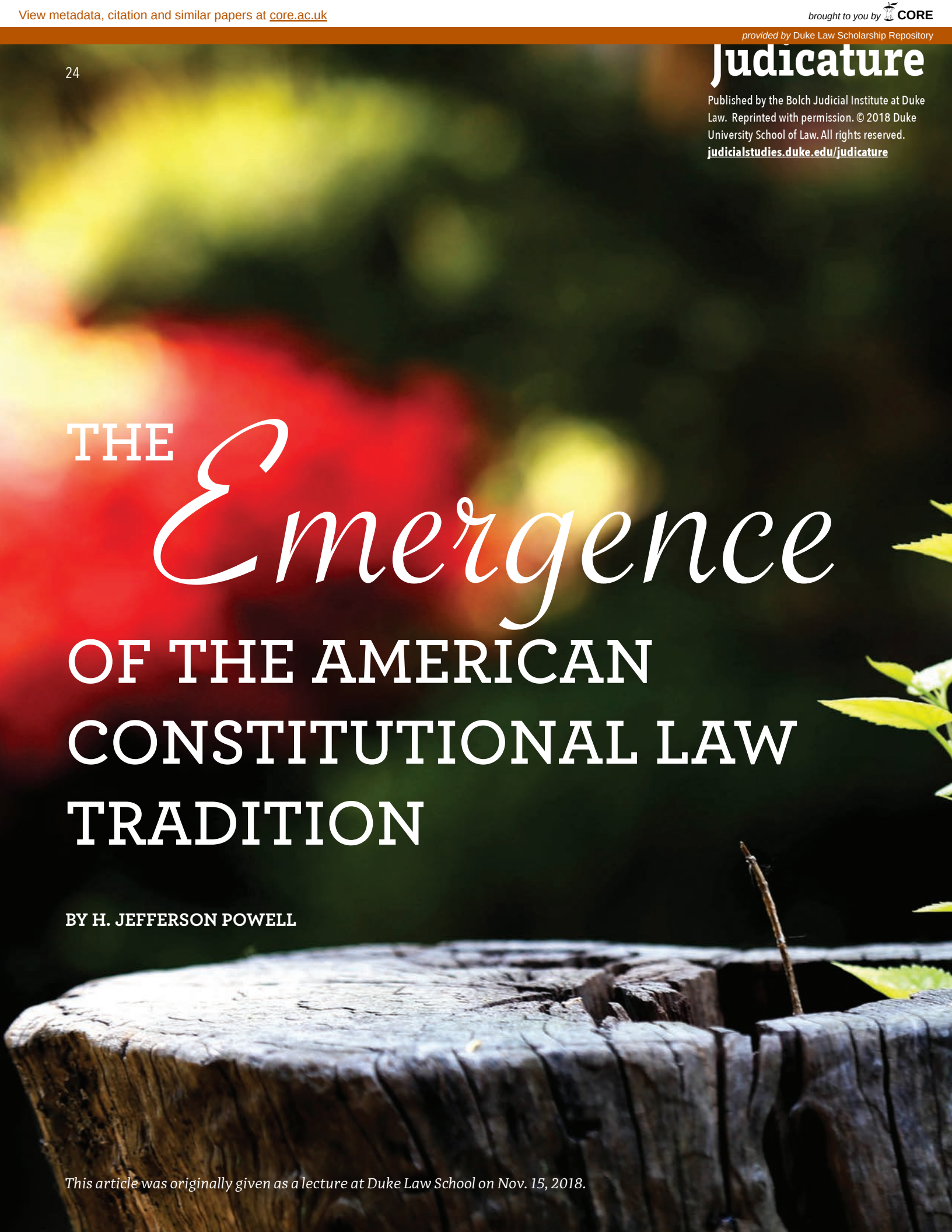
Judicature

Published by the Bolch Judicial Institute at Duke Law. Reprinted with permission.
judicialstudies.duke.edu/judicature

THE *Emergence* OF THE AMERICAN CONSTITUTIONAL LAW TRADITION

BY H. JEFFERSON POWELL



This article was originally given as a lecture at Duke Law School on Nov. 15, 2018.

My title is "The Emergence of the American Constitutional Law Tradition," and what I want us to think about today is the process by which American constitutional law came to be what it is in 2018. Now that's a long, complicated story, and all I can do is give you a few outtakes from what is a much broader book project. I'm going to summarize some specific stories from the overall narrative, and hope to give you a sense of how the big story hangs together.

Before I begin, however, I want to say something about the word "tradition." By tradition we often mean some practice that a particular group or community engages in over time. In my maternal grandparents' family, it is a tradition to eat celery stalks stuffed with homemade pimento cheese on Thanksgiving. I don't know when the Carters began doing so — but it's something we do: If the people you're dining with on Thanksgiving don't have a plate full of celery and pimento cheese, they're probably not Carters. *Repeating* this little tradition year after year is an identifying mark of my family.

