

# READING THE EARLY AMERICAN LEGAL PROFESSION: A STUDY OF THE FIRST AMERICAN LAW REVIEW

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*This Note seeks to demonstrate the ripeness of early American legal periodicals as a subject of further inquiry by reading the American Law Journal (1808–1817), the first American law review, as a reflection of the changing nature of the legal profession at a crucial time in American history. Close analysis of the content and editorial choices of the journal suggests that the journal both reflects and addresses three early nineteenth century professional needs: the need to practice in a variety of jurisdictions and areas of law; the need to give voice and content to the emerging idea of a professional self-consciousness, which some scholars suggest developed only later in the century; and the need to respond to the internationalization of American legal and political affairs, which undercuts the arguments of many legal historians that the period marked an increasing tendency in American jurisprudence to look inward. The few scholars who have attempted to paint a picture of legal affairs in this transformative period have typically focused on the dockets of particular jurisdictions while overlooking legal periodicals. However, such sources can more accurately portray the state of the national legal profession given that a journal editor, unconstrained by state or regional boundaries, can incorporate cases and sources from a wide range of jurisdictions and on a varied array of topics. Furthermore, the fact that periodicals are necessarily dependent on a subscriber base suggests that such editors had to touch on issues of interest to subscribers from all across the country in order to stay afloat.*

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\* Copyright © 2012 by Zoey F. Orol, J.D. Candidate, 2013, New York University School of Law; B.A., 2010, Harvard College. I would like to thank Professor Daniel Hulsebosch, who sparked my interest in this topic and provided extensive feedback throughout the writing and editing process, and the editorial staff of the *New York University Law Review*, particularly Colleen Lee and Anthony Enriquez. And finally, I want to thank my dad, Elliot Orol, whose lovingly scrutinizing editorial gaze has improved so much of my writing.

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## INTRODUCTION

It is nearly impossible to imagine a time when the legal profession was without law reviews. In conjunction with court decisions, law reviews are the primary way in which legal academics, judges, and practitioners explore the complexities and nuances of American law while simultaneously asserting their collective identity as an autonomous profession. Even though lawyers were present in the American colonies well before independence was proclaimed, the first American law review was not published until 1808.<sup>1</sup>

That is not to say that colonists had no legal publications at their disposal. Some colonists sailed across the Atlantic armed with extensive knowledge of the law as well as with their law books, though as Chancellor James Kent of New York recalled, “when he went on the bench in 1798 . . . [t]here were no American lawbooks, and of those imported from England there were so few copies that not all courts”—let alone lawyers—“could consult them.”<sup>2</sup> Others were able to instruct themselves in the vagaries of court procedure by consulting one of a handful of do-it-yourself legal manuals such as Giles Jacob’s *Every Man His Own Lawyer*, a publication designed to instruct laymen on everything from “Laws relating to Marriage, Bastardy, Infants, Ideots, [and] Lunaticks” to “Arrests . . . and Bail,” to rudimentary trusts and estates law, and “publick Offences, Treason, Murder, Felony, Burglary, Robbery, Rape, Sodomy, Forgery,” and “Perjury”—so “that all Manner of Persons may be particularly acquainted with our Laws and Statutes . . . and know how to defend Themselves and their Estates and Fortunes, In all Cases whatsoever.”<sup>3</sup>

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<sup>1</sup> See, e.g., Maxwell Bloomfield, *Hall, John Elihu*, in 9 AMERICAN NATIONAL BIOGRAPHY 863, 863 (1999) (“Hall combined his legal and literary interests by editing the first American legal periodical, the American Law Journal, which he published in six volumes from 1808 to 1817.”).

<sup>2</sup> PERRY MILLER, *THE LIFE OF THE MIND IN AMERICA* 109 (1965).

<sup>3</sup> GILES JACOBS, *EVERY MAN HIS OWN LAWYER* i (7th ed. 1768). Not all American attorneys needed to turn to these do-it-yourself manuals. As Julius Goebel notes, even during the colonial period there were highly sophisticated and well-read American attorneys. *CASES AND MATERIALS ON THE DEVELOPMENT OF LEGAL INSTITUTIONS* 300 (Julius Goebel, Jr. ed., 1949) (“In jurisdictions like New York and Pennsylvania . . . practice was on a high professional level and a most complete absorption of common law, substantive and adjective, had been achieved . . .”). See also Mary Sarah Bilder, *The Lost Lawyers: Early American Legal Literates and Transatlantic Legal Culture*, 11 YALE J.L. & HUMAN. 47, 49, 51 (1999) (arguing that “legal practitioners were a constant—and powerful—element of early Rhode Island legal culture” and that “no dramatic shift

But by the beginning of the nineteenth century, changing American political and social realities had lawyers in a bit of a bind. No longer were instructional manuals and ad hoc access to English legal sources sufficient to serve the needs of the profession's elite.<sup>4</sup> First, the country's expansion—as well as the deepening commercial ties among the states—meant that attorneys needed to be familiar with laws, rules, and practices of jurisdictions outside their own.<sup>5</sup> Particularly given the emergence of regional centers of economic activity such as New York, Philadelphia, and Charleston, lawyers had reason to expect their clients' business to cross state lines.<sup>6</sup> Second, the period marked the beginning of lawyers' self-consciousness as a profession, a development that promoted the sense that lawyers should adhere to certain standards including a proto-code of ethics and well-rounded educational achievement. And finally, the profession was increasingly mired in international affairs. International politics—most notably, for purposes of this Note, the Napoleonic Era and the War of 1812—required lawyers to be deeply familiar with international maritime law, and America's concurrent emergence as a player on the world stage meant that American lawyers began to see themselves as part of a transatlantic elite, requiring familiarity with European sources of law.

John Elihu Hall, a Baltimore attorney,<sup>7</sup> sought to respond to these needs by publishing the first American law review, called the

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occurred from a seventeenth-century world without lawyers to an eighteenth-century world with them”); *id.* at 83–102 (discussing how American attorneys in the colonial period learned the substance of the law).

<sup>4</sup> These changing aspects of American politics and society were unlikely to have affected those lawyers who specialized in purely local matters such as debt collection.

<sup>5</sup> See *infra* Part I.

<sup>6</sup> See *infra* note 21–24 and accompanying text.

<sup>7</sup> Scholars have only sparse information about Hall's life. Bloomfield, *supra* note 1, at 864 (“There is no biography of Hall, or any major collection of unpublished papers.”). However, scholars such as Bloomfield have been able to determine that he spent time studying at Princeton but did not graduate, and then became an apprentice in the law office of Joseph Hopkinson, a “leading” Philadelphia lawyer. *Id.* at 863. After being admitted to the Pennsylvania bar in 1805, he moved to Baltimore, where he started the *American Law Journal*. *Id.* The journal failed for financial reasons in 1817, and Hall's attempt to restart it in 1821 under the name *Journal of Jurisprudence* apparently failed, as only one issue of the new journal was ever published. *Id.* at 864. Hall also managed to devote some time to other literary pursuits. According to Bloomfield, using the pseudonym “Sedley,” Hall occasionally wrote essays that were published in *Port Folio*, “the leading Federalist magazine of the early nineteenth century,” that constituted “reflections on the low state of American society and manners.” *Id.* Hall also completed a fictional account of the Greek poet Anacreon, which was serialized in the *Port Folio* in 1820, and edited *Poems by the Late Dr. Shaw*, a collection of works by a celebrated Baltimore poet. *Id.* A staunch opponent of the War of 1812, Hall was a Federalist and was even involved in defending the office of a Federalist publisher against an anti-British mob in July 1812. *Id.* In 1814, Hall

*American Law Journal*, in 1808.<sup>8</sup> The journal functioned as a hybrid academic journal and reporter, publishing

[laws] which relate to negotiable paper, to the manner of executing legal instruments, such as deeds, letters of attorney, &c. and of authenticating them so as to make them evidence—adjudged cases in England or America—opinions delivered by eminent counsellors of any country—lists of English statutes which have been extended to the different states—early notices of new publications on subjects of law, commerce or politics—essays on legal or commercial subjects—biographical memoirs of distinguished characters—[and] sketches of parliamentary and congressional debates.<sup>9</sup>

The journal spanned areas of the law as diverse as insurance, bigamy, maritime law, property, procedure, and fraud, and republished case opinions from state, federal, and foreign courts.<sup>10</sup>

Little has been written about the American legal profession in this transitional era, despite scholars' acknowledgment of its importance in crafting the robust corps of attorneys that marked the later nineteenth century.<sup>11</sup> Those scholars who have attempted to paint a

was elected to the American Philosophical Society. *Id.* He devoted the waning years of his life to editing the *Port Folio*, abandoning his legal practice in 1816, but "ill health and mounting debts forced Hall to discontinue its publication." *Id.* Hall died in Philadelphia on June 12, 1829. *Id.* at 863–64. For more on Federalist literary culture, see generally MARSHALL FOLETTA, *COMING TO TERMS WITH DEMOCRACY: FEDERALIST INTELLECTUALS AND THE SHAPING OF AN AMERICAN CULTURE* (2001).

<sup>8</sup> See *supra* note 1 and accompanying text.

<sup>9</sup> *Preface*, 1 AM. L.J. v, vii–viii (1808).

<sup>10</sup> See Appendix B, *infra*.

<sup>11</sup> See, e.g., M. H. HOEFLICH, *LEGAL PUBLISHING IN ANTEBELLUM AMERICA* 6–7 (2010) ("American law and the American legal profession underwent profound changes. This was a period of extensive legal syncretism of American and English law. English law was neither wholly rejected nor wholly accepted, and every lawyer during this period had to know something of English statutes and cases as well as the great treatise literature that had dominated English legal thought, particularly the works of Coke and Blackstone. At the same time, each of the new American states and the new federal government were developing legal literatures of their own . . ."); see also, e.g., MILLER, *supra* note 2, at 109–10 (discussing the experience of Chancellor Kent and the role of law schools in bringing order to legal jurisprudence). The changing nature of the legal profession in this era ultimately spawned the first American law schools, such as Harvard Law School in 1817, *Our History*, HARVARD LAW SCHOOL, <http://www.law.harvard.edu/about/history.html> (last visited Sept. 14, 2012); Yale Law School in the 1820s, *History of YLS*, YALE LAW SCHOOL, <http://www.law.yale.edu/about/historyofyls.htm> (last visited Sept. 14, 2012) and New York University School of Law in 1835, *About NYU Law*, NEW YORK UNIVERSITY SCHOOL OF LAW, <http://www.law.nyu.edu/about/index.htm> (last visited Sept. 14, 2012), though attendance at these law schools was largely limited to a small, elite segment of American lawyers during this period. See, e.g., HOEFLICH, *supra*, at 18 & n.58 (noting the number of attorneys who had enrolled in law schools at various times in the nineteenth century). For general background on the history of legal education from the eighteenth century to the present, see generally *THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES* (Steve Sheppard ed., 1999).

picture of legal affairs in this period typically focus on the dockets of particular jurisdictions while overlooking early American legal periodical literature. But such early periodicals can more accurately portray the state of the national legal profession because a journal editor, unconstrained by the legal happenings of a particular state or region, can incorporate cases and sources from a wide range of jurisdictions and topics. Furthermore, the fact that periodicals are necessarily dependent on a subscriber base suggests that such editors had to touch on issues of interest to subscribers from all across the country to stay afloat.

This Note seeks to redress this scholarship gap by demonstrating the ripeness of early American legal periodicals as a subject of further inquiry. I will read the *American Law Journal* as a reflection of the changing nature of the legal profession at a crucial time in American history, focusing in particular on the way the journal reflects and addresses the three professional needs described above: the need to practice across a variety of jurisdictions and a wide range of subject matters, the need to give voice and content to the emerging idea of a professional self-consciousness, and the need to respond to the internationalization of American legal and political affairs.<sup>12</sup> I intend to demonstrate that the *American Law Journal* and other similar periodicals have been unfairly overlooked as well as mischaracterized. M. H. Hoeflich, who has conducted significant research into the publication histories of American legal periodicals, classifies the *American Law Journal* as little more than a pecuniary vehicle.<sup>13</sup> Maxwell Bloomfield, who has studied the role of lawyers in American culture in the nineteenth century, describes it as a “speculative” publication of “general interest,” as opposed to the “rigorously utilitarian” publications of the more cohesive legal profession of the mid-nineteenth century such as the *Monthly Law Reporter* (1838–1866), the *New York Legal Observer* (1842–1854), the *Pennsylvania Law Journal* (1842–1848), and the *Western Law Journal* (1843–1853).<sup>14</sup> A deeper inquiry into

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<sup>12</sup> I am indebted to Harvard University’s History and Literature department, and particularly to James Murphy, for instructing me in the merits of this approach—that the editor’s choice of cases, biographies, and articles provides a window into the time period that is useful for historical analysis. This approach is also similar to that taken by A. W. B. Simpson in *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. CHI. L. REV. 632 (1981). Simpson argues that certain “literary forms are closely tied to theories about the nature of law itself, and this is particularly true of the treatise.” *Id.* at 633. He posits that “[a]s law was a science based on principles, the function of the jurist was to expound these principles in a systematic manner,” a function to which the treatise was uniquely suited. *Id.* at 672.

<sup>13</sup> HOEFLICH, *supra* note 11, at 177.

<sup>14</sup> MAXWELL BLOOMFIELD, *AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776–1876*, at 143 (1976).

the *American Law Journal* demonstrates the inaccuracy of these characterizations.<sup>15</sup>

Unfortunately, Hall never published a subscriber list despite his promise to do so in the first issue of the *American Law Journal*.<sup>16</sup> But editorial notes throughout the journal suggest that Hall was in dialogue with his readership, which sustained the journal until 1817 when the sixth and final volume was published.<sup>17</sup> There is also some secondary evidence that the periodical had a wide readership. Charles Shields recounts that “[t]he publication achieved rapid success . . . . It was cited and quoted by the leading legal writers of the day and was cited in arguments in both the state supreme courts and United States Supreme Court.”<sup>18</sup> Maxwell Bloomfield’s short biography of Hall in the *American National Biography* notes that “bar leaders praised the *Journal* and cited it in arguments before state supreme courts and the U.S. Supreme Court.”<sup>19</sup> And an 1809 review of the journal in the *Monthly Anthology and Boston Review* “agree[d] with the editor in his opinion of the importance of such a work,” noting, “[w]e highly applaud the attempt of Mr. Hall, and the publication is much more interesting than could have been expected from so novel an undertaking.”<sup>20</sup> It is safe to say, then, that Hall’s lens on the American legal

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<sup>15</sup> For another student-authored piece on a similar legal history topic, see Andrew M. Siegel, “*To Learn and Make Respectable Hereafter*”: *The Litchfield Law School in Cultural Context*, 73 N.Y.U. L. REV. 1978 (1998) (discussing the history and role in American legal education of the Litchfield Law School, considered by many legal historians the second American law school).

