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Matthew J. Steilen
University at Buffalo School of Law

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Genteel Culture, Legal Education, and Constitutional Controversy in Early National Virginia

Matthew Steilen

University at Buffalo School of Law, State University of New York, Buffalo, NY, USA
Email: mjsteile@buffalo.edu

Abstract

This article focuses on the movement to reform legal education in early national Virginia, offering a fresh perspective by examining the connection between legal education and society and culture. It challenges the notion that constitutional ideas were the primary driving force behind reforms and argues that social status and "manners" played a more significant role. Wealthy elites in Virginia associated manners with education, sending their sons to college to become gentlemen, as it secured their aspirations to gentility and their influence over society and politics. Reformers sought to capitalize on this connection by educating a generation of university-trained, genteel lawyers who could lead the state's legislature and its courts. In this sense, educational reform was genteel rather than democratic in its basic assumptions. The article examines the central figure of George Wythe and explores his influence on Virginia's leading men, including Thomas Jefferson and St. George Tucker. It delves into the student experience in Wythe's law office and at the College of William and Mary, the success of educational reforms in the central courts, and the effects on Virginia's constitutional development. The college-educated lawyers who came to dominate the legislature in the early nineteenth century used their training for politics. As these lawyers sought to strengthen the institutions their party controlled, they drove the development of constitutional doctrines like federalism and separation of powers.

Independence brought a wave of reform to American institutions and laws. From the perspective of reformers, one of the most important changes was to schools, though this may come as a surprise today. At the time it was broadly assumed that the republican governments being established in the states would require educated men. Indeed, as some saw matters, without a robust class of gentlemen, liberally educated in the "science" of law, republican reforms to legislatures, courts, and state laws could not succeed. So it was that

between about 1780 and 1820, legal education entered the university in Virginia, New York, Pennsylvania, Kentucky, Connecticut, and Massachusetts.[1]

This article is a study of the movement to reform legal education in early national Virginia. The topic has long attracted historians, and we possess valuable studies of the Virginia bench and bar, its court system, and related efforts to establish a system of public schools.[2] The aim here is to place a different body of evidence at the center of the account: evidence that connects legal education to society and culture. This will cast a different light on reform. Constitutional ideas appear less like causes than effects. As for causes, some evidence suggests that what really moved reformers were things like social status and "manners," by which I mean a person's behavior toward others, their outward bearing, and appearance. The wealthy patricians of the state had long drawn a connection between manners and education, dispatching their sons to college to become gentlemen.[3] Most lacked a title or ancient family lineage, and education secured their aspirations to gentility.[4] It also helped to secure their influence over Virginia society and politics. Reformers grasped the connection and sought to make use of it themselves; by raising a generation of university-educated, genteel lawyers, they hoped to control republican politics in the emerging post-revolutionary society. Genteel manners would suit young graduates to lead the state's legislature and its courts. Legal "science"—the

[1] Mark Boonshoft, *Aristocratic Education and the Making of the American Republic* (Chapel Hill: University of North Carolina Press, 2020), 60–69; Tom Cutterham, *Gentleman Revolutionaries: Power and Justice in the New American Republic* (Princeton: Princeton University Press, 2017), 44–65; Johann N. Neem, *Democracy's Schools: The Rise of Public Education in America* (Baltimore: Johns Hopkins Press, 2017), 8–11; Mark Warren Bailey, "Early Legal Education in the United States: Natural Law Theory and Law as Moral Science," *Journal of Legal Education* 48, no. 3 (1998): 316–18; Paul Carrington, "The Revolutionary Idea of University Legal Education," *William and Mary Law Review* 31, no. 3 (1990): 527. In England, as well, the desire to provide the sons of gentlemen with a scientific education in law led to the establishment of the Vinerian chair at Oxford. David Lemmings, *Professors of the Law: Barristers and English Legal Culture in the Eighteenth Century* (Oxford: Oxford University Press, 2000), 113–31; David Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain* (Cambridge: Cambridge University Press, 1989), 32–33.

[2] Andrew J. O'Shaughnessy, *The Illimitable Freedom of the Human Mind: Thomas Jefferson's Idea of a University* (Charlottesville: University of Virginia Press, 2021) (public schools and University of Virginia); Alan Taylor, *Thomas Jefferson's Education* (New York: Norton, 2019) (College of William and Mary and University of Virginia); Jessica K. Lowe, *Murder in the Shenandoah: Making Law Sovereign in Revolutionary Virginia* (Cambridge: Cambridge University Press, 2019) (social change and reform of courts and law); A. G. Roeber, *Faithful Magistrates and Republican Lawyers: Creators of Virginia Legal Culture, 1680–1810* (Chapel Hill: University of North Carolina Press, 1981) (changes to court system); W. Hamilton Bryson, "The History of Legal Education in Virginia," *University of Richmond Law Review* 14 (1979): 155 (changes to legal education); Alan McKinley Smith, *Virginia Lawyers, 1680–1776: The Birth of a Profession* (PhD diss., Johns Hopkins University, 1967) (bench and bar).

[3] William E. Nelson, *The Common Law in Colonial America: The Chesapeake and New England, 1660–1750*, vol. 3 (Oxford: Oxford University Press, 2016), 47; Rhys Isaac, *The Transformation of Virginia, 1740–1790* (Charlotte: University of North Carolina Press, 1982), 131.

[4] Michal J. Rozbicki, *The Complete Colonial Gentleman* (Charlottesville: University of Virginia Press, 1998), 44–58.

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systematic ordering and presentation of law, so emphasized by the new law professors—would ensure the social order remained stable as it changed. In this way, change could be made to answer genteel sensibilities about preserving English liberties and *salus populi*, rather than left to an unpredictable clash of interests.[5] Constitutional ideas enter the picture only here, recruited to buttress the leadership of these men.

The central figure in this account is George Wythe. Wythe is perhaps best known to legal historians as a law teacher. In 1779, he was appointed to a newly created chair in "Law and Police" at the College of William and Mary. During this period Wythe also accepted pupils and law clerks and served as a Chancellor on the state's high court of equity. In these roles he can be connected to many of Virginia's leading men, including Thomas Jefferson, who clerked in Wythe's law office and later engineered the creation of his chair at the College, as well as John Marshall, St. George Tucker, and Spencer Roane, all of whom either studied under Wythe or clerked for him. By all indications Wythe left a strong impression on this generation, and we possess many reminiscences. If the extant evidence is a fair guide, it was Wythe's scholarly interests and methods, his personal habits, and his demeanor that registered with contemporaries more profoundly than anything else.[6] One of the central goals of this article is to give balance and context to our understanding of Wythe; as we will see, the evidence presents significant challenges, and though they are rarely mentioned in legal scholarship, a reliable account is impossible without addressing them.

The article presents the evidence in three parts, each examining a group of interrelated people and a theme. The first part, in two sections, is a study of the student experience in Wythe's law office and at the College of William and Mary. Then, as now, bored students tended to skim their treatises, commentaries, and institutes, devoting more energy to practical exercises like moot courts and to social events like dinners. Of course, the moots and the dinners had value, for it was in those settings that young men learned how to persuade a legislative delegate or a judge, and, more generally, how to relate to one another. Reformers understood this. Jefferson described William and Mary during Wythe's tenure as "the place where are collected together all the young men of Virginia under preparation for public life."[7] While legal treatises might depict Virginia as "a free and equal society created by and for the people," as one historian recently summarized them, reformers spoke of natural inequalities cultivated by a select group of young men at

[5] Alfred S. Konefsky, "Book Review: Law and Culture in Antebellum Boston," *Stanford Law Review* 40 (1988): 1128–32, 1134–35.

[6] On Wythe, see the editorial essay accompanying "Notes for a Biography of George Wythe," J. Jefferson Looney, ed., *Papers of Thomas Jefferson, Retirement Series, Volume 16, June 1820 to February 1821* (Princeton: Princeton University Press, 2019), 230. An essential repository of Wythe-related materials can be found at "Wythepedia," hosted by the College of William and Mary at https://lawlibrary.wm.edu/wythepedia/index.php/Main_Page.

[7] Thomas Jefferson to Richard Price, August 7, 1785, Julian P. Boyd, ed., *Papers of Thomas Jefferson, Volume 8: 25 February to 31 October 1785* (Princeton: Princeton University Press, 1953), 357.

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school.[8] The socialization of these men would ensure the success of "republican" institutions like the legislature.

The second part of the article, again in two sections, considers the success of educational reforms. It begins in the state's central courts, where an educated bench and bar nurtured a scientific practice of the law. Their community was genteel and had long sought to distinguish itself from lesser men practicing in the local county courts. We follow St. George Tucker's entry into this community, gather a sense of its norms from his notes of their proceedings, and consider his appearance in 1782 before the state's high court, the Court of Appeals, in the famous *Case of the Prisoners*.[9] It was in this case that Wythe, who sat on the Court of Appeals in his capacity as Chancellor, asserted a judicial power to refuse to give effect to unconstitutional laws. Modern commentaries on the case have overlooked that Wythe's opinion begins with a discussion of the value of education. Though these developments stand as evidence that educational reforms had borne some fruit, the conduct of the central courts soon acquired a partisan connotation. Jefferson came to see politics as their defining feature; a late letter slanders "the Richmond lawyers" of the central courts as "rank Federalists."[10] Jefferson's primary interest had been in improving the state legislature, the General Assembly.[11] Although in the 1820s college men constituted over half its lower house, the House of Delegates, they did not have the effect Jefferson had hoped for.[12] Part of the fault lay, perhaps, with William and Mary for having failed to prepare them. The College faced significant challenges in this period, including low enrollments, interference by trustees, and student riots; but difficulties with the program were also due to the limits of Wythe's methods and to the changing character of

[8] Ellen Holmes Pearson, *Remaking Custom* (Charlottesville: University of Virginia Press, 2011), 32–43.

[9] Commonwealth v. Caton ("Case of the Prisoners"), Daniel Call, *Reports of Cases Argued and Decided in the Court of Appeals of Virginia*, vol. 4 (Richmond: Shepard & Co., 1833), 7–8; David John Mays, ed., *The Letters and Papers of Edmund Pendleton, 1734–1803*, vol. 2 (Charlottesville: University Press of Virginia, 1967), 417; Charles F. Hobson, ed., *St. George Tucker's Law Reports and Selected Papers, 1782–1825*, vol. 3 (Chapel Hill: University of North Carolina Press, 2013), 1741–48.

[10] Thomas Jefferson to James Madison, February 1, 1825, David B. Mattern et al., eds., *Papers of James Madison, Retirement Series, Volume 3: 1 March 1823 - 24 February 1826* (Charlottesville: University Press of Virginia, 2016), 470–71.

[11] "Notes on Early Career (the so-called 'Autobiography')," in J. Jefferson Looney, *Papers of Thomas Jefferson: Retirement Series, Volume 17: 1 March to 30 November 1821* (Princeton: Princeton University Press, 2020), 324.

[12] On the number of lawyers in the Virginia General Assembly, see Daniel P. Jordan, *Political Leadership in Jefferson's Virginia* (Charlottesville: University of Virginia Press, 1983), 51–57; E. Lee Shepard, "Lawyers Look at Themselves Professional Consciousness and the Virginia Bar, 1770–1850," *American Journal of Legal History* 25, no. 1 (1981): 6–9. Writing about the end of his period, Shepard concludes the percentage of lawyers in the assembly was "far out of proportion to their numerical position in society." Lawyers also constituted a majority of the states' congressional delegation, three-fourths of which were graduates of William and Mary. O'Shaughnessy, *The Illimitable Freedom of the Human Mind*, 97; Jordan, *Political Leadership in Jefferson's Virginia*, 42–44; Richard R. Beeman, *The Old Dominion and the New Nation, 1788–1801* (Lexington: University Press of Kentucky, 1972), 48.

young men, who showed more interest in preserving their honor than in mastering legal "science."

The final part of the article, also comprising two sections, explores the effects of reform on Virginia's constitutional development. In Virginia it was college-educated lawyers who led the political parties that emerged in the 1790s and who gave partisanship its legal and rhetorically incendiary character. To some extent this distinguishes the state. In Pennsylvania, in contrast, where non-genteel "common men" were better able to use local institutions to organize independently, the class dimensions of political partisanship became salient at an earlier date. Common men experimented with a variety of "extralegal" arrangements (such as independently mustering in local militia units) for communicating political sentiment. Similarly, in New Hampshire, country lawyers made use of juries and untrained judges to protect local interests.[13] Writers occasionally defended these practices by espousing what modern historians have called "antilegalism": the view that learned legal techniques and sources, like the common law, were inappropriate for making sense of constitutions, which ought to be plain and immune from manipulation by lawyers.[14] In Virginia, while there was anti-lawyer sentiment and anti-elitist criticism of the 1776 state constitution, the dominance of college-educated lawyers in the state-wide and national institutions where constitutional views were expressed tended toward an establishment of legal pluralism rather than a robust antilegalism.[15]

In this context, "legal pluralism" is meant to describe how lawyers advanced competing legal claims for the power and independence of institutions their party dominated. Republican lawyers in the General Assembly promoted its powers to interpret the federal Constitution in a series of resolutions challenging the federalization of state debt and the Alien and Sedition Acts.[16] Federalist

[13] John Phillip Reid, *Controlling the Law: Legal Politics in Early National New Hampshire* (DeKalb: Northern Illinois University Press, 2004), 24–26.

