York at the time. The van Staphorst chose James Duane, the mayor of New York City, and Rufus King, Massachusetts delegate to the Continental and Confederation Congresses, and future member of the Committee of Style of the national Constitutional Convention and United States Senator from New York.

¹⁵¹ See Gary Born, *International Commercial Arbitration* (2009). The piepowders courts, which still existed in the late eighteenth century in a greatly diminished form, resembled arbitral tribunals, but they typically handled small-potatoes disputes among tradespeople at local fairs. See 3 William Blackstone, *Commentaries* *32-33 ("It is a court of record, incident to every fair and market; of which the steward of him, who owns or has the toll of the market, is the judge. It was instituted to administer justice for all injuries done in that very fair or market, and not in any preceding one. So that the injury must be done, complained of, heard, and determined within the compass of one and the same day.").

¹⁵² Federal Arbitration Act (February 12, 1925), Pub L. 68-401, 43 Stat 883, codified at 9 U.S.C. §1 et seq.

admiralty and maritime jurisdiction to the national courts. The great prevalence of arbitration in the United States today is yet another way in which modern American procedural rules appear more beholden to the civil law tradition than to the common law tradition.

The plea of Supreme Court original jurisdiction in *Van Staphorst* appeared to have a sound constitutional basis. Article III extended the national judicial power to “Controversies . . . between a State . . . and foreign . . . Citizens,” and also provided that “the supreme Court shall have original jurisdiction” in cases “in which a State shall be Party.”¹⁵³ Luther Martin, Maryland’s very able attorney general and an ardent anti-Federalist during the constitutional convention,¹⁵⁴ did not initially file a reply on the state’s behalf, but later complied with a Court order to plea or face default judgment.¹⁵⁵ Since the key witnesses were in Holland, plaintiffs’ counsel, Attorney General Edmund Randolph acting in a private capacity, moved the Court to appoint commissioners to conduct depositions there pursuant to Section 30 of the Judiciary Act.¹⁵⁶ Although a docket entry indicates that these depositions were taken, the parties ended up settling and the case was dismissed on August 6, 1792.¹⁵⁷

What is most striking about *Van Staphorst* are the international and thoroughly modern features of the controversy. The problem of enforcing sovereign debt persists today on the international plane, as does the challenge of designing a viable forum for dispute resolution of sovereign debt cases.¹⁵⁸ The potential use of the U.S. Supreme Court was an ingenious attempt at a solution: as I have noted elsewhere, the Court—as an intermediate institution between foreign bankers and individual state legislatures (a “quasi-international tribunal”)—promised a “credibly neutral forum.”¹⁵⁹ Accordingly, the question of whether

¹⁵³ U.S. Const. Art. III, §2.

¹⁵⁴ See Pauline Maier, *Ratification: The People Debate the Constitution, 1787-1788* 90-91 (2010). Martin arrived late at his state’s ratification convention and said nothing, pleading laryngitis. *Id.* at 244.

¹⁵⁵ The pleadings have not survived. It is likely that the plaintiffs filed a writ of assumpsit, which was the writ filed in *Chisolm v. Georgia*. James Sullivan, Attorney General of Massachusetts, reported that “A plea is filed to the action in common form, that the state never promised.” 5 DHSC, *supra* note XX, at 22.

¹⁵⁶ Judiciary Act of 1789, ch. 20, § 30, 1 Stat. 73, 88.

¹⁵⁷ Minutes of the Supreme Court, August 6, 1792, in Maeva Marcus & James R. Perry, 1 *The Documentary History of the Supreme Court of the United States: Suits Against the States* 201 (1994).

¹⁵⁸ See Shane Romig, *Ghana Ordered to Release Argentine Ship*, Wall St. J., Dec. 15, 2012, <http://online.wsj.com/article/SB10001424127887323297104578181382814430450.html>.

¹⁵⁹ Lee, *The Supreme Court as Quasi-International Tribunal*, *supra* note XX, at ____.

Article III of the Constitution contemplated it was a difficult one. Legal scholarship on these early constitutional cases usually emphasizes the sovereign immunity doctrinal features, which tends to obscure the larger policy implications and functional design motivations.

As *Van Staphorst* was winding down, *Chisholm v. Georgia*¹⁶⁰ was making its way through the national courts. *Chisholm*, too, involved state sovereign debt to an out-of-state creditor. However it did not implicate the more sensitive, structural problem of foreign bankers with lines of credit extended to multiple states, but rather a one-time past contract to an out-of-state American creditor. As such, *Chisholm* accentuated the symbolic aspect of the state sovereign debt cases and deemphasized their systemic international political economy ramifications.

By a contract dated October 31, 1777, Georgia had contracted with Robert Farquhar, a South Carolina merchant, for the purchase of provisions.¹⁶¹ Farquhar apparently delivered the goods, and Georgia authorized payment by its agents who never paid Farquhar. After the war, Farquhar died, but Alexander Chisholm, a fellow South Carolinian, became the executor of his estate and pursued Farquhar's claim against Georgia on behalf of his heir, a minor child named Elizabeth.

Farquhar originally sued in the Southern Circuit before a panel consisting of Justice James Iredell and Nathaniel Pendleton, the U.S. judge for the district of Georgia. The panel dismissed the suit, with Iredell expressing the view that the Constitution vested original jurisdiction in any case to which a state is party to the Supreme Court alone. Chisholm filed an original action in the Supreme Court for *assumpsit*—the form of action for damages to remedy non-performance on a simple contract. A summons, dated February 8, 1792, was served on the governor and attorney general of Georgia, ordering the state of Georgia to appear in the Court on the first day of the 1792 August term to answer Chisholm's plea. Georgia did not appear; nor did its governor give instructions to counsel (Alexander Dallas, the first reporter of the Court's decisions) who was representing it in another matter at the Court. Accordingly, the Court heard only arguments from Attorney General Randolph acting as private counsel for Chisholm. Aware of the significance of the issue, the justices of the Court invited any

¹⁶⁰ 2 U.S. 419 (1793).

¹⁶¹ 5 DHSC, *supra* note, at 127-32.

member of the Supreme Court bar present to speak up, but no one did.¹⁶²

The Court decided 4-1 in favor of the constitutionality of the Supreme Court's original jurisdiction. I do not want to talk about *Chisholm*'s holding, which has inspired reams of commentary;¹⁶³ what is more important is to illuminate the divergence in opinions among the justices about how to go about deciding the case.