<sup>16</sup> *To Readers and Correspondents*, 1 AM. L.J. iii, iii (1808) (“The different agents of the Law Journal are requested to transmit lists of subscribers obtained by them, to the Publishers, at Philadelphia, on or before the 1st of December next . . . so that the lists of subscribers” can “accompany the fourth number . . .”).

<sup>17</sup> See, e.g., *Laws of Maryland 1807–8*, 1 AM. L.J. 87, 87 (1808) (“Gentlemen of the bar will confer a favour by sending similar abstracts of the laws of their respective states.”); *Attachments in North Carolina*, 1 AM. L.J. 417, 417 (1808) (quoting a reader’s letter to Hall that accompanied a summary of the laws of attachment in North Carolina “to express my desire that the work may succeed”); *Advertisement to the First Volume of the Second Series*, 4 AM. L.J. v, vi (1813) (noting that a reviewer recommended that the journal cover “inquiries into the origin of the federal constitution and that of the several states, which would afford us some view of the progress we have made” and that accordingly, Hall “collected a variety of pamphlets, illustrative of our political and legal history” that would be published); *Intelligence and Miscellaneous Articles: Domestick*, 6 MONTHLY ANTHOLOGY & BOSTON REV. 428, 428–29 (1809) (“[W]e would recommend inquiries into the origin of the Federal constitution and that of the several states, which would afford us some view of the progress we have made.”).

<sup>18</sup> Charles E. Shields III, *Chancellor Kent’s Abridgement of Emerigon’s Maritime Insurance*, 108 PENN ST. L. REV. 1123, 1135 n.119 (2004). A Westlaw search shows that the journal was cited in at least sixteen state and federal court opinions (including three times by the Supreme Court), from 1812 to 1932.

<sup>19</sup> Bloomfield, *supra* note 1, at 864.

<sup>20</sup> *Intelligence and Miscellaneous Articles: Domestick*, *supra* note 17, at 428–29.

profession is not unrepresentative, and can be aptly used to read the story of American lawyers at this moment of increasing self-consciousness and professional change.

This Note will proceed in three parts. Part I will explore how the *American Law Journal* responded to American lawyers' practical need to function across state lines and in different legal subject areas. Part II will illustrate how Hall attempted to cement the professionalization of American lawyers by suggesting particular ethical obligations of and educational requirements for lawyers. Part III will demonstrate the increasing internationalization of the American legal profession in the early nineteenth century by considering the internationally-minded cases and European sources of law that Hall included in his publication; this part will also suggest several areas of jurisprudence that Hall carved out as uniquely American, immune to foreign influence.

I use empirical analysis to supplement my argument. To show that the *American Law Journal* reflects lawyers' need to practice in multiple jurisdictions and to demonstrate the internationalization of the profession, I divided all of the cases that appear in the six volumes of the *American Law Journal* into five jurisdictional categories: Britain/British courts, U.S. Supreme Court, U.S. Senate, U.S. federal courts, and state courts. I also divided all of the cases, statutes, and articles by subject matter. These jurisdictional and subject matter tallies are referenced throughout the Note and are reproduced in Appendices A and B, respectively.

## I

### A FAR-FLUNG PROFESSION

The beginning of the nineteenth century was a time of increasing expansion and interconnectedness in America. The Louisiana Purchase of 1803 had nearly doubled the size of the United States.<sup>21</sup> Demographic shifts brought more Americans to previously sparse areas of the country, and northeastern states, particularly New York and Pennsylvania, became even denser with their increasing prominence as industrial centers.<sup>22</sup> Commercial ties among the states became so strong that the Bank of the United States was re-chartered in 1816 to ensure a uniform and interconnected continental economy, which Henry Clay dubbed the "American System." The New York legislature appropriated funds for the Erie Canal in the following year

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<sup>21</sup> JOSEPH R. CONLIN, *THE AMERICAN PAST* 168 (7th ed. 2004).

<sup>22</sup> *Id.* at 181.

to promote interstate commerce.<sup>23</sup> The popularization of steamboats and railroads was not far behind.<sup>24</sup>

For American lawyers, these demographic and social shifts required familiarity with the laws, practices, and procedures of states they may never even have visited. But the do-it-yourself manuals of the colonial period and renowned legal tomes like Blackstone's *Commentaries* could hardly be expected to serve these practical needs. Hall stepped into the fray, noting:

If a Law Journal have [*sic*] been found to be so useful and necessary in Great Britain, where notoriety and uniformity may be established by an appeal to one supreme tribunal, how important would such a publication be, in our country, governed as it is by the various and conflicting laws of different states, which are yet so intimately connected by commercial and political relations?<sup>25</sup>

Hall's introduction to the first volume of the *American Law Journal* suggests that lawyers were losing lawsuits—and perhaps clients—because of their lack of familiarity with the laws of other states. Noting that “heavy expense” can arise from being “ignorant of the laws which prevail where the controversy has existed,” Hall focused on the problems facing attorneys who represented merchants:

[If a merchant were to] apply for advice respecting a contract which has been made in a different state, his counsel may not be able to procure the statute by which that transaction is governed: and if it be in his possession, he is still ignorant of the exposition or limitation which it has received from juridical adjudications.<sup>26</sup>

Hall emphasized this ignorance again in the following volume, lamenting that American attorneys “are not unfrequently [*sic*] so ignorant of the decisions in any other state, than their own, as never to have heard the names of some of the reporters.”<sup>27</sup>

Hall's selection of articles and cases suggests that American lawyers in this period had to be familiar with the trial practice of different states, perhaps indicating a rise in litigation involving parties who were not citizens of the same state—a trend that would be expected at a time of increasing mobility and commercial unification. In the first volume alone, Hall reproduced the full rules of procedure of the

<sup>23</sup> *Id.* at 189.

<sup>24</sup> *Id.* at 191–94.

<sup>25</sup> *Preface, supra* note 9, at v–vi.

<sup>26</sup> *Id.* at vi.

<sup>27</sup> *Review*, 2 *AM. L.J.* 173, 174 (1809); *see also* DANIEL J. HULSEBOSCH, *CONSTITUTING EMPIRE* 237 (2005) (“[As] the states united to form a common constitution, many suddenly apprehended just how much the laws of the states varied. Not only their statutes differed but their common-law systems too.”).

Maryland Circuit Court;<sup>28</sup> described the procedures for attaching property in New York,<sup>29</sup> South Carolina,<sup>30</sup> and North Carolina;<sup>31</sup> and listed Maryland's statutes of limitations in cases involving commerce and estate law.<sup>32</sup> In later volumes, Hall explained the cases over which Pennsylvania justices of the peace had jurisdiction<sup>33</sup> and the roles of various courts established in the Territory of Orleans.<sup>34</sup> He also noted what formalities were required to authenticate title deeds to property in New York,<sup>35</sup> Virginia,<sup>36</sup> and Kentucky.<sup>37</sup>

This varying procedure from state to state was likely a legacy of the "shapeless colonial jurisprudence" that contained "no separation of functions" for lawyers.<sup>38</sup> As such, the American lawyer, a "Jack-of-all-trades," who, from colonial times, had to be knowledgeable in multiple areas of the law, now had to be knowledgeable in multiple areas of the law *in multiple jurisdictions*. State court cases in the *American Law Journal* come from eleven states, in order of appearance: New York, Pennsylvania, Maryland, South Carolina, Georgia, Massachusetts, Virginia, North Carolina, Tennessee, Connecticut, Ohio, and the Orleans and Mississippi Territories. District and circuit court cases, Supreme Court cases, and British cases are also included.<sup>39</sup> These cases focus on a notably diverse array of topics including maritime law, insurance, constitutional law, trusts and estates, contracts, bankruptcy, assault, corporations, libel, and property.<sup>40</sup> Many of these cases did not bear directly on trial practice, suggesting that American lawyers' practices in the early nineteenth century encompassed much more than litigation and court appearances. For instance, in the first issue of the *American Law Journal*, Hall excerpts annotated Maryland state laws on topics ranging from building streets, collecting officials' salaries, debt relief provisions, and incorporating Baltimore.<sup>41</sup>

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<sup>28</sup> *Regula*, 1 AM. L.J. 484 (1808).

<sup>29</sup> *The Attachment Law of New-York*, 1 AM. L.J. 407 (1808).

<sup>30</sup> *An Abstract of the Attachment Law of South Carolina*, 1 AM. L.J. 321 (1808).

<sup>31</sup> *Attachments in North Carolina*, *supra* note 17.

<sup>32</sup> *Limitations of Actions in Maryland*, 1 AM. L.J. 426 (1808).

<sup>33</sup> *Pennsylvania Common Pleas*, 3 AM. L.J. 113 (1810).

<sup>34</sup> *Judicial Establishment in the Territory of Orleans*, 3 AM. L.J. 65 (1810).

<sup>35</sup> *Manner of Proving Deeds in New York*, 2 AM. L.J. 458 (1809).

<sup>36</sup> *The Manner of Authenticating Foreign Deeds, Records and Other Instruments in Writing, in Order to Entitle Them to Be Admitted in Evidence in Virginia*, 3 AM. L.J. 68 (1810).

<sup>37</sup> *Laws of Kentucky*, 4 AM. L.J. 120 (1813).

<sup>38</sup> MILLER, *supra* note 2, at 135.

<sup>39</sup> See Appendix A, *infra* (classifying cases by jurisdiction).

<sup>40</sup> See Appendix B, *infra* (classifying cases, statutes, and articles by topic area).

<sup>41</sup> *Laws of Maryland 1807-8*, *supra* note 17.

The significant number of state laws on commercial topics such as debt relief and incorporation<sup>42</sup> may also suggest that Hall viewed the *American Law Journal* as a way to present states' experiments with *lex mercatoria* with the aim of showcasing a uniquely American jurisprudence.<sup>43</sup> This interpretation is buttressed by Hall's explanation of his inclusion of a Pennsylvania law regulating arbitrations—a law he dubs an “experiment”:

[T]hat it may be known to the readers of our Journal . . . [A]nd if it should not be found to effectuate the object intended by it, we hope it will be remembered only as a warning to those who may hereafter wish to depart from the path which the wisdom of ages has pronounced to be the safest as well as the nearest to the temple of justice.<sup>44</sup>

Cases from across jurisdictional lines, then, were valuable not only to inform practitioners of current laws and practices in states outside their own, but also for their predictive value—their ability to illustrate trends in the evolution of particular areas of the law—and for their ability to unearth general legal principles to which practitioners could appeal wherever they went.

Even disputes discussed in the *American Law Journal* that appear to be of purely local concern showcase general principles of commercial law that practitioners could rely on across state lines. For instance, in the fourth volume of the journal, Hall reproduced the opinion in the case of *Blount v. Chester*, involving the purchase of a horse; the seller did not say anything about the horse's defective eyes and the purchaser ultimately obtained money damages for fraud.<sup>45</sup> And in the first volume, Hall presented the case of *Day v. Jarvis*, in which two parties agreed to trade fifty engravings of George Washington for fifty engravings of Thomas Jefferson.<sup>46</sup> Jarvis, the original possessor of the Washington engravings, later refused to give more than twenty-five Washington engravings for fifty Jefferson engravings because Jefferson's “popularity . . . was sinking so rapidly” and “there was no chance of HIS ever being re-elected.”<sup>47</sup> Instead of representing purely local concerns, these two cases can instead be taken to illustrate general principles of trade and commerce: Material facts that a purchaser is unlikely to be able to discover on his own

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<sup>42</sup> See Appendix B, *infra*.

<sup>43</sup> See Part III.D, *infra* (discussing the areas of law that Hall portrayed as immune from the influence of foreign sources of law). *Lex mercatoria*, or “merchant law,” refers to the body of commercial law developed in Europe beginning in the medieval period.

<sup>44</sup> *An Act Regulating Arbitrations*, 3 AM. L.J. 163, 163 (1810).

<sup>45</sup> *Blount v. Chester*, 4 AM. L.J. 618 (1813).

<sup>46</sup> *Day v. Jarvis*, 1 AM. L.J. 175, 175 (1808).

<sup>47</sup> *Id.*

must be divulged in a sale of goods, and contracts, once made for valid consideration, cannot be altered absent extenuating circumstances.

Hall's selection of cases and laws, then, first and foremost served lawyers' practical need to function across state lines and in a wide variety of disciplines. But Hall may also have had a particular agenda—to showcase general principles of commercial law that undergirded the laws of various American jurisdictions.

## II

### A SELF-CONSCIOUS PROFESSION

Legal historians typically date the rising self-consciousness of the profession to the mid-nineteenth century. Bloomfield, for instance, posits that “in the pre-Jackson period . . . a professional outlook . . . scarcely existed.”<sup>48</sup> Hoeflich, similarly, focuses on John Livingston's publication, beginning in 1849, of the *Law Register*, the predecessor of Martindale-Hubbell,<sup>49</sup> and his organization of the North American Legal Association to “bring together lawyers . . . to form a loose organization” as marking the point when lawyers began to “form alliances” across jurisdictional lines.<sup>50</sup> Roscoe Pound argued that “[t]he idea of a profession was repugnant to the Jeffersonian era.”<sup>51</sup> The *American Law Journal* suggests that this professional self-consciousness emerged much earlier than these legal scholars contend and also adds content to precisely what standards lawyers were expected to meet.

As early as the publication of the first volume of the *American Law Journal* in 1808, Hall was already emphasizing the need for lawyers to be well read, intellectually curious, and broadly minded Renaissance men<sup>52</sup>—a background largely accessible, in Hall's day, only to those lawyers fortunate enough to have received formal academic training.<sup>53</sup> In 1794, for instance, James Kent, later Chancellor of New York, lectured to Columbia College students that “every American lawyer” should “master the Greek and Latin classics as well as moral philosophy, history, logic, and mathematics” because “[o]nly an attorney ‘well read in the whole circle of the arts and sciences’ could form ‘an accurate acquaintance with the general principles of

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<sup>48</sup> BLOOMFIELD, *supra* note 14, at 139.

<sup>49</sup> HOEFLICH, *supra* note 11, at 149.

<sup>50</sup> *Id.* at 148, 151.

<sup>51</sup> ROSCOE POUND, *THE FORMATIVE ERA OF AMERICAN LAW* 7 (1938).

<sup>52</sup> See generally MILLER, *supra* note 2, at 140 (discussing the idea that lawyers should have broad educational training, even beyond legal subjects).

<sup>53</sup> ROBERT A. FERGUSON, *LAW AND LETTERS IN AMERICAN CULTURE* 28–29 (1984) (discussing various leading jurists' recommendations for legal curricula).

Universal Law.’”<sup>54</sup> While historian Robert A. Ferguson suggests that “the controlling aspirations of an intellectual elite remained firm” even at the time of John Quincy Adams’s entry into the profession,<sup>55</sup> other scholars attribute the entrenchment of these ideas about what a lawyer should be and should know to the period when law schools gained primacy closer to the middle of the nineteenth century.<sup>56</sup> In its presentation of articles and sentencing excerpts, the *American Law Journal* exposed lawyers to these models, democratizing the profession by urging that lawyers of a wide variety of educational attainment aspire to these traits.