[14] Gerald Leonard and Saul Cornell, *The Partisan Republic: Democracy, Exclusion, and the Fall of the Founders' Constitution* (Cambridge: Cambridge University Press, 2019), 50–51, 84–92; see also Woody Holton, *Unruly Americans and the Origins of the Constitution* (New York: Hill and Wang, 2007). Relatedly, John Phillip Reid has described the legal views of the untrained New Hampshire lawyers as a jurisprudence of "common sense." Reid, *Controlling the Law.*

[15] The fullest expression of antilegalism I have encountered from Virginia is an 1807 pamphlet by Thomas Jones, *An Address to the People of Virginia: in Two Parts. Shewing the Danger Arising from the Unbounded Influence of Lawyers*, which I address below. The pamphlet tends to confirm the dominance of educated lawyers in Virginia government. On the character of anti-lawyer sentiment in Virginia during this period, see Shepard, "Lawyers Look at Themselves Professional Consciousness and the Virginia Bar, 1770–1850," 4–7, 10. On the democratic and anti-oligarchic rhetoric of state constitutional reform in Virginia, see Fletcher M. Green, *Constitutional Development in the South Atlantic States, 1776–1860* (Chapel Hill: University of North Carolina Press, 1930), 173–76; Merrill D. Peterson, ed., *Democracy, Liberty, and Property: State Constitutional Conventions of the 1820's* (Indianapolis: Bobbs-Merrill Company, 1966), 272–73; Kevin R. C. Gutzman, *Virginia's American Revolution: From Dominion to Republic, 1776–1840* (Lanham: Roman and Littlefield, 2007), 187–88.

[16] Herman V. Ames, ed., *State Documents on Federal Relations: The States and the United States* (Philadelphia: University of Pennsylvania, 1906), 4–7; J. W. Randolph, ed., *The Virginia Report of 1799–1800* (Richmond, 1850), 22–23, 162–67.

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lawyers, from their own redoubt in the federal courts, drew on a range of ideas to promote the interpretive powers of the federal judiciary. They asserted that judicial settlements of controversial matters were "peaceful," in contrast to the "hostility" of legislative proceedings and the dangers of perpetual conflict they created—a trope of period rhetoric that commentators have again largely overlooked, but which provides a fruitful context for interpreting remarks like Alexander Hamilton's, in Number 78 of *The Federalist*, that the judiciary "can never attack with success" the other departments, but shows a "natural feebleness" in contrast to them.[17] Federalist lawyers also described the courts as standing between government and "the people," where they might interpose themselves by giving effect to the Constitution. Both parties pressed claims on behalf of "the people," but we should not be misled by the rhetoric; in Virginia, at least, this was a contest waged by legal elites, using legal tools, and producing what has been called a "'lawyerizing' of the Constitution."[18] It was not a contest between "democracy and the court," as a recent study has framed the national politics of the period, if that is taken to imply that "common men" led or organized independently.

The constitutional conflicts of Republicans and Federalists between 1790 and 1820 have been described many times, but my aim here is to introduce evidence largely excluded from leading accounts, with an eye to better revealing the dynamic character and contingency of constitutional ideas. Those ideas were bound up with ambitions for social reform, and reform sometimes failed or produced unexpected results. In Virginia, a plan to provide the sons of the gentry with a liberal legal education seems to have generated a lawyer-dominated political class disposed to frame its conflicts in constitutional terms and to wage them as legal disputes.

Preparing to be a Gentleman Lawyer

Schooling played an important role in colonial Virginia. It was necessary for developing the deportment and liberal habits of mind that conveyed an impression of gentility, an image especially important to leading colonials,

[17] No. 78, Benjamin F. Wright, ed., *The Federalist by Alexander Hamilton, James Madison, and John Jay* (Cambridge: Belknap Press, 1961) [1788]. As George Wythe put this idea in 1782, in the *Case of the Prisoners*, where Virginia's General Assembly and Governor were at odds about the state constitution's allocation of the pardon power, the effect of a judicial proceeding was that "the pretensions of each party are fairly examined, their respective powers ascertained, and the boundaries of authority peaceably established." Commonwealth v. Caton ("Case of the Prisoners"), Call, *Reports of Cases Argued and Decided in the Court of Appeals of Virginia*, vol. 4, 7–8 [1782].

[18] H. Jefferson Powell, "The Principles of '98: An Essay in Historical Retrieval," *Virginia Law Review* 80 (1994): 731; cf. Alfred S. Konefsky, "Simon Greenleaf, Boston Elites, and the Social Meaning and Construction of the Charles River Bridge Case," in *Transformations in American Legal History: Law, Ideology, and Method; Essays in Honor of Morton J. Horowitz*, eds. Daniel W. Hamilton and Alfred L. Brophy, vol. 2 (Cambridge: Harvard University Press, 2010), 189–90. "[E]lites expressed anxiety … by articulating legal arguments about wealth distribution, principally grounded in the takings analogy. But they were driven by perceptions of social alarm and decay."

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whose social status in the larger British empire was uncertain.[19] The Lees of Westmoreland County, long one of Virginia's great families, hired a tutor to begin educating their young sons. The Rev. Mr. Craig boarded with the Lees at Stratford Hall and taught their sons in a red brick schoolhouse on the plantation property, beginning each weekday before breakfast and concluding around 5 p.m. This was a "private school," that is, a school operated for the children of a single family or group of families. Under Craig, the Lee boys were instructed in reading and writing, as well as ancient languages, modern languages, and biblical exegesis. But Craig was also charged with developing their morals, deportment, and discipline, and it was for this reason that he accompanied the family to social events and ate meals with them.[20]

We know few details about the curriculum tutors delivered. It seems likely that studies took a meandering course, even under the very best of teachers. George Wythe, both during his service as Professor of Law and Police and as Chancellor, boarded and taught a number of boys, including twelve-year-old Littleton Waller Tazewell, who went on to serve as governor of Virginia and a member of the U.S. Senate. Writing years later, Tazewell recalled how his morning lessons began. Upon entering the room where Wythe was working, the teacher would pull "some Greek book" from the shelf, open it "at random," and ask him to translate "the first passage that caught his eye." The afternoon was dedicated to algebra or to science experiments. In the evening, Tazewell would be asked to read aloud from a work of literature; inevitably, he recalled, the reading would suggest "some anecdote" to Wythe, who, it seemed to the child, possessed "a stock almost inexhaustible" of digressions.[21]

As an adult Tazewell admitted to doubts about Wythe's technique. It might have worked on someone older or "more advanced," he thought, "but in my situation it was objectionable in many respects." The subjects were beyond his comprehension; the "irregular course" of translations made it impossible to advance in Greek or Latin. What Tazewell did learn, he confessed, was a certain "stratagem" for avoiding the worst: by artfully placing a book in Wythe's study the night before, his teacher would be likely to select it the next day for the morning's "impromptu" translations.[22]

At least at Tazewell's age of 12, it seems likely that the most important subject taught was not Greek, algebra, or literature, but manners. In Tazewell's case, despite his academic struggles, Wythe "proudly exhibited" him "as a boy of great promise" to "[e]very foreigner or other gentleman of distinction" visiting the house, who seemed to arrive in a constant stream.[23] Wythe himself

[19] Isaac, *The Transformation of Virginia, 1740–1790*, 131; Phillip Hamilton, *The Making and Unmaking of a Revolutionary Family: The Tuckers of Virginia, 1752–1830* (Charlottesville: University of Virginia Press, 2003), 19–20; Rozbicki, *The Complete Colonial Gentleman*, 50–58.

[20] Smith, "Virginia Lawyers, 1680–1776," 82, 85, 92.

[21] Littleton Waller Tazewell, "An Account of the History of the Tazewell Family" (1823), 133–34, Special Collections Research Center, Swem Library, College of William and Mary.

[22] Tazewell, "An Account of the History of the Tazewell Family," 134–35.

[23] Tazewell, "An Account of the History of the Tazewell Family," 135.

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was known for his own "suavity of manners."[24] Tazewell recalled that Wythe's manners "were very polished indeed, and full of dignity and grace."[25] Henry Clay, the famous U.S. Senator, thought Wythe performed "the most graceful bow that I ever witnessed," even though, by the time Clay had clerked for him, Wythe was "bent by age" and "carried a cane."[26] William DuVal, a neighbor in Richmond, observed of another young man under Wythe's care that "he had caught the Suavity of his Master's Manners."[27] This was Michael Brown, a free "mulatto" whom Wythe was teaching Latin and Greek, and whom he had provided for in his will.

Another important dimension of manners was personal appearance, and again Wythe set a distinctive and memorable standard. The son of one of his pupils recalled Wythe wearing a "single-breasted black broadcloth coat, with a stiff collar turned over slightly at the top, cut in front in Quaker fashion," layered over "a long vest, with large pocket-flaps and a straight collar, buttoned high on the breast, showing the ends of the white cravat." His "shorts" were trimmed with "silver knee and shoe-buckles." Overall, he was "particularly neat in his appearance." Compared with the mid-century dress of Virginia gentry, Wythe's stiff, upright Quaker collars and high-buttoned vest must have seemed simple and clean.[28] This fit with his reputation for personal hygiene; neighbors would observe Wythe drawing water for his daily "shower-bath" from the well in his front yard.[29] Henry Clay also recalled that Wythe's "personal appearance and his personal habits were plain, simple and unostentatious."[30] The Pennsylvanian Benjamin Rush, who met Wythe in the hothouse of the Second Continental Congress, described him as possessing a "dovelike simplicity and gentleness of manner."[31] The images are striking and suggest that Wythe carefully cultivated his appearance, just as Jefferson did.[32]

[24] "Notes for a Biography of George Wythe," in Looney, *Papers of Thomas Jefferson, Retirement Series, Volume 16*, 230.

[25] Tazewell, "An Account of the History of the Tazewell Family," 129.

[26] Henry Clay to B. B. Minor, May 3, 1851, B. B. Minor, ed., *Decisions of Cases in Virginia by the High Court of Chancery: With Remarks Upon Decrees by the Court of Appeals, Reversing Some of Those Decisions* (Richmond: J. W. Randolph, 1852), xxxv.

[27] William P. DuVal to Thomas Jefferson, August 29, 1813; J. Jefferson Looney, ed., *Papers of Thomas Jefferson, Retirement Series, Volume 6: 11 March to 27 November 1813* (Princeton: Princeton University Press, 2010), 460.

[28] George Wythe Munford, *The Two Parsons: Cupid's Sports; The Dream; and The Jewels of Virginia* (Richmond: J. D. K. Sleight, 1884), 416. On the reliability of this source, see the judgment in Julian Parks Boyd, *The Murder of George Wythe* (privately printed for the Philobiblon Club, 1949), 10, 14–15. On the transformation in dress among the gentry during the eighteenth century, see G. S. Wilson, *Jefferson on Display: Attire, Etiquette, and the Art of Presentation* (University of Virginia Press, 2018), 12–13.

[29] Hugh Blair Grigsby, *The History of the Virginia Federal Convention of 1788*, ed. R. A. Brock, vol. 1 (Richmond: Virginia Historical Society, 1890), 34.

[30] Henry Clay to B. B. Minor, May 3, 1851, Minor, *Decisions of Cases in Virginia by the High Court of Chancery*, xxxv.

[31] Benjamin Rush, *A Memorial Containing Travels Through Life*, ed. Louis Alexander Biddle (Lanorie: Louis Alexander Biddle, 1905), 114.

[32] Wilson, *Jefferson on Display*, 5–6; Maurizio Valsania, *Jefferson's Body: A Corporeal Biography* (Charlottesville: University of Virginia Press, 2017).

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When Wythe began to accept law clerks, probably in the early 1760s, he made an education in manners a central part of their training as well. The first clerk of which we have any record is Thomas Jefferson.[33] Amazingly, Wythe brought along the twenty-year-old, skinny, tall, freckled Jefferson to dinners at the palace with Virginia's lieutenant governor, Francis Fauquier. This was the same young Jefferson who, just months earlier, had written to a friend complaining about his law studies and confessing he had left the treatise by that "the old dull scoundrel Coke" packed away.[34] It was the dinners, not Coke's treatise, that impressed the young man. Years later, he still enthused at being included among the governor's "*amici omnium horarum*," which included Wythe and William Small, then Professor of Natural Philosophy at William and Mary. The four of them, Jefferson thought, "formed a *partie quarreé*," enjoying refined conversation and music.[35] Fauquier invited other promising students to dinner as well.[36] It was these experiences that likely led Jefferson to gush that Williamsburg "was the finest school of manners in America."[37] He later duplicated the effort at the University of Virginia, where he reputedly had dinner with every member of the inaugural class. A student recalled the dinners as a "feast of reason," where Jefferson demonstrated how to conduct amiable conversation and exhibit good manners.[38]

This was not a mass society. Persuasion in public councils would depend on underlying personal relationships that could not be established without gentlemanly manners. Jefferson's ideal of deliberation was intimate conversation, much like something that would occur with guests at a family dinner table.[39] Both Wythe and Jefferson understood the importance of gentlemanly manners and their efforts to foster them in students were intentional. A letter of introduction Wythe sent to St. George Tucker in 1792, who had recently taken over Wythe's post at William and Mary, recommended its carrier to Tucker's

[33] Thomas Hunter, "The Teaching of George Wythe," in *The History of Legal Education in the United States: Commentaries and Primary Sources*, ed. Steve Sheppard, vol. 1 (Pasadena: Salem Press, 1999), 142.

[34] Thomas Jefferson to John Page, December 25, 1762, Julian P. Boyd, ed., *The Papers of Thomas Jefferson, Volume 1: 1760–1776* (Princeton: Princeton University Press, 1950), 5.

[35] Thomas Jefferson to Louis H. Gardin, January 15, 1815; J. Jefferson Looney, ed., *Papers of Thomas Jefferson, Retirement Series, Volume 8, October 1814 to August 1815* (Princeton: Princeton University Press, 2011), 200; "Notes on Early Career," in Looney, *Papers of Thomas Jefferson: Retirement Series, Volume 17*, 310.