Intellectual traditions differ in the way they cohere over time. As the great philosopher Alasdair MacIntyre said years ago, a tradition of rational inquiry does *not* maintain its continuity through the simple repetition of what has been thought and said in the past. What gives life to such a tradition is not so much agreement about answers as it is agreement about questions. In MacIntyre's words, an intellectual "tradition is an argument extended through time in which [even its] fundamental agreements are defined and redefined . . . [through] conflict."[1] An intellectual tradition, unless it goes dead, is a continuity of conflict, and debate and disagreement are its lifeblood. The emergence of the American constitutional law tradition, then, is the story of an ongoing debate, an endless argument over, among other things, what constitutional law is about.

One other thing: Let me tell you up front my hidden agenda. First, I want you to be optimistic *and* also anxious about the health of our constitutional law tradition. We're living in a time of deep constitutional division, but severe disagreement is nothing new, and raucous debate is a sign of health, not decay. But at the same time, the tradition will not maintain itself: It depends on our commitment to carry on our debates in good faith, to recognize whenever possible the good faith of those with whom we disagree, and to resist the perennial temptation to convert constitutional law into a mere tool of ideological warfare. And second? I hope to persuade some of you that the study of our constitutional law's past for its own sake is endlessly fascinating, quite apart from any value it may have in present-day debates.

Now, let me take you back to the very beginning of the American constitutional law tradition. It's somewhat artificial to choose a specific year, and even more a specific day, as the beginning of any great intellectual tradition: They don't spring fully formed from the forehead of Zeus; they take shape gradually. That said, I feel confident that few lawyers in this room will question the date I've chosen to begin my story. After all, an obvious starting point for our tradition is Feb. 7, 1292.

Perhaps there's someone here who's not a lawyer, and I should say a bit about the significance of Feb. 7, 1292. It was on that day that King Edward I commissioned William de Bereford as a judge on the Court of Common Pleas, thus ▸

setting in motion the intellectual and institutional developments that eventually lead to American constitutional law in 2018.[2] Bereford himself is a fascinating character: He came from a modest family in the English midlands, and he declined to pursue a career in the church or in the king's household, the only options for a brainy and ambitious young man without means. Instead, Bereford somehow managed to worm his way into the small group of non-clerics who in the 1270s and '80s were coalescing as full-time advocates in the Court of Common Pleas. By the late 1280s, Bereford was what a modern scholar called "the Common Bench specialist par excellence," and the king himself had retained Bereford in several cases.[3] Appointing this familiar, skilled, and no doubt reliable legal henchman to the court likely seemed a safe choice to Edward and his advisors, but putting Bereford on the bench would have repercussions the king could never have guessed.

For one thing, Bereford was one of the first royal judges chosen for his professional skills and accomplishments in the law. Before him, appointment to a royal court almost always went to a senior government bureaucrat, often a churchman: Such judges came to the bench with little knowledge of legal procedure and no personal interest in expanding the role of the courts in government. Bereford was a judge of a different ilk: He owed his elevation to his mastery of the law, and his interests and his judgments were shaped by professional pride and expertise. His appointment was a successful experiment. After him, almost all royal judges had backgrounds similar to his, and the judiciary quickly became the preserve of an autonomous profession, rather than a branch of the church or the bureaucracy.[4]

By Bereford's death, what were originally personal duties owed between specific individuals were well on their way to becoming obligations running with the land itself, and ownership was increasingly determined by legal rules and the market rather than heredity. This was no accident.

Perhaps this would not have mattered so much if William de Bereford had been a different character or his appointment had occurred in a different era, but, at times, history is shaped by the accidental convergence of the personal and the societal. Bereford was a self-confident and forceful individual, politically shrewd and utterly convinced that it was lawyers who ought to say what the law is. He was long-lived as well, and served for almost 34 years, half of the time as chief justice. By the time he died, no common law judge or advocate knew any vision of law but Bereford's.

Of equal importance, Bereford was given the opportunity to shape bench and bar in a time of great legal ferment. King Edward I was later named the English Justinian because it was in his reign, and that of his son Edward II, that the common law of the realm was overhauled root and branch and began to assume its developed medieval and early modern form.[5] For the first Edward's first 20 years, legal reform was centered in the high Court of Parliament. The dominant judicial body was the Court of King's Bench, and the clerks in the royal Chancery held a tight grip on what cases the royal courts could and could not hear. By the time Chief Justice Bereford died, all of this was in the process of transformation: The initiative for legal change now lay in the Court of Common Pleas, the authority of King's Bench to review Common Pleas decisions was largely a dead letter, and Bereford had wrested effective control over his court's jurisdiction from Chancery. Bereford was, in short, the first great practitioner of what later became a legal maxim, "It is the duty of a good judge to expand his jurisdiction."[6]

But to what end, you ask? What was Chief Justice Bereford trying to accomplish in expanding his court's authority? The Yearbooks — those marvelous but often perplexing records of legal argument in the medieval courts that begin their regular appearance under Bereford — give us no clear answer, though they give many examples of his wit and his quick temper. But if you examine his patterns of commentary and judgment, you begin to see overarching themes. Let me give you a couple of examples.