One aspect of the increasing professionalization of American lawyers was lawyers’ necessary interest in legal affairs outside of their home states. As the previous section and the multijurisdictional tally of cases Appendix A suggests,<sup>57</sup> the *American Law Journal* facilitated this perspective by reproducing cases from states across the union, varying federal jurisdictions, and Britain.<sup>58</sup> Another way in which the *American Law Journal* attempted to increase lawyers’ awareness of their national professional presence was a call to the journal’s Philadelphia publishers “to transmit lists of subscribers obtained by them” to “distinguish the names of professional gentlemen from others, so that the list of subscribers, which will accompany the fourth number, may exhibit some view of the number of attorneys in this country.”<sup>59</sup> This call for subscribers should be read as more than facilitating a “referral” service;<sup>60</sup> instead, Hall wanted attorneys to be aware of their counterparts in other states who were similarly interested—for professional and intellectual as well as practical reasons—in the breadth of legal topics and decisions of varying jurisdictions represented in the journal.

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<sup>54</sup> *Id.* at 28.

<sup>55</sup> *Id.* at 29.

<sup>56</sup> See, e.g., MILLER, *supra* note 2, at 109–10 (discussing the rise of law schools); BLOOMFIELD, *supra* note 14, at 36 (“The best hope for the preservation of an American arcadia lay in the sturdy, independent yeoman.”).

<sup>57</sup> See Appendix A, *infra*.

<sup>58</sup> Hall’s presentation of the locally oriented cases discussed in the previous section, *supra* notes 45–47 and accompanying text, may indicate that Hall sought to cement the rising self-consciousness of a nationwide legal profession by making his subscribers aware of laws and developments occurring outside a reader’s home state. It is hard to read the Pennsylvania law levying a tax on dogs, *Act Laying a Tax on Dogs in Certain Counties, and for Other Purposes*, 3 AM. L.J. 159 (1810); or a Maryland law “to revive and aid the proceedings of the orphans’ court of Saint Mary’s county,” *Laws of Maryland 1807–8*, *supra* note 17, at 87; or a Maryland law “annulling the marriage of Patrick Sim and Ariana Sim,” *id.* at 88, as suggesting general principles of commercial law, and it is unlikely that a reader would need to know about these acts to perform services for a client.

<sup>59</sup> *To Readers and Correspondents*, *supra* note 16, at iii.

<sup>60</sup> HOEFLICH, *supra* note 11, at 151.

Because of the nature of the articles presented in the *American Law Journal*, this section will focus on two slightly different aspects of the professionalization of American lawyers, both of which the *American Law Journal* aimed to facilitate: first, a proto-code of “ethics” regarding personal characteristics that were thought to be essential for lawyers in this period;<sup>61</sup> and second, and closely related, a growing consensus about what lawyers should know, particularly outside of legal topics.

This section will consider two categories of articles in the *American Law Journal*—sentencing excerpts and biographies—that demonstrate the journal’s role in facilitating the professionalization of American lawyers.

### A. *Sentencing Excerpts*

Hall excerpts sentencing decisions from a variety of jurisdictions that are surprisingly alike in tone and content. Priming his readers to view the judges he cites as textbook examples of morality and zeal for justice, Hall editorializes at the beginning of the first sentencing excerpt of the journal that his intention in quoting the judge in question was to do “no less honour to his head, as a sound and able Judge, than to his heart, as a virtuous and humane man.”<sup>62</sup> Interestingly, the first excerpt is of Judge Wilds of South Carolina as he sentences a slave owner for the brutal murder of a slave; Wilds suggests that “a subsequent legislature” should decide whether “a very slight punishment” is still, consonant with the beliefs of “our fathers,” appropriate for “the present state of society” given that such punishment is “so opposite to the apparent rights of humanity.”<sup>63</sup> The idea of a lawyer’s essential humanity—of wanting to use the law as a tool to promote both individual and collective security and liberty, regardless of a party’s race or even enslavement—recurs in the second sentencing

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<sup>61</sup> It is worth noting that this increasing professionalization may have inadvertently worked to encourage mistrust of lawyers among non-lawyers. Bloomfield’s study of fiction written by lawyers in the early nineteenth century lends some credence to this idea. Focusing on three books—Henry Brackenridge’s *MODERN CHIVALRY* (1792–1815), William Littell’s *EPISTLE . . . TO THE PEOPLE OF THE REALM OF KENTUCKY* (1806), and George Watterson’s *THE LAWYER; OR, MAN AS HE OUGHT NOT TO BE* (1808)—Bloomfield notes that despite the differences among these books, “all three . . . depict the lawyer as an embattled intellectual whose professional acquirements have somehow isolated him from the rest of society.” BLOOMFIELD, *supra* note 14, at 165. Littell’s and Brackenridge’s texts sought to demonstrate that “the lawyer’s superior intelligence . . . elevated him above the common herd and enabled him to act as an American philosophe, a wise and trustworthy counselor to the masses.” *Id.* at 169.

<sup>62</sup> *Charge Delivered by the Honourable Judge Wilds of South-Carolina*, 1 AM. L.J. 67, 67 (1808).

<sup>63</sup> *Id.* at 68.

excerpt from a Pennsylvania Circuit Court judge. Delivering a high-handed rebuke to three men who resisted arrest, the judge cries:

Is it possible that you could for a moment have entertained the expectation, that it was in your power to obstruct, with effect, the streams of justice, which give life to the political body, and by which that liberty which we all profess to love, is refreshed and invigorated? . . . The courts of justice are the sanctuaries of the law and it is through the law that our government speaks and acts. Impair, by any means, the power of these tribunals in the lawful exercise of their functions, and you attack the majesty of the law, and sap, most essentially, the foundations of the republic.<sup>64</sup>

For this judge, resisting arrest was such a profound attack on the justice system, kept in place to safeguard “the foundations of the republic,” that it merited a year in prison and a \$300 fine.<sup>65</sup> Even dueling was seen as offending all-important order: A judge from the Court of King’s Bench attempted to make an example out of a dueler “to teach the country . . . that a spirit of duelling is not to be tolerated in any country pretending to civilization, but must be beat down by the strong arm of the law.”<sup>66</sup> Baron Smith, in another dueling case, characterizes his “duty” as “to state *mercifully*”—again underscoring the link between judging and human sympathy—“what I conceive to be the law.”<sup>67</sup>

The ideal judge punishes in a manner commensurate with the crime and without regard to personal sentiment.<sup>68</sup> The judge in *State v. Asselin* is quoted in the journal as saying:

Whatever sentiments I may entertain of this prosecution, or of the character of Mr. *Asselin*, I feel my conscience and my judgment encompassed by obligations, which I shall faithfully discharge, without permitting my passions to be warped by circumstances which are connected with the relative situation of men in society.<sup>69</sup>

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<sup>64</sup> *United States v. Lowrey*, 1 AM. L.J. 232, 233–34 (1808).

<sup>65</sup> *Id.* at 236. The equivalent of \$300 in 1800 dollars is nearly \$4000 in 2010 dollars. *The Inflation Calculator*, <http://www.westegg.com/inflation/> (last visited Sept. 14, 2012).

<sup>66</sup> *Duelling*, 3 AM. L.J. 193, 196 (1810).

<sup>67</sup> *North v. Miles*, 2 AM. L.J. 115, 126 (1809) (emphasis added). Attorneys other than judges are portrayed in the *American Law Journal* as sharing similar “humane” sentiments. DeWitt Clinton, then mayor of New York City, is quoted in a jury charge in the case of parties accused of inciting others to riot: “Would to God, that this transaction had never taken place!—Would to God, that the court had been spared the pain of condemning parties concerned in this riot! But we have our duty to perform—and it shall be performed.” *People v. Ferris*, 4 AM. L.J. 209, 217 (1813).

<sup>68</sup> Perhaps here we see echoes of Cesare Beccaria’s eighteenth century international bestseller *ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS* (Richard Bellamy ed., Cambridge Univ. Press 1995) (1764).

<sup>69</sup> *State v. Asselin*, 2 AM. L.J. 101, 103 (1809).

An article from the second volume further supports this image of the ideal lawyer: “He delights to be an arbitrator, not an incendiary . . . .”<sup>70</sup>

Humanity, zeal for justice, and complete impartiality, then, are the recipe for “an Honest Lawyer,”<sup>71</sup> constituting a proto-code of ethics that Hall sought to bring to lawyers of varying levels of educational attainment from all across the country.

### *B. Biographies*

Hall’s biographies of eminent jurists, past and present, similarly serve as professional models. The jurists he selects embody qualities similar to those mentioned above, and also exhibit a degree of educational attainment that most Americans could never approach because of the relatively limited access to formal legal—and other educational—training in the period.<sup>72</sup>

Hall’s first lawyer profile, that of Scottish jurist James Mackintosh, makes clear Hall’s view that lawyers ought to be extremely well read and intellectually curious, both for their own sake and to enhance their abilities in practice.<sup>73</sup> Characterizing the lawyer as a “liberal scholar,” Hall exhorts his readers to enter “the interior recesses of the studious” to “unfold[ ] to his inquisitive research the restless operations of genius.”<sup>74</sup> Mackintosh, an ambitious doctor who later decided to study the law, was a true Renaissance man according to Hall: “Scarcely is there a topic of literature but some of his lectures touched upon, or a department of science which they have not surveyed.”<sup>75</sup> His knowledge of literature supposedly aided his rhetoric in

<sup>70</sup> *The Adversaria*, 2 AM. L.J. 165, 172 (1809).

<sup>71</sup> *Id.* at 171.

<sup>72</sup> The *American Law Journal*’s emphasis on educational attainment mirrors Hoeflich’s characterization of the importance of the antebellum law book trade, representing the increasing aspiration of the organized legal profession in the United States to be seen as a ‘learned’ profession. From its humble beginnings in the colonial years, after the Revolution, the legal profession made enormous efforts to upgrade its social standing . . . . The most important means of achieving these ends were to raise the intellectual level of the profession and make it seen as a learned profession with all of the prestige associated with this idea. The surest route to creating a learned profession, or at least the appearance of one, was to create a ‘bookish’ profession.

HOEFLICH, *supra* note 11, at 173. See also MILLER, *supra* note 2, at 140–41 (discussing the intellectual standards of the profession in the mid-nineteenth century).

<sup>73</sup> The fact that Hall selects transatlantic lawyers, both living and dead, to profile may also lend credence to the idea of American lawyers coming to self-identify as members of a transatlantic legal elite.

<sup>74</sup> *Biography*, 1 AM. L.J. 121, 121 (1808).

<sup>75</sup> *Biographical Sketch of Sir James Mackintosh, Recorder of Bombay, &c.*, 1 AM. L.J. 122, 130 (1808).

a way that made him a more successful lawyer, “supply[ing] . . . authorities and quotations from philosophers, orators and poets of every age and country, to establish his positions and variegate his manner.”<sup>76</sup> The hyperbole Hall uses to describe his subject only underscores the extent to which he hopes his readers will follow Mackintosh’s example: “Like the splendour of the golden bough that bore the Trojan hero through the darksome regions of the nether realms,” Hall writes of Mackintosh, “the luminous glance of his genius darted through all the branches of the tree of knowledge, and gilded with a new light every leaf upon which it shone . . . .”<sup>77</sup>

Other subjects of Hall’s biographies exhibit similar educational attainment, which is portrayed as enhancing lawyers’ abilities in practice. George Wythe, chancellor of Virginia, learned Latin and Greek, math, moral and natural philosophy, and studied “literary pursuits.”<sup>78</sup> Hall suggests that this background helped Wythe write an important report that gave Virginia the “best parts of their present code of laws.”<sup>79</sup> Echoing the lawyerly traits that he highlighted through his selection and publication of sentencing excerpts, Hall champions Wythe as rigidly impartial, “[s]uperior to popular prejudice and every corrupting influence”; “nothing could induce him to swerve from truth and right.”<sup>80</sup> The connection between learning and legal ability is highlighted in other biographies as well, including that of Serjeant Maynard, an “artful as well as learned lawyer.”<sup>81</sup> A lawyer, then, should be well read and learned for their own merits, but also for the practical benefits he can derive from these scholarly pursuits.

Through these sentencing excerpts and biographies, Hall gives content to the professional standards that lawyers were increasingly expected to meet. By exposing all of his subscribers—not only those with academic legal training—to this proto-code of ethics and recommendations regarding educational attainment, Hall uses his journal as a vehicle to democratize the profession, both showcasing and accelerating the formation in the early nineteenth century of a professional

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<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *George Wythe, Esq.*, 3 AM. L.J. 93, 93 (1810). Similarly, Sidney Godolphin, “a courtier at large,” “had, by his study and diligence, mastered not only all the classical learning, but all the arts and entertainments of the court.” *Sidney Godolphin*, 3 AM. L.J. 247, 247 (1810).

<sup>79</sup> *George Wythe, Esq.*, *supra* note 78, at 95.

<sup>80</sup> *Id.* at 98.

<sup>81</sup> *Serjeant Maynard*, 3 AM. L.J. 107, 109 (1810).

self-awareness that many scholars suggest emerged only much later in the century.<sup>82</sup>

### III AN INTERNATIONAL PROFESSION

Perhaps the clearest evidence of the *American Law Journal's* desire to serve the needs of the profession can be found in the international aspects of the journal. Some legal historians categorize the state of the profession and legal jurisprudence at the beginning and middle of the nineteenth century as looking increasingly inward—an indicator, to these scholars, of legal and judicial nationalism.<sup>83</sup> However, the *American Law Journal* demonstrates that, for both practical and theoretical reasons, the American legal profession was heavily influenced by international affairs and sources of law. First, the international political situation necessitated an understanding of foreign laws, particularly regarding maritime and insurance law. As Ferguson notes, the British blockade during the War of 1812 “disrupted coastal shipping, ruined intercontinental trade, and forced new efforts in domestic manufacturing, internal transportation, and mechanical invention. Overnight the law required experts in admiralty and insurance law to handle the tangled aftermath of confiscations and losses.”<sup>84</sup> The *American Law Journal's* heavy focus on these areas of law can be seen in the tally of cases in Appendix B. Ariel Lavinbuk's pioneering empirical analysis of the Supreme Court docket demonstrates just how significant cases involving international affairs were in this period:

Under Chief Justices Jay and Marshall, the Court heard more than 1300 cases between 1791 and 1835. Beginning with *Georgia v. Brailsford*, 323 of these cases, or one in four, involved the foreign affairs of the United States. Nearly two in five cases heard by the Jay Court involved international issues. During John Marshall's thirty-five-year term as Chief Justice, only one year, 1803, failed to see a single foreign relations case reach the Supreme Court. Not surprisingly, the Court heard more of these cases in the years following armed conflict. From 1813 to 1820, for example, more than forty percent of the Court's docket raised questions implicating foreign affairs.<sup>85</sup>

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<sup>82</sup> See *supra* notes 48–51 and accompanying text (discussing various scholars' views on when lawyers became true “professionals” with a cohesive self-perception).