[36] Emory G. Evans, *A "Topping People": The Rise and Decline of Virginia's Old Political Elite, 1680–1790* (Charlottesville: University of Virginia Press, 2009), 139.

[37] Memoirs of T. J. Randolph, quoted in Dumas Malone, *Jefferson and His Time, Volume 1, Jefferson the Virginian* (Boston: Little, Brown & Co., 1948), 87.

[38] O'Shaughnessy, *The Illimitable Freedom of the Human Mind*, 11.

[39] O'Shaughnessy, *The Illimitable Freedom of the Human Mind*, 23–24, 28–29. On Jefferson's tendency to imagine himself as a "patriarch" presiding over his family and hosting his intimate friends, and the connection to his conception of republican politics, see Peter S. Onuf, "Making Sense of Jefferson," in *The Mind of Thomas Jefferson* (Charlottesville: University of Virginia Press, 2007), 33; Annette Gordon-Reed and Peter S. Onuf, *Most Blessed of the Patriarchs: Thomas Jefferson and the Empire of the Imagination* (New York: Liveright Publishing, 2016), 28–40; Matthew Crow, *Thomas Jefferson, Legal History, and the Art of Recollection* (Cambridge: Cambridge University Press, 2017), 88–89, 105.

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company for his "agreeable conversation and polite manners."[40] Wythe and Jefferson were of course not alone in these attitudes; it was generally understood that manners were an important part of genteel education. Despite Jefferson's enthusiasm for William and Mary and the University of Virginia, they were hardly the only schools whose teachers arranged for dinners with distinguished guests in an effort to display manners and form connections.[41]

Law as Science and Scientific Education

What purported to distinguish lawyers educated by Wythe from county-court lawyers and justices of the peace was not gentlemanly manners—these they shared—but science. In Wythe's hands, according to Jefferson, the law was a "science," which meant it was a rational, organized system, its proceedings "methodical" and its substance "logical."[42] This was reflected in Wythe's law practice. In pleading before a court, Jefferson observed, he "never indulged himself with an useless or declamatory thought or word." His language was "chaste." Wythe's energies were devoted instead to laying out his system. He tended to consult many different sources in his argument, which was likely written, at least in outline, and delivered by reading or extemporizing from the writing.[43] Henry Clay also recalled Wythe devoting considerable energy to preparation. As a result, Clay thought, his strength "lay in the opening of the argument of a case," where he displayed "clearness and force." In this respect Wythe was often contrasted with Edmund Pendleton, his great competitor at the Virginia General Court bar. Pendleton was known for a quick wit and his "melodious," "clear and silver-toned" voice, which he kept "under perfect control."[44] He, too, was a student of the law, wrote Hugh Blair Grigsby, a nineteenth-century lawyer and journalist, but the law "as it was to be found in cases," rather "than as a system."[45] Pendleton's strategy was to poke holes in Wythe's system—an unnerving experience, as every scholar who has presented their research knows. As Attorney General William Wirt recalled, Pendleton would "tease him with quibbles, and vest him with sophistries, until he destroyed his composure of mind and robbed him of his strength."[46]

[40] George Wythe to St. George Tucker, October 23, 1792, Tucker-Coleman Papers, Special Collections Research Center, Swem Library, College of William and Mary.

[41] Boonshoft, *Aristocratic Education and the Making of the American Republic*, 26.

[42] "Notes for a Biography of George Wythe," Looney, *Papers of Thomas Jefferson, Retirement Series, Volume 16*, 230.

[43] Jefferson recalled Wythe destroying copies of arguments he had delivered in cases. Thomas Jefferson to John Tyler, November 25, 1810; J. Jefferson Looney, ed., *Papers of Thomas Jefferson, Retirement Series, Volume 3: August 1810 to June 1811* (Princeton: Princeton University Press, 2006), 228. Some commentators have doubted that Wythe wrote his arguments. Bernard Schwartz, Barbara Wilcie Kern, and Richard B. Bernstein, eds., *Thomas Jefferson and Bolling V. Bolling: Law and the Legal Profession in Pre-Revolutionary America* (San Marino: Huntington Library, 1997), 86.

[44] Sallie E. Marshall Hardy, "Some Virginia Lawyers of the Past and Present," *The Green Bag* 10 (1898): 15.

[45] Hugh Blair Grigsby, *The Virginia Convention of 1776* (Richmond: J. W. Randolph, 1855), 127.

[46] William Wirt, *Sketches of the Life and Character of Patrick Henry*, 9th ed. (Philadelphia: Desilver, Thomas & Co., 1836), 66.

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Reformers believed that to prepare young men to practice law as a science would require university study. The law office simply did not force a clerk to engage his materials, and many predictably avoided the task. An anonymous letter published in the *Virginia Gazette* in 1773 complained of new lawyers, putatively trained in law-office a clerkship, but who began their practice "utterly unacquainted" with the law. This might be cured, the author thought, by establishing a professor of law at William and Mary.[47] Not everyone shared this view; William Short, who studied briefly under Wythe, recalled that he had also begun his practice largely ignorant of court procedure, but placed the blame on legal science itself. "Scientific students … are apt to despise the mere technical & practical past of the business—that is the process or forms of pleading.... These were known to the clerks of courts & to every pettifogger & I despised them."[48] It was depth of knowledge, not technical or practical expertise, that reformers most valued. Jefferson fumed about graduates who had acquired "a smattering of every thing" from paging through Blackstone. Even "unlettered common people" saw these men for what they were, Jefferson thought: "Ephemeral insects of law."[49] The insult suggests a class distinction, but in terms of learning there was not a great distance between such men and the planter-lawyers of the House of Delegates. Benjamin Harrison, a leading member of the House, who had studied at William and Mary in an earlier generation, had made only a few entries in his own commonplace book, mislabeling some causes of action and including others that were obsolete. Most of the book remained blank.[50]

By contrast, studying law under Professor Wythe required diligence. In 1780, just after Wythe's appointment, John Brown described his studies under Wythe in a letter to his uncle.[51] "I apply closely to the Study of the Law and find it to be a more difficult Science than I expected," he reported, though he hoped "with Mr Wythes assistance" he might eventually "make some proficiency in it." Brown understood this would take some time. "[T]hose who finish this Study in a few months either have strong natural parts or else they know little about it."[52] He may have been thinking of a classmate, John Marshall, who attended Wythe's class for a short period while on leave from the Continental Army in the spring of 1780.[53]

[47] Quoted in Bryson, "The History of Legal Education in Virginia," 169–70.

[48] William Short to Greenbury Ridgely, December 11, 1816, George Green Shackelford, ed., "To Practice Law: Aspects of the Era of Good Feelings Reflected in the Short-Ridgely Correspondence, 1816–1821," *Maryland Historical Magazine* 64 (1969): 349–50.

[49] Thomas Jefferson to John Tyler, June 17, 1812, J. Jefferson Looney, ed., *Papers of Thomas Jefferson, Retirement Series, Volume 5, May 1812 to March 1813* (Princeton: Princeton University Press, 2008), 136.

[50] David Thomas Konig and Michael P. Zuckert, eds., *Papers of Thomas Jefferson, Second Series: Jefferson's Legal Commonplace Book* (Princeton: Princeton University Press, 2019), 10–11.

[51] John Brown to William Preston, January 26, 1780 and February 15, 1780, Steve C. Sturz, ed., "Glimpses of Old College Life," *William and Mary Quarterly* 9 (1900): 75–76.

[52] John Brown to William Preston, February 17, 1780, Sturz, "Glimpses of Old College Life," 76.

[53] Marshall's commonplace book was unfinished, and historians have surmised that he left before the semester was over. Marshall's notes appear to be largely excerpts of Matthew Bacon's *Abridgement*, an English treatise that was then circulating in Virginia libraries. Charles T. Cullen,

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The state of the evidence makes it difficult to say much about the content of Wythe's curriculum at William and Mary. There are educated guesses about the texts Wythe assigned but no real sense of what he said about them. A set of lecture notes was mysteriously lost.[54] Another possible source, Wythe's extensive personal library, was dispersed after his death, and no complete catalogue of its holdings exists. Of the 490-some titles that researchers believe were part of the collection, a recent study observed they were mostly conventional for a "well-rounded gentleman," though they did include a significant number of case reports, as one would expect.[55] Wythe's collection was distinctive in one area, its Greek and Latin list, which tends to corroborate his period reputation as the state's most accomplished classical scholar.[56] Wythe's judicial opinions also contain discussions of Roman law and letters.[57] Taken together with Tazewell's recollections (the impromptu Greek translations), this suggests that classical texts formed an important part of Wythe's teaching materials. He seems to have been attracted to Roman literature at least in part because it was useful for giving a systematic exposition of the law. The case reports of the common law made a poor comparison, Wythe thought, for first they had to be "winnowed from the chaff accumulated with them," and only then "a body of civil law may be formed, equal in value with the [Roman] code, pandects, institutes, and novels."[58]

Wythe's courses at William and Mary also included mock exercises. These were an important element, not make-work, and resemble the popular essay and oratory competitions then held in academies, known as "emulation."[59] As related by John Brown, the student who had confessed to his uncle that mastering the law would take some time, the professor had recently "founded two Institutions": "a Moot Court, held monthly or oftener in the place formerly

"New Light on John Marshall's Legal Education and Admission to the Bar," *American Journal of Legal History* 16, no. 4 (1972): 348; William F. Swindler, "John Marshall's Preparation for the Bar-Some Observations on His Law Notes," *American Journal of Legal History* 11, no. 2 (1967): 208; Law Notes, Herbert Johnson, ed., *Papers of John Marshall, Volume 1* (Chapel Hill: University of North Carolina Press, 1974), 37–40.

[54] Wythe's Lost Papers, *Wythepedia*; John Tyler to Thomas Jefferson, November 12, 1810, Jefferson-Tyler Correspondence, *Wythepedia*; Thomas Jefferson to John Tyler, November 25, 1810, *Papers of Thomas Jefferson, Retirement Series, Volume 3*, 228.

[55] Linda K. Tesar, "The Library Reveals the Man: George Wythe, Legal and Classical Scholar," in "*Esteemed Bookes of Lawe" and the Legal Culture of Early Virginia*, eds. Warren M. Billings and Brent Tarter (Charlottesville: University of Virginia Press, 2017), 125.

[56] "Notes for a Biography of George Wythe," Looney, *Papers of Thomas Jefferson, Retirement Series, Volume 16*, 229. Further references are collected in Tesar, "The Library Reveals the Man," 127.

[57] Richard J. Hoffman, "Classics in the Courts of the United States, 1790–1800," *American Journal of Legal History* 22 (1978): 55, 60. On the use of ancient sources by other Virginian judges, see W. Hamilton Bryson, "The Use of Roman Law in Virginia Courts," *American Journal of Legal History* 28, no. 2 (1984): 139. On New York Chancellor James Kent's study of Roman literature, see Amalia D. Kessler, *Inventing American Exceptionalism: The Origins of American Adversarial Legal Culture, 1800–1877* (New Haven: Yale University Press, 2017), 42–43.

[58] Minor, *Decisions of Cases in Virginia by the High Court of Chancery*, 231. Jefferson took a similar view of the civil law and thought its principles might be used in Chancery. Thomas Jefferson to John Tyler, June 17, 1812, Looney, *Papers of Thomas Jefferson, Retirement Series, Volume 5*, 136.

[59] Boonshoft, *Aristocratic Education and the Making of the American Republic*, 24–25.

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occupied by the Genl Court in the Capitol," and "a Legislative Body, consisting of about 40 members."[60] Brown thought the exercises "the best amusement after severer studies" in the library and the lecture hall. But they were also "very usefull & attended with many important advantages," like helping him overcome his shyness. For the audience Wythe had assembled a distinguished group. In the moot court, Brown wrote, "Mr Wythe and the other professors sit as Judges," before a collection "of the most respectable of the Citizens." William Short also remembered pleading causes "in a simulated court, where our professor presided."[61] The student debating society, Phi Beta Kappa, also staged debates, where Short faced off against John Marshall. "The auditory at that time certainly considered my speech far superior to his," Short recalled, but observers had perhaps misjudged Marshall. Though he possessed little "general knowledge of law," and no classical education, in practice Marshall became "irresistible" at the bar, "concentrating his ideas as it were through a lens," focusing "on all the strong points" and ignoring the rest.[62]

Another student, Thomas Lee Shippen, thought the mock legislatures were particularly valuable. The professor had constructed a raised "Presidential seat," and seeing Wythe upon it put "a damp upon the spirits of the speaker." Wythe had served as clerk of the House of Burgesses (colonial predecessor to the House of Delegates) and was chairman of one of its standing committees. But despite the intimidation Shippen must have felt, he made it through his speech and was greeted with applause. Writing to his parents, he reveled in the success. It had been his "political birth," he wrote, having "delivered an oration for the first time in our grand and august Assembly."[63]

"Law as science" emerges from the evidence less as a body of substantive doctrines than norms for interpreting and presenting the law. In part this is an effect of limitations in the evidence, as I have noted, but not entirely. When writers describe Wythe as, for example, upright, pure, disinterested, "deeply learned," and possessing an "inflexible rectitude"—common remarks in our sources—it is not entirely clear whether they have his character or his legal work in mind.[64] "Disinterested" might refer to an absence of material interest (Wythe was known to decline legal fees), or to an objective legal analysis. Our sources do not seem inclined to fully separate these things. In this

[60] John Brown to William Preston, July 6, 1780, Sturz, "Glimpses of Old College Life," 79–80.