Three of the justices – Chief Justice John Jay, and Associate Justices John Blair and William Cushing, relied on the words of the written Constitution. Their opinions are similar in reasoning. None of them cited any cases or appealed to English legal or political traditions, although Jay indicated that this was because there were none on point: “I have made no references to cases, because I know of none that are not distinguishable from this case.”¹⁶⁴ Blair and Jay also generally dismissed lessons from Europe (including England) because of their feudal element: Blair declared:

In considering this important case, I have thought it best to pass over all the strictures which have been made on the various European confederations; because, as, on the one hand, their likeness to our own is not sufficiently close to justify any analogical application; so, on the other, they are utterly destitute of any binding authority here. The constitution of the United States is the only fountain from which I shall draw; the only authority to which I shall appeal. Whatever be the true language of that, it is obligatory upon every member of the Union.¹⁶⁵

And Cushing opined:

The grand and principal question in this case is, whether a state can, by the federal constitution, be sued by an individual citizen of another state? The point turns not upon the law or practice of England, although, perhaps, it may be in some measure be elucidated thereby, nor upon the law of any other country whatever; but upon the constitution established by the people of the United States; and particularly, upon the extent of powers given to the

¹⁶² 5 DHSC, *supra* note XX, at 134.

¹⁶³ *See, e.g.*, William Casto, *The Supreme Court in the Early Republic 1788-97* (1995); Lee, *Making Sense of the Eleventh Amendment*, *supra* note XX, at 1078-86.

¹⁶⁴ *Chisholm*, 3 U.S. at 478 (opinion of Jay, C.J.)

¹⁶⁵ *Id.* at 449 (opinion of Blair, J.).

federal judiciary in the 2d section of the 3d article of the constitution.¹⁶⁶

Jay also thought the text was dispositive: “If we attend to the words, we find them to be express, positive, free from ambiguity, and without room for such implied expressions: ‘The judicial power of the United States shall extend to controversies between a State and citizens of another State.’”¹⁶⁷ He proffered the additional reason that since states could sue persons in the Supreme Court, equity required that they could also be sued by persons in the Court.¹⁶⁸

These three opinions cannot be fairly “coded” as civilian or common law in their way of thinking. They seem textualist in the modern sense of the word. Blair and Cushing, in particular, strongly hinted that decisional authority would make no difference in the face of what they saw as unambiguous language in the Constitution. Jay’s theoretical receptiveness to cases might be taken as a common law sensibility, but his emphasis on popular sovereignty points in the opposite direction, to a first principles mode of analysis.

It is the other two opinions that show in vivid relief a divergence of views along the civil law/common law divide about how to decide constitutional cases. James Wilson, the Scottish emigrant law professor, wrote an academic essay very much in the civilian fashion. His close friend, James Iredell, the sole dissenter, wrote a classic common law opinion which is the only opinion that is commonly read today. Wilson proposed to examine the case:

1st. By the principles of general jurisprudence. 2d. By the laws and practices of particular States and Kingdoms 3dly. and chiefly I shall examine the important question before us, by the constitution of the United States, and the legitimate result of that valuable instrument.”¹⁶⁹

Wilson proceeded to do precisely that, engaging in a lengthy disquisition about the nature of sovereignty in different forms of government, citing Homer, Demosthenes, Louis XIV, as well as

¹⁶⁶ *Id.* at 466 (opinion of Cushing, J.).

¹⁶⁷ *Id.* at 476 (opinion of Jay, C.J.)

¹⁶⁸ “It would be strange, indeed, that the joint and equal sovereigns of this country, should, in the very Constitution by which they professed to establish justice, so far deviate from the plain path of equality and impartiality to give to the collective citizens of one State a right of suing individual citizens of another State, and yet deny to those citizens a right of suing them.” *Id.* at 477 (opinion of Jay, C.J.).

¹⁶⁹ *Id.* at 453 (opinion of Wilson, J.).

English authorities like Bracton and Blackstone.¹⁷⁰ His basic points were that there was “nothing” in the “general principles of jurisprudence . . . which tends to evince an exemption of the State of Georgia from the jurisdiction of the Supreme Court,”¹⁷¹ and that since the American people were sovereign, they could “vest . . . judicial power over those States and over the State of Georgia in particular.”¹⁷² In other words, Wilson reasoned, in the civilian fashion, that although the general rule might be deemed that the sovereign was not suable, the uniquely American rule of suability for the states was not a bad custom or *malus usus*. He ended with the words of the Constitution: “It is confirmed, beyond all doubt, by the direct and explicit declaration of the Constitution itself.”¹⁷³

Iredell takes a completely different tack, presuming that the common law of England was dispositive, despite the plain-language reading of the words of the Constitution adopted by the majority.

The only principles of law . . . that can be regarded, are those common to all the States. I know of none such, which can affect this case, but those that are derived from what is properly termed ‘the common law,’ a law which I presume is the ground-work of the laws in every State in the Union and which I consider, so far as it is applicable to the peculiar circumstances of the country. . . to be in force in each State, as it existed in England (unaltered by any statute) at the time of the first settlement of the country. The statutes of England that are in force in America differ perhaps in all the States; and, therefore, it is probable the common law in each, is in some respects different. But it is certain that in regard to any common law principle which can influence the question before us no alteration has been made by any statute which could occasion the least material difference. . .¹⁷⁴

And, by a detailed survey of English cases, statutes, and treatises, Iredell came to the conclusion that “in England, certain judicial proceedings not consistent with the sovereignty, may take place against the Crown but that an action of *assumpsit* will not lie.”¹⁷⁵

¹⁷⁰ *See id.* at 453-64.

¹⁷¹ *Id.* at 458.

¹⁷² *Id.* at 464.

¹⁷³ *Id.* at 466.

¹⁷⁴ *Id.* at 435 (opinion of Iredell, J.).

¹⁷⁵ *Id.*, at 430.

Since *Chisholm* had filed an *assumpsit* action, Iredell concluded that Georgia, like the Crown, could not be sued.

Iredell lost the battle but won the war. The Eleventh Amendment to the Constitution was ratified within two years of the *Chisholm* decision, overturning its result by prescribing that the national “Judicial power . . . shall not be construed to extend to any suit in law or equity . . . against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”¹⁷⁶ Although *Chisholm* had been an out-of-state American, the Amendment, by its terms, also precluded future actions in the national courts by foreign bankers like the van Staphorst.

However, it is not clear what we are to make of the Eleventh Amendment’s enactment for the purposes of this article. Its passage does not necessarily mean that Iredell had applied the right reasoning (i.e., the common law method of relying on English decisions and practice) to get to the right result. Indeed, the fact that the Constitution was amended to rule out a literal interpretation in order to obtain the “right” result might be construed to show that the majority were right to be more textualist about constitutional meanings. By the same token, we cannot rule out that Wilson had applied the right reasoning to get to the wrong result. What the divergent styles of the opinions in *Chisholm* do show is that there were multiple ways of thinking about how to decide a constitutional case—textualism, civil law reasoning, and common law reasoning. Dissecting the opinions in *Chisholm* also helps us to see that textualism is a different approach to constitutional interpretation than the civil law method. Just what a civilian approach to deciding cases entails will be clearer after discussion of our next two case studies.