<sup>83</sup> See *infra* notes 153–54 and accompanying text.

<sup>84</sup> FERGUSON, *supra* note 53, at 199–200.

<sup>85</sup> Ariel N. Lavinbuk, Note, *Rethinking Early Judicial Involvement in Foreign Affairs: An Empirical Study of the Supreme Court's Docket*, 114 *YALE L.J.* 855, 872–73 (2005) (footnotes omitted). See also *id.* at 877 (“Admiralty was at the heart of international affairs

International politics was not the only reason why American lawyers increasingly looked across the pond for guidance. Commerce, too, provided an important impetus for looking outward. Daniel Hulsebosch has argued that given “the cultural significance of oceanic trade in the early nineteenth century,” American lawyers had to consult European sources of law because “[t]he rules of etiquette for this international society lay in treatises on commercial law.”<sup>86</sup> And while Blackstone had perhaps the greatest influence of any single European jurist,<sup>87</sup> American lawyers in the period “drew on continental European” sources “and participated in a cosmopolitan Atlantic world with an increasing number of authorities” as well.<sup>88</sup>

The first and second parts of this section will argue that the *American Law Journal* reflects the dominance of international issues in American legal affairs in both the court opinions that are reprinted<sup>89</sup> and the laws of foreign jurisdictions that are reproduced.<sup>90</sup> The third part of this section will demonstrate the significant degree to which international legal sources were applied in American courts, suggesting that such sources played a much more permanent role in domestic American laws and jurisprudence beyond the specific exigencies of the War of 1812. The final part of this section will illustrate a countervailing trend in the *American Law Journal* to showcase what

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during the Jay and Marshall period. As Grant Gilmore and Charles Black once argued, admiralty was “the inevitable concern of statecraft—and the plaything of politics.” (quoting GRANT GILMORE & CHARLES L. BLACK, JR., *THE LAW OF ADMIRALTY* 958 (2d ed. 1975)). See also Thomas H. Lee, *The Supreme Court of the United States as Quasi-International Tribunal: Reclaiming the Court’s Original and Exclusive Jurisdiction over Treaty-Based Suits by Foreign States Against States*, 104 COLUM. L. REV. 1765, 1860–61 (2004) (noting that the framers “had to invest this quasi-international role in the Supreme Court because there were no international courts at the time to serve this crucial function” of “enabl[ing] peaceful settlement of disputes between States or their citizens and foreign states or their citizens or subjects . . . . At stake was nothing less than the survival of the Republic, for an aggrieved treaty partner had a right at international law to break off diplomatic or crucial trade relations and even to wage war against all of the United States to remedy the breach”). For more on the Supreme Court’s role in foreign policy, see generally Kimi Lynn King & James Meernik, *The Supreme Court and the Powers of the Executive: The Adjudication of Foreign Policy*, 52 POL. RES. Q. 801, 801–08 (1999); Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665 (1986).

<sup>86</sup> HULSEBOSCH, *supra* note 27, at 289.

<sup>87</sup> See FERGUSON, *supra* note 53, at 15 (“The impact [of Blackstone] on early American intellectuals was so profound on so many levels as to constitute one of the greatest instances of paradigmatic migration, innovation, and reconstruction in the history of Anglo-American culture.”).

<sup>88</sup> HULSEBOSCH, *supra* note 27, at 206. For more on how American attorneys obtained foreign legal sources, see M. H. Hoeflich, *Translation & the Reception of Foreign Law in the Antebellum United States*, 50 AM. J. COMP. L. 753 (2002).

<sup>89</sup> See Part III.A, *infra*.

<sup>90</sup> See Part III.B, *infra*.

Hall portrayed as uniquely American areas of law, devoid of the influence of foreign sources.<sup>91</sup>

### A. *International Politics in the American Law Journal*

Two case studies—those of the ships *Horizon* and *Zodiac*—will suffice to illustrate the significant role of international politics in the *American Law Journal*, reflecting the degree to which American lawyers' practices were affected by matters far outside their home jurisdictions.<sup>92</sup>

In 1804, the *Horizon* sailed from Charleston, South Carolina to Zanzibar. Mid-voyage, the captain stopped at Buenos Aires and decided to take on cargo for the English market and sail to London. Bad weather forced the ship to stop at Lisbon, where an English frigate made prize of the *Horizon* as she left port. The cargo was then confiscated in England as having been put on board at an enemy colony. The ship was somehow released, took on more cargo, and then was wrecked once again at sea; the remains of the ship were sold by French authorities, raising the question of what to do with the proceeds from the sale.<sup>93</sup>

The ultimate question involved America's rights as a neutral nation during the Napoleonic Wars, but the convoluted proceedings in the case demonstrate the extent to which American politicians, acting

<sup>91</sup> Hall's portrayal of areas of American jurisprudence through a nationalistic lens in the *American Law Journal* seems to support the institutionalist theories held by scholars such as Klaus Luig and J. W. Cairns. Luig argues that

the theory according to which the unity of European legal science, based as it was on the *ius commune* of Roman and canon law, continued in existence until the nineteenth century, will in some sense be modified. . . . [B]y the end of the eighteenth century, the *usus modernus* in Germany had created 'in lieu of the European tradition of *ius commune* which had simply been adopted in legal sources, literature and principles, a system of the entire law valid in Germany.' . . . [A] similar process of formation of national law occurred in the other West European countries.

Klaus Luig, *The Institutes of National Law in the Seventeenth and Eighteenth Centuries*, 17 *JURID. REV.* 193, 193 (1972). Cairns applied this theory to Blackstone, arguing that his "*Commentaries* constitute an institutional work." John W. Cairns, *Blackstone, an English Institutional: Legal Literature and the Rise of the Nation State*, 4 *OXFORD J. LEGAL STUD.* 318, 320 (1984). These scholars—and the subjects of their writing—aim to illustrate what was distinctive about the jurisprudence and legal cultures of the countries they study.

<sup>92</sup> For more analysis of the centrality of foreign policy disputes in the making of early American constitutional law, see generally David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 *N.Y.U. L. REV.* 932 (2010); David Sloss, *Judicial Foreign Policy: Lessons From the 1790s*, 53 *ST. LOUIS U. L.J.* 145 (2008).

<sup>93</sup> See 1 A. T. MAHAN, *SEA POWER IN ITS RELATIONS TO THE WAR OF 1812*, at 172 (1905) (discussing the facts in the case of the *Horizon*). It is hard to imagine a set of facts bearing more resemblance to a stereotypical anxiety-producing law school exam.

through their lawyers, were at the mercy of foreign courts. The American minister, General Armstrong, communicated about the ship through Spanish officials, at least in part to explain how future cases involving condemned American ships would be decided.<sup>94</sup> Napoleon and the French prize council contended that American ships were subject to the Berlin Decree, which forbade the importation of British goods into European countries allied with or dependent upon France, instead of a July 1778 law under which the “question whether property taken from a wreck ought to be restored or confiscated” had “always” been “solved,” at least prior to Napoleon’s reign.<sup>95</sup> The French prize court deciding the issue ultimately ruled to release the *Horizon*, with the exception of the English goods, which were condemned.<sup>96</sup>

The undated case of the *Zodiac* was also decided in a foreign court—the Vice Admiralty Court at Halifax. On a voyage from New York to Lisbon, the American ship *Zodiac* was seized by a British ship. The question was whether the capture was legal because the British ship “was sailing under a passport, or flag of truce,”<sup>97</sup> which seems to have meant that the British ship was traveling under American protection.<sup>98</sup> The court went on to apply “those principles of publick law which relate to captures made by vessels having a passport or safe conduct,”<sup>99</sup> deciding that the capture of the *Zodiac* was an unlawful act committed by an unruly British subject—“a young and inexperienced officer,” as the British court described him.<sup>100</sup> But even though those principles of law were “so well and so commonly understood,”<sup>101</sup> it appears that the captors on the British ship, with the aid of a lower court, created additional delay through “clandestine proceedings” that were “contrary to the established practice of civilized nations.”<sup>102</sup>

These cases illustrate the extent to which American lawyers—particularly commercial lawyers, about whom Hall expresses particular concern in the preface to the first volume of the

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<sup>94</sup> *Id.*

<sup>95</sup> *Case of the Horizon*, 1 AM. L.J. 312, 318 (1808).

<sup>96</sup> *Id.* at 319; see also MAHAN, *supra* note 93, at 172 (discussing the facts of the case of the *Horizon*).

<sup>97</sup> *In the Case of the Zodiack*, 4 AM. L.J. 254, 255 (1813).

<sup>98</sup> *Id.* at 260 (“To a vessel thus employed, in a communication between the two countries, with a passport, protection from capture is granted by the one nation, and the other engages that the vessel employed shall abstain from all acts of hostility.”).

<sup>99</sup> *Id.* at 259.

<sup>100</sup> *Id.* at 261.

<sup>101</sup> *Id.* at 259.

<sup>102</sup> *Id.* at 261.

*American Law Journal*<sup>103</sup>—had to be familiar with foreign practice and procedure to ensure that their clients did not incur “heavy expense” needlessly.<sup>104</sup> The tally of cases in Appendix B demonstrates just how significant international maritime issues were to American lawyers of the period, with 46 out of the 155 cases in the journal focusing on maritime law. These two case studies show the extreme complexity and multijurisdictional nature of the cases with which American lawyers and their clients had to contend. In the case of the *Horizon*, for an American lawyer to even begin to predict the outcome of such a situation for a client, he would have had to understand which maritime laws had historically applied in cases involving multinational cargo and captures, as well as the interactions between those laws and Napoleon’s political maneuverings—all in a conflict in which the United States, at this point in history, theoretically remained neutral. An attorney in a *Zodiac*-like situation would have had to be aware of the possibility that lower British courts could act contrary to established British trial practice and to know the various responsibilities of ships sailing under diplomatic protection. It was no wonder that a legal publication illustrating important principles of international law and answering issues of international jurisdiction was thought to be “useful and necessary” in America.<sup>105</sup>

### B. *International Legal Sources in the American Law Journal*

The sheer volume of international legal sources excerpted in the *American Law Journal* suggests that American lawyers of this period would have to have been familiar with European sources of law to navigate cases like those mentioned in the previous section. But the types of sources published in the journal also suggest that the American legal profession increasingly saw itself as part of a transatlantic elite, requiring knowledge of European sources of law for reasons beyond practical necessity.

The European law most frequently excerpted in the *American Law Journal* is *Il Consolato del Mare*, “the venerable code of maritime laws” that, despite its disputed origin,<sup>106</sup> has “form[ed] the rule of decision in commercial matters, for almost all of Europe, from the

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<sup>103</sup> See *Preface*, *supra* note 9, at vi (“Every merchant must sensibly feel the inconvenience and perplexity which result from his ignorance of those laws by which his dearest rights and most important privileges are regulated.”).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at v–vi.

<sup>106</sup> *Il Consolato del Mare*, 2 AM. L.J. 385, 385 (1809) (“The origin of this work . . . has been disputed with as much tenacity as the birth-place of Homer.”).

earliest ages of jurisprudence.”<sup>107</sup> In the fourth number of the journal’s second volume, Hall reproduces the portion of *Il Consolato del Mare* indicating “the order of proceeding before the consuls,”<sup>108</sup> how lawyers are to “challenge[ ] witnesses,”<sup>109</sup> and how to appeal from an unfavorable verdict.<sup>110</sup> In the first issue of the third volume, Hall includes an even more detailed account of procedure before the consular courts,<sup>111</sup> including “[h]ow and within what Time the Appeal is to be prosecuted,”<sup>112</sup> which parties are to pay the costs of the lawsuits,<sup>113</sup> and how property of a condemned party is to be taken.<sup>114</sup> Hall returns to *Il Consolato del Mare* in the second issue of the fourth volume, including an excerpt regarding “cases of Recaptures.”<sup>115</sup>

Other European sources of law seem similarly designed to provide practical advice to American lawyers. In the second issue of the second volume, Hall translates civil law relating to “the action of Theft against Mariners, Inn and Stable Keepers,” highlighting the role of the doctrine of respondeat superior.<sup>116</sup> In the fourth issue of the same volume, Hall translates “the Second Title of the Fourteenth Book of the Digests” entitled, “Of the Rhodian Law concerning Jettison,” which includes very specific instructions on allocation of costs when cargo is thrown off a ship to lighten its load.<sup>117</sup> In other issues, Hall translates civil law relating to “[m]aritime loan”;<sup>118</sup> Cornelius van Bynkershoek’s *A Treatise on the Law of War*;<sup>119</sup> Danish rules “concerning privateering and the lawful decision of prizes”;<sup>120</sup>

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 389 (italics removed).

<sup>109</sup> *Id.* at 390 (italics removed).

<sup>110</sup> *Id.* at 391.

<sup>111</sup> *Il Consolato del Mare*, 3 AM. L.J. 1 (1810).

<sup>112</sup> *Id.* at 2.

<sup>113</sup> *Id.* at 4.

<sup>114</sup> *Id.* at 5–6.

<sup>115</sup> *Of Cases of Recaptures*, 4 AM. L.J. 299 (1813) (detailing maritime rules of proprietorship following the capture and recapture of a ship).

<sup>116</sup> *Civil Law*, 2 AM. L.J. 250, 250–51 (1809) (italics removed).

<sup>117</sup> *Civil Law—Part 2*, 3 AM. L.J. 14, 17 (1810).

<sup>118</sup> *Civil Law*, 3 AM. L.J. 151, 151 (1810) (italics removed).

<sup>119</sup> Cornelius van Bynkershoek, *On the Law of War*, 3 AM. L.J. 1 (1810). Note that this is the third issue of the third volume of the journal, despite what the pagination appears to indicate. The translator of the work, who was not Hall, notes that Hall insisted on including the translation, *id.* at v, because “[i]t is known and admired wherever the law of nations is acknowledged to have a binding force. Its authority is confessed . . . in the halls of courts of justice: to be unacquainted with it, is a disgrace to the lawyer and to the statesman” although “the *English* . . . have not favoured the world with a good translation of it into our common idiom.” *Id.* at vi.

<sup>120</sup> *Danish Instructions*, 4 AM. L.J. 263, 263 (1813).

and French criminal law relating to criminal procedure,<sup>121</sup> trial practice,<sup>122</sup> and sentencing.<sup>123</sup>

Some aspects of the translated European sources of law seem unlikely to have been of practical value to American lawyers and so can be read as demonstrating the extent to which American lawyers increasingly took—or at least aspired to take—their places in a transatlantic legal and political elite. For instance, in the fourth number of the journal's second volume, Hall translates excerpts of *Il Consolato del Mare* regarding how a court should choose judges in maritime cases.<sup>124</sup> American lawyers attempting to counsel clients on European trial practice would not have required that knowledge; instead, the excerpted law was likely intended to instruct American lawyers on general principles of law that offered an instructive comparison with American law. And the wholesale reproduction of the Bynkershoek treatise—a seminal text on the law of nations<sup>125</sup>—seems to serve a similar function. After reading the treatise, which occupies all of the third issue of the journal's third volume, American lawyers would be more conversant in European legal theory in a way that would permit them to engage on such topics with their transatlantic counterparts.