[61] William Short to Greenbury Ridgely, December 11, 1816, Shackelford, "To Practice Law," 349.

[62] William Short to Greenbury Ridgely, November 10, 1817, Shackelford, "To Practice Law," 367–68; Lyon Gardiner Tyler, "Original Records of the Phi Beta Kappa Society," *William and Mary Quarterly* 4, no. 4 (1896): 236.

[63] Thomas Lee Shippen to parents, February 4, 1784, quoted in Imogene E. Brown, *American Aristides: A Biography of George Wythe* (Rutherford: Fairleigh Dickinson University Press, 1981), 204.

[64] Henry Clay to B. B. Minor, May 3, 1851, Minor, *Decisions of Cases in Virginia by the High Court of Chancery* ("upright"); Thomas Jefferson to William DuVal, June 14, 1806, Dice Robins Anderson, "The Teacher of Jefferson and Marshall," *South Atlantic Quarterly* 15, no. 4 (October 1916): 343 ("purer"); "Notes for a Biography of George Wythe," Looney, *Papers of Thomas Jefferson, Retirement Series, Volume 16* ("disinterestedness"); Hugh Blair Grigsby, *Discourse on the Life and Character of the Hon. Littleton Waller Tazewell* (Norfolk, 1860), 18 ("deeply learned"); Andrew Burnaby, "Travels Through the Middle Settlements in North America," in *Burnaby's Travels Through North America* (London: T. Payne, 1798), 53 n. ("inflexible rectitude").

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sense, to speak of legal science was to speak of practicing law in a particular way: in a way that exhibited virtues of character like those commonly ascribed to Wythe. Wythe's "manners" were norms for a "scientific" practice of law. Training a generation of young men to research, write, speak, and deliberate like Wythe meant training them to exhibit these manners, to be learned, disinterested, and upright gentlemen. These were the sort of men that Wythe and Jefferson hoped would lead the Virginia House of Delegates. And this was why the mock legislature in which Thomas Lee Shipped had experienced a "political birth" was so important.

Tucker and the Gentlemen of the General Court

When Wythe's law clerks and students reflected on their teacher, how did they think about reforms that he attempted to carry out? Were they successful? Or did young men decide there were other, perhaps more effective ways to conduct themselves in the House of Delegates? What about before the General Court and the other Virginia courts? There is, in fact, a large body of evidence one could marshal to answer these questions. In addition to Jefferson, Madison, Tazewell, Short, Clay, Marshall, and Tucker, Wythe taught dozens of other young men who became part of the Virginia political and legal elite, including Spencer Roane, Benjamin Watkins Leigh, James Monroe, John Breckenridge, and William Branch Giles.[65] Although, of course, we cannot examine all of their careers here, several left writings that speak to legal education and its effect on Virginia politics and society.

Let us take St. George Tucker as an example. Tucker has left us a large body of writing, but I want to focus here on evidence relating to his relocation to Virginia, his education, and his early practice before the central courts in Richmond. That evidence reaffirms the importance of gentlemanly manners among legal elites at the central court bar. These men were connected through marriage and business to Virginia's planter society, and even while they sought to reform that society, they remained part of it. (Tucker himself married into such a family and was a disappointed planter.) At the same time, the evidence also reveals the General Court cautiously expanding its powers to review proceedings in the county courts before the justices of the peace, traditionally a base of planter power. And it reveals that, occasionally, in matters of great significance, a scientific exposition of the law was crucial to the successful use of those powers, enabling the state's new supreme court, the Court of Appeals, to refashion policies enacted by the members of the General Assembly. From this slice of evidence, at least, it looks as if educational reform had some bite.

Tucker clerked in Wythe's law office in the early 1770s, about a decade after Jefferson. He came to Williamsburg from Bermuda, where his father, Henry Tucker, was a successful merchant and politician. Henry had long sought to give his son a sound education in manners. At sixteen St. George was dispatched to grammar school in the Bermuda capital, where he mastered the

[65] Charles Warren, *A History of the American Bar* (Boston: Little, Brown & Co., 1911), 344. See also "Wythe the Teacher," *Wythepedia*.

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art of the genteel bow, going "down to the Ground," and which he reported using after being invited to dinner by an "extremely polite, well-bred Gentleman."[66] When Henry heard news that the College of William and Mary offered a genteel education at a fraction of the price of the English Inns of Court, he agreed to send St. George, on hopes that his son would benefit from "the Improvement and the Connections" available there.[67]

St. George's brother, Henry Jr., urged him to use his time at university to connect with Williamsburg's leading figures, which would "be serviceable at some future period."[68] This was not simply a matter of networking, but of learning to adopt their manners. "It wou'd be prudent to court in Intimacy," Henry Jr. observed, "as their conversation must be instruction and from their Manners you may be able to form your own." In a subsequent letter he cited the example of a young attorney, recently arrived in Bermuda, who had taken the genteel community by storm for his clever, entertaining conversation, his plethora of anecdotes, and the striking "Law-Gown" he donned in court.[69] But Henry Jr. had little to worry about. St. George was naturally sociable and good-humored, and he shared enough of his father's ambition to be careful about his public behavior, if not strategic.[70] About legal science, St. George's attitudes in this period are harder to discern. Although he meticulously archived his letters and notes, he never seems to have described his clerkship under Wythe.[71] This may have been because he was bored with it; the "Study of law," he wrote in 1775, was "dry and tedious."[72]

By 1786, however, after a decade spent planting tobacco and speculating in land, Tucker had become convinced that practicing law was the only way to sustain his financial independence.[73] He had been part-timing in nearby county courts for several years, but now he decided to move to Richmond to practice at the General Court bar. About a dozen lawyers were then practicing before the central courts, which included, besides the General Court, courts of

[66] St. George Tucker, "Journal of His Voyage to Bermuda," August 10, 1773, quoted in Hamilton, *The Making and Unmaking of a Revolutionary Family*, 22.

[67] Thomas Tudor Tucker to St. George Tucker, June 22, 1771, id218848, Box 1, Folder 5, Tucker–Coleman Papers, 01/Mss. 40 T79. Special Collections Research Center, Swem Library, College of William and Mary.

[68] Henry Tucker, Jr. to St. George Tucker, July 30, 1772, id219900, Box 1, Folder 10, Tucker–Coleman Papers, 01/Mss. 40 T79. Special Collections Research Center, Swem Library, College of William and Mary.

[69] Henry Tucker to St. George Tucker, November 30, 1771, id218856, Box 1, Folder 5, Tucker–Coleman Papers, 01/Mss. 40 T79. Special Collections Research Center, Swem Library, College of William and Mary; George Bascome to St. George Tucker, March 4, 1772, id219716, Box 1, Folder 8, Tucker–Coleman Papers, 01/Mss. 40 T79. Special Collections Research Center, Swem Library, College of William and Mary.

[70] See the description of Tucker's letters home in Lowe, *Murder in the Shenandoah*, 34.

[71] Hamilton, *The Making and Unmaking of a Revolutionary Family*, 28.

[72] Quoted in Hamilton, *The Making and Unmaking of a Revolutionary Family*, 43.

[73] Alan Taylor, *The Internal Enemy: Slavery and the War in Virginia, 1774–1832* (New York: Norton, 2013), 30–33; Smith, "Virginia Lawyers, 1680–1776," 91. On Tucker's disappointed ambitions to be a planter, see Hamilton, *The Making and Unmaking of a Revolutionary Family*, 3; Lowe, *Murder in the Shenandoah*, 45.

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Admiralty and Chancery, along with a supreme Court of Appeals staffed by the central court judges sitting en banc.[74] Tucker was instinctively comfortable in this company. A letter to his wife Frances from April 1786 describes attending dinner with Edmund Randolph, then the state's attorney general. "When I entered the room, the whole Court and Bar were seated in their sables," Tucker wrote, referring to their black dress. "I told the Attorney that I thought at first I had mistaken his Invitation and had got to a Funeral. I thought he did not much relish the joke."[75]

Tucker devoted his first term at the bar to taking notes on the hearings. They are an important source of our understanding of the culture of this group; they have a conservational feel that is remarkable and suggests a familiarity between members of the bench and bar. In addition to arguments from lawyers on both sides of the case, Tucker's record includes questions or suggestion by the judges, asides between the lawyers, and even occasional laughter. Usually, the discussion focuses on the elements of a common-law form of action, particularly debt, detinue, and case; the interpretation of wills and statutes; or various irregularities in the courts below.[76]

County irregularities appear to have constituted a significant portion of the hearings Tucker observed. In Bower v. McCampbell, for example, the defendant asked the General Court to issue a writ of certiorari to remove proceedings from Rockbridge County Court. The affidavit in support of the motion complained "the plaintiff was [also] Judge of the court & had great influence therein," so the defendant could not receive justice. The situation was not unheard of; indeed, the extant order books suggest the justices or family members were often parties. "The Court hesitated for some time," wrote Tucker, "conceiving the Allegation too general, but upon some Circumstances mentioned by [Judge] Fleming," certiorari was awarded.[77] Tucker does not record what the circumstances were. Review of the county courts seems to have been a delicate matter, and the counties might even return fire. In another case recorded by Tucker, heard in the Court of Appeals, the justices considered how to respond to a county court's service of process upon the General Court's Chief Justice during term time. Chancellor Wythe was incensed. He suggested summoning "the Attorney who ordered the process, the Clerk who issued it & the officer who served

[74] Charles T. Cullen, "St. George Tucker and Law in Virginia" (PhD diss., University of Virginia, 1971), 87.

[75] St. George Tucker to Francis Tucker, April 4, 1786, quoted in Cullen, "St. George Tucker and Law in Virginia," 78. The fullest account of Tucker, Frances Randolph, and their family is found in Lowe, *Murder in the Shenandoah*; and Hamilton, *The Making and Unmaking of a Revolutionary Family*.

[76] W. Hamilton Bryson, ed., *Miscellaneous Virginia Law Reports, 1784–1809* [...] (Dobbs Ferry: Oceana Publications, 1992), Introduction; Charles F. Hobson, ed., *St. George Tucker's Law Reports and Selected Papers, 1782–1825*, vol. 1 (Chapel Hill: University of North Carolina Press, 2013), General Introduction and Notebook 1; Daniel Call, *Reports of Cases Argued and Adjudged in the Court of Appeals*, vol. 3 (Richmond: Thomas Nicolson, 1801), 507–98.

[77] Bower v. McCampbell, October 27, 1786, Hobson, *St. George Tucker's Law Reports and Selected Papers, 1782–1825*, vol. 1, 143.

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it, to appear [and] shew cause why an Attachment agt. them should not issue for their Contempt of this Court."[78] Other irregularities were more mundane but showed the need for professional lawyers in the counties. One sheriff had executed judgment "with a blank for the name of the County."[79] In another case, judgment was entered before the paper commencing the suit had been filed.[80]

In other cases, the Court considered how to interpret a series of conflicting statutes, or a statute and principles of "unwritten" law, such as the common law or the law of nations. In one of the most important of these cases, Hannah v. Davis, the General Court held that, according to Tucker's notes, "no Indian brought into this Govt. from the back Country" since 1705 "could be made a slave." A law of 1670 had permitted American Indians captured in war to be made "servants" for a term of years. In 1682 the assembly eliminated the term and made captured Indians slaves for life, on grounds that they ought to be treated like those captured in Africa. Nevertheless, subsequent laws had opened trade with the Indian tribes, a practice implying peace, and thus, it was argued, a repeal of the 1682 statute. Plaintiffs in the case were descendants of Bess, who was thought to have made a slave sometime after 1705. Four lawyers presented arguments, including John Marshall for the plaintiffs, who asked the court whether it would "Countenance a flagitious Act"—that is, the illegal enslavement of Bess and her progeny after trade had been opened—rather than construe the trade laws to free them by implication. The Court of Appeals chose the latter course, and in so doing it essentially announced a policy for the state. It is worth noting that this was not the first time, nor the last, that a Virginia court declared the 1682 statute repealed.[81] But at least theoretically, as reporter Daniel Call (also a student of Wythe's) put it in another case, the interpretation of the Court of Appeals "forms a precedent, which should be adhered to as part of the law itself."[82]

On occasion the General Court considered not only amending the policy of the assembly, but nullifying it entirely. In 1782, several years before *Hannah*, Tucker had been involved in a case in which several defendants asked the judges to do just this, *Commonwealth v. Caton* or the "Case of the Prisoners,"

[78] "In the court of Appeals," November 10, 1786, Hobson, *St. George Tucker's Law Reports and Selected Papers, 1782–1825*, vol. 1, 145–46.

[79] Livingston v. Upshaw, October 27, 1786, Hobson, *St. George Tucker's Law Reports and Selected Papers, 1782–1825*, vol. 1, 143.

[80] Paterson v. Baird, April 9, 1787, Hobson, *St. George Tucker's Law Reports and Selected Papers, 1782–1825*, vol. 1, 156.

[81] Gregory Ablavsky, "Comment: Making Indians 'White': The Judicial Abolition of Native Slavery in Revolutionary Virginia and Its Racial Legacy," *University of Pennsylvania Law Review* 159 (2011): 1487–94. Professor Ablavsky identified the issue as being definitively resolved by the Court of Appeals' final disposition in *Pallas v. Hill*.

[82] Hannah & others against Davis, April 20, 1787, in Hobson, *St. George Tucker's Law Reports and Selected Papers, 1782–1825*, vol. 1, 166–68; *Tucker's Law Reports*, 1:25. For Tucker's subsequent decision in the Court of Appeals case of Hudgins v. Wright, which cites Hannah v. Davis, but rejects George Wythe's suggestion that the Declaration of Rights made every person born in Virginia free, see Hudgins v. Wrights, in William W. Hening and William Munford, eds., *Reports of Cases Argued and Determined in the Supreme Court of Appeals of Virginia* [...], vol. 1 (Flatbush: I. Riley, 1809), 137–38.

