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The Law of the Kings
Abba Paulos Tzadua, translator, and Peter L. Strauss
Federal Justice in the Mid-Atlantic South: United States Courts from Maryland to the Carolinas, 1836–1861

Peter Graham Fish
Duke University
To MARIA and JONATHAN
Contents

Tables xvi
Graphs xix
Maps xxi
Illustrations xxiii
Foreword xxvii
Acknowledgments xxxi

Part One
Politics, Courts and Judges

Chapter 1 · Changing Landscapes for Federal Justice 5
Nation and Region 5
Polarizing Politics 7
A Federal Presence 10
Courts in Crisis 10
Court-Packing Circuit Politics 12
Obliterate the Fourth Circuit? 14
Farewell Old Fifth Circuit 16
Reformers' Perpetual Pursuit 20

Chapter 2 · Judges Appointed and (Mostly) Confirmed 23
Judicial Selection 23
Maryland 24
Upton Scott Heath 24
John Glenn 26
William Fell Giles 28
Eastern Virginia 30
Peter Vivian Daniel 30
John Young Mason 32
Senatorial Balks 35
James Dandridge Halyburton 37
Western Virginia 38
Isaac Samuels Pennybacker 38
John White Brockenbrough 39
North Carolina 42
Henry Potter 42
Asa Biggs 44
South Carolina 49
Robert Budd Gilchrist 49
Andrew Gordon Magrath 51
Judges All 56

Chapter 3 · Politics, Vocations and Avocations 59
From Politics, Into Politics