The law of real property before Bereford was largely a description of the personal, political, and constitutional relationships among the Crown, its great noble vassals, their lesser tenants, and so on. By Bereford's death, what were originally personal duties owed between specific individuals were well on their way to becoming obligations running with the land itself, and ownership was

increasingly determined by legal rules and the market rather than heredity.[7] This was no accident: As Bereford said in a 1320 case enforcing a bargain concerning land, the decision rested in part on the existence of a quid pro quo, "there [was here] one thing in return for another, for which principle we have great regard."[8]

Again, Bereford usually insisted that litigants and their lawyers turn square corners in satisfying the law's technical requirements. But he detested attempts to use legal technicalities to achieve unfair advantage. In a 1310 case, Bereford exploded when a defendant invoked a trivial pleading error in order to avoid a clear duty to pay half the plaintiff's loss: "Reason requires that you [pay], and the law is founded on reason, and good faith demands it. You want to have the eggs and the half penny too."[9] (By the way, according to one historian, a half penny would buy a dozen eggs about this time.[10])

By and large, the changes Bereford and his colleagues effected in the law are ones most of us would think desirable. But Bereford's central importance for our story lies elsewhere, in the style of judicial personality he bequeathed the common law, and ultimately American constitutional law.

Our tradition is not the product of anonymous bureaucrats, but the creation in large measure of strong-minded and strong-willed judges prepared to use their creativity to reshape the law. Think of the truly influential constitutional judges in U.S. history from John Marshall and Joseph Story to William Brennan and William Rehnquist. They were all heirs of William de Bereford in their willingness to exercise power. We can say of each what Justice Benjamin Cardozo wrote about Chief Justice Marshall: He "gave to the Constitution . . . the impress of his own mind . . . [so that] our constitutional law is what it is, because he moulded it . . . in the fire of his own intense convictions."[11]

And thereon hangs the other side of Chief Justice Bereford's legacy to us. That he, and his American heirs, have acted out of intense conviction, I have no doubt. But was it right for him, or for them, to do so? What is and what should be the relationship between the judge's personal convictions and the "law" supposedly being expounded? Bereford upended many of England's previous constitutional arrangements, and he often did so by strained readings of Parliament's acts, by ignoring common law rules that were in his way, and by finding means to circumvent the limitations on his court's authority. All of this should sound familiar: American constitutional law has been deeply shaped by the exercise of judicial power in the Bereford style by judges cast in the Bereford mold . . . and one of our central debates has been over how to ensure that the exercise of such power by such judges is legitimate.

This problem of legitimacy is not a modern or American discovery. Eighteen years after Bereford died, the Court of Common Pleas heard a case, *Flaundres v. Rychman*, in which the plaintiff's lawyer invoked a Bereford decision. When one of the judges sounded doubtful, the lawyer insisted. "I think you will do as others have done in the same case, or else we do not know what the law is." Justice Roger Hillary, the first known Legal Realist, answered: "[Law] is the will of the Justices." To which Chief Justice John Stonor immediately replied — and I will quote the law French since I took a course in that bizarre language years ago and seldom get to mispronounce it: "*Nanyl, ley est resoun*." "Nonsense! [it's an emphatic negative], law is reason."[12]

Resoun in law French is sometimes best translated by a phrase like "what makes sense" or "what is in fact truly just," and Stonor was, I think, taking a step beyond Bereford's dislike for the use of technicalities employed to achieve unjust ends. Over the next three centuries, this idea that law is reason was fleshed out, and it was another chief justice of Common Pleas, Sir Edward Coke, who gave the equation its canonical formulation.[13] In November 1608, King James I convened a meeting at Westminster of judges and other high officials: James was unhappy about the Common Pleas interfering with the work of commissions exercising the king's personal prerogative and wanted to rein Coke in.[14] In the course of the discussion, James commented that if law is reason, then he himself — being a reasonable and learned king — was perfectly competent to make legal decisions or delegate them to his political councilors. Coke tried to find a polite way to say no:

> [T]rue it is that God has endowed your Majesty with excellent Science and great endowments of nature, but your Majesty is not learned in the Lawes of your Realme of England, and causes which concern the life, or inheritance, or goods of your Subjects . . . are not to be decided by naturall reasoning but by the artificiall reason and judgment of Law . . . which requires long study and experience.

The authority of the courts over political actors, in other words, stems from the judges' intellectual immersion in the tradition of legal thought. Even when the law requires judges to give effect to an act of Parliament or of the monarch, such political acts must enter the domain of law governed by the ▸

judges' reasoned judgment before they can rightly touch the "life or inheritance or goods" of the individual. It's a bold and indeed breathtaking claim about the authority of legal reason, and the scope of judicial authority, and it is one that underlies virtually all of modern American constitutional law.