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well-known to legal historians for its role in the development of judicial review.[83] From our perspective, the case is also significant for its endorsement of thoroughly discussing and explaining the law. As we have seen, Jefferson and Wythe seem to have imagined that they would reform the General Assembly by educating its gentlemen members. *Caton* shows the fruit of a legal education in checking those members from the bench. Science is made to look like it has an institutional home. The argument was controversial and involved significant risk for the judges; six years later, in 1788, in response to the judges' remonstrance than an act of the assembly violated the state constitution, the assembly effectively stripped the Court of Appeals of its jurisdiction and transferred all its cases to a new supreme court.[84]

At the time of the *Case of the Prisoners*, Tucker was still practicing law in the county courts. He found his way into the case at the invitation of the presiding judge of the Court of Appeals, Edmund Pendleton, who had solicited outside opinions, perhaps in an effort to bolster the court's authority. On panel with Pendleton was Chancellor Wythe, Pendleton's old adversary at the General Court bar and Tucker's teacher. At the time Wythe was still serving (simultaneously) as Professor of Law and Police at William and Mary. Tucker's notes wisely reflect a sensitivity to his teacher's ambitions for educated lawyers to lead the General Assembly. While "the power properly belonging to the Judiciary Department, is," argued Tucker, "to explain the Laws of the Land as they apply to particular Cases," nevertheless, if the "Legislative shall find that Mischiefs have, or may arise from such Interpretation *it is undoubtedly their province to explain their own Acts*."[85] The pinch came when it was the constitution being explained. The constitution was, after all, another law, and judges might have to apply it to decide a case—indeed it was "the first Law by which they are bound," which a decision could not contravene without being "absolutely subversive" of government. It followed, reasoned Tucker, that if an act of the General Assembly "shall be found absolutely & irreconcilably contradictory to the Constitution," the Court of Appeals must declare it void. From such a decision the General Assembly could have no relief. It could not itself apply the constitution to the case, since it was the judicial power to decide cases. Nor could it interpret the constitution by passing a statute, as Parliament had long done, since Parliament had used this method to change the British constitution, while the General Assembly was bound by

[83] Robert J. Steinfeld, *"To Save the People from Themselves": The Emergence of American Judicial Review and the Transformation of Constitutions* (Cambridge: Cambridge University Press, 2021), 175–84, 195–208; Phillip Hamburger, *Law and Judicial Duty* (Cambridge: Harvard University Press, 2008), 487–96; William Michael Treanor, "The Case of the Prisoners and the Origins of Judicial Review," *University of Pennsylvania Law Review* 143 (1994), 494–500. The best account of the efforts to reform the county courts by expanding the jurisdiction of judges sitting on the central courts is in Roeber, *Faithful Magistrates and Republican Lawyers*, 160–202.

[84] This was reported as the "Cases of the Judges of the Court of Appeals." For the assembly's response, see Hamburger, *Law and Judicial Duty*, 571.

[85] Hobson, *St. George Tucker's Law Reports and Selected Papers, 1782–1825*, 2013, vol. 3, 1741–42 (emphasis added).

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Virginia's constitution, being "inferior or subordinate" to the body that had enacted it. In effect, concluded Tucker, the "Fundamental Principles" of American government rendered "the Judiciary Department" the "Guardian" of the constitution.[86]

What Chancellor Wythe made of his clerk's argument we cannot know, though his opinion in the case does suggest approval. It is difficult, otherwise, to explain why Wythe begins by affirming the value of education for determining the powers of government. "Among all the advantages, which have arisen to mankind, from the study of letters, and the universal diffusion of knowledge, there is none of more importance, than the tendency they have to produce discussion upon the respective rights of the sovereign and the subject; and, upon the powers which the different branches of government may exercise."[87] Wythe does not say where this discussion should occur, and presumably the matter could be taken up by the gentlemen of the General Assembly. In this context, however, Wythe agreed that the court had to give its own construction. The other departments had already weighed in, and "those[] who hold the purse and the sword" were left "differing as to the powers which each may exercise." A legal case was now before the courts, and "administering the public justice of the country" required the judges to determine whether defendants' pardon complied with restrictions set out in the constitution. There were advantages to resolving the dispute in this setting; in court, Wythe observed, "the pretensions of each party are fairly examined, their respective powers ascertained, and the boundaries of authority peaceably established."

The *Case of the Prisoners* suggests that Wythe's methods of teaching law had some effect on Virginia's central courts. Our evidence reveals that the lawyers of the bench and bar thought they should give a systematic exposition of the law as it applied to the cases there. At the same time, the *Case of the Prisoners* also suggests that Wythe's methods were, from a relatively early date, linked to proceedings in court. In court there was a prospect of, as Wythe put it, "peaceably" resolving disputes between the branches about their respective powers. Positioned between "purse" and "sword," possessing the powers and interests of neither branch, but obligated to do justice, the court could be made to appear like a kind of neutral arbiter. The image pushed the listener to associate legal science with judicial proceedings. By 1793, St. George Tucker, now on the General Court bench himself, would write that "the duty of expounding must be exclusively vested in the judiciary," omitting entirely what he had emphasized eleven years earlier: the right of the legislature to explain its own acts.[88] "Expounding" the law—giving a systematic and

[86] Hobson, *St. George Tucker's Law Reports and Selected Papers, 1782–1825*, vol. 3, 1744–45. Tucker calls the Virginia Convention that enacted the 1776 constitution a "political Legislature," and contrasts it with the General Assembly, a "civil Legislature."

[87] Case of the Prisoners, *Reports of Cases Argued and Decided in the Court of Appeals of Virginia*, 7–8.

[88] Kamper v. Hawkins, 1 Va. Cas. 20, 78–79 (Va. 1793).

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exhaustive explanation of it—looked increasingly like a dimension of judicial power.[89]

The Limits of Legal Science

At the same time, there were limits to the effectiveness of legal science, even within Virginia's courts, and taking stock of these will show how legal "science" was intertwined with a particular vision for Virginia society. We should begin again with the Virginian avatar of legal science, George Wythe. The praise lavished on Wythe in our sources tends to obscure that his vision for legal education at William and Mary was not universally shared—perhaps not even widely shared. It was tied to a particular method of practicing law, which, in truth, had long been confined in Virginia to a small group of lawyers working in the central courts. These men actively maintained the boundaries that insulated them. As Jefferson advised Wythe, if Virginia was to develop its "men of science" into great judges, it would need to continue excluding county-court lawyers from the central-court bar, or "an inundation of insects" would surely "come from the county courts and consume the harvest."[90]

Even at the bar of the central courts, Wythe himself did not always find success applying his scientific methods. As Henry Clay conceded many years later, Pendleton had often prevailed against him. Pendleton was "prompt to meet all the exigencies which would arise in the conduct of a cause in court," but Wythe was not so quick.[91] He was, perhaps, less an advocate than a scholar. One bit of faint praise described him in court as "always able, ... and at times even eloquent."[92] Wythe's manners, though practiced, showed something like a scholar's reserve. Littleton Waller Tazewell surmised that his tutor's "fondness for study kept him much secluded from general observation," creating an "excessive modesty." In contrast, he admitted, Pendleton was "more courtly."[93] Views like these percolated in tall tales about the Pendleton–Wythe rivalry. According to one, Virginia's last royal governor, Lord Dunmore, quipped to Pendleton that he had no need to wait for co-counsel, since he alone could defeat both opposing counsel, Wythe and Robert Carter Nicholas.[94] There are other stories, as well. They make it unreasonable simply to take at face value Jefferson's claim that Wythe held "first place" at the Virginia bar "without competition," and similar remarks.[95]

[89] Matthew Steilen, "Judicial Review and Non-Enforcement at the Founding," *University of Pennsylvania Journal of Constitutional Law* 17 (2014): 556–59. For an argument that "expounding" had long been a duty attached to the judicial office, see Hamburger, *Law and Judicial Duty*, 219–20.

[90] Thomas Jefferson to George Wythe, March 1, 1779, Julian P. Boyd, ed., *The Papers of Thomas Jefferson, Volume 2: January 1777 to June 1779* (Princeton: Princeton University Press, 1950), 235.

[91] Henry Clay to B. B. Minor, May 3, 1851, Minor, *Decisions of Cases in Virginia by the High Court of Chancery*, xxxiv.

[92] Grigsby, *The Virginia Convention of 1776*, 121.

[93] Quoted in Brown, *American Aristides*, 70.

[94] "With your lordship's assistance?" Wythe is said to have retorted. Lyon Gardiner Tyler, "George Wythe, 1726–1806," in *Great American Lawyers*, vol. 1, ed. William Draper Lewis (Philadelphia: John C. Winston, 1907), 74.

[95] Thomas Jefferson to Ralph Izard, July 17, 1788, Julian P. Boyd, ed., *Papers of Thomas Jefferson, Volume 13: March–7 October 1788* (Princeton: Princeton University Press, 1956), 372. For similar

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Not all of Wythe's limitations were attributable to scholarly seclusion. Some were surely due to shortcomings in legal science itself. A complete and systematic presentation of the law was not always necessary or even persuasive. Our records suggest, nonetheless, that for the gentlemen of the General Court, "the more citations one found" in a lawyer's brief, "the more weight his brief held."[96] The practice looks a bit like compulsion. St. George Tucker confessed a tendency to "have been sometimes too prolix," and was described by a law reporter as giving opinions "sometimes a little tinctured with technicality."[97] If these things happened only "sometimes," it was evidently often enough for Tucker to develop a reputation for piling on authorities. Disregarding a movement in the Court of Appeals toward unanimous opinions, Tucker began to prepare his own opinions ahead of conference, sharing them with the other judges only once they were complete, when they must have been received as fait accompli. In one infamous episode, an exasperated colleague declared that he would not listen to another of Tucker's "long, tedious, and ridiculous opinions," tearing the paper from Tucker's hands and throwing it on the floor.[98] The antagonist was Spencer Roane, also a former student of Wythe's, and though his conflict with Tucker may best be understood as a personal struggle for control of the Court of Appeals, the language of his outburst is revealing. Around the same time, another judicial colleague complained of "the unfortunate practice of quoting lengthy and numerous British cases," which he thought bogged down the Court of Appeals with "reconciling absurd and contradictory opinions of foreign judges."[99] Of the many allusions to the ancient world in Wythe's Chancery opinions, one modern scholar has observed that their purpose is often obscure—except, perhaps, as a showcase of the judge's knowledge.[100]

Even Wythe's students, as deeply as they admired their teacher, expressed some doubt about his methods of teaching and practice. We have already encountered Tazewell's frustrations with his Greek lessons. Jefferson's nephew, Peter Carr, also thought the professor spent too much time on "the dead

remarks from Jefferson about Wythe, made after Wythe's death, see "Notes for a Biography of George Wythe," Looney, *Papers of Thomas Jefferson, Retirement Series, Volume 16*, 229–32.

[96] Cullen, "St. George Tucker and Law in Virginia," 88.

[97] St. George Tucker, "Draught of a Letter Intended for Richard Rush," Geo. P. Coleman, ed., "Randolph and Tucker Letters," *Virginia Magazine of History and Biography* 42, no. 3 (1934): 220; Call, *Reports of Cases Argued and Decided in the Court of Appeals of Virginia*, vol. 4, xxvi–xvix.

[98] Hobson, *St. George Tucker's Law Reports and Selected Papers, 1782–1825*, vol. 1, 89–90, 101; Timothy S. Huebner, *The Southern Judicial Tradition: State Judges and Sectional Distinctiveness, 1790–1890* (Athens: University of Georgia Press, 1999), 19–20; F. Thornton Miller, *Juries and Judges versus the Law: Virginia's Provincial Legal Perspective, 1783–1828* (Charlottesville: University of Virginia Press, 1994), 69–73.

[99] This colleague was John Tyler, who preceded Tucker on the General Court and the United States District Court. Lyon G. Tyler, *The Letters and Times of the Tylers*, vol. 1 (Richmond: Whittet & Shepperson, 1884), 260.

[100] Hoffman, "Classics in the Courts of the United States, 1790–1800," 65. The practice was not unique to Wythe; as legal historian Amalia Kessler has described, early American chancellors thought "Roman civil law" to be an important model. Kessler, *Inventing American Exceptionalism*, 40–41.

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languages." They were not entirely useless, he conceded, but this "mode of education"—paying the ancient languages "strict and constant attention"—was "a measure fallen into disuse; and for my own part I think not entirely without reason."[101] Another writer recalled remarking to "an eminent lawyer"—who, from the sound of it, may have been Wythe—that he saw

> no good reason in a government like ours for retaining Latin and French phrazes in our laws .... To which he hastily replied, "Good God, sir, if all this was done, law would no longer be a science." ... I was at once forcibly struck with the idea that this class of men were dangerous and designing characters, and that ever artifice would be resorted to by them, to keep the mass of people in darkness and ignorance.[102]

William Short also reflected critically on Wythe's curriculum. Years into retirement, after a lengthy and distinguished public career, Short still felt the sting of embarrassment at his ignorance of basic procedure when he began his practice in the county courts. "Scientific lawyers," he thought, were raised "looking down as derogatory on the county," devoting their time instead to a study of general principles.[103] But this did not serve their clients' interests. Even "a man who has passed with éclat through our Universities," Short observed, will "yield the palm to some country clown, on whom his pride & legal opportunities shall make him look down with scorn, but on whom clients ... will look up to as their protector."[104]

The testimonials we have from Wythe's former students are full of praise, but they must be read in context. There were of course other students at William and Mary during the decade that Wythe taught there, and we should think of him as engaged in a competition for influence over this broader class of young gentlemen. Here, it must be said, much of the evidence implies a losing battle. During Wythe's tenure the college was repeatedly in crisis, struggling with student riots and a budgetary crunch triggered by the loss of its endowment and declining enrollments.[105] Other American schools were also facing riots, but efforts to discipline students at William and Mary were complicated by a genteel culture built around independence and honor, and these complications put a damper on plans to reform Virginia society through school. Fathers intervened to protect sons, and uncles their nephews, touching off a series of contests between faculty and trustees, known as "visitors," who tended to align with powerful parents and did not hesitate to fire professors.[106]

[101] Julian P. Boyd, ed., *Papers of Thomas Jefferson, Volume 15: 27 March to 30 November 1789 with Supplement, 19 October 1772 to 7 February 1790* (Princeton: Princeton University Press, 1958), 156.