Managing Antebellum Interstate Relations

In the first half of the nineteenth century, entrepreneurial American jurists, led by Joseph Story, turned to the general and uniform law aspect of the civil law tradition as they sought to adapt American national legal institutions and rules for the stewardship of a country experiencing astonishing growth in a very short time. As a future U.S. Attorney General put it in 1820: “the civil and continental law is the origin of all that law, mercantile and maritime, which now regulates our most important affairs, as a

¹⁷⁶ U.S. Const. amend. xi.

commercial people.”¹⁷⁷ Particularly important was the crafting of uniform commercial rules to enable and encourage cross-border private transactions between strangers residing in different states and between Americans and foreigners. This had been easier to do in the early years when maritime commerce was the main event: federal judges had lawmaking power under the admiralty and maritime grants, and state courts and legislatures had no lawmaking power.

But the promulgation of general and uniform commercial rules on land, where the federal judicial power did not have exclusive reach, was a more difficult challenge. The states had lawmaking power within their borders, but because their sovereign powers extended only to the extent of these borders, they could not enact uniform rules. Presumably, Congress might have been able to pass uniform commercial rules under its constitutional power to regulate commerce. But it was politically difficult to reach a solution as to the content of any uniform rules, since the states were wary of privileging the interests of groups that were prevalent in each of the states.¹⁷⁸ The national courts stepped into the breach with the two instruments of civilian origin at their disposal: their equity powers¹⁷⁹ and general commercial law from which they could generate rules of decision for suits at law heard under the diversity jurisdiction.¹⁸⁰ These were the primary projects of the Article III courts until slavery hijacked the national agenda and the courts were pulled into the controversy. It should come as no surprise that when this happened, national judges looked to civil law for guidance as to how to navigate the crisis, most notably to the conflict of laws doctrine pioneered by Bartolus to keep peace among the medieval Italian city-states.

C. The Role of Civil Law in *Dred Scott v. Sandford*

Dred Scott v. Sandford is notorious for its holding that an African-American was not a citizen of a State for purposes of diversity jurisdiction. Chief Justice Roger Taney’s opinion for the Court did not stop with the jurisdictional holding but went on to

¹⁷⁷ See Caleb Cushing, *On the Status of the Civil Law*, 11 N. Am. Rev. 407, 411 (1820); but cf. Lawrence M. Friedman, *A History of American Law* 194 (3d ed. 2005) (reporting sentiment in California senate in 1850 that “The Commerce of Civil Law countries...creeps timidly along a few familiar shores” which Friedman concludes “is almost certainly patriotic self-delusion” in the former Spanish possession).

¹⁷⁸ Cf. Mann, *Republic of Debtors*, *supra* note XX.

¹⁷⁹ See Kristin A. Collins, “*A Considerable Surgical Operation*”: *Article III, Equity, and Judge-Made Law in the Federal Courts*, 60 Duke L. J. 249 (2010).

¹⁸⁰ See *Swift v. Tyson*, 41 U.S. 1 (1842).

invalidate the Missouri Compromise, which had outlawed slavery north of 36°30' in territory acquired by an 1803 treaty from France, as beyond Congress's enumerated powers. These holdings were exceedingly controversial,¹⁸¹ but there was a third more lawyerly ground for the decision which was discussed in earnest by the more thoughtful Justices in the majority and dissents. The question was this: If a slave is taken from Missouri by his owner to Illinois and the Wisconsin Territory where slavery was prohibited by federal law and then returns voluntarily to Missouri, does Missouri law control whether he retains his slave status? Or does his temporary sojourn as a free man under the laws of the general sovereign abolish his slave status throughout the United States? Framed in this way, the question was a variant of the essential conflict-of-laws issue that civilian jurists in multi-unit political systems like Bartolus had grappled with for 500 years. And so it is not surprising that the analysis of all of the opinions of the Justices who addressed this question except for Taney's (who saw it as minor) turned on one civilian source. What is surprising, at least without the perspective lent by this article, is the remarkable respect accorded to the civilian source, a 30-year old opinion by Lord Stowell, a British civilian who, as an admiralty judge, had handed down scores of prize decisions adverse to American interests.¹⁸² One former U.S. President thought Stowell was arguably America's greatest public enemy: "Is not Lord Stowell the most responsible man of our age for the last war with Great Britain?"¹⁸³

Stowell knew as soon as he decided *Rex v. Allan*¹⁸⁴ (hereinafter "the *Slave Grace*") in 1827 that it would be of vital

¹⁸¹ Taney's holding on whether African-American persons descended from slaves were "citizens of different States" as those words were used in Article III, Section 2 of the Constitution is disturbing to modern sensibilities but plausible as a matter of interpretation whether as an original matter (1787-89) or contemporaneous usage (1854-57). This conclusion is supported by the language of the Fourteenth Amendment, the first sentence of which explicitly reversed this holding: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens...of the State wherein they reside." U.S. Const. Amend. xiv. §1. What makes this part of the opinion troubling, rather, is its tone, to wit, his extraneous and ungenerous statements about the African race. His second holding on the Missouri Compromise appeared both unnecessary in light of the subject-matter jurisdictional holding and subsequent congressional statutes and more suspect as a matter of law in its exceedingly strict construction of Congress's power to regulate the territories under Article IV, Section 3 of the Constitution.

¹⁸² See Bourguignon, Sir William Scott, *supra* note XX.

¹⁸³ J.Q. Adams, Letter to Joseph Story (September 25, 1829) *in* 2 Life and Letter of Joseph Story, *supra* note XX, at 12-13.

¹⁸⁴ John Haggard, ed., The Judgment of the Right Hon. Lord Stowell respecting the Slavery of the Mongrel Woman Grace on an Appeal from the Vice-Admiralty Court of Antigua (1827) (manuscript on file with author).

interest to American jurists. Indeed, that proved to be the case, as legal historian Paul Finkelman has amply documented.¹⁸⁵ Immediately after the decision was published Stowell sent a reprint to Associate Justice Joseph Story.¹⁸⁶ In Stowell's own words, the question in the case (actually, five consolidated cases) was:

whether the emancipation of a slave, brought to England, insured a complete emancipation to him upon his return to his own country, or whether it only operated as a suspension of slavery in this country, and his original character devolved upon him again, upon his return to his native Island.¹⁸⁷

Stowell confided to Story that the cases “had cost [him] a great deal of trouble and anxiety.”¹⁸⁸ He was 83 at the time-- these were the last cases concluding almost 40 years as a judge, and, because they were likely the most important cases he had ever decided, they would have an outsized effect on his judicial legacy.