King James was not amused. Indeed, he was enraged by what he called "treason," and Coke only barely escaped a cell in the Tower of London. But the episode had no effect on Coke's behavior as a judge, and Anglo-American lawyers have long cited it as an important milestone in the history of the rule of law: For all the king's bluster, it was Coke and the common law that had the last laugh. It's a great tale, and more or less true. But of equal importance for our story is what the king actually said. James didn't simply lose his temper: He also delivered a shrewd counter to Coke's argument.

> If the judges interprete the lawes themselves, and suffer none else to interprete, then they may easily make of the laws shipmens hose.[15]

I don't know why the king thought of sailors' socks, but his point is clear: If, as Coke claimed, it is the province and duty of the courts *alone* to say what the law is, there is no institutional check on the judges. Neither legal texts, which clever construction can leave as flexible as a stocking, nor the forms of legal reason, which the courts themselves define, can prevent a supremacy not of law, but of lawyers — and, above all, judges.

The distinguished legal historian William Holdsworth once wrote that the U.S. Supreme Court embodies "Coke's ideal of the supremacy of the law."[16] Precisely because that is true, the American constitutional law tradition continues to wrestle with King James's objection: that to legitimate judicial decision by judicial reasoning is viciously circular, and that a court acting on Coke's ideal is free to assume an illegitimate political role at will.

If, as Coke claimed, it is the province and duty of the courts alone to say what the law is, there is no institutional check on the judges. Neither legal texts, which clever construction can leave as flexible as a stocking, nor the forms of legal reason, which the courts themselves define, can prevent a supremacy not of law, but of lawyers — and, above all, judges.

Now let me bring you forward not quite two centuries and across the Atlantic to Washington, D.C. It is the winter of 1800–1801, and the infant United States is in a constitutional crisis, a crisis of constitutional politics rather than constitutional law. It's become clear that both the House and the Senate in the next federal Congress will have Republican majorities, and that the current president, Federalist John Adams, will not keep his office barring some sort of political coup d'etat. It's quite unclear who *will* become president, since the pre-12th Amendment electoral college arrangements have produced a tie between two Republicans. And in the meantime and up to the beginning of March, the old Federalist-controlled Congress is sitting, Adams is still president, and the defeated Federalists have one last window of opportunity to wield power.

The story by which the crisis was surmounted and Jefferson became president is no doubt familiar.[17] I want us to focus instead on a different aspect of that winter's events. On Dec. 22, 1800, a Republican congressman, Thomas Davis, gave a speech in which he smugly warned his Federalist colleagues that political time was running out on them: "The sun of Federalism is nearly set — not three months, and it sets forever."[18] Davis's image apparently hit a nerve, and the Federalists repeatedly brought it up to rebut it. But the rhetorical argument over the twilight of Federalism took a new turn the following month, as the House debated a bill to re-authorize the Sedition Act of 1798.

On Jan. 21, Federalist Jonas Platt reminded the House of Davis's sunset imagery and "confessed that he viewed with horror the awful night that would follow."[19] Platt quickly made it clear that he and other Federalists dreaded the Republican triumph not only for its immediate political ramifications, but also for what it implied about the future of the Constitution itself. Congress was the central locus for federal constitutional debate at first, and, over the previous 12 years, the emergence of Federalists and Republicans as partisan political factions in Congress was paralleled by the emergence of two distinct approaches to constitutional argument. Republicans generally insisted on construing the Constitution with painstaking adherence to its precise wording and literal meaning.

James Madison's great speech against the national bank bill in February 1791 offered a dense list of "rules" of interpretation emphasizing the duty to obey "the natural and obvious force of the terms and the context" of particular constitutional provisions.[20] Other Republicans took even more stringent views: As Stevens Mason put it in a later debate, "[n]ot only sentences, but words, and even [punctuation] points elucidate its meaning," and the elucidation of the text's meaning *is* constitutional law.[21]

In contrast, the Federalists, in that long first decade, regularly denounced Republican textualism as a betrayal of the written Constitution. Rising to answer Madison's attack on the bank bill, the great Federalist Fisher Ames mocked Madison's arguments:

> I never suspected that the objections I have heard stated had existence; I consider them as discoveries [that] the acute penetration of that gentleman [has] brought . . . to light.