### C. *International Legal Sources in American Cases*

Early American lawyers required familiarity with European legal sources not only to prepare for and understand the results of cases decided in courts outside the United States. As the *American Law Journal* demonstrates, European sources of law appeared repeatedly in American court decisions as justifications, precedents, and models. For American lawyers to do their jobs even in their home jurisdictions, then, familiarity with European sources of law was essential.

The number of cases Hall cites that incorporate European sources of law is significant. By my count, at least thirteen of the sixteen volumes of the *American Law Journal* include American cases decided with the aid of some form of European legal source. The first issue alone contains three detailed explanations and examples of adoption of English precedents. In *Rhineland v. Insurance Co. of Pennsylvania*, a U.S. Supreme Court case from 1807 that decided how abandonment of a ship's cargo affected recovery under the ship owner's insurance policy, the court adopted English precedent that

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<sup>121</sup> *Review*, 4 AM. L.J. 588, 590 (1813).

<sup>122</sup> *Id.* at 598.

<sup>123</sup> *Id.* at 605.

<sup>124</sup> *Il Consolato del Mare*, *supra* note 106, at 386.

<sup>125</sup> This term signifies general principles of international law that supposedly apply to all "civilized" nations.

refused to distinguish “between the capture by a belligerent from a belligerent and from a neutral.”<sup>126</sup> *Hudson v. Guestier*, another Supreme Court case from the same year involving jurisdiction over seized ships, placed faith in “the law of nations” to declare “a sentence of condemnation,”<sup>127</sup> and noted that had the case involved “a prize of war,” the Court would “have precedents and principles which would guide us” from “*Louis XVI*” and English practice.<sup>128</sup> And the decision in *Rose v. Himely*, another Supreme Court case involving jurisdiction over seized ships, demonstrated particular attention to English precedent, not only because of its “correctness” but also because of the “importance” of English law “to the peace and security of the mercantile world.”<sup>129</sup>

English precedent appears to be the most frequently cited extra-American source of law. In the second issue of the journal Hall reproduces an excerpt of the Georgia Superior Court opinion in the case of *Paul Grimball*, which explained the role of equity courts by noting that “[o]ur ancestors felt, as we have felt after them, the necessity of some tribunal, armed with the attribute of alleviating the inexorable-ness of the law.”<sup>130</sup> Of course, these ancestors were British; regardless of the political friction between Britain and America in the years leading up to the War of 1812, American courts could not deny their jurisprudential inheritance. As a Virginia state court noted in *Livingston v. Jefferson*:

When our ancestors migrated to America, they brought with them the common law of their native country, so far as it was applicable to their new situation; and I do not conceive that the revolution would, in any degree, have changed the relations of man to man, or the law which regulated those relations. In breaking our political connection with the parent state, we did not break our connexion [*sic*] with each other.<sup>131</sup>

In other words, the default position of American courts was to apply English common law.

English precedent is shown to apply in American cases spanning an incredibly diverse array of issues. Procedural and jurisdictional precedent appears again in the third issue of the first volume in *Talbot v. Commanders and Owners of the Brigs Achilles, Patty and Hibernia*, a Pennsylvania state court case involving the jurisdictional reach of

<sup>126</sup> *Rhineland v. Insurance Co. of Pennsylvania*, 1 AM. L.J. 1, 4 (1808).

<sup>127</sup> *Hudson v. Guestier*, 1 AM. L.J. 5, 5 (1808).

<sup>128</sup> *Id.* at 7.

<sup>129</sup> *Rose v. Himely*, 1 AM. L.J. 11, 34 (1808).

<sup>130</sup> *Paul Grimball*, 1 AM. L.J. 183, 187 (1808).

<sup>131</sup> *Livingston v. Jefferson*, 4 AM. L.J. 78, 86 (1813) (Marshall, C.J., concurring).

admiralty courts;<sup>132</sup> *Woodruff v. Ship Levi Dearborn*, a Georgia Admiralty Court case from the fourth volume that involved liens on a ship;<sup>133</sup> and again at the beginning of the sixth volume in the case of the ship *L'Invincible*, a Massachusetts Circuit Court case that held that “[t]he general doctrine, that the trial of prizes belongs exclusively to the courts of that state to whom the captor belongs, is now too firmly settled to admit of doubt.”<sup>134</sup> English precedent is shown to apply to maritime law, such as in the case of *Natterstrom v. Ship Hazard*, a Massachusetts District Court case from the third issue of the journal’s second volume, in which the court applies “Sea Laws,” which were “first published in England, in the reign of Queen Anne,” to decide how much of a dead seaman’s wages were owed to his heirs;<sup>135</sup> to questions of citizenship in the Virginia state court case *Trytitle Lessee of Reed v. Reed*;<sup>136</sup> to libel cases in the South Carolina Court of Appeals case *State v. Lehre*;<sup>137</sup> and to prize cases in the Mississippi Territory admiralty case *United States v. Schooner Active*, which assessed the jurisdictional reach of federal prize courts.<sup>138</sup> In the area of estates and inheritance law, Hall cites British cases to the virtual exclusion of American ones, suggesting just how significant English precedent may have been in this area.<sup>139</sup> These are but a few examples of the role of English precedent in the cases Hall cites. Given the apparently entrenched role of English law in American court cases, it is unsurprising that at the beginning of the fourth volume, Hall announced his intention to reproduce—at the request of his readers—“copious accounts” and “faithful translations” of “some old Latin tracts respecting the civil law and the common law of England.”<sup>140</sup>

While English precedent appears regularly in the American court decisions Hall excerpts, the role of the law of nations—reliance on

<sup>132</sup> *Talbot v. Commanders and Owners of the Brigs Achilles, Patty and Hibernia*, 1 AM. L.J. 266, 270–71 (1808).

<sup>133</sup> *Woodruff v. Ship Levi Dearborn*, 4 AM. L.J. 88, 88–91 (1813).

<sup>134</sup> *The Ship L'Invincible*, 6 AM. L.J. 1, 4 (1817).

<sup>135</sup> *Natterstrom v. Ship Hazard*, 2 AM. L.J. 359, 360, 362 (1809).

<sup>136</sup> *Trytitle Lessee of Reed v. Reed*, 3 AM. L.J. 22, 30 (1810) (relying on English interpretation of the terms “alien” and “alien born” as well as *Calvin’s Case*, the famous 1608 decision involving the effect of James I’s ascent to the English throne in 1603 on Scottish citizenship).

<sup>137</sup> *State v. Lehre*, 4 AM. L.J. 48, 50 (1813) (“All the great expounders of the law, from Lord Coke, down to Mr. Justice Blackstone, have uniformly laid it down as a rule of the common law that the truth of a libel cannot be given in evidence in a criminal proceeding; and this rule has never been departed from in a single instance.”).

<sup>138</sup> *United States v. Schooner Active & Cargo*, 5 AM. L.J. 541, 551 (1814).

<sup>139</sup> See, e.g., *Perrin v. Blake*, 1 AM. L.J. 189, 192–93 (1808) (a British case involving estates and inheritance law); *Scott v. Scott*, 1 AM. L.J. 305, 305 (1808) (same).

<sup>140</sup> *Advertisement to the First Volume of the Second Series*, *supra* note 17, at vi.

fundamental legal principles outlined by international law scholars such as Vattel<sup>141</sup> and enshrined in European treaties and precedents—is noteworthy. The Maryland District Court noted succinctly in the case of the deserters of the British frigate *L’Africaine*, “the law of nations is the law of the land” and so, accordingly, “all judicial tribunals, exercising common law jurisdiction, are bound to carry into effect the laws of nations.”<sup>142</sup> The court noted, “the law of nations requires the delivery of deserters from the ships of war belonging to a nation at peace with that country in whose ports the persons have deserted and taken refuge,”<sup>143</sup> and decided accordingly. Hall noted at the beginning of the fourth volume that “we should be at no loss” if “the annals of our domestic jurisprudence might fail in the contribution of materials,” for the “legal lore of former ages and foreign nations is an abundant treasury, to which the scientific lawyer can always resort for those abstract principles of right which are applicable at all times and in all places.”<sup>144</sup> A Pennsylvania court agreed, basing its decision in *M’Fadon & Greetham v. Schooner Exchange*, a case involving American jurisdiction over a French ship condemned in Philadelphia, on the fact that “by the unanimous consent of nations,” foreign ships are subject to laws of the country in whose waters they sail.<sup>145</sup> Vattel’s writings are even applied to the interpretation of American treaties.<sup>146</sup>

Hall was not content to rely solely on American court cases to highlight relevant content of the law of nations. Through articles such as *The Adversaria, no. 2*, printed in the first issue of the second volume, lawyers gained exposure to “principles in the law of nations” including the fundamental principles that: “All the members of a state are answerable for the injustice of the government to which they belong”;<sup>147</sup> “[t]he property of individuals is legally answerable for the imputed injustice of their government”;<sup>148</sup> and “[t]he rights of war externally against the public enemy, in which are included all his individuals, are naturally and originally unlimited.”<sup>149</sup> An article entitled

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<sup>141</sup> Emerich de Vattel was the eighteenth-century author of the seminal international law text *The Law of Nations*. For more on the use of Vattel’s writings and theories in early America, see generally Robert J. Reinstein, *Executive Power and the Law of Nations in the Washington Administration*, 46 U. RICH. L. REV. 373 (2012).

<sup>142</sup> *Case of the Deserters from the British Frigate L’Africaine*, 3 AM. L.J. 132, 132 (1810).

<sup>143</sup> *Id.*

<sup>144</sup> *Advertisement to the First Volume of the Second Series*, *supra* note 17, at vii.

<sup>145</sup> *M’Fadon & Greentham v. Schooner Exchange*, 4 AM. L.J. 233, 248 (1813).

<sup>146</sup> *Trytitle Lessee of Reed v. Reed*, *supra* note 136, at 43 (1810) (applying Vattel’s theories to interpret the 1783 Treaty of Paris, which ended the Revolutionary War).

<sup>147</sup> *The Adversaria*, *supra* note 70, at 165.

<sup>148</sup> *Id.* at 166.

<sup>149</sup> *Id.* at 167.

*The Honest Politician, Part I* explained to readers “some points in the law of nations, as involved in the capture of the Chesapeake”—maritime principles including

whether the ships of war of one country are justifiable in searching those of another, what are the duties which good faith requires from a neutral nation towards a belligerent, and how far it is consistent with the obligations of national honour and individual honesty to afford protection to the seamen of our neighbours . . . .<sup>150</sup>

Hall continued to supplement American court cases applying the law of nations with scholarly articles through the end of the run of the journal. In the second issue of the sixth and final volume, Hall included translations of two French essays, *The freedom of the navigation and commerce of neutral nations, during war, considered according to the law of all nations, that of Europe, and treaties* and *An historical and juridical Essay to serve as an explanation of the disputes between belligerent powers and neutral states, on the subject of the freedom of maritime commerce*.<sup>151</sup> And yet, Hall called for European nations to even further standardize and publish the law of nations, noting in the sixth volume, “it would be a great advantage for all the states of Europe, and a work well worthy of their sovereigns to have a general code composed of the law of war and marine . . . .”<sup>152</sup>

The significant role of European sources of law in American court cases and the importance Hall ascribed to articles explaining the contents of the law of nations demonstrate the increasing international focus of the American lawyer in the beginning of the nineteenth century. Not only were American lawyers required to be conversant with European sources of law for practical reasons—the increasing number of foreign trials implicating American interests, and the reliance on international sources of law in courts at home—but for American lawyers to truly assume a place in a European legal and scholarly elite, they also had to understand fundamental principles of the law of nations.

#### *D. A Counterbalance: Uniquely American Areas of Law*

The extensive role of foreign precedent in the American court cases presented in the *American Law Journal* casts doubt on the theories of scholars who characterize the law in the period—particularly as reflected in the decisions and writings of Chancellor Kent and Justice

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<sup>150</sup> *Review*, 3 AM. L.J. 361, 375 (1810).

<sup>151</sup> *Preface*, 6 AM. L.J. 153, 153 (1817).

<sup>152</sup> *Freedom of the Navigation and Commerce of Neutral Nations, in Time of War*, 6 AM. L.J. 159, 275 (1817).

Story<sup>153</sup> but also more generally<sup>154</sup>—as increasingly insular and divorced from foreign precedent. However, the *American Law Journal* does portray four particular areas—constitutional law, common law, slavery, and relations with indigenous populations—as moving in a different direction from European theorists.

What is particularly notable about these cases is that, in reality, leading opinions in these four areas that do not appear in the *American Law Journal* were often highly reliant on foreign doctrines and sources of law,<sup>155</sup> while the opinions in those areas that appeared in the journal did not rely on foreign legal sources. We can only speculate on Hall's motives for strictly presenting opinions in these areas that do not, despite the reality of American jurisprudence at the time, engage with foreign sources of law—which, admittedly, represent a small portion of the total number of opinions printed in the journal. However, it is conceivable that Hall wanted to portray the areas in

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<sup>153</sup> See, e.g., FERGUSON, *supra* note 53, at 23 (suggesting that Justice Marshall's arguments were "grounded . . . upon appeals to the *principia* of American civilization . . . . Already the final arbiter of the law in 1803, the Supreme Court was the great oracle of Americanism by the time of Marshall's retirement in 1835"); HOEFELICH, *supra* note 11, at 177 (noting that Story and Kent "aspired to create an 'American' jurisprudence whose basic tenets would be common to all states' systems and taught in the university-affiliated law schools like Harvard"); HULSEBOSCH, *supra* note 27, at 281 (arguing that Kent's goal was to present "the states' municipal laws as systematic and principled, along the lines of constitutional law, rather than merely as frameworks for dispute resolution"), 283 (suggesting that Kent wanted to prove "that there was *an* American law"); *id.* at 286–87 (noting that Kent and other Federalists sought "to create a uniform American private law"); MILLER, *supra* note 2, at 157 ("As American law, by means of reports, commentaries, and schools, began to achieve solid form, patriots of both parties were moved to salute a recognizable triumph. Story in 1819 threw modesty to the winds by declaring that Johnson's *Reports* for New York 'will bear comparison with those of an equal period in the best age of the English law'—for him an American extravagance beyond any that Walt Whitman would later reach.").