What made the distinguished civilian particularly anxious was that his decision that a slave remained a slave upon return was in tension with a famous 1772 judgment by the most renowned common law judge of the late eighteenth century, Sir William Murray (Lord Mansfield), Chief Justice of the Court of King's Bench. Mansfield, in his celebrated (and cryptic) opinion in *Somerset's Case*,¹⁸⁹ had granted a writ of *habeas corpus* to a runaway slave whose owner had detained him in England until he could be returned in chains to slavery in the British West Indies. Mansfield's opinion had some ringing language – “slavery is so odious that it cannot be established without positive law”¹⁹⁰ which had led many to believe that slavery could not operate in England or any British possession without a statute of explicit authorization.¹⁹¹ *Somerset's Case* led to the disappearance of slavery in England,¹⁹² but as slavery was still practiced in the

¹⁸⁵ See Paul Finkelman, *An Imperfect Union: Slavery, Federalism, and Comity* 185-235 (1981).

¹⁸⁶ William Scott, Letter dated January 9, 1828, in Joseph Story, *Life and Letters*, p. 552.

¹⁸⁷ *Id.* at 553.

¹⁸⁸ *Id.* at 552.

¹⁸⁹ *Rex v. Knowles, ex parte Sommersett* (1772) 20 State Tr 1.

¹⁹⁰ *Id.*

¹⁹¹ See James Oldham, *New Light on Mansfield and Slavery*, 27 *Journal of British Studies* 45 (1988).

¹⁹² Formal abolition was effected by the Slavery Abolition Act of 1833. 3 & 4 Will. IV c.73.

colonies, the British had pattered along for 50 or so years without a clear answer to the question facing Stowell in 1827.

Before we turn to the opinion itself and how it was treated by the American Justices in *Dred Scott*, it is worthwhile to scrutinize in greater detail the correspondence in 1827-28 between Stowell, the English civilian at the end of a 40-year judicial career, and Joseph Story, the great antebellum American justice at the height of his powers. Coming as it did upon his retirement, Stowell believed (correctly in my view) that his opinion in *Slave Grace* set out not only “the result of my labors upon the subject” but also “most probably upon every other.”¹⁹³ As such, he took the occasion to ruminare to Story on his attitude to judging and how he felt about the common law judges’ fondness for (their own) case law.

I have ventured to differ sometimes in the interpretation of the law as given by our [common law] Judges and have incurred censure on that account, as straying from an authority that ought to bind me. I have rather thought, that in the jurisdiction of the Admiralty, I am to look to the real justice of the case, and not to what has been pronounced in a somewhat similar case by the decision of a single Judge of the Common Law. I rather think we are too fond of cases; when a matter is to be argued, we look immediately for the cases, and by them we are determined more than perhaps by the real justice that belongs to the question; this may enforce the uniformity of the law, which is certainly a very desirable purpose, but is by no means the first purpose that ought to be considered; for if the judgment be erroneous, it is but an indifferent exposition of the law.¹⁹⁴

Story heartily agreed with Stowell and assured him that Stowell, and the civilian approach with its general principles of public and civil law, were much admired in America:

I cannot but think that upon questions of this sort [*i.e.*, *Slave Grace*], as well as of general maritime law, it were well if the common lawyers had studied a little more extensively the principles of public and civil Law, and had looked beyond their own municipal jurisprudence. The Court of Admiralty would itself have been much less hardly dealt with, if Common Law Judges had known more of the principles which governed it.

¹⁹³ *Id.* at 553.

¹⁹⁴ Stowell to Story (Letter dated May 17, 1828), *Id.* 554, at 556.

And I am free to say that in every case, in which you have been called to review any of the Common Law doctrines on maritime subjects, and have differed from them, I have constantly been persuaded that your judgment was correct. This too, as far as I know, is the general opinion in America; for we are not so strict as our mother country in our attachment to everything in the Common Law, and more readily yield to rational expositions, as they stand on more general jurisprudence. In short, we are anxious to build up our commercial law, as much as possible, upon principles absolutely universal in their application to maritime concerns.¹⁹⁵

Story was not just being nice to the old man, as we can see in his defense of Stowell a year later to John Quincy Adams, who had referred to him and Mansfield as “Courtier Judges.”¹⁹⁶ Story wrote:

I have been a diligent reader of Lord Stowell’s decisions. And though certainly I do not agree in all his opinions, the mass of them appear to me remarkable for sagacity, earnestness and sound administration of public law. I could except some opinions on points of public law, upon which different nations contend for different principles, because these may fairly be held open for controversy by minds of equal ability and equal independence. With such exceptions, I hardly know where I can look for so much practical wisdom in decision as to Lord Stowell’s judgments.¹⁹⁷

With specific regard to Stowell’s opinion in *Slave Grace*, Story had written to Stowell:

I have read with great attention your judgment in the Slave Case from the Vice-Admiralty Court of Antigua. Upon the fullest consideration, which I have been able to give the subject, I entirely concur in your views. If I had been called upon to pronounce a judgment in a like case, I should certainly have arrived at the same result, though I might not have been able to present the reasons which lead

¹⁹⁵ Story to Stowell (Letter dated September 22, 1828), Id. 557, at 558-59.

¹⁹⁶ Adams to Story (Letter dated November 4, 1829), *in* 2 Life & Letters, *supra* note XX, 18, at 20.

¹⁹⁷ Story to Adams (Letter dated November 24, 1829), 21, 22 *in* 2 Life & Letters, *supra* note XX, at 20.

to it in such a striking and convincing manner. It appears to me that the decision is impregnable.

In my native state, (Massachusetts) the state of slavery is not recognized as legal; and yet, if a slave should come hither, and afterwards return to his own home, we should certainly think that the local law would re-attach upon him, and that his servile character would be reintegrated. I have had occasion to know that your judgment has been extensively read in America (where questions of this nature are not of unfrequent discussion) and I never have heard any other opinion but that of approbation of it expressed among the profession of the Law.¹⁹⁸

The opinion in question was a beautiful example of a civilian master at his most ingenious, navigating a legal order dominated by the common law mentality. Stowell accepted Mansfield's decision in *Sommersett's Case* as the equivalent of a canonical text to be reasoned from (and around). To that degree, his technique was the same as a common law judge might use to distinguish binding precedent. He did qualify that Mansfield's opinion had been an abrupt reversal of "a practice which had endured universally in the colonies . . . and in Great Britain"¹⁹⁹ and that Mansfield had tried as hard as he could to avoid a decision. Stowell then pointed out that "ancient custom is generally recognized as a just foundation of all law" and that "the practice of slavery, as it exists in Antigua, and several other of our colonies" was founded on such local custom, which Britain itself had initially foisted upon the colonies and from which it was still benefiting economically.²⁰⁰ He reasoned, accordingly, that Mansfield's famous sentence--"slavery is so odious that it cannot be established without positive law" was logically limited to England at the time of utterance, since slavery did in fact exist in the colonies at the time without a code by dint of custom. And, he observed, "the sovereign state has looked upon the manner in which the law has been exercised in a subject-country, without interposing in any manner to prevent it."²⁰¹ In fact, Stowell observed, slavery had not only continued unabated in Antigua for the 50 intervening years since Mansfield's decision, it had never been abolished by Parliament in England proper and British officials continued to carry on as if slaves were property in the

¹⁹⁸ Story to Stowell (Letter dated September 22, 1828), Id. 557, at 558.