Sarcasm to one side, according to Ames, Madison's textualism was a radical mistake. Contrary to Madison, dogmatic "rules" about how to interpret the Constitution were quite incapable of ensuring correct constitutional answers. Madison's attempts to parse its words "will be found as obscure [as the arguments he] condemn[s]; they only set up one construction against another."[22]

For Ames, and for the Federalists generally, fidelity to the Constitution lay in adherence to the Constitution's purposes rather than its precise wording. "That construction may be maintained to be a safe one which promotes the good of the society, and the ends for which the Government was adopted."[23] As someone else put it, "the boundaries of the Constitution cannot be laid down with mathematical precision, by the square and compass. They must be ascertained by . . . the exercise of discretion."[24] Congressman Platt was mourning not just a defeat on the level of power and policy, but a deeper tragedy: the Constitution's transformation from a coherent instrument of governance into a grab bag of separate clauses for lawyers to quibble over.

It's important to understand what was actually at stake in the winter of 1800 and 1801. There was of course a political and partisan dimension to the debate over constitutional method: Federalist discretion conveniently legitimated their legislative program, while Republican textualism happily vindicated their general opposition to Federalist legislation. But the debate over constitutional method was not simply a matter of political expedience. It also reflected principled concerns, on the part of both factions, about the capacity of Lord Coke's "artificiall Reason and judgment of Law" to reach legitimate decisions under the Constitution. Republicans were echoing King James's fear that professional legal reason is the tool by which legal insiders can circumvent written limits on their power. Federalists, for their part, thought that most constitutional difficulties "arise from a narrow, technical, lawyer-like view of the Constitution" at odds with "the great national purposes for which the Constitution was adopted."[25]

If our constitutional law tradition had followed either set of fears, in 2018 it might not really be a *legal* tradition at all. Strict textualism can produce rampant disregard for the too-strict textual limits on power: As one congressman said, the text "will be habitually broken whenever the pressure of events shall seem to require."[26] A thorough-going emphasis on purpose, on the other hand, tends to reduce constitutional questions to straightforward questions of policy: The Constitution, as a senator once asserted, "is one eternal *now*" and authorizes whatever seems "necessary and proper" to do "this day."[27]

Our tradition went neither of these paths, and one of the reasons goes back to that fateful winter. The day before Congressman Platt bemoaned the sunset of Federalism, President Adams nominated his secretary of state, John Marshall, to be chief justice. The Federalist majority in the Senate made no public objection, but, behind closed doors, many Federalist leaders were disappointed. Marshall's political heart was in the right place, most of them conceded, but constitutionally he was all too similar to his cousin Thomas Jefferson, another nit-picking Southern lawyer. After meeting Marshall, Oliver Wolcott wrote Ames that

> Marshall . . . is doubtless a man of virtue . . . but he will think too much of the State of Virginia, and is too much disposed to govern the world according to rules of logic; he will read and expound the Constitution as if it were a penal statute, and will sometimes be embarrassed with doubts of which his friends will not perceive the importance.

Ames was less indulgent: "False Federalists or such as act wrong from false fears should be dealt hardly with, if I were Jupiter the Thunderer."[28] But he kept quiet too, and Marshall was quickly confirmed.

Ames, who died in 1808, doubtless went to his grave thinking he had been right about Marshall. In a series of early, mostly forgotten decisions — I have in mind such headliners as *Clarke v. Bazadone* and *Hepburn v. Ellzey*[29] — Marshall led the Court in reaching ▸

constitutional decisions by carefully textual means, but, as time passed, it became clear that Marshall was no Jefferson, and no Fisher Ames either. He and his allies stood, rather, in the tradition of Lord Coke and sought to answer constitutional questions by applying what Marshall called "that great paramount law of reason, which pervades and regulates all human systems," while observing the American principle that the written Constitution is "a rule for the government of *courts*, as well as of the legislature."[30] Constitutional law *is* reason, reason operating to give reasonable effect to the written supreme law. The underlying intellectual structure of American constitutional law in 2018 descends in lineal succession from the common law of Chief Justice Coke in no small measure because Chief Justice Marshall made it so. And, as a consequence, our tradition is also a debate over the extent to which the Supreme Court has been guilty of the sins about which King James warned us.

My last story begins a few years before the winter of 1800 and 1801, in 1793 on the ground floor of the Philadelphia City Hall, where the Supreme Court of the United States is announcing its first substantive decision, *Chisholm v. Georgia*.[31] By a four to one vote, the justices have concluded that the Court has original jurisdiction over a contract action brought by a South Carolina citizen against the state of Georgia, but our concern today is not with the decision itself; instead, I want us to think about a single line in Chief Justice John Jay's seriatim opinion.

In Jay's view, the only important objection to the Court's jurisdiction lay in the idea that Georgia as a sovereign enjoyed immunity from suit, and Jay thought the answer to that objection obvious: The idea of sovereign immunity has no place in American constitutional law. As the term itself suggests, Jay explained, sovereign immunity stems from "feudal principles, [a political] system [that] considers the Prince as the sovereign, and the people as his subjects."