[102] Thomas Jones, *An Address to the People of Virginia: in Two Parts. Shewing the Danger Arising from the Unbounded Influence of Lawyers ...* (Richmond, 1807), 22–23.

[103] William Short to Greenbury Ridgely, December 11, 1816, Shackelford, "To Practice Law" 349–50.

[104] William Short to Greenbury Ridgely, January 30, 1817, Shackelford, "To Practice Law" 352.

[105] Taylor, *Thomas Jefferson's Education*, 35–42.

[106] O'Shaughnessy, *The Illimitable Freedom of the Human Mind*, 214–20; Taylor, *Thomas Jefferson's Education*, 24–31.

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Students refused to inform on one another, or even to tolerate public accusations of misbehavior, which they might take as an affront to their honor.[107] They resisted punishment as a mark of subordination fit for slaves, and some insisted on demonstrating their own mastery by physically abusing the enslaved men and women working at the college. The foremost concern of many young men seems to have been their manliness. This made them acutely sensitive to words; Tucker's stepson, John Randolph, was challenged to a duel when he refused to apologize for publicly correcting the pronunciation of another student at William and Mary. Randolph shot his opponent, though fortunately the boy survived.[108] Some leading Virginians criticized dueling, but for a young man embroiled in conflict it could be difficult to avoid, at least if he wanted to preserve his honor and remain a candidate for public office.[109] These developments did not bode well for the culture of learned public debate that Wythe had been trying to foster in his students.[110] Indeed, by the 1830s, slavery would be nearly impossible to discuss in many Virginia colleges and, soon thereafter, in its assembly as well.

It was their peers, not their professors, that students sought most to impress.[111] In a letter to a favorite grandson, Jefferson recalled his own flirtations with "bad company" as a young man. Luckily, he soon became acquainted "with some characters of very high standing," and, when "under temptations & difficulties, I would ask myself what would D^{r} Small, mr Wythe, Peyton Randolph do in this situation? what course in it will ensure me their approbation?"[112] The advice was given to steer Carr away from the more usual course, as Jefferson's own admission implies.

Most collegians were drawn to men like James Innes. Innes attended William and Mary about a decade after Jefferson, where he was by all measures a

[107] Kenneth S. Greenberg, *Honor and Slavery: Lies, Duels, Noses, Masks, Dressing as a Woman, Gifts, Strangers, Humanitarianism, Death, Slave Rebellions, the Proslavery Argument, Baseball, Hunting, and Gambling in the Old South* (Princeton: Princeton University Press, 1996), 7–12; Bertram Wyatt-Brown, *Southern Honor: Ethics and Behavior in the Old South* (Oxford: Oxford University Press, 2007), 57.

[108] Taylor, *Thomas Jefferson's Education*, 75–76.

[109] See Joanne B. Freeman, *The Field of Blood: Violence in Congress and the Road to Civil War* (New York: Farrar, Straus and Giroux, 2018), 76.

[110] Taylor, *Thomas Jefferson's Education*, 79–80; Jay Fliegelman, *Declaring Independence: Jefferson, Natural Language & the Culture of Performance* (Stanford: Stanford University Press, 1993), 28–29, 34 (drawing a connection between the growing interest in rhetoric and parliamentary governance); Peter J. Aschenbrenner, *British and American Foundings of Parliamentary Science, 1774-1801* (New York: Routledge, 2018), 79 (noting Jefferson's understanding that the "potential for violence among members was always present in the legislature").

[111] Lorri Glover, *Southern Sons: Becoming Men in the New Nation* (Baltimore: Johns Hopkins Press, 2007), 59–63, 65–72; Jon L. Wakelyn, "Antebellum College Life and the Relations Between Fathers and Sons," in *The Web of Southern Social Relations: Women, Family, and Education*, eds. Jon L. Wakelyn, R. Frank Saunders, and Walter J. Fraser (Athens: University of Georgia Press, 1985), 118.

[112] Thomas Jefferson to Thomas Jefferson Randolph, November 24, 1808, Manuscript/Mixed Material, Library of Congress, https://www.loc.gov/item/mtjbib019337/. An earlier letter to nephew Peter Carr advised the young man to ask "how you would act were all the world looking at you." Thomas Jefferson to Peter Carr, August 19, 1785, Boyd, *Papers of Thomas Jefferson, Volume 8: 25 February to 31 October 1785*, 405–8.

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capable student. After completing his bachelor's degree (still unusual in this period), Innes was appointed "head usher" and began to clerk in Wythe's law office. At the same time, however, he took a leadership role in a student society, the "F.H.C. Society," sometimes called the "Flat Hat Club," which was devoted to socializing and partying.[113] Innes formed a close bond with another of F.H.C.'s early members, St. George Tucker. A letter from Innes to Tucker written in the fall of 1773, when Innes was clerking and Tucker was studying at William and Mary, pokes fun at the notion of "science"—suggesting it was a term Wythe often repeated and that students rolled their eyes at. "[R]epair hither to the temple of Mirth and Hilarity—I wd have said science, too, had I not thought you would have laughd at me."[114] Innes signed off "half Drunk." As the Revolution opened in Virginia he became a leader of the students. Innes was already known for conflicts with the faculty over his practice of "Beating & Punishing the Negroes of the College when he thinks them in fault," and during the war threatened to "cane" a militia captain dispatched by the Governor to retrieve two cannon he had stolen to fire during a party.[115] His temperament blended with a whiggish politics in a way that was attractive to the student body.[116] Here was a model of manhood, mastery, and independence that would prove far more attractive to young gentlemen than the one provided by George Wythe, with his deep and elegant bows and his arcane legal "science." In the 1780s, when Noah Webster (another school reformer) visited William and Mary to deliver a series of lectures, he found only six students in attendance. "Virginians," he concluded, "have much pride, little money on hand, great contempt for Northern people, & amazing fondness for Dissipation."[117]

Innes would have become an important leader in Virginia had he not died early. In 1780 he began the first of several terms in the Virginia House of Delegates, where he joined with other lawyers. The profession proved influential on issues like reform of the county-court system and the handling of planter debt. A pamphlet published in Richmond in 1807 complained about lawyers' "growing and dangerous influence ... in our legislative councils."[118] They sought to "monopolize representation," and practiced "a species of eloquence that dazzles and deludes the understanding and imposes upon the judgment of the multitude." Even Jefferson was prepared to admit that lawyers had, "by their numbers in the public councils ..., wrested from the public hand

[113] Jane Carson, *James Innes and His Brothers of the F.H.C.* (Williamsburg: Colonial Williamsburg, 1965); "The Flat Hat Club," *William and Mary Quarterly* 25, no. 3 (1917): 161–64.

[114] James Innes to St. George Tucker, November 11, 1773, id221468, Box 2, Folder 5, Tucker–Coleman Papers, 01/Mss. 40 T79, Special Collections Research Center, Swem Library, College of William and Mary.

[115] Quoted in Taylor, *Thomas Jefferson's Education*, 35–36, 39–40.

[116] Scott Taylor Morris, "Southern Enlightenment: Reform and Progress in Jefferson's Virginia" (PhD diss., Washington University, 2014), 50.

[117] Quoted in J. E. Morpurgo, *Their Majesties' Royall Colledge: William and Mary in the Seventeenth and Eighteenth Centuries* (Williamsburg: College of William and Mary, 1976), 212.

[118] Jones, *An Address to the People of Virginia*, 1, 6, 13.

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the direction of the pruning knife," though he thought their influence generally republican.[119] To other men, however, the mass of lawyers in the General Assembly seemed primarily interested in smoothing its own way. The Richmond pamphleteer charged them with seeking to advance the profession's interest in lawsuits, particularly for the recovery of debt, an interest "distinct from and directly opposed to that of the community at large."[120] Jefferson also expressed frustration at the failure "to bring forth the wisdom of our country into it's councils," using "country" to refer to Virginia, though lawyers then made up roughly half the House of Delegates.[121] According to William Wirt, who had served as clerk in the House of Delegates, one was more likely to hear a "puerile rant, or tedious and disgusting inanity" than "general knowledge" and "close and solid thinking."[122] Few representatives were scientific lawyers, then, despite their education.

The program at William and Mary had proved a failure. Wythe resigned his chair in frustration in 1789.[123] In a letter to William Short, Jefferson predicted that unless Wythe was quickly rehired, "it is over with the college."[124] Wythe would not return. His replacement, St. George Tucker, was forced to accommodate himself to what was in truth a deteriorating environment. Tucker was repeatedly targeted by student rioters for his efforts at discipline, and finally quit when college trustees ordered him to perform bed checks on students.[125] Wythe departed for Richmond, ostensibly to focus on his work as the state's Chancellor, and there he embarked on the project of building a body of learned chancery opinions. In 1806, however, he was murdered by a nephew, George Wythe Sweeney, apparently seeking his inheritance to pay off gambling debts.[126] Sweeney also killed Michael Brown, the young man of mixed race who was living with Wythe and a beneficiary of his will.

Wythe's murder was deeply traumatic for the legal community in Richmond. It overhangs much of our evidence about him, who in later remembrances is almost made to symbolize the aspiration for reforming Virginia society through education and law. Into Wythe men seem to have poured their nostalgia for a time when the prospect of liberal reform had been live. But Wythe's "legal science" had faced important social limits from the beginning. As reformers soon perceived, the rising generation seemed unwilling to do the hard work that science required, and too proud and sensitive to sustain the public criticism that

[119] Thomas Jefferson to Benjamin Austin, January 9, 1816, J. Jefferson Looney, ed., *Papers of Thomas Jefferson, Retirement Series, Volume 9: September 1815 to April 1816* (Princeton: Princeton University Press, 2012), 333–37.

[120] Jones, *An Address to the People of Virginia*, 5.

[121] Thomas Jefferson to Thomas Cooper, March 9, 1822, Library of Congress, Manuscript/Mixed Material, https://www.loc.gov/item/mtjbib024316/.

[122] [William Wirt], *The Letters of the British Spy*, 3rd ed. (Richmond: Samuel Pleasants, 1805), 34–35.

[123] Wythe's letter of resignation is quoted in Brown, *American Aristides*, 222–23.

[124] Thomas Jefferson to Ralph Izard, July 17, 1788, Boyd, *Papers of Thomas Jefferson, Volume 13: March–7 October 1788*, 372.

[125] Taylor, *Thomas Jefferson's Education*, 90–91.

[126] The best account of Wythe's murder, including some speculation beyond the reach of our evidence, can be found in Boyd, *The Murder of George Wythe*.

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effective legislatures required. Jefferson remained convinced that a scientific education was essential for republicanism, though his University of Virginia would struggle with many of the same social problems.[127]

There was retrenchment, as well, in Virginia attitudes about slavery—a matter Jefferson had formerly connected to educational reform, in hopes that the next generation of enlightened leaders would be able to eliminate it. In 1820, in the aftermath of the Missouri Crisis, Jefferson expressed worry that the efforts of his generation "to acquire self government and happiness to their country, is to be thrown away by the unwise and unworthy passions of their sons," in apparent reference to their growing sectional attachment to slavery.[128] Around the same time, however, he complained that Virginia's young men, dispatched to the North for a costly college education, were "imbibing opinions and principles in discord with those of their own country."[129] A letter to John Taylor of Caroline, perhaps the period's preeminent spokesman for southern rights on the question of slavery, declared that northern colleges "are no longer proper for Southern and Western students."[130] Some scholars have concluded, not without reason, that Jefferson envisioned the University of Virginia as a bastion for the defense of slavery and the racism and violence with which it was intertwined. Jefferson, as is well known, freed only a few of his own slaves (mostly his children with Sally Hemings), and, according to a recent, sympathetic study, "could not imagine an interracial society" and "took little interest in the education of African Americans" after 1796.[131] George Wythe, in contrast, freed his slaves during his lifetime, and had taken Michael Brown as a pupil in his home at the time they both were murdered. By 1820, the hope that a generation of liberally educated gentlemen would eliminate slavery in Virginia was dashed; instead, after 1830, they would choose to entrench it.

A Republican Assembly

If the program at William and Mary did not accomplish reformers' aims, did it fail to have any effect at all? This would be surprising; the assembly was, after all, full of its graduates. If we study proceedings there for evidence of the role legal education did play, what jumps out is how law provided a vocabulary and a method for conducting partisan political dispute. Deliberations could be strikingly sophisticated and full of legal argument. They were perhaps less intimate

[127] See O'Shaughnessy, *The Illimitable Freedom of the Human Mind*, 41–57.