¹⁹⁹ Slave Grace, at 16.

²⁰⁰ *Id.* at 18,

²⁰¹ *Id.* at 26.

legal sense.²⁰² “Our own domestic policy continues to be actively employed in supporting the rights of proprietors over the persons committed to their authority, in the character of slaves.”²⁰³

The consequence was that the custom of slavery in Antigua could not be fairly characterized as a bad custom that must be abolished – “*malus usus abolendus est*—even in the consideration of England.”²⁰⁴ Stowell concluded:

Still less is it to be considered a *malus usus* in the colonies themselves, where it has been incorporated into full life and establishment; where it is the system of the state, and every individual in it; and fifty years have passed without any authorized condemnation of it in England as a *malus usus* in the colonies.²⁰⁵

Stowell’s conclusion reveals a counter-intuitive aspect of the civilian approach that made it especially attractive for Americans committed to federalism.²⁰⁶ Although civil law thinking professes fidelity to universal or general principles, the flexibility inherent in the way the *malus usus* doctrine was actually applied permitted a great deal of deference to local customs.

Stowell and Story had died by the time *Dred Scott* was decided but Stowell’s decision was featured in four of the opinions in the case. Justice Samuel Nelson took a more moderate position than the Chief Justice and emphasized the conflict of laws solution in his opinion concurring in the judgment. He quoted the Story-Stowell correspondence and pointed out that “[t]he case before Lord Stowell presented much stronger features for giving effect to the law of England . . . for in that case the slave returned to a

²⁰² Id. at 44 (“Have not innumerable Acts passed which regulate the condition of slaves, which tend to consider them, as the colonists themselves do, as *res positae in commercio*, as mere goods and chattels, as subject to mortgages, as constituting part of the value of estates, as liable to be taken in execution for debt”).

²⁰³ Id. at 47.

²⁰⁴ Id. at 41. The Latin maxim likely originated from Alberico Gentili (1552-1608), an Italian protestant Bartolist jurist who had emigrated to England with his family in 1580 where he was made Regius Professor Civil Law at Oxford University, a position that had been created by a statute under Henry VIII. Gentili was a noted writer on the law of nations and also a preeminent practitioner in the High Court of Admiralty where he represented the interests of Spain in the early seventeenth century. See Kingsbury and Staummann, eds., *supra* note XX. The common lawyer Coke used the specific maxim in the First part of his Institutes to sanction England’s abolition of Ireland’s customs. Coke, 1 Institutes, Ch. 11, §212, *supra* note XX.

²⁰⁵ Id.

²⁰⁶ See Finkelman, *supra* note XX (tracing evolution of the “*Slave Grace* doctrine” in the states).

colony of England over which the Imperial Government exercised supreme authority.”²⁰⁷ Justice Peter Daniel, in another concurring opinion, mentioned the “lucid and able opinion of Lord Stowell” and reasoned that “[i]f the principle of this decision be applicable as between different portions of one and the same empire, with how much more force does it apply as between nations or Governments entirely separate, and absolutely independent of each other?”²⁰⁸

The dissents, because they had to distinguish it, engaged Stowell’s decision in a more sophisticated way. Justice John McLean distinguished Stowell’s opinion on its own terms by noting that the “law of England did not prohibit slavery but did not authorize it,”²⁰⁹ and so Stowell’s opinion did not foreclose a different result if England in fact had abolished slavery, which it did not do by statute until 1833. In a subsequent passage, McLean revealed just how carefully he had read and digested Stowell’s logic:

In coming to the conclusion that a voluntary return by Grace to her former domicil, slavery attached, Lord Stowell took great pains to show that England forced slavery upon her colonies, and that it was maintained by numerous acts of Parliament and public policy, and, in short, that the system of slavery was not only established by Great Britain in her West Indian colonies, but that it was popular and profitable to many of the wealthy and influential people of England, who were engaged in trade, or owned and cultivated plantations in the colonies. No one can read his elaborate views, and not be struck with the great difference between England and her colonies, and the free and slave States of this Union.²¹⁰

Justice Benjamin Curtis, in his dissent made the same point, although not in as great detail as McLean. “If there had been an act of Parliament declaring that a slave coming to England with his master should thereby be deemed no longer to be a slave, it is easy to see that the learned judge could not have arrived at the same conclusion.”²¹¹

There are at least three lessons to be drawn from this case study. First, it is remarkable how much American Supreme Court

²⁰⁷ 60 U.S. 457, 468.

²⁰⁸ 60 U.S. 469, 486.

²⁰⁹ 60 U.S. 529, 548.

²¹⁰ *Id.* at 560.

²¹¹ 60 U.S. 564, 591-92.

justices, in deciding the most important constitutional case to date involving a highly controversial issue, engaged “foreign law” made by a civil law judge who might today be branded a war criminal because of his rubber-stamping of the enemy’s naval excesses during the War of 1812. The difference from present attitudes to the use of contemporaneous foreign or international law in constitutional interpretation is astounding. Second, although the American judges essentially treated Stowell’s opinion in the common law fashion as a case to be deployed in support or distinguished, they obviously read it and were impressed by it, despite the fact that it represented a very different way of reasoning from a common law judge. This suggests that the American justices might already have internalized civil law modes of legal reasoning and so were receptive to Stowell’s approach. Third, Stowell’s *Slave Grace* provides a model or a blueprint of what a civil law constitutional opinion looks like and thus a metric for comparison and measurement of civilian influence in American constitutional law opinions.

By way of transition, it may be helpful to give an example of how Stowell’s approach might be applied to a modern constitutional-law issue and how it would differ from a common law approach. Consider the question of the constitutionality of affirmative action at public universities. What would Stowell have done? 1) He would have begun with a canonical text: the Equal Protection Clause of the Fourteenth Amendment says that a state shall not “deny to any person within its jurisdiction the equal protection of the laws.” 2) He would then have derived from the text a first principle: The words reflect the principle that people should be free from discrimination. 3) He would have identified a local custom and its justification: Some highly selective state schools give special consideration to certain minority applicants to maintain diversity in their student bodies. 4) He would have evaluated whether the local custom was a bad custom (*malus usus*) in contradiction to the principle: Although it may disadvantage some applicants who are not members of the minority, the policy does not amount to a bad custom because its intent is to help and not to discriminate. 5) Conclusion. The local custom – the school’s affirmative action policy, is consistent with text and principle and so should be upheld.