> No such ideas obtain here; at the Revolution, the sovereignty devolved on the people; and they are truly the sovereigns of the country, but they are sovereigns without subjects . . . and have none to govern but themselves; the citizens of America are equal . . . as joint tenants in the sovereignty. . . . [and t]he attention and attachment of the Constitution to the equal rights of the people are discernable in almost every sentence of it.[32]

Jay's understanding of equality was not ours, and by "equal rights" he meant that every member of the community is equally entitled to the protection of the law, not that everyone's rights are the same. But in one respect, Jay's views do not differ from ours: As he had written a few years before, he believed that "all our inhabitants of every colour and denomination [should] be free and equal."[33] And because he believed that, Jay had to recognize a glaring anomaly in his account of the American constitutional order.

I left out a phrase from the *Chisholm* passage I quoted; now let me restore the missing words. Americans, Chief Justice Jay asserted, "are truly the sovereigns of the country, but they are sovereigns without subjects (unless the African slaves among us may be so called)." As Jay painfully recognized, the existence of human chattel slavery in the United States contradicted what he believed to be the fundamental premise of the Republic: that, among its inhabitants, there can be no subjects, "for in this country there are none; [no one is] an inferior . . . for all ["our inhabitants"] are, as to civil rights, perfectly equal."[34] But no, not all Americans were free or equal, and Jay had no constitutional answer to that ultimate contradiction: In *Chisholm*, he simply acknowledged it.

Later constitutional lawyers cut the Gordian knot. In 1806, Jackey Wright and her daughter and granddaughter brought a suit for their freedom in the Virginia Court of Chancery.[35] The Wrights claimed that they could prove their direct descent from a Native American ancestor and thus could not be held as slaves under Virginia law. Based on the evidence, Chancellor George Wythe, a legendary figure in founding-era American law, ruled in their favor — and he gave a constitutional basis for his decision as well. Article 1 of the Virginia Declaration of Rights states that "all men are by nature equally free and independent and have certain inherent rights," including personal liberty. Under this article, Wythe concluded that "freedom is the birth right of every human being" in Virginia, and the burden of proof lay on a would-be slaveholder to prove with clear evidence his claim to hold another person in bondage.[36]

Chancellor Wythe's constitutional holding left slavery legal on its face, but nonetheless threatened to topple the institution one successful suit for freedom after another, and it is not surprising that the state court of appeals rejected his article 1 reasoning while affirming his judgment on the facts. One of the judges sitting on the appeal was St. George Tucker, who had serious anti-slavery credentials: Three years earlier, he had published a direct attack on the institution.[37] But in *Hudgins v. Wright*, Tucker denied that slavery was inconsistent with Virginia

constitutional *law*, however poorly it fit with Virginia constitutional principle. According to Tucker,

> the first clause of the Bill of Rights . . . was meant to embrace the case of free citizens, or aliens only; and not by a side wind to overturn the rights of property, and give freedom to those very people [who] had no concern, agency or interest [in "the revolution"].[38]

Slaves, in other words, might be "people" but they were not part of *our* people, the people for whom American constitutions are made. In Jay's terms, slaves are *among* us, but Tucker insisted, they are not *of* us. Tucker's reasoning defused the revolutionary potential of constitutional language about liberty and equality and quickly became standard judicial fare; but Tucker's was not the only possible answer to Jay's dilemma.

Let's now go to Raleigh: It's December 1829. The North Carolina Supreme Court has before it a case called *State v. Mann*.[39] Mann shot a slave named Lydia whose services he had leased, and a jury convicted him of a "cruel and unwarrantable" battery. State law was clear that had he killed Lydia, Mann would have been criminally liable, but she survived the injury. Now the supreme court had to decide what other limits North Carolina law imposed on the use of violence to impose a slaveholder's will. Defending the jury verdict, State Attorney General Romulus Saunders argued that the master/slave relation was analogous to other asymmetrical legal relationships — parent/child, master/apprentice, and so on — and that in every case the law regulated the relationship and required that the person in authority act reasonably and without unnecessary cruelty.[40] The court, however, concluded that state law allowed the slaveholder to use any level of violence short of murder, and left the task of justifying its decision to its newest member, Thomas Ruffin, no doubt with the expectation that Ruffin would write an opinion sugar-coating the harsh result. But for unknown reasons, Ruffin took a different tack.

Three drafts of his opinion survive. The first fits the usual model followed by opinions on the law of slavery: It's defensive, apologetic, intended to persuade the reader that the holding is a just and appropriate balancing of "the rights of the owner" with "the general protection and comfort of the slave."[41] Over the next two drafts, however, Ruffin systematically stripped away most of the self-exculpatory language and refashioned the opinion to deny any claim that the court was upholding something that could be called a right:

> [I]t may well be asked, which power of the master accords with right? The answer will probably sweep them all away. But we cannot look at the matter in that light. The truth is that we are forbidden to enter upon a train of general reasoning on the subject. We cannot allow the right of the master to be brought into discussion in courts of justice.[42]

Over 500 years earlier, Chief Justice Bereford and his colleagues had begun the process of subjecting the power relationships of medieval England to the power of legal reason. In 1829, Judge Ruffin conceded that at the heart of republican North Carolina, there was an area of social life into which legal reason could not go, within which violence was unchecked by law. While the legislature could, by an act of political will, modify this reality, Ruffin denied the competence of law to do so. "The difficulty is determining where a Court may properly begin. . . . The Court, therefore, disclaims the power of changing the relation in which these parts of our people stand to each other."[43]

Mann's disavowal of any power on the part of the court to protect [African slaves] from harm was an outright confession that slavery rendered American constitutional law incoherent.