<sup>154</sup> See, e.g., HULSEBOSCH, *supra* note 27, at 278 (noting that for Federalists, "[t]he object was legal uniformity, but this was a means to the further end of political unity. Uniform substantive law would help bind the original states and provide a prefabricated legal infrastructure for new ones out west"); MILLER, *supra* note 2, at 128 ("[T]he nationalistic obsession of American jurists prevented even the most clear-thinking of them from taking advantage of the divinely given opportunity then offered them. Unlike the judges of England, the Americans were not bound to ancient precedents, since they could arbitrarily decide which of them had relevance to America. Unlike Continental judges, they were not restricted by any codes except the loose ones of the state and national constitutions. In short, they, and they alone in the Western culture, had the chance to apply to their emerging jurisprudence the laws of historical development, of the relativity of temporal standards.").

<sup>155</sup> See, e.g., *Johnson v. M'Intosh*, 21 U.S. 543, 567–68 (1823) (discussing the doctrine of discovery as applied to indigenous relations); Jedediah Purdy, *Property and Empire: The Law of Imperialism in Johnson v. M'Intosh*, 75 GEO. WASH. L. REV. 329 (2007) (discussing Chief Justice Marshall's opinion in *Johnson v. M'Intosh* in the context of the law and theory of colonialism); *supra* Part III.C (explaining that American courts applied English common law by default).

which American jurisprudence deviated from foreign sources because information about foreign precedent in these areas was already widely available via English law books and other sources. In other words, perhaps Hall deliberately sought out areas in which he could add value to American lawyers' understanding of the law.

Despite the fact that other written constitutions existed throughout the European world by the time of the *American Law Journal's* publication, and Britain's unwritten constitution found expression in statutes, court judgments, and treaties, the *American Law Journal* cases dealing with constitutional law rarely look to outside sources. Instead, courts shown in the *American Law Journal* as deciding constitutional issues focus particularly on general principles enshrined in the American constitution. In the second issue of the journal, a Pennsylvania court deciding *Commonwealth v. Duane* in 1807 fashioned a rule regarding when bail is required for good behavior without regard to contrary (albeit unsettled) English precedent. Noting that the "*United States . . . have at all times been very much alive to the liberty of the press and the right of trial by jury,*"<sup>156</sup> the court applied those principles—enshrined in the Bill of Rights—in holding that "as a general rule," "surety [i.e., bail] . . . ought not to be demanded before conviction."<sup>157</sup> The South Carolina Circuit Court in the 1808 case *Gilchrist v. Collector of the Port of Charleston* decided that it had the power to issue a writ of mandamus based solely on jurisdiction conferred by the "constitution and laws of the *United States,*"<sup>158</sup> rejecting the ad-hoc approach of English courts to jurisdictional issues—"the unpopular grounds of *prerogative* and *analogy to the king's bench*"<sup>159</sup>—as not based on a standard legal rule. A Massachusetts district court ruling on the validity and constitutionality of an American embargo law looked not to Vattel or Grotius but instead to the Federalist Papers, a source urged as "superior to *Blackstone . . . for extensive and accurate knowledge of the true principles of government.*"<sup>160</sup> This judicial nationalism is perhaps best on display in *Livingston v. Van Ingen*, a case involving parties who had been granted the exclusive right to navigate the Hudson River and another party who attempted to ferry passengers across in violation of

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<sup>156</sup> *Commonwealth v. Duane*, 1 AM. L.J. 168, 171 (1808).

<sup>157</sup> *Id.* at 168. In other words, defendants in typical cases should not be required to post money to ensure their good behavior before trial, though what we now think of as bail—money posted to ensure the defendant's appearance at trial—was still permissible under the court's ruling.

<sup>158</sup> *Gilchrist v. Collector of the Port of Charleston*, 1 AM. L.J. 429, 446 (1808).

<sup>159</sup> *Id.*

<sup>160</sup> *United States v. The Brigantine William*, 2 AM. L.J. 255, 266 (1809).

that grant. After extensive consideration of the history of the Constitution, particularly as relates to granting patents,<sup>161</sup> the New York Court of Errors notes:

Every lover of the arts, every patron of useful improvement, every friend to his country's honor, has beheld this success with pleasure and admiration.—From this single source [i.e., patent law] the improvement [i.e., ferries designed for popular transit] is progressively extending to all the navigable waters in the United States, and it promises to become a great public blessing by giving astonishing facility, dispatch and safety not only to travelling, but to the internal commerce of this country. It is difficult to consider even the known result of the undertaking without feeling a sentiment of good-will and gratitude towards the individuals by whom they were procured, and who carried on their experiment with patient industry, at great expense, under repeated disappointments, and while constantly exposed to be held up as dreaming projectors to the *whips and scorns of time*. . . . I think the prize has been dearly earned and fairly won, and that the statutes bear the stamp of an enlightened and munificent spirit.<sup>162</sup>

American constitutional law, the journal suggests, should be interpreted not in light of foreign sources but in the context of uniquely American needs—here, for instance, the need to promote economic growth and ease of navigation across the vast American landmass. Not only was the grant at issue constitutional, but the court also urges that it be taken as a blessing in its satisfaction of these seminal American requirements.

Practical realities of the American continent are not the only considerations Hall suggests we might keep in mind when interpreting the Constitution. Hall also recommends states' ratification debates on the Constitution, which illustrated the concerns of the founding generation. Perhaps the most revealing debates Hall publishes are those of the Pennsylvania legislature, which take up the lion's share—130 pages—of the third issue of the journal's fourth volume, highlighting many of the arguments that also found expression in the *Federalist* and *Anti-Federalist Papers* regarding checks and balances, state sovereignty, the importance of maintaining order, popular representation in government, slavery, and control over the American military.<sup>163</sup>

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<sup>161</sup> *E.g.*, *Livingston v. Van Ingen*, 4 AM. L.J. 1, 8–13 (1813) (due to a pagination error, this source can be found in the second issue of the fourth volume, where the pagination restarts from 1).

<sup>162</sup> *Id.* at 197–98.

<sup>163</sup> *On the Constitution of the United States of America*, 4 AM. L.J. 321 (1813); *see also Debates on the Constitution*, 4 AM. L.J. 563 (1813) (a reproduction of the New York legislature's debates on the Constitution).

These debates suggest that we interpret the Constitution, typically thought to embody the Federalists' position,<sup>164</sup> and the Bill of Rights, a result of significant Anti-Federalist lobbying,<sup>165</sup> as a compromise in statecraft, and give voice to both sets of interests in future cases involving constitutional issues.<sup>166</sup>

The several proposed amendments to the Constitution that Hall publishes in the *American Law Journal* portray American constitutional law as an experiment securely outside the reach of foreign legal sources. The amendments instead respond to similar concerns raised in the constitutional debates Hall publishes as well as the themes that echo throughout the Federalist and Anti-Federalist Papers. In the first issue of the third volume, for instance, Hall publishes a review of a proposed amendment to the Constitution from U.S. Senator Hillhouse of Connecticut that would reduce the terms of the president and congressmen to avoid factionalism,<sup>167</sup> a significant concern underlying Madison's Federalist No. 10.<sup>168</sup> A Virginia congressman proposed that state legislatures be able to give explicit directions to their representatives in the U.S. Senate regarding which laws to propose and how to vote<sup>169</sup> and noted that such a right never belonged to Englishmen.<sup>170</sup> And finally, in the third volume of the journal, Hall showcases how state legislatures were in dialogue with one another regarding the Constitution, as if to suggest that American statesmen—not foreign legal sources—were the experts on how best to use the Constitution to safeguard the rights of the American people. He excerpts an opinion by the Virginia state legislature opposing a constitutional amendment proposed by the Pennsylvania legislature that would have established “an impartial tribunal to

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<sup>164</sup> See CONLIN, *supra* note 21, at 146 (discussing the relationship of the Federalist Papers to the Constitution).

<sup>165</sup> *Id.* (discussing Anti-Federalists' lobbying for the Bill of Rights).

<sup>166</sup> Interestingly, much of the Pennsylvania ratification debates had already been published by local newspapers during the Constitutional Convention. Perhaps Hall was also engaging in the contemporary debate about the intent of those who wrote and ratified the Constitution—and whether those opinions should matter in courts' interpretation of the Constitution. For more on the historical underpinnings of originalism as an interpretive theory, see generally JOHNATHAN O'NEILL, *ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY* (2005).

<sup>167</sup> *Review of Hillhouse's Amendment to the Constitution of the United States*, 3 AM. L.J. 81, 87 (1810).

<sup>168</sup> THE FEDERALIST NO. 10 (James Madison) (arguing that a large republic is better suited than a small one to guard against the insidious influence of factions).

<sup>169</sup> *Debates on the Constitution*, 4 AM. L.J. 563, 571 (1813) (describing a “[s]ubstitute, proposed by Mr. Leigh, of Dinwiddie, Virginia to the preamble and resolutions, on the subject of the right of the state-legislatures to instruct their senators in the Congress of the United States”).

<sup>170</sup> *Id.* at 584.

decide disputes between the state and federal judiciary”<sup>171</sup>—an institution the Pennsylvanians thought was necessary for fear “that the federal judiciary will, from a lust of power, enlarge their jurisdiction to the total annihilation of the jurisdiction of the state courts, that they will exercise their will instead of the law and the constitution.”<sup>172</sup> Consulting no sources other than their common sense and the text of the Constitution, the Virginia legislators noted that “[t]he judiciary are the weakest of the three departments of government, and least dangerous to the political rights of the constitution,”<sup>173</sup> and so judges pose no threat meriting the establishment of such a tribunal, which, contrary to the Pennsylvanians’ expectations, would instead “tend rather to invite than prevent a collision between the federal and state courts” and “a serious and dangerous embarrassment to the operations of the general government.”<sup>174</sup>

The second area of law that the *American Law Journal* portrays American jurists as distinguishing from foreign precedent and influence is the common law. While conceding that significant portions of English common law found their way into American law, Hall nonetheless points out that such transposition was neither complete nor uniform. One particularly interesting article is a report on which English laws were in force in Pennsylvania at the beginning of the nineteenth century and which “ought to be incorporated.”<sup>175</sup> The Pennsylvania legislature considers which subjects of English law would have been appropriate to the colonies and, accordingly, were likely to have been put in force by the colonists, and also notes that other states have made similar efforts to “update” English law in recognition of the fact that some precedent is “not properly applicable to any other country than *England*.”<sup>176</sup> Hall even excerpts a case relating to contract law—a fundamental common law subject—in which the Pennsylvania Circuit Court explicitly broke with English precedent: The court explained, “[w]e cannot . . . yield our assent to the hypothesis stated by this learned [British] judge . . . that he who by his own conduct prevents the fulfillment of a contract, shall not take advantage of a non-performance on the other side.”<sup>177</sup> As if the court’s rejection of English precedent were not explicit enough, Hall then publishes an article with excerpts of several English decisions on the

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<sup>171</sup> *Amendment of the Constitution*, 3 AM. L.J. 142, 142 (1810).

<sup>172</sup> *Id.* at 142–43.

<sup>173</sup> *Id.* at 143.

<sup>174</sup> *Id.*

<sup>175</sup> *Report*, 2 AM. L.J. 51, 55 (1809).

<sup>176</sup> *Id.* at 54.

<sup>177</sup> *Odlin v. Ensurance Company of Pennsylvania*, 2 AM. L.J. 221, 230 (1809).

same subject, including one that directly disagrees with the Pennsylvania decision.<sup>178</sup> Hall, then, suggests that even in the area of fundamental common law disciplines, American jurists were asserting their right to distinguish American law from foreign teachings.

The American court decisions on the issue of slavery that are excerpted in the journal, too, are largely devoid of foreign sources. *Commonwealth v. Smith*, for instance, expresses concern that declaring an indenture of a slave void would upset the careful federal structure permitting states to make individual decisions about the legality of slavery within their own borders—which could ultimately lead to the perpetuation of slavery, to which Pennsylvania was firmly opposed.<sup>179</sup> In *Almeida v. Certain Slaves*, the South Carolina District Court considered whether slaves were property or people, noting extensive disagreement among the states<sup>180</sup> and its opinion that Congress determined that slaves were people based on its abolition of the slave trade.<sup>181</sup> Accordingly, the court decided that “[s]laves captured in time of war, cannot be libeled as prize: nor will the District Court of the United States consider them as prisoners of war.”<sup>182</sup> Hall returned to Pennsylvania in the fifth volume of the journal, excerpting the *Case of Lewis*, which affirmed the rights of slaveholding members of Congress to bring their slaves to free states while Congress was in session. The opinion is notable for our purposes because of the Pennsylvania Supreme Court’s analysis that the southern states’ “union with the other states could never have been cemented without yielding to their demands on this point.”<sup>183</sup> The rights of slaveholders were to be determined with regard to the—uniquely American—coexistence of the pro-slavery southern bloc, desirous of the right to hold slaves based on economic and social factors, with largely anti-slavery northern states.

Hall does reproduce—perhaps in a nod to his apparent anti-slavery views—a British royal edict to promote “Good Governance and Protection of Slaves in the Spanish Colonies.” This edict required slave owners to instruct slaves in religion,<sup>184</sup> feed and clothe them,<sup>185</sup>

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<sup>178</sup> *Decisions in England on the Same Subject*, 2 AM. L.J. 232, 232–33 (1809).

<sup>179</sup> *Commonwealth v. Smith*, 4 AM. L.J. 111, 112 (1813) (“[A]ll persons residing in *other* states, who may find their slaves in *this* state, will . . . take their slaves home, and hold them as slaves for life.”).

<sup>180</sup> *Almeida v. Certain Slaves*, 5 AM. L.J. 459, 461 (1814).

<sup>181</sup> *Id.* at 463–64.

<sup>182</sup> *Id.* at 459.

<sup>183</sup> *Case of Lewis*, 5 AM. L.J. 465, 473 (1814).

<sup>184</sup> *For the Good Government and Protection of Slaves in the Spanish Colonies*, 6 AM. L.J. 465, 466 (1817). The introduction to the edict notes that it was published to remedy “abuses” of slaves committed by British slave owners living in America—for slave owners

employ them in agriculture,<sup>186</sup> care for “old and infirm” slaves,<sup>187</sup> permit slave marriage,<sup>188</sup> and punish slaves in a manner commensurate with offenses they committed.<sup>189</sup> But this excerpt is the only foreign slavery-related piece in the *American Law Journal*, and there is no evidence that any of the courts cited in the journal consider foreign opinions on slavery in their own cases.

The final area of American jurisprudence that Hall portrays as immune from the influence of foreign sources is relations with Native Americans, particularly in the Tennessee case of *Coulter’s Lessee v. Hodge*, involving a conflict between a grant to white settlers and land reserved for Native Americans. While the court does note the existence of treaties with Native Americans before the Revolution, the opinion is largely confined to interpretation of federal acts passed after independence, such as a North Carolina law of 1777.<sup>190</sup> The court decides that the grant to white settlers was made “with all the legal forms required by law,” and that the state of North Carolina was obliged to issue the grant in order to settle the territory at issue<sup>191</sup>—a decision that seems largely guided by the practical need to direct American settlers across the vast continent.