Consider, by contrast, the way a common law judge might have reached the same result. Case 1 held that legal classifications based on race must be strictly scrutinized, meaning the state has to have a compelling interest and its policy must be narrowly tailored to achieve that interest. Case 2 left open the possibility that student-body diversity is a compelling interest in the higher

education setting. Case 3 held that student-body diversity is indeed a compelling interest in the higher education setting. Case 4 held that narrow tailoring to achieve the compelling interest requires individualized enquiry in applying admissions standards. In the next subpart, we shall see how the civil law model of constitutional adjudication was applied in postbellum constitutional cases.

Postbellum Apogee

The Civil War marked a dividing point in the history of the United States on many levels, including its Constitution and legal institutions. For present purposes, it bears remembering that even before the War, the civil law tradition had progressed to the era of codification in continental Europe. The United States, too, had witnessed codification movements in several states, in addition to the wholesale implementation of a civil code in Louisiana.²¹² With codification had come the disciplinary identity of law as a science, first in Germany and then throughout Europe and North America. American respect for the institution of the German university and their scientific methods led to a pattern of study on the continent, which resulted in greater familiarization of the American legal elite with continental thought and legal education. These processes accelerated in the postbellum era once peace had been restored.²¹³

On the constitutional front, the Civil War had resulted in amendments which transformed public law by their focus on individual rights. The more conservative members of the Court moved to cabin aggressive interpretations of what these amendments entailed and to restore governmental power, both at the state and national levels. The civilian concept of general principles of public law common to all “civilized nations” delineating what government could do was a useful tool in reestablishing and expanding governmental power. Moreover, national judges and public lawyers had garnered much experience in applying public international law, a civilian discipline during the War. The laws of war were applied on land and at sea, and the United States became a net captor of prizes for the first time in its history. The law of nations was used to manage foreign relations, and elite lawyers were increasingly globalist in outlook and experience. For instance, Chief Justice Morrison Waite obtained his appointment by virtue of fame achieved by his representation of the United States in international arbitrations with the United

²¹² See Friedman, *supra* note XX, at 113-19.

²¹³ See Reimann, ed., *supra* note XX.

Kingdom over reparations for breaches of neutrality during the War. The end result of all this was a heightened receptiveness to the civil law tradition, particularly with regards to its norms concerning sovereignty and interactions among sovereigns.

Our last case study identifies a group of decisions in the postbellum era that explicitly relied upon “universal” or “general” principles of public law common to sovereign states to justify constitutional holdings. A “universal” principle was one that all sovereigns shared; a “general” principle was one that most sovereigns shared. Prevalent synonyms for such principles were “essential attributes of sovereignty” or “inherent sovereign powers” or “powers incident to sovereignty.” The basic idea was the same: there was something called the sovereign state or the civilized nation, and it possessed a standard bundle of powers in international affairs and national governance. Domestic constitutions reflected these principles, but they were not constitutive of them, nor could they destroy them.

In many cases, such principles were invoked in preference to explicit constitutional text or case law. In some instances, famous prior decisions were marginalized or inexplicably not cited. This late nineteenth century phenomenon in constitutional jurisprudence has already been identified by existing scholarship, including my own, and labeled as the influence of “international law”²¹⁴ or of “inherent powers”²¹⁵ reasoning. Those labels are not inaccurate, but they do not convey all of what was going on: my work implied that the shift in reasoning was due to a pragmatic invocation of international law to solve domestic problems, and Sarah Cleveland’s work suggested that it was an attempt to escape the strictures of enumerated powers to maintain control over Indians and aliens. While both insights may be correct to some extent, they are distinct from the idea of this article that American jurists of the time thought about public law, and specifically constitutional law, in a very different mindset than public lawyers do today when common law constitutionalism is hegemonic.

D. Reasoning From “Principles of Public Law”

The doctrine of national constitutional constraints on the “personal jurisdiction” of state courts now makes it home in the Due Process Clause of the Fourteenth Amendment, but, as every

²¹⁴ See, e.g., Lee, Making Sense, *supra* note XX

²¹⁵ See, e.g., Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 Tex. L. Rev. 1 (2002).

civil procedure professor knows, that is not the actual legal basis of the iconic decision that created the doctrine.²¹⁶ The question in *Pennoyer v. Neff*²¹⁷ was whether an Oregon court could enforce a judgment against a non-resident when the plaintiff did not serve process on the defendant in Oregon in obtaining the judgment.²¹⁸ Justice Stephen Field's²¹⁹ opinion for the Court held that it could not: "The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum ... [an] illegitimate assumption of power." The Court described this as "a principle of general, if not universal, law."²²⁰ This principle was really:

two well established principles of public law respecting the jurisdiction of an independent State over persons and property.... One of these principles is that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory.... The other principle of public law referred to follows from the one mentioned; that is, that no State can exercise direct jurisdiction and authority over persons or property without its territory.²²¹

Field cited two authorities in support of these principles: Joseph Story's treatise on conflict of laws and Henry Wheaton's treatise on international law. As the noted proceduralist Geoffrey Hazard has skillfully deconstructed,²²² Field was drawing these principles straight from Story, who had in turn extracted and revised them from the conflict of law writings of the Dutchman Huber. Field also cited and distinguished cases, most likely to rebut the dissenter, Justice Ward Hunt, whose opinion, in classic common law mode, discussed a bevy of statutes and decisions that the majority's holding would invalidate.

Justice Field was a particularly vocal advocate of public principles reasoning, perhaps because of his familiarity with the

²¹⁶ The state-court judgment at issue in *Pennoyer v. Neff*, 95 U.S. 714 (1878) had been filed before the ratification of the Fourteenth Amendment.

²¹⁷ 95 U.S. 714 (1878).

²¹⁸ An Oregon statute had authorized notice by publication in a local newspaper in lieu of process.

²¹⁹ Field had direct experience in the civil law tradition. He had practiced in California, and his brother David Dudley Field had been the force behind the codification movement in New York. See Paul Kens: Justice Stephen Field: Shaping Liberty from the Gold Rush to the Gilded Age (1997).

²²⁰ Id. At 720.

²²¹ Id. At 722.