Wait! — did you hear that? *These parts of our people*. In *State v. Mann*, Ruffin resolved the ambiguity in Jay's words, "the African slaves among us," an ambiguity that Tucker and others exploited by denying that slaves were ever part of the American people or entitled to the equal liberty our constitutions seek to protect. Ruffin denied himself that easy excuse. *Our people*: The African slaves among us *are* us, or part of us, and *Mann*'s disavowal of any power on the part of the court to protect those Americans from harm was an outright confession that slavery rendered American constitutional law incoherent, a confession all the more sweeping because its constitutional dimension was almost invisible.

We've now come full circle, from the promise of 1292 to the dead end of 1829. However powerful Ruffin's merciless portrayal of slavery, his opinion ended on a helpless note: In the face of slavery, Marshall's "great paramount law of reason" was powerless.

In a sense, Ruffin was right: As a matter of history the constitutional self-contradiction of American slav- ▸

ery came to an end (to the extent it did) only through political acts of will — the Civil War and the Reconstruction Amendments. But I want to suggest in conclusion that Ruffin was also wrong, not just morally wrong in his complicity in radical injustice, but wrong in reaching so quickly the conclusion that law was helpless in the face of that injustice. One of the most persistent themes in the American constitutional law tradition has been our refusal to accept too quickly a limit on the problems "the artificiall Reason and judgment of law" can address. That there are such limits is also a theme in the tradition, but, in identifying those limits, I believe we should always question any assumption, whether comfortable or despairing, that constitutional law cannot address a social wrong.

Whether we have reached a limit on the law's domain is itself a critical and often difficult question of constitutional law. At times, whatever answer we give will fall short of geometric proof, and when that is so, the assumptions, the preconceptions, and the prejudices we bring to the question may determine our answer. We are responsible for our assumptions and should be mindful of our prejudices. The constitutional law tradition may and should structure our decisions; it cannot relieve us of the burden and the privilege of responsible decision.

H. JEFFERSON POWELL is a Duke University Professor of Law and Director of Duke's First Amendment Clinic. He has served as deputy assistant attorney general and principal deputy solicitor general in the U.S. Department of Justice and as special counsel to the attorney general of North Carolina.

1 Alasdair MacIntyre, Whose Justice? Which Rationality? 12 (1988).

2 On Bereford, *see generally* The Earliest English Law Reports, Vol. II viii-xxi (Paul A. Brand ed. 1996); William C. Bolland, Chief Justice Sir William Bereford (1924); Thomas Lund, The Creation of the Common Law 23–63, 349–55 (2015).

3 Brand, *supra* note 2, at cxxxii.

4 T.F.T. Plucknett, *The Legal Profession in English Legal History*, *in* T.F.T. Plucknett, Studies in English Legal History XIX 332–33 (1983).

5 1 William Blackstone, Commentaries on the Laws of England *23 (1765) (English laws reached a "peak of perfection . . . Under the auspices of our english justinian, king edward the first"). On legal reform under Edward I, *see* T.F.T. Plucknett, A Concise History of the Common Law 27–31 (5th ed. 1956).

6 On Bereford's successful expansion of the role of Common Pleas, see Professor Lund's brilliant detective work: Lund, *supra* note 2, at 65–126. *See also Collins v. Blantern*, 95 Eng. Rep. 850, 852 (C.P. 1767) (Wilmot, C.J.) (quoting the maxim in the usual Latin, "*est boni judicis ampliare jurisdictionem*").

7 On bereford and changes in real property law, see T.F.T. Plucknett, Statutes and their Interpretation in the First Half of the Fourteenth Century 155–56 (1922). *See generally* S.F.C. Milsom, Historical Foundations of the Common Law 99–118 (2d ed. 1981).

8 *Ashby v. Langton* (C.P. 1320), *Year Books of Edward II, 1320*, 127, 131 (S.J. Stoljar & L.J. Downer ed. 1988).

9 *Gaunt v. Gaunt* (C.P. 1310), *Year Books of Edward II, 1309-1310*, 79, 80 (F.W. Maitland ed. 1905).

10 *See* Kenneth Hodges, "List of price of medieval items," http://medieval.ucdavis.edu/120D/Money.html (last visited Jan. 21, 2019).