[128] Thomas Jefferson to John Holmes, April 22, 1820, J. Jefferson Looney, ed., *Papers of Thomas Jefferson, Retirement Series, Volume 15: 1 September 1819 to 31 May 1820* (Princeton: Princeton University Press, 2018), 550–51.

[129] Thomas Jefferson to James Breckinridge, February 15, 1821, Looney, *Papers of Thomas Jefferson, Retirement Series, Volume 16*, 611–13.

[130] Thomas Jefferson to John Taylor, February 14, 1820, Looney, *Papers of Thomas Jefferson, Retirement Series, Volume 3*, 611.

[131] O'Shaughnessy, *The Illimitable Freedom of the Human Mind*, 198, 206. O'Shaughnessy does not read Jefferson's letters on the need for a southern university as evidence of his intention to establish a pro-slavery institution. *Ibid.*, 105–6. For a contrary interpretation of the evidence, see Glover, *Southern Sons*, 52–56.

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and conversational than Jefferson had imagined, at least on the most momentous occasions, when the legislative journals record lengthy oratories by leading men, a form that may have been better suited to print.[132] Naturally, these methods did not have a party persuasion; gentleman lawyers on both sides of the party divide could make use of their education against opponents. Louis Hartz has described how defenders of slavery in the antebellum South began to curate a kind of "reactionary Enlightenment": a conservative vision for society that emphasized what were Enlightenment values, like security of property, autonomy, and order. In the same fashion they made use of the reactionary potential in elite legal culture.[133] Both parties employed legal science to construct a case for the power of institutions they dominated.

It was the application of legal methods and ideas to partisan conflict that made the 1790s so generative for emerging doctrines of federalism and separation of powers. As historians have long observed, partisanship in the period was characterized not merely by policy disputes, but by "a complete distrust of the motives and integrity, the honesty and intentions of one's political opponents."[134] Distrust tended to elevate disagreements about policy into matters of principle. As to Alexander Hamilton's proposal for a national bank, Jefferson observed, there "was not merely a speculative difference. [Hamilton's] system flowed from principles adverse to liberty, and was calculated to undermine and demolish the republic, by creating an influence of his department over the members of the legislature."[135] A fear that one's opponents were conspiring to destroy the government produced mutual intolerance and encouraged partisans to describe each other in inflammatory language. The conservative French nobleman, Francois de la Rouchefoucauld Liancort, who was then touring the United States (having himself fled revolution in France), observed how "[p]olitical intolerance proceeded to the extreme," so that "the most disgraceful and hateful appellations were mutually given by the individuals of the parties to each other."[136] It was in this vein that Thomas Paine wrote to George Washington to inquire, he said, "whether you are an apostate or an imposter; whether you have abandoned good principles, or whether you ever had any."[137] Anyone could be reduced to a stereotypical

[132] Legislative debates were published in Virginia newspapers and became an important part of the period print culture. See, e.g., Morris, "Southern Enlightenment," 166.

[133] Louis Hartz, "The Reactionary Enlightenment: Southern Political Thought before the Civil War," *Western Political Quarterly* 5, no. 1 (1952), 31–39. For reactionary Enlightenment as a frame for interpreting Virginia society, see Morris, "Southern Enlightenment," 1–20.

[134] John R. Howe, Jr., "Republican Thought and Political Violence of the 1790s," *American Quarterly* 19, no. 2 (1967): 149.

[135] Thomas Jefferson to George Washington, September 9, 1792, John Catanzariti, ed., *Papers of Thomas Jefferson, Volume 24: 1 June–31 December 1792* (Princeton: Princeton University Press, 1990), 351–60.

[136] Duke de la Rouchefoulcauld Liancourt, *Travels through the United States of North America*, 2nd ed., vol. 4 (London: R. Phillips, 1800), 330–31.

[137] Thomas Paine to George Washington, July 30, 1796, David R. Hoth and William M. Ferraro, eds., *Papers of George Washington, Presidential Series, Volume 20: 1 April–21 September 1796* (Charlottesville: University of Virginia Press, 2019), 515–41.

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villain, a habit of argument that tended to make the issue of constitutional enforcement seem urgent.

It was in this atmosphere that the members of the Virginia General Assembly sought to establish a robust role for themselves within the new federal system. Their sensitivity to the question of constitutional enforcement is detectable from a relatively early date. In January 1790, Hamilton delivered his *Report on Public Credit* to the U.S. House of Representatives, advocating that the national government assume public war debt. The report observed that "[i]f all the public creditors receive their dues from one source, distributed with an equal hand, their interest will be the same."[138] In Virginia this was perceived, according to John Marshall, who was then serving in the House of Delegates, as an effort to "bestow[] on the [federal] government an artificial strength, by the creation of a monied interest subservient to its will."[139] A federal act assuming state debts narrowly passed Congress in the summer of 1790, but when the Virginia House of Delegates convened for its session in October, the members were still angry and they turned to the act almost immediately. It was, concluded the Committee of the Whole House, "repugnant to the Constitution of the United States," which did not "expressly grant" a power to assume debts.[140] A special committee was directed to prepare a memorial for communicating the House's judgment to Congress. Historians have justly characterized the memorial as an expression of whiggish "country" opposition politics.[141] But the memorial also offered a theory of the role of the General Assembly in enforcing constitutional limits. Its members were the "guardians ... of the rights and interests of their constituents, ... sentinels placed by them over the ministers of the foederal government, to shield it from their encroachments, or at least to sound the alarm when it is threatened with invasion." The first draft of the memorial concluded that the "consent of the State Legislatures ought to be obtained, before the act can assume a constitutional form," but in later versions this language was struck in favor of a recommendation that Congress "revise and amend" the act.[142]

The difficulty with recruiting the assembly for this role was the appearance it engendered of unlawful resistance to the national government—or even of a scheme to foment insurrection. Violence was indeed a possibility. In 1794 resistance to the nation's first excise taxes, which targeted spirits, matured into an

[138] "Report Relative to a Provision for the Support of Public Credit," January 9, 1790, *The Papers of Alexander Hamilton*, vol. 6, *December 1789–August 1790*, ed. Harold C. Syrett (New York: Columbia University Press, 1962), 51, 80.

[139] John Marshall, *The Life of George Washington* [...], vol. 2 (Philadelphia: James Crissy, 1832), 192; Albert J. Beveridge, *The Life of John Marshall, Volume II: Politician, Diplomatist, Statesman, 1789–1801* (Boston: Houghton Mifflin, 1944), 54–55.

[140] *Journal of the House of Delegates of the Commonwealth of Virginia Begun ... [October 1790]* (Richmond: John Dixon, 1791), 36.

[141] Miller, *Juries and Judges versus the Law*, 48; Lance Banning, *The Jeffersonian Persuasion: Evolution of a Party Ideology* (Ithaca: Cornell University Press, 1978), 136, 150–52.

[142] William Waller Hening, ed., *Statutes at Large of Virginia*, vol. 13 (Philadelphia: Thomas Desilver, 1823), 234–35, 237–39; Ames, *State Documents on Federal Relations*, 5–7; *Journal of the House of Delegates of the Commonwealth of Virginia Begun .... [October 1790]*, 81–82.

insurrection in western Pennsylvania and had to be put down by force. On the other hand, members of Virginia's General Assembly could point to a long history of lawfully enforcing constitutional limits. The colonial predecessor of the House of Delegates, the House of Burgesses, had received petitions and acted on grievances for many decades.[143] In the 1760s it was the Burgesses that assumed leadership of the resistance to imperial tax policies, morphing, sometime later, into a "provincial convention," which would manage the war, govern the state, and write and adopt Virginia's first constitution.[144] The House of Delegates continued to receive petitions, and its Committee of Propositions and Grievances remained perhaps the most important of the five standing committees.[145] In 1797, just prior to enactment of the Alien and Sedition Acts, Jefferson himself petitioned the House to complain of a local grand jury presentment against a state representative for circulating a letter criticizing the Adams administration, which sought, the jury had alleged, "to increase or produce a foreign influence ruinous to the peace."[146] Jefferson asked for redress but did not suggest a particular remedy. What, in this case, could the House of Delegates do?

A variety of answers to this question were aired in the years that followed. One that gained an audience in the General Assembly was that it alone was suited to gather public opinion and communicate it to Congress. "Force was not thought of by any one," maintained John Mercer of Spotsylvania, speaking in the Committee of the Whole House in defense of what would later become known as the "Virginia Resolutions." Mercer's occupation is not known, but his father, also John Mercer, possessed one of the greatest libraries in colonial Virginia and had been a leading lawyer, as were several brothers, all of whom were educated at William and Mary. As Mercer described the Delegates' aim, "We do not wish ... to be the *arm* of the people's discontent, but to use their *voice*." He thought "legislatures" well suited to this role, "possessing all the organs of civil power, and confidence of a people," as well as the means to communicate with one another. This, argued Mercer, was the real purpose of the Resolution: to "obtain a similar declaration of opinion" from the other states, and "thereby to obtain a repeal." This was the sense in which state governments could be said to enjoy a right "to interfere" with federal law. That differed from the aim imputed by the Resolution's opponents, who accused its authors of a design "to rouse the people to resistance."[147]

[143] Brent Tarter, *The Grandees of Government: The Origins and Persistence of Undemocratic Values in Virginia* (Charlottesville: University of Virginia Press, 2013), 17, 127–35.

[144] John E. Selby, *The Revolution in Virginia, 1775–1783* (Williamsburg: Colonial Williamsburg, 1988), 45–54; Charles Ramsdell Lingley, *The Transition in Virginia from Colony to Commonwealth, vol. 36, Studies in History, Economics and Public Law* (New York: Columbia University Press, 1910), 21, 83–84, 110–57.

[145] Beeman, *The Old Dominion and the New Nation, 1788–1801*, 44; Charles Sackett Sydnor, *American Revolutionaries in the Making: Political Practices in Washington's Virginia* (New York: The Free Press, 1952), 98.

[146] Revised Petition to the Virginia House of Delegates, August 7–September 7, 1797, Barbara B. Oberg, ed., *Papers of Thomas Jeferson, Volume 29: 1 March 1796–31 December 1797* (Princeton: Princeton University Press, 2002), 499–504.

[147] Randolph, *The Virginia Report of 1799–1800*, 41–44.

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What was public opinion of the constitutionality of the Alien and Sedition Acts? If there was one, it is hard to detect in the debates. Mercer proffered a lawyerly construction of the allocation of power over foreign affairs under the Constitution, citing *The Federalist*, the records of the Virginia ratifying convention, the text of the Necessary and Proper Clause, and the Tenth Amendment, among other sources. He denied the Constitution could be read to grant Congress a power to expel the subjects of foreign countries at peace with the United States; or that treatises by Vattel and Blackstone could be read to describe an inherent power in the national government to expel strangers as a concomitant of sovereignty. Over the course of debate in the next several days, a key question crystallized: Whether the Constitution granted Congress an implied, "general" power over foreign affairs, or only "special," enumerated powers. The handling of this question by several delegates demonstrated powerfully how legal "science" might be used to interpret the Constitution. Listening in the assembly were a number of Wythe's former students, including the committee chair, James Breckenridge, and Littleton Waller Tazewell, the sometime Greek translator.[148]

Though most of these arguments had little obvious relation to popular sentiment, partisans hotly contested which institution it was that delivered the real sense of "the people." Federalists in Congress defended their own, more liberal interpretation of federal power by observing that the Constitution contained only "principles which are to govern in making laws," leaving members to "exercise our judgments, and on every occasion to decide according to an honest conviction of its true meaning."[149] Federalists in the Virginia House of Delegates urged that the judgment of Congress about the scope of its power foreclosed the matter, since its houses represented both "the whole people, and the respective state sovereignties."[150] Republicans in the House nonetheless impeached that judgment by describing it as essentially self-dealing. There was "a spirit … manifested by the Federal Government, to enlarge its powers by forced constructions of the constitutional charter which defines them." Even here learned law played a crucial role; what made the constructions "forced" was their violation of a legal maxim, which prohibited "expound[ing] certain general phrases … so as to destroy the meaning and effect of particular enumeration, which necessarily explains and limits the general phrases."[151]

According to Jefferson in the Kentucky Resolutions, passed around the same time, the problem was deeper than this. Had the federal government been "made the exclusive or final *judge* of the extent of the powers delegated to itself," "that would have made its discretion, and not the Constitution, the measure of its powers." Constitutionalism required an external judge. Or, as

[148] Randolph, *The Virginia Report of 1799–1800*, 160.

[149] Fisher Ames in the U.S. House of Representatives, February 3, 1791, quoted in H. Jefferson Powell, "The Political Grammar of Early Constitutional Law," *North Carolina Law Review* 71 (1993): 998–99.

[150] Randolph, *The Virginia Report of 1799–1800*, 30.

[151] On the use of lawyer's techniques by Republicans during these debates, see Powell, "The Principles of '98," 730.