²²² See Hazard, *A General Theory of State-Court Jurisdiction*, *supra* note XX.

civil law tradition as a practitioner and judge in former Spanish California.²²³ For example, *United States v. Jones*²²⁴ presented the question of whether the Fifth Amendment Taking Clause permitted the national government to delegate to states the job of calculating “Just Compensation” for property the national government had taken. Field wrote: “The power to take private property for public uses, generally termed the right of eminent domain, belongs to every independent government. It is an incident of sovereignty . . . and . . . requires no constitutional recognition.”²²⁵ *Chae Chan Ping v. United States*²²⁶ involved a Chinese resident alien whose official authorization to return to the United States had been voided by the passage of the Exclusion Acts. Justice Field wrote that the proposition that “Congress can exclude aliens from its territory was “not open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence.”²²⁷

Cases implicating the constitutional scope of Congress’s powers over immigration were a particularly fertile subject for principles of public law reasoning. Justice Horace Gray in *Nishimura Ekiu v. United States*²²⁸ declared: “It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.”²²⁹ The next year, in *Fong Yue Ting v. United States*,²³⁰ he declared: “The general principles of public law which lie at the foundation of these cases are clearly established by previous judgments of this Court and by the authorities therein referred to.”²³¹ Of course, this was circular reasoning because such “previous judgments” included cases like *Nishimura* and *Chae Chan Ping* which had themselves relied on inherent sovereign powers or general principles of public law reasoning. This reasoning was not confined exclusively to the judicial branch. In the *Head Money Cases*,²³² famous for their statement that statutes were the equals of treaties, the United States had argued that the power to regulate immigration was “implied in

²²³ See Kens, *supra* note XX.

²²⁴ 109 U.S. 513 (1883).

²²⁵ *Id.* at 519.

²²⁶ 130 U.S. 581 (1889).

²²⁷ 130 U.S. at 603-04.

²²⁸ 142 U.S. 651 (1892).

²²⁹ *Id.* at 659.

²³⁰ 149 U.S. 698 (1893).

²³¹ *Id.* at 704-05.

²³² 112 U.S. 580 (1884).

[the] very existence of independent government anterior to the adoption of a constitution,” the terms of which were “merely in recognition and not in creation thereof.”²³³

Another good example of “public principles” reasoning was the seminal federal sovereign immunity case, *United States v. Lee*,²³⁴ decided in 1882. By the late nineteenth century, the Supreme Court had affirmed the sovereign immunity of the United States but without articulating its legal basis or whether such immunity was required by the Constitution. Some constitutionalists took a historical approach and believed that it was derived from the British monarch’s immunity from suit in his own courts, the common law courts. Both the majority and dissenting opinions in the case, which were in agreement as to the sovereign immunity of the United States, justified the government’s sovereign immunity on the basis of principles of general jurisprudence and public law.

Justice Samuel Miller opined for the majority:

It seems most probable that it has been adopted in our courts as a part of the general doctrine of publicists that the supreme power in every state, wherever it may reside, shall not be compelled, by process of courts of its own creation, to defend itself from assaults in those courts.²³⁵

The term “publicists” was a common term for the continental European treatise writers on the law of nations and civil law. Justice Gray, for the dissenters wrote: “To repeat the words of Chief Justice Taney, already quoted: ‘It is an established principle of jurisprudence, in all civilized nations, that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission.’”²³⁶ The same principle was deployed in the service of state sovereign immunity in *Hans v. Louisiana*,²³⁷ despite the Court’s frank admission that the words of the Constitution supported the contrary conclusion:²³⁸ “It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without

²³³ Brief for the United States at 2, *Edge v. Robertson*, 112 U.S. 580 (1884) (No. 722).

²³⁴ 106 U.S. 196 (1882).

²³⁵ *Id.* at 206-07.

²³⁶ *Id.* at 235 (quoting *Beers v. Arkansas*, 61 U.S. 527, 529 (1857)).

²³⁷ 134 U.S. 1 (1890)

²³⁸ *Id.* at 10 (Conceding the fact that the Eleventh Amendment did not prohibit a suit by an in-state citizen: “It is true the Amendment does so read.”)

its consent. This is the general sense and the general practice of mankind.”²³⁹

Perhaps the earliest example of this sort of reasoning in the postbellum period involved the constitutionality of paper money. The Court had held that paper currency was unconstitutional by a 4-3 vote in *Hepburn v. Griswold*;²⁴⁰ but overruled *Hepburn* a year later in the *Legal Tender Cases*²⁴¹ by a 5-4 vote. In a key concurring opinion, Justice Bradley wrote: “It seems to be a self-evident proposition that [the government] is invested with all those inherent and implied powers which, at the time of adopting the Constitution, were generally considered to belong to every government as such and as being essential to the exercise of its functions.”²⁴² Justice Gray endorsed a similar rationale in upholding the constitutionality of legal tender for the payment of private debts as “a power universally understood to belong to sovereignty, in Europe and America, at the time of the framing and adoption of the Constitution.”²⁴³ Gray observed that it had since become “one of the powers belonging to sovereignty in other civilized nations, and not expressly withheld from Congress by the Constitution.”²⁴⁴ This sort of reasoning thrust the dogma of Congress’s enumerated powers on its head.²⁴⁵

Somewhat related to the subject of Congress’s power to make money was its power to criminalize the unauthorized making of other people’s money.²⁴⁶ That was the question in *United States v. Arjona*,²⁴⁷ which stands as testament for just how far “principles of public law” reasoning could go in a constitutional case during the postbellum period. The question in *Arjona* was the constitutional scope of Congress’s power to “define and punish offenses against the law of nations.”²⁴⁸ The suspect statute criminalized the counterfeiting of foreign bank notes. Chief

²³⁹ *Id.* at 13.

²⁴⁰ 75 U.S. 603 (1870).

²⁴¹ 79 U.S. 457 (1871).

²⁴² 79 U.S. at 556.

²⁴³ *Juilliard v. Greenman*, 110 U.S. 421 (1884).

²⁴⁴ *Id.*

²⁴⁵ *McCulloch v. Maryland*, 17 U.S. 316, 405 (1819) (“This government is acknowledged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it . . . is now universally admitted.”) Note Marshall’s invocation of a universal principle to justify enumerated powers, which was countermanded in the postbellum cases by other universal or general principles.

²⁴⁶ The importance of public law principles reasoning in financial matters is fascinating and under-examined, although it make a lot of sense when one considers the early American angst about the Bank of the United States.

²⁴⁷ 120 U.S. 479 (1887).

²⁴⁸ U.S. Const. Art. I §8.

Justice Morrison Waite's unanimous opinion for the Court did not cite a single opinion of any court, despite the fact that Joseph Story had famously upheld the piracy statute under the Define and Punish Clause in *United States v. Smith*.²⁴⁹

The only source cited in Waite's opinion is an international law treatise by Emmerich de Vattel, a Swiss publicist,²⁵⁰ who wrote "it is easy to conclude that, if one nation counterfeits the money of another, or if she allows and protects false coiners who presume to do it, she does that nation an injury."²⁵¹ This passage does not say that it is a violation of the law of nations for someone to counterfeit foreign (private) bank notes; it just says that if a nation counterfeits foreign money or harbors those who do, it does that other nation an "injury." Vattel did not specify if that injury was a legal injury subject to reprisal by war at international law, or the sort of political injury redressable by diplomacy or other political means. Waite also cited another passage from Vattel to the effect that nations should "support . . . by good laws" the "custom" of bankers exchanging funds with each other. Waite subsequently concluded that "it is easy to see that the same principles that . . . in the opinion . . . of so eminent a publicist as Vattel . . . could be applied to the foreign exchange of bankers may, with just propriety, be extended to the protection of the more recent custom among bankers of dealing in foreign securities."²⁵² Hence the statute was a constitutional exercise of the Define and Punish Clause power.