11 Benjamin N. Cardozo, The Nature of the Judicial Process 169–70 (1921).

12 *Flaundres v. Rychman* (C.P. 1344), *Year Books of Edward III, 1344*, 377 (Luke O. Pike ed. 1905).

13 On Coke, *see generally* Christopher Hill, *Sir Edward Coke — Myth-Maker*, *in* Christopher Hill, Intellectual Origins of the English Revolution 225–65 (1965); David Little, Religion, Order, and Law 167–217 (1969); David Chan Smith, Sir Edward Coke and the Reformation of the Laws (2014).

14 Coke's account of the incident is in his reports. *Prohibitions del Roy*, 12 Co. Rep. 63, 64–65. For a fuller picture, in addition to the works cited *supra* note 13, *see* Roland G. Usher, *James I and Sir Edward Coke*, 18 Eng. Hist. Rev. 664 (1903) (reproducing accounts by other participants).

15 Usher, *supra* note 14, at 669 (quoting James I from Sir Julius Caesar's "Notes. Touching Prohibitions."). Howard Nenner's succinct discussion of James's remark is illuminating. *See* Howard Nenner, By Colour of Law 71–72 (1977).71–72 (1977).

16 William S. Holdsworth, Some Makers of English Law 131 (1938).

17 There are many accounts. I think one of the most insightful is Joanne B. Freeman, Affairs of Honor: National Politics in the New Republic 199–261 (2001).

18 10 Annals Of Cong. 840 (1851) (Joseph Gales & William W. Seaton eds.).

19 *Id.* at 917.

20 2 Annals of Cong. 1945–46 (1834) (Joseph Gales & William W. Seaton eds.).

21 11 Annals of Cong. 59–60 (1851) (Joseph Gales & William W. Seaton eds.).

22 2 Annals of Cong., *supra* note 20, at 1954–55.

23 *Id.* at 1956.

24 31 Annals of Cong. 633 (1854) (Joseph Gales & William W. Seaton eds.) (remarks of Henry St. George Tucker). Congress reprised the 1790s debates over constitutional method at later points — in 1811 over the unsuccessful effort to recharter the first national bank and in 1817 and 1818 over internal improvements bills. By then, most congressional Republicans had moved away from the severe textualism of the 1790s to a position increasingly indistinguishable from that of the Marshall Court, and the banner of strict textualism was carried by a dwindling minority of "Old Republicans."

25 *Id.* at 1222 (remarks of Eldred Simkins).

26 32 Annals of Cong. 1324 (1854) (Joseph Gales & William W. Seaton eds.) (remarks of Henry St. George Tucker).

27 22 Annals of Cong. 142 (1853) (Joseph Gales & William W. Seaton eds.) (remarks of William H. Crawford).

28 Works of Fisher Ames, Vol. II, 1799 (William B. Allen ed. 1983) (letter from Wolcott to Ames); *id.* at 1302–03 (letter of Ames to Christopher Gore).

29 *Clarke v. Bazadone*, 5 U.S. 212 (1803) (holding that Supreme Court had no general supervisory authority over territorial court); *Hepburn & Dundas v. Ellzey*, 6 U.S. 445 (1805) (holding that the District of Columbia is not a "state" for constitutional purposes).

30 The first quotation is from one of the newspaper essays Marshall published under a nom de plume to defend *McCulloch v. Maryland*. *See A Friend of the Constitution III*, Alexandria Gazette (July 2, 1819), *reprinted in* John Marshall's Defense of *McCulloch v. Maryland* 168 (Gerald Gunther ed. 1969). For the second quotation, see *Marbury v. Madison*, 5 U.S. 137, 180 (1803).

31 *Chisholm v. Georgia*, 2 U.S. 419 (1793).

32 *Id.* at 471–72, 478.

33 *See* Jake Sudderth, *Jay and Slavery*, The Papers of John Jay (2002), http://www.columbia.edu/cu/libraries/inside/dev/jay/JaySlavery.html (quoting Jay to Dr. Benjamin Rush, March 24, 1785, Jay ID #9450).

34 *Chisholm*, 2 U.S. at 472. I supplied the words "our inhabitants" from the letter to Rush, *supra* note 33.

35 *Hudgins v. Wright*, 11 Va. 134 (1806).

36 Wythe's opinion is not extant but the reporters of the appellate decision indirectly quoted him. *Id.* at 134.

37 Tucker originally published *A Dissertation on Slavery* in pamphlet form in 1796. He later included the essay as an appendix to his widely-used *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* (1803).

38 *Hudgins*, 11 Va. at 141 (Tucker, J., concurring).

39 *State v. Mann*, 13 N.C. 263 (1829).

40 For the verdict and Saunders's argument, see *id.* at 263–64.

41 Ruffin's drafts are printed in The Papers of Thomas Ruffin 249–57 (J.G. de Roulhac Hamilton ed. 1920). The quoted language is from his first draft. *Id.* at 249.

42 *Mann*, 13 N.C. at 267.

43 *Id.*