These four areas of American jurisprudence—constitutional law, common law, slavery, and Native American relations—portrayed as outside the influence of foreign precedent do lend some credence to the views of particular scholars<sup>192</sup> that this period marked an increasing tendency to look inward to cement, and to construct a uniquely American jurisprudence. However, as demonstrated in Parts III.A, III.B, and III.C, these four areas of law were the exception and not the rule, at least insofar as the editorial choices of the *American Law Journal* suggest. Instead, the *American Law Journal* portrays American law as heavily reliant on foreign sources and precedent, highlighting the international nature of the American legal profession.

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“to be sufficiently instructed in all the dispositions” of King George III’s “dominions in America since its discovery.” *Id.* at 465.

<sup>185</sup> *Id.* at 466.

<sup>186</sup> *Id.* at 467.

<sup>187</sup> *Id.* at 468.

<sup>188</sup> *Id.* at 468–69.

<sup>189</sup> *Id.* at 469–70.

<sup>190</sup> See *Coulter’s Lessee v. Hodge*, 5 AM. L.J. 342, 347–48 (1814) (basing opinion on federal acts passed after independence).

<sup>191</sup> *Id.* at 349 (“N. Carolina expected ‘lands would accrue . . .’”); *id.* at 351 (stating that North Carolina “had a right to dispose of their western territory in April, 1783, when they opened John Armstrong’s office, for the sale of lands, all over the state”).

<sup>192</sup> See, e.g., *supra* notes 153 and 154 and accompanying text (detailing views of scholars such as Hulsebosch and Miller that the period marked a resurgence of American legal nationalism).

## CONCLUSION

A study of the *American Law Journal* yields fruitful results for the legal historian. Unconstrained by jurisdictional boundaries, Hall chose to reproduce court opinions, foreign and domestic laws, articles, and biographies that, he hoped, would serve the American legal profession in the early nineteenth century. As members of an increasingly far-flung profession, stretched across the backdrop of commercial interconnectedness, American lawyers had to be familiar with the decisions and laws of other states and to be truly generalist practitioners. Hall attempts to prepare American lawyers for this task by reproducing court cases and articles on a wide variety of topics from maritime law to insurance law, from property to contracts, from bigamy to fraud, and in jurisdictions from New York to the Orleans Territory and in between. As members of an increasingly self-aware profession, American lawyers would have had to become familiar with the growing ethical and educational standards of the profession; Hall primarily uses sentencing excerpts and biographies of eminent jurists to give content to those standards and to teach that content to his readers, most of whom would never have attended law school or achieved any significant level of academic training. And finally, as members of an increasingly international profession, American lawyers of the period would have had to be familiar with foreign sources of law, many of which had already made their way into American court decisions by the time of the publication of the *American Law Journal*. While the journal suggests a few discrete areas in which American courts pushed the direction of jurisprudence away from foreign influence, it mainly provides convincing evidence of the degree to which the legal profession overtly borrowed from Britain and continental sources of law.

All of this is to suggest that historians of the American legal profession should direct their attention to early American legal periodicals as a new source of information. While Hall's subscriber list was never published with the journal, it is clear that he must have had some significant readership to remain in business, particularly given the difficulties inherent in legal publishing at the time, which Hoeflich discusses.<sup>193</sup> It can be inferred, then, that many attorneys from across the country agreed with Hall that there were certain professional needs that had to be satisfied. Current scholars who confine their studies to the dockets of particular jurisdictions cannot begin to approach such a broad-based analysis. Wrongly neglected, early

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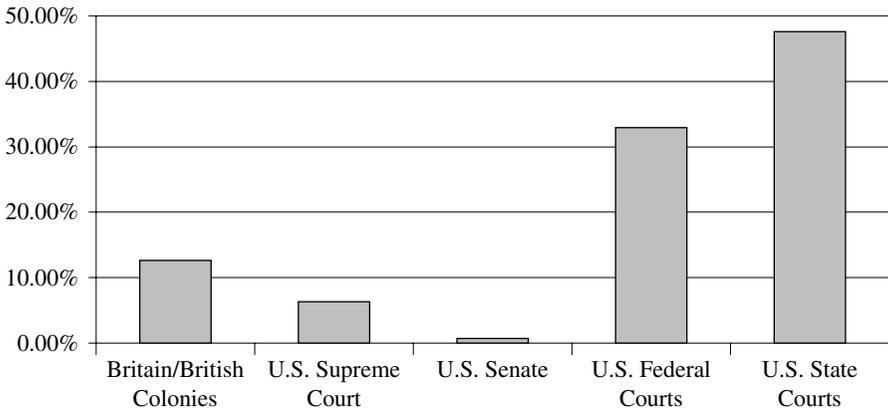
<sup>193</sup> See, e.g., HOEFLICH, *supra* note 11, at 46 (noting that legal books were difficult to distribute and financially risky to publish).

American legal periodicals offer a unique window into the national aspects of the American legal profession at a time when the profession—like the country itself—was undergoing significant change.

APPENDIX A

*American Law Journal Cases by Jurisdiction*

Total: 143



**Britain/British Colonies: 18 (12.6%)**

Volume 1: *Tothill v. Pitt* (Chancery); *Case of Sampson, Phippen, Master* (Court of Vice Admiralty); *Perrin v. Blake* (Court of King’s Bench); *Vice-Admiralty Decision of Sir James Mackintosh* (Vice Admiralty); *Case of the Eliza* (Admiralty); *Scott v. Scott* (Chancery); *Bart v. Royal Exchange Assurance Company* (King’s Bench); *Carr v. Hood* (King’s Bench); *Case of Schooner Washington* (Vice Admiralty)

Volume 2: *Attorney General v. Hicks* (Chancery); *North v. Miles* (King’s Bench); *Blewit v. Marsden* (King’s Bench); *Case of the Schooner Derne* (Vice Admiralty); *Case of the Herkimer* (Vice Admiralty); *Maury v. Shedden* (unnamed court); *Conway and Davidson v. Forbes and Conway* (unnamed court); *Davidson v. Gray* (unnamed court); case arising under British Orders in Council and the Navigation Act (unnamed court)

Volume 3: *Thompson v. Millie* (Court of Sessions); *Sinclair v. Xavier* (Common Pleas)

Volume 4: *Case of the Zodiac* (Vice Admiralty); Unnamed Case of American ship taken on voyage from Boston to Cherbourg (Admiralty); *The Snipe* (Admiralty); *The Orion* (Vice Admiralty); *Kirkpatrick v. Creevey* (Assizes)

**US Supreme Court: 9 (6.3%)**

Volume 1: *Rhineland v. Insurance Company of Pennsylvania*; *Hudson v. Guestier*; *Rose v. Himely*; *Fitzsimmons v. Newport*

*Insurance; Groudson v. Leonard; Marshall v. Delaware Insurance; Peisch v. Ware; Alexander v. Baltimore Insurance Company*

Volume 5: *Bank of Columbia v. Patterson's Administrator*

**U.S. Senate: 1 (0.7%)**

Volume 1: *Honourable John Smith* (Senator treason trial)

**U.S. Federal Courts: 46 (32.2%)**

Volume 1: *Scriba v. North American Insurance* (PA Circuit Court); *Murray and Mumford v. Insurance Company of Pennsylvania* (PA Circuit Court); unnamed case on construction of maritime contracts (MD District Court); *Hayton v. Wilkinson* (MD District Court); *Bank of the United States v. Deveaux* (GA Circuit Court); *Gilchrist v. Collector of the Port of Charleston* (SC District Court); *Van Vechten v. Hopkins* (NY Circuit Court); *United States v. Schooner William and Samuel* (PA District Court)

Volume 2: *United States v. Hipkin* (District of Norfolk); *Odlin v. Ensurance Co. of Pennsylvania* (PA Circuit Court); *Fogerty v. Pratt* (PA District Court); *United States v. Brigantine William* (MA District Court); *United States v. Smith* (NY District Court); *United States v. Sloop Polly and Jane* (NY District Court); *Natterstrom v. Ship Hazard* (MA District Court)

Volume 3: *United States v. Price* (NY District Court); *United States v. Barney* (MD District Court); *L'Africaine* (MD District Court); *United States v. Cave* (PA District Court); *Evans v. Weiss* (PA Circuit Court)

Volume 4: *Livingston v. Van Ingen* (NY Circuit Court) (2x); *Livingston v. Jefferson* (VA Circuit Court); *Woodruff v. Ship Levi Dearborn* (GA, District and Circuit Court opinions); *Munn v. Du Pont de Nemours* (PA Circuit Court); *Schooner Enterprize v. United States* (NY Circuit Court); *M'Fadon & Greetham v. Schooner Exchange* (PA Circuit Court); *Hitchen v. Wilson* (MD Circuit Court); *Wesley v. Biays* (MD Circuit Court); *Baxter v. Biays* (MD Circuit Court); *Jones v. Smith and Buchanan* (MD Circuit Court); Isaac Williams case (CT Circuit Court); *Case of the Aurora* (RI District Court); *United States v. Schooner Matilda* (NC Circuit Court); *United States v. Ship Good Friends* (DE District Court)

Volume 5: *Almeida v. Certain Slaves* (SC District Court); *Golden v. Prince* (PA Circuit Court); *Murray v. Lane* (DE Circuit Court)

Volume 6: *The Ship L'Invincible* (MA Circuit Court); *The Saratoga* (MA Circuit Court); *Rand v. The Ship Hercules* (MA District Court); Johnson v. various merchandise (NY District Court) (2x); *Gill, Canonge & Co. v. Jacobs* (SC Circuit Court); *Adams v. Storey* (NY Circuit Court); *Fisher v. The Sybil* (SC Circuit Court)

**State Courts: 69 (48.3%)**

Volume 1: *Commonwealth v. Duane* (PA); *People v. Hoag* (NY); *Day v. Jarvis* (PA); *Commonwealth v. Naglee* (PA); *M'Mechin's Lessee v. Grundy* (MD); unnamed assault case (NY); *Talbot v. Commanders and Owners of the Brigs Achilles, Patty and Hibernia* (PA); *Commonwealth v. Cobbett* (PA); *Maryland v. Baptis Irvine* (MD); *Callahan v. Hallowell* (SC); *Lenox v. Hallowell* (SC); *McKim v. Smith* (MD)

Volume 2: Habeas petition of Hippolyte Dumas (PA); *President, Managers and Company of the Erie and Waterford Turnpike Road v. Cochran* (PA); *Grimball v. Ross* (GA); *State v. Asselin* (GA); *Gilbert and Dean v. Nantucket Bank* (MA); *Haskins v. Latour* (MD); *D.C. Stewart* (MD); Habeas petition of Emanuel Roberts (MD); *John Carrere v. Union Insurance Co.* (MD); *President, Managers and Company of the Lancaster, Elizabeth and Middletown Turnpike Road v. Stubbs* (PA); *Winthrop v. Pepoon* (SC); Batture cases (Orleans Territory) (5 articles, but only 2 trials)

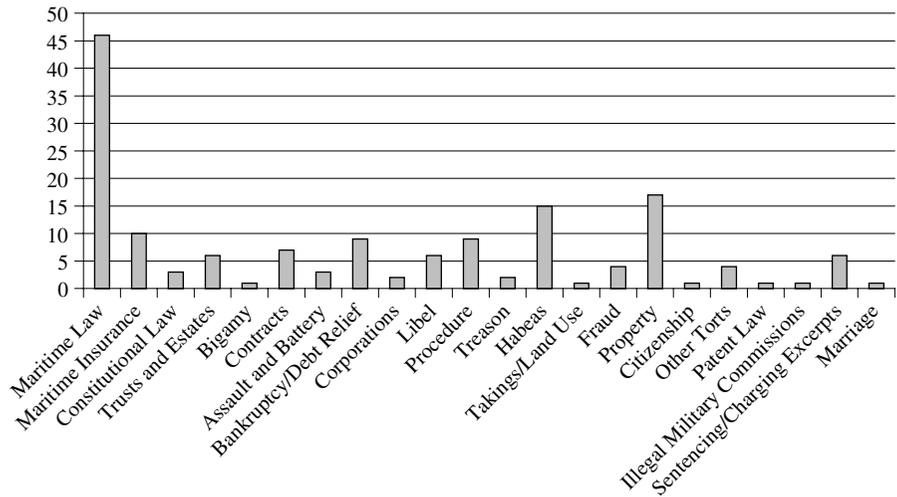
Volume 3: *Reed v. Reed* (VA); *Coulter v. Jones* (PA); *Flury v. Nalts* (NC); *Farmers' Bank of Lancaster* (PA); *People v. Frothingham* (NY)

Volume 4: *Vincent's Lessee v. Conrad* (TN); *State v. Lehre* (SC); *Commonwealth v. Myers* (VA); *Commonwealth v. Smith* (PA); *Slade v. Morgan* (MD); *Beall v. Beall* (MD); *Gill v. Cole* (MD); *Gaither* (MD); *Ringgold's Lessee v. Cheney* (MD); *Lodge v. \_\_\_* (MD); *Galt v. Merryman* (MD); *Blount v. Chester* (NC); *Livingston v. Van Ingen* (NY)

Volume 5: Tilghman opinion on habeas petition of Alien Enemy (PA); two more opinions on Batture (Orleans Territory); *Commonwealth v. Smith* (PA); *Talbott v. Heirs of Bedford* (TN); *Coulter's Lessee v. Hodge* (TN); *Case of Lewis* (PA); *In the Case of Field* (PA); *In the Matter of Everard Bolton* (PA); *In the Matter of Ephraim Merritt* (SC); *Crittenden v. Jones* (NC); *In the Matter of William Meade* (VA); *United States v. Schooner Active* (MS Territory)

Volume 6: *Commonwealth v. Van Lear* (PA); *United States v. Campbell* (OH); *Commonwealth v. Captain John Schultz* (PA); *Duffie v. Mathewson* (NY); trials of Judge Workman and Colonel Kerr (Orleans Territory); *Peck v. Lockwood* (CT); *Fairfax's Devisee v. Hunter* (VA); *Brown v. Union Insurance Company of New-London* (CT); *The Farmer's and Mechanic's Bank v. Smith* (PA); *Attorney-General v. Broaddus* (VA)

## APPENDIX B

*American Law Journal* Cases, Statutes, and Articles by TopicCases: 155<sup>194</sup>**Maritime Law (International and Domestic): 46*****Jurisdiction: 6***

Volume 1: *Hudson v. Guestier*; *Rose v. Himely*; *Talbot v. Commanders and Owners of the Brigs Achilles, Patty and Hibernia*

Volume 4: *McFadon v. Schooner Exchange* (2x)

Volume 6: *The Ship L'Invincible*

***Prize/Violation of Non-Intercourse or Embargo Acts: 24***

Volume 1: *Court of Vice Admiralty in Nassau*; *Groudson v. Leonard*; *Vice Admiralty decision of Sir James Mackintosh*; *The Eliza*; *United States v. Schooner William and Samuel*

Volume 2: *Vice Admiralty Court of Antigua*; *Case of the Herkimer*; *United States v. Brigg Little Ann*; *United States v. Sloop Polly and Jane*; *Case Arising Under British Orders in Council and Navigation Act*

Volume 3: *United States v. Price*

Volume 4: *United States v. Ship Levi Dearborn* (two opinions); *Schooner Enterprize v. United States*; *Case of the Zodiac*; *Case of American Ship Taken on Voyage from Boston to Cherbourg*; *The*

<sup>194</sup> This figure includes sentencing/charging excerpts and related opinions about the Batture, accounting for the discrepancy with the jurisdictional tally in Appendix A.