There are many more decisions like this from the 1870s to the 1890s, and it would be gilding the lily to describe them all when the point seems sufficiently clear. However hard it might be for us to imagine today, there was a time in the constitutional history of this country when its jurists believed that the course of their domestic public law was determined by universal or general principles which were more important to reaching decisions than prior decisions or the words of the Constitution. Sometimes, as in *Arjona*, it seems that a treatise by a scholar who had ruminated about these enduring principles was a better source than what other judges had thought under the pressure of having to decide real cases or the words the framers and ratifiers of the Constitution had chosen.

²⁴⁹ 18 U.S. 154 (1820).

²⁵⁰ On the popularity of Vattel in America, see Lee, Making Sense, *supra* note XX.

²⁵¹ 120 U.S. at 484.

²⁵² *Id.* at 485-86.

The Hegemony of Common Law Constitutionalism

Toward the end of the nineteenth century, more and more constitutional decisions of the Supreme Court adopted the common law mode of relying on prior decisions and the experience of the deciding judges. Justice Henry Brown's opinion for the Court in *Plessy v. Ferguson*²⁵³ is a good example of this mode of reasoning, but so is Chief Justice Earl Warren's opinion for the Court in *Brown v. Board of Education*²⁵⁴ which narrowed *Plessy*. As the Court's constitutional decisions proliferated, they grew more elaborate in analysis because they mattered more and because they had to adopt or distinguish more prior decisions. But even so, we should not forget that *stare decisis* is only one feature of the common law model, and that modern American constitutional practice has rejected other important parts of it. For instance, we do not use jury trials in constitutional cases as we did in some of the state sovereign debt cases of the late eighteenth century.²⁵⁵ Instead, judicial review is implemented almost exclusively through appellate jurisdiction, itself a civil law institution in the late eighteenth century. Furthermore, public law cases on the Supreme Court's original docket have long been handled according to the civilian model of factfinding by masters or judges.²⁵⁶ What we now call common law constitutionalism may contain much more of the civil law tradition than we realize.

Conclusion

In an entry on the "law of nations" for the Encyclopedia Americana, Joseph Story once referred to public law as having two parts: the "external" law of nations (i.e., international law), and the "internal" law of nations (i.e., domestic public law).²⁵⁷ A good way to understand what it means to "think like a civilian" in national public law cases is to imagine the domestic analogues to the doctrine of sources in public international law, a subject which

²⁵³ 163 U.S. 537 (1896).

²⁵⁴ 347 U.S. 483 (1954).

²⁵⁵ See *Oswald v. New York*, Jury Verdict (February 5, 1795) in 5 DHSC, *supra* note XX, at 119 ("The Jury having considered the Cause of Oswald v. State of New York do find a verdict for the Plaintiff 5315 Dollars with six cents Costs. Phila February 5th, 1795").

²⁵⁶ See Vincent L. McKusick, *Discretionary Gatekeeping: The Supreme Court's Management of Its Original Jurisdiction Docket Since 1961*, 45 Me. L. Rev. 185 (1993); *In Re Troy Anthony Davis* (Ga. S.D. Case No. CV409-130) available in two parts at:

http://www.gasd.uscourts.gov/pdf/409cv00130_92part1.pdf

http://www.gasd.uscourts.gov/pdf/409cv00130_92part2.pdf

²⁵⁷ Joseph Story, "Law of Nations" in *Encyclopedia Americana* (1840) (on file with the author).

retains a strong civilian flavor.²⁵⁸ These are: 1) treaties, 2) custom “as evidence of a general practice accepted as law;” 3) “the general principles of law recognized by civilized nations;” and, as “subsidiary means,” 4) “judicial decisions and the teachings of the most highly qualified publicists.”²⁵⁹ Article 38 of the Statute of the International Court of Justice, from which the sources doctrine is drawn, also authorizes equity, confirming “the power of the Court to decide a case *ex aequo et bono* [out of equity and justice], if the parties agree.”²⁶⁰ An analogous civilian approach to public domestic law would thus look to canonical texts, custom as evidence of general practice accepted as law, general principles of public law, and cases and treatises as secondary means, with equity to prevent manifest injustice. This is different from how a common law judge would go about deciding a constitutional case, most notably in the theoretical primacy of canonical texts, the secondary importance of judicial decisions, and the role of general principles of public law.

The basic claim of this article has been that at the start and during the first century of American constitutional history, some American lawyers conceived of public law adjudication by the national courts as in part a civilian enterprise, and not just as a common law endeavor. This changed near the end of the nineteenth century with the hegemony of the common law tradition in the constitutional public sphere, even as statutes made major inroads in its heartland private law sphere and in sub-constitutional public law. The dominance of common law constitutionalism has been so strong that we have lost sight of the fact that there was not always just one way of thinking about what it means to implement the Constitution. Dispelling the monist fallacy and recovering the diverse past may help us to continue American constitutionalism’s success in the future, both at home and in the many nations abroad who are inspired by it.

History has a mysterious way of repeating itself. Nearly 200 years after the original Constitution was ratified, a jurisprudential approach that treats it and certain contemporaneous sources as canonical texts has risen and achieved ascendancy in practice. It was nearly 200 years after the *Corpus juris civilis* was rediscovered in the West that Bartolus and his disciples moved the civil law tradition in a direction that basically endured until the

²⁵⁸ Public international law and public domestic law have many functional resemblances, as Jack Goldsmith and Daryl Levinson have recently argued. See Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, and Public Law* 122 Harv. L. Rev. 1791 (2009).

²⁵⁹ Article 38 of the Statute of the International Court of Justice, United Nations Charter.

²⁶⁰ *Id.* §2.

American founding. But that tradition was about much more than the canonical texts, and, as the challenge of the Humanists dramatically underscored, a jurisprudence based on texts that cannot be changed may offer a certainty that is only an illusion. The ultimate result, 400 years later, was an abandoning of the ancient texts for new ones.

The lesson I draw from this is not that one approach to constitutional jurisprudence is worse or better than another. Rather, it is an appreciation of the fact that we can have good faith differences about what law means, especially our most cherished law. If this is true, then condemnations of one or the other approach may be both unfair and inevitable. But if we can agree that the rule of law is at a better place now than it was 600 years ago, and that the first century of America's constitution was a story of progress with setbacks along the way, then perhaps we can agree that a diversity of views about how to think about our most important laws is also a good thing. If so, then the only thing for us to do is to be true to our views while trying to be more tolerant of the views of others, in the hope that our descendants, 600 years from now, will also see the story of law and of American constitutional law as a story of progress.