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in "other cases of compact among parties having no common judge, each party has an equal right to judge for itself." Famously enough, Kentucky deleted Jefferson's proposed remedy that states "nullify" unconstitutional federal laws, but this did not prevent a widespread perception, voiced in the Rhode Island Counter-Resolution, that the authority to judge constitutionality asserted by Virginia's legislature would be "hazarding an interruption of the peace of the states by civil discord, in case of a diversity of opinions among the state legislatures."[152]

A Federalist Court

The learned character of deliberations in the General Assembly did not spare it from criticism for its resolutions against the Alien and Sedition Acts. The charge that the assembly was inviting popular resistance was hard to shake. The language of the Resolutions was extreme, as was typical for the period, but which again reinforced a sense that the assembly was looking for trouble. The federal government's exercise of implied power was, it read, "dangerous," formed part of a conspiratorial "design" to expand its power, and had already produced "alarming infractions" of the Constitution. The profession, at the Resolutions' end, of a desire for "perpetuating the union" seemed, in comparison, somewhat forced—especially as it was joined to a caveat, that the union must be under "the most scrupulous fidelity to the Constitution" as Virginia had interpreted it.[153]

Hostile rhetoric was connected to hostile resistance and to physical violence. The example of the Whiskey Rebellion, cited earlier, should not lead us to conclude that the specter of violence was merely out-of-doors. It was indoors as well, and especially in the legislature, where, as one commentator reminds us, "[t]he potential for violence among members was always present," and significant enough that Jefferson's 1801 *Manual of Parliamentary Practice* warned against it.[154] Jefferson's model rules for parliamentary proceedings were designed to facilitate a collaborative process of deliberating and amending proposed bills, in which, as he framed it, "friends of the paragraph" might address the objections voiced against a bit of language. But deliberations were increasingly at risk of suddenly turning personal, rather than remaining focused on language or policy. A reader of the newsprint reports of the General Assembly's 1831 debate over slave emancipation described them as "reckless discussions," in which "the *dissolution* of the *Union* is spoken of, and many other monstrous opinions & acts present an

[152] Resolutions of Virginia of December 21, 1798, Resolutions of the Kentucky Legislature, and [Counter-Resolution of the] State of Rhode Island and Providence Plantations, all in *The Virginia Report of 1799–1800*, 22–23, 162–67, 169. For an account of the state legislature in Jefferson's constitutional thought, see Gerald Leonard, "Jefferson's Constitutions," in *Constitutions and the Classics: Patterns of Constitutional Thought from John Fortescue to Jeremy Bentham*, ed. Denis Galligan (Oxford: Oxford University Press, 2014), 369–88.

[153] Randolph, *The Virginia Report of 1799–1800*, 22–23.

[154] Aschenbrenner, *British and American Foundings of Parliamentary Science*, 79, 162.

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awful prospect."[155] Legislatures in other states saw wrestling, fistfights, and even murder on the floor.[156]

The hostile bearing of state legislatures on the question of their rights might result in an unending back-and-forth, eventually frustrating both governments and producing a violent confrontation. It was this prospect that Marshall laid out in the opening paragraph of his opinion in *McCulloch v. Maryland*, where he justified the Court's determination of the "conflicting powers" of Congress and the states on grounds that the question "must be decided peacefully" or remain subject to "hostile legislation," and "perhaps, of hostility of a still more serious nature."[157] The argument was much like the one his former teacher Wythe had made years earlier in another weighty case, the *Case of the Prisoners*: that the Court of Appeals should intervene to decide the contest between the House of Delegates and the Governor over the pardon power, "so that the boundaries of authority" would be "peaceably established."[158] States could not claim a right to be the final judges of the meaning of the Constitution on grounds that they had delegated the powers in it, since the Constitution had proceeded not from state legislatures, but from the people acting in convention. This was, Marshall wrote, "the only manner in which they can act safely, effectively and wisely, on such a subject—by assembling in convention." It was, he implied, *unsafe* to attempt to deliberate about a constitution in a legislative assembly, so the people had been forced out-of-doors. The "awful" responsibility of interpreting what they had done to decide a dispute between the federal government and a state necessarily lay with the Court. "[B]y this tribunal alone can the decision be made. On the Supreme Court of the United States has the Constitution of our country devolved this important duty."

The idea that judicial proceedings were "peaceful" in contrast to the proceedings of other departments was, by 1819, an old idea, though its service in partisan causes was relatively new. Early appearances of the idea do not have an overtly partisan character, but look more like familiar, widely acknowledge features of elite legal practice. Marshall emphasized the idea in a speech to the 1788 Virginia ratifying convention, as he sought to assure its delegates that federal courts under the proposed Constitution would declare unconstitutional laws void. What was the "service or purpose of a Judiciary," Marshall asked, "but to execute the laws in a peaceable orderly manner, without shedding blood, or creating a contest, or availing yourselves of force?" There was "no other body that affords such a protection."[159] What was it about the judicial process that was "peaceable" in comparison to proceedings in other

[155] Garritt Minor to William Cabell, March 9, 1832, quoted in Morris, "Southern Enlightenment," 171.

[156] Freeman, *The Field of Blood*, 4–5.

[157] McCulloch v. Maryland, 17 U.S. 316, 401 (1819).

[158] Call, *Reports of Cases Argued and Decided in the Court of Appeals of Virginia*, vol. 4, 7–8.

[159] *The Documentary History of the Ratification of the Constitution*, vol. 10, *Ratification by the States: Virginia, No. 3*, eds. John P. Kaminski, Gaspare J. Saladino, et al. (Madison: University of Wisconsin Press, 1993), 1432.

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departments? For his part, Marshall sought to emphasize that judicial enforcement of constitutional limits took place in the context of a litigated case. In cases, constitutional questions were presented so as to "assume a legal form for forensic litigation and judicial decision," by "parties come into court," who were "reached by its process, and bound by its power." When the exercise of legal judgment arose out of a public discussion of the Constitution by opposed parties, who had submitted to the court and would be bound by its judgment, and who guided the court by offering a scientific account of the relevant authorities, it encouraged the peaceful settlement of differences. No other institution of government resolved disputes this way.[160] It is not hard to see the image of George Wythe hovering behind this framing of the legal process—with his simple, clean dress, his elaborate presentation of the law, and his "dovelike simplicity and gentleness of manner," as Benjamin Rush had described him.

Federalists began to draw on this idea of peace in their effort to steer major issues into the Supreme Court, where they had reason to expect more favorable results. To do this, however, the constitutional questions involved had to be framed "forensically," as Marshall put it. This was important to the justices, who under Chief Justice John Jay in the early 1790s had begun to shield themselves from partisan politics and political accountability by refusing traditional extrajudicial obligations, like giving advice to the government.[161] Under Marshall's leadership the Court had continued to insulate itself by insisting on a distinction between law and politics.[162] To preserve the protection this distinction provided sometimes required contriving a legal case. Indeed, a number of the leading federalism cases that came before the Supreme Court between roughly 1790 and 1820 were collusive or involved deliberately contrived disputes in order to obtain a judgment, including *Hylton v. United States*, *Fletcher v. Peck*, *Martin v. Hunter's Lessee*, and *McCulloch*.[163] The broader practice may have grown out of a legal fiction, the "feigned issue," long employed to obtain a judgment on the validity of a land title, or other devices for obtaining the equitable division of an estate.[164] The "feigned issue" could be found in St. George Tucker's edition of Blackstone and must have been familiar

[160] *The Papers of John Marshall*, vol. 4, *Correspondence and Papers, January 1799–October 1800*, ed. Charles T. Cullen (Chapel Hill: University of North Carolina Press, 1987), 95–96 ("assume a legal form").

[161] Stewart Jay, *Most Humble Servants: The Advisory Role of Early Judges* (New Haven: Yale University Press, 1997). For an interpretation of the decline of advisory opinions that focuses on jurisprudential developments rather than American politics, see Christian R. Burset, "Advisory Opinions and the Problem of Legal Authority," *Vanderbilt Law Review* 74 (2021), 623.

[162] See, e.g., Marbury v. Madison, 5 U.S. 137, 164–66 (1803).

[163] Hylton v. United States, 3 U.S. (3 Dall.) 136 (1796); Fletcher v. Peck, 10 U.S. (6 Cranch) 48; Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).

[164] Lindsay G. Robertson, "A Mere Feigned Case: Rethinking the Fletcher v. Peck Conspiracy and Early Republican Legal Culture Symposium," *Utah Law Review* 2000, no. 2 (2000): 256–62; Charles F. Hobson, "John Marshall and the Fairfax Litigation: The Background of Martin v. Hunter's Lessee," *Journal of Supreme Court History* 21, no. 2 (1996): 39–40 (describing the use of ejectment for similar purposes).

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to at least his more attentive students.[165] There were other forms of "non-contentious" jurisdiction as well, which legal scholars have described as relatively common in the early federal courts.[166] If so, then Federalists must have found contriving a case an attractive means for steering a matter into court and away from a hostile Republican legislature.[167] They continued to invoke this idea for years, in what now appears to be a vain (and counter-productive) hope of settling major national controversies. Thus Justice Story opened his opinion in *Prigg v. Pennsylvania* by acknowledging that the case "has been brought here by the co-operation and sanction" of the parties, "with a view to have those questions finally disposed of by the adjudication of this Court; so that the agitations on this subject … may subside."[168]

The principal difficulty with framing matters forensically and pushing them into the Supreme Court for peaceful settlement was that it seemed to elevate the Court beyond its proper station in a republic. If the Court were to make a peaceful settlement, it would have to be final; but a settlement could only be final in a republic if "the people" acceded and elected representatives who would comply. Spencer Roane seized on just this implication in his published criticism of Marshall's opinion in *McCulloch*, written under the pseudonym *Hampden*. Quoting James Madison's printed remarks on the Virginia Resolutions, known as the "Report of 1799" and ostensibly authored by a special committee of the Virginia House of Delegates, Roane observed that "the last resort by the judiciary, is in relation to the authority of the other departments of the government," but not to the people of the different states, whom Roane described as "the parties to the compact under which the judiciary is derived."[169] To allow that would be to delegate a judicial power that "would *annul* the authority delegating it." The Court was part of the federal government, and the federal government was itself a party in the dispute, just as the departments of a state government. Rather than settle the matter peacefully, then, the Court had also served as a partisan in the "warfare carried

[165] William Blackstone and St. George Tucker, *Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws, of the Federal Government of the United States, and of the Commonwealth of Virginia*, vol. 4 (Philadelphia: William Young Birch and Abraham Small, 1803), 451–52.

[166] James E. Pfander, *Cases Without Controversies: Uncontested Adjudication in Article III Courts* (Oxford: Oxford University Press, 2021), 23, 25; Russell Wheeler, "Extrajudicial Activities of the Early Supreme Court," *Supreme Court Review*, 1973, 131–39. For an exploration of why there are few records of the use of the feigned issue in federal litigation, see Stephen E. Sachs, "The Feigned Issue in the Federal System" (2007), 2–3.

[167] Some Federalist lawyers were repeat players in contrived cases. Jared Ingersoll, for example, appeared in *Hylton*, *Pennington v. Coxe*, 6 U.S. (2 Cranch) 16 (1804); and *Magniac v. Thomson*, 32 U.S. 348 (1833). Contriving legal jurisdiction was not a strategy limited to Federalists. See, for example, Edward Livingston to James Madison, May 6, 1808, *Founders Online*, National Archives, Early Access Document. The practice only seems to have been overtly controversial in Fletcher v. Peck, a case whose partisan dimension was pronounced. The partisan character of the case may explain, as well, Justice William Johnson's objections to hearing it. 10 U.S. (6 Cranch) at 147.

[168] 41 U.S. 539, 609 (1842).

[169] [Spencer Roane,] No. IV, Gerald Gunther, *John Marshall's Defense of McCulloch v. Maryland* (Stanford: Stanford University Press, 1969), 148–49. For Madison's remarks, see Randolph, *The Virginia Report of 1799–1800*, 196.

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on by the legislature of the union against the rights of 'the states' and of 'the people.'"[170]

Conclusion

None of this was intended. The "Richmond lawyers" trained by Wythe had turned out to be, from Jefferson's perspective, "rank Federalists," not Republicans, even though they were by any measure eminent practitioners of legal science. In their hands legal science was not republican at all, but an instrument of foreign influence and corruption. A lengthy, discursive judicial opinion identifying broad principles and incorporating varied legal sources, such as Wythe might have authored, had now become a means of giving "extra-judicial" commentary on cases "not before the court," a practice Jefferson thought "very irregular."[171] Another norm fractured was the "independence" of the educated Virginia gentleman, whose privilege and property had ensured that his judgment remained his own, but which now appeared in the justices of the Supreme Court like a suspicious lack of "dependence" on the people, from whom their authority was supposed to flow. Marshall used his office to give liberal constructions to the Constitution that destroyed the sense of the people ratifying it and the liberty they had enjoyed to settle their own affairs. Legal science, it seems, was of little help, since principles and authorities could be cited by lawyers on both sides of the partisan divide. The same rule might even take on different meanings in different hands. The ideas just would not sit still.

It is not a properly historical question, but it is worth considering whether reformers had simply been wrong about the effect of legal education on republicanism. They had mistaken the appeal of legal science to the rising generation of Virginia gentry, and they had not seen how the ambitious lawyers to whom it was attractive might use it for other ends. Or perhaps we should say that reformers were not wrong, but the effects of schooling had depended on the context in ways that were hard for them to see. What gave a legal education its liberal effect was the intellectual or material context. Whatever it was had eroded between 1779 and 1820, draining education of its liberal effect and leaving it, instead, merely a reflection of the reactionary intellectual environment growing in the south, from whose perspective "Richmond law" looked like alien control.

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[170] [Spencer Roane,] No. I, Gunther, *John Marshall's Defense of McCulloch v. Maryland*, 109.

[171] Thomas Jefferson to William Johnson, June 12, 1823, Manuscript/Mixed Material, Library of Congress, https://www.loc.gov/item/mtjbib024682/. On Marshall's methods, see Charles F. Hobson, *The Great Chief Justice: John Marshall and the Rule of Law* (Lawrence: University Press of Kansas, 1996), 32–36; G. Edward White, *The Marshall Court and Cultural Change, 1815–1835,* History of the Supreme Court of the United States, vols. 3–4 (New York: MacMillan, 1988), 196–98.

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Matthew Steilen is a professor of law at the University at Buffalo School of Law <mjsteile@buffalo.edu>.

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