Snipe; Aurora; *United States v. Schooner Matilda*; *United States v. Ship Good Friends*

Volume 5: *Almeida v. Certain Slaves*; *United States v. Schooner Active and Cargo*

Volume 6: *Johnson v. Various Merchandise Listed on Page 68*  
(2x)

***Wages: 8***

Volume 2: *Fogerty v. Pratt*; *Natterstrom v. Ship Hazard*

Volume 3: *Thompson v. Millie*

Volume 4: *Hitchen v. Wilson*; *Wesley v. Biays*; *Jones v. Smith*

Volume 6: *The Saratoga*; *Rand v. Ship Hercules*

***Taxation: 1***

Volume 1: *Peisch v. Ware*

***Maritime Bonds: 2***

Volume 2: *United States v. Hipkin*; *United States v. Smith*

***Agency: 1***

Volume 3: *Flury v. Nalts*

***Desertion: 1***

Volume 3: *The Ship L'Africaine*

***Fraud: 1***

Volume 3: *United States v. Cave*

***Licensing: 1***

Volume 4: *The Orion*

***Salvage: 1***

Volume 6: *Fisher v. The Sybil*

***Insurance (Maritime): 10***

Volume 1: *Scriba v. North American Insurance*; *Fitzsimmons v. Newport Insurance Co.*; *Marshal v. Delaware Insurance Co.*; *Murray and Mumford v. Insurance Co. of Pennsylvania*; District Court of MD opinion on construction of maritime contracts; *Bart v. Royal Exchange Assurance Co.*; *Alexander v. Baltimore Insurance Co.*

Volume 2: *John Carrer v. Union Insurance Co.*; *Odlin v. Ensurance Co. of Pennsylvania*

Volume 6: *Brown v. Union Insurance Co. of New-London*

***Constitutional: 3***

Volume 2: *United States v. Brigantine William*

Volume 4: *Livingston and Fulton v. Van Ingen*

Volume 6: *Fairfax's Devisee v. Hunter*

**Trusts and Estates: 6**

Volume 1: *Tohill v. Pitt; Perrin v. Blake*

Volume 3: *Coulter v. Jones*

Volume 4: *Slade v. Morgan; Beall v. Beall; Lodge v. \_\_\_*

**Bigamy: 1**

Volume 1: *People v. Hoag*

**Contracts: 7**

Volume 1: *Day v. Jarvis; Van Vechten v. Hopkins; McKim v. Smith and Steene*

Volume 2: *Gilbert and Dean v. Nantucket Bank; Winthrop v. Pepon*

Volume 3: *Sinclair v. Xavier, King of France*

Volume 5: *Bank of Columbia v. Patterson's Administrator*

**Assault and Battery: 3**

Volume 1: *Commonwealth v. Naglee; Trial of Dr. William Little*

Volume 6: *Duffie v. Mathewson*

**Bankruptcy/Debt Relief: 9**

Volume 1: *M'Mechin's Lessee v. Grundy; Hayton v. Wilkinson*

Volume 2: *Grimball v. Ross; D.C. Stewart*

Volume 3: *Farmers' Bank of Lancaster*

Volume 5: *Golden v. Prince; Crittenden v. Jones*

Volume 6: *Adams v. Storey; The Farmer's and Mechanic's Bank v. Smith*

**Corporations: 2**

Volume 1: *Bank of the United States v. Deveaux*

Volume 2: *President, Managers and Company of the Lancaster, Elizabeth and Middletown Turnpike Road v. Stubbs*

**Libel: 6**

Volume 1: *Commonwealth v. Cobbett; Maryland v. Baptis Irvine; Carr v. Hood*

Volume 3: *People v. Frothingham*

Volume 4: *State v. Lehre; Kirkpatrick v. Creevey*

**Procedure: 9**

Volume 1: *Scott v. Scott; Callahan v. Hallowell; Lenox v. Hallowell; Gilchrist v. Collector the Port of Charleston*

Volume 2: *North v. Miles*

Volume 4: *Commonwealth v. Myers; Galt v. Merryman; Baxter v. Biays*

Volume 6: *United States v. Campbell*

**Treason: 2**

Volume 1: *Case of the Honourable John Smith*

Volume 6: *Trials of Judge Workman and Colonel Kerr*

**Habeas: 15**

Volume 1: *Commonwealth v. Duane*

Volume 2: Habeas petition of Hippolyte Dumas; *State of Georgia v. Asselin*; habeas petition of Emanuel Roberts

Volume 4: *Commonwealth v. Smith*

Volume 5: Tilghman opinion; *Commonwealth v. Smith*; *Case of Lewis*; *In the Case of Field*; *In the Matter of Everard Bolton*; *In the Matter of Ephraim Merritt*; *In the Matter of William Meade*

Volume 6: *Commonwealth v. Van Lear*; *Gill, Canonge & Co. v. Jacobs*; *Commonwealth v. Captain John Schultz*

**Takings/Public Land Use: 1**

Volume 2: *Turnpike Road v. Cochran*

**Fraud: 4**

Volume 2: *Attorney General v. Hicks*; *Blewit v. Marsden*; *Haskins v. Latour*

Volume 4: *Blount v. Chester*

**Property: 17**

Volume 2: Batture cases (five opinions)

Volume 4: *Vincent's Lessee v. Conrad*; *Livingston v. Van Ingen*; *Livingston v. Jefferson*; *Ringgold's Lessee v. Cheney*; another Batture opinion

Volume 5: Two pamphlets about Batture; *Talbott v. Heirs of Bedford*; *Coulter's Lessee v. Hodge*

Volume 6: *Peck v. Lockwood*

**Citizenship: 1**

Volume 3: *Reed v. Reed*

**Other torts: 4**

Volume 3: *United States v. Barney*

Volume 4: *Munn v. Du Pont De Nemours*; *Gill v. Cole*

Volume 5: *Murray v. McLane*

**Patent: 1**

Volume 3: *Evans v. Weiss*

**Sentencing/Charging Excerpts: 6**

Volume 1: Judge Wilds; *United States v. Lowrey*

Volume 2: W. C. Alcock case

Volume 3: British dueling case

Volume 4: Jury charge for indictment for riot; censure of corrupt District Attorney

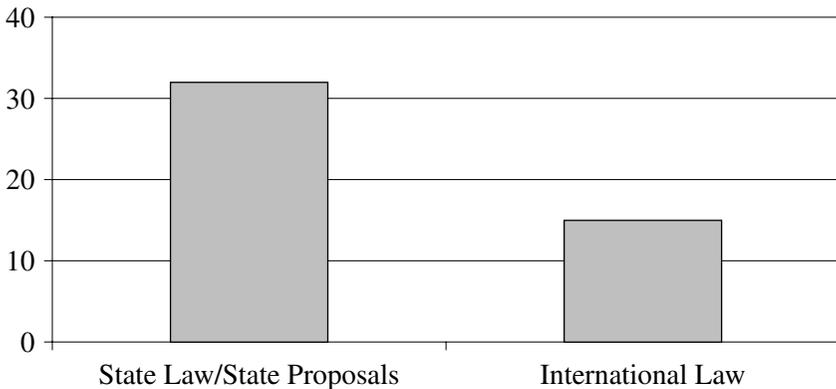
**Accepting Illegal Military Commissions: 1**

Volume 4: Isaac Williams Case

**Marriage: 1**

Volume 6: *Attorney-General v. Broaddus*

Statutes: 47



**State Law/State Proposals: 32 (68.1%)**

Volume 1: annotated MD state laws on all different topics; abstract of attachment law of SC; MD laws on bonds; NY law on attachment; NC law on attachment; list of MD statutes of limitations; rules of procedure in MD Circuit Court

Volume 2: report on which English statutes are in force in PA; list of PA insolvent laws; NY law on proving titles

Volume 3: MD attachment laws; bills of exchange in territory of Orleans; judicial establishment in territory of Orleans; manner of authenticating writings in VA; act for regulating conveyances in VA; act to prevent VA landowners from evading taxes; PA law re: taxation of dogs; PA act regulating arbitrations; constitutional amendment proposed by VA

Volume 4: KY laws on authenticating documents; rules of procedure of NY District Court; act to regulate attachments in GA; report of committee on laws of CT; amendment proposed by VA representative to Constitution

Volume 5: Act of GA for asserting her limits; Act of SC for confirming convention of Beaufort; Act of GA for selling land to several companies in 1789; act of sales by GA in 1795; repealing act;

10/26/1787 Congressional Resolution; bill in MD House of delegates re: habeas corpus; NY bill on raising troops to defend NY

**International Law: 15 (31.9%)**

Volume 1: Article XII of 1800 treaty between France and United States

Volume 2: translation of *Il Consolato del Mare*

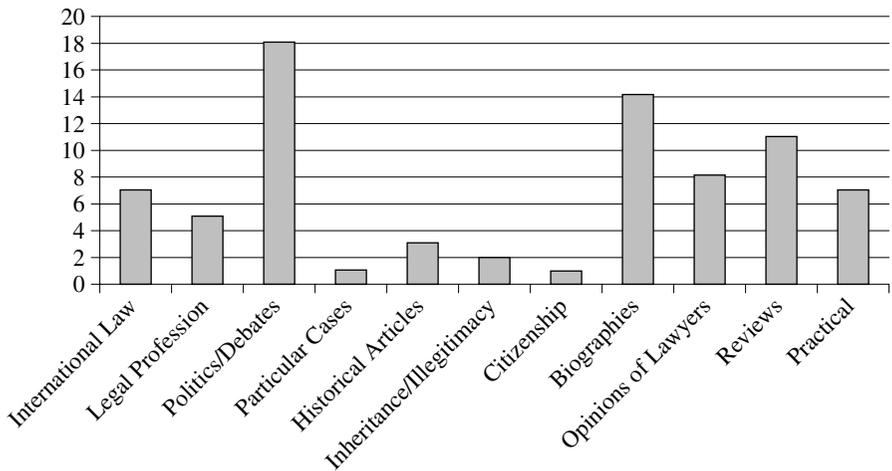
Volume 3: more *Il Consolato del Mare*; translation of “Rhodian law concerning Jettison”; more civil law translated (“of maritime loan”); translation of French law on same topic

Volume 4: form of a Turkish power of attorney; Danish rules on privateering; more translations of *Il Consolato del Mare*; *Ordonnance de la Marine*; another review of French criminal law

Volume 5: excerpt from Treaty of Paris; Proclamation of 1763; King George’s grant of governorship of British province of Georgia

Volume 6: survey of European commercial law during wartime

Articles: 77



**Articles on International Law: 7**

Volume 1: article about *Case of the Horizon* (international ships); “The Honest Politician, Part I” (discussion of law of nations and capture of ships)

Volume 2: article on French law; “Principles of the Law of Nations”; more civil law in translation

Volume 3: translation of Bynkershoek’s *A Treatise on the Law of War* (entire vol. 3 no. 3)

Volume 4: more excerpts of *Il Consolato del Mare*

**Articles on the Legal Profession: 5**

Volume 1: “The Adversaria no. 1”: humorous comments about lawyers throughout English history

Volume 2: “Character of an Honest Lawyer”

Volume 4: article on juries; legal anecdote about town crier who wants to have son replace him

Volume 6: article about how hard it is to get laws published

**Articles on Politics/Debates: 18**

Volume 1: article about Aaron Burr; message from President to Congress

Volume 2: series of letters between Madison and Pinckney about embargo

Volume 4: commentaries on the U.S. Constitution; NY debates on Constitution

Volume 5: report of Board of Trade regarding extension of FL; extract from instructions to Governor Chester; answers to Joseph Purcell about where rivers of FL are; report from Secretary of State on Spanish claims; governor’s communication to GA legislature; extract of Pinckney’s representation to court of Spain; letter from MD Senate to House about bill House rejected, and House reply; report of VT legislature to VT governor on militia

Volume 6: debates of House of Representatives of the Territory of Orleans on memorial to Congress; “faithful picture of the political situation of New Orleans”; governor’s explanation of veto of a bill about justices of the peace; argument in House of Lords on admiralty jurisdiction

**Articles on Particular Cases: 1**

Volume 5: article on “The Yazoo Question”: case of Georgia land sales

**Historical Articles: 3**

Volume 1: article on historical jurisdiction of admiralty courts; article about Justinian’s code

Volume 6: notes on “The Institutes of Justinian”

**Articles on Inheritance/Illegitimacy: 2**

Volume 4: note on illegitimate children; speech of Miss Polly Baker

**Articles on Citizenship: 1**

Volume 6: discussions on questions about effect of independence on citizenship

**Biographies: 14**

Volume 1: James Mackintosh; Thomas Lord Coventry

Volume 2: Right Honorable Lord Chancellor Eldon

Volume 3: George Wythe; Lord Chief Justice Hales; Sir William Scroggs; Serjeant Maynard, Thomas Syderfine; M. De Lolme; Lord Chief Justice Jeffries; Sir Edmund Saunders; Sir Leoline Jenkins; Sidney Godolphin

Volume 4: Character of Fisher Ames

**Opinions of Lawyers: 8**

Volume 1: opinion on cargo from ship being seized relative to direction of voyage; opinion of William Pinkney on trusts and estates; British judges' opinions on rules of evidence

Volume 3: judge's opinion on arming ships; British Attorney General on alienage question

Volume 4: opinion by Luther Martin on warranty; opinion by U.S. Attorney General on case of General Wilkinson

Volume 5: opinion of Colonel Hamilton on whether Yazoo grants to companies were valid, despite repeal

**Reviews: 11**

Volume 1: review of Tyng's reports; review of "Abridgment of the Law of Nisi Prius"; review of "Treatise on Pleading in Civil Actions"; review of "Practical Points, or, Maxims in Conveyancing"

Volume 2: review of nisi prius reports in Westminster Hall courts; review of French civil code

Volume 3: review of civil law especially regarding inheritance; review of Hillhouse's Amendment to the Constitution; review of documents relating to Olmstead's case

Volume 4: review of new publication of French Code of Criminal Instruction; review of biography of Alexander Hamilton

**Practical: 7**

Volume 1: article on how to file a declaration in a suit (from Consetio's Practice of the Ecclesiastical Courts, London); "practical treatise of the law of Vendors and Purchasers of Estates" (London); "Treatise on Conveyancing"; "Observations on the Rules of Descent"

Volume 6: explanation of CT court structure; plan to publish laws of Spanish Indies; how to execute deeds and other instruments of writing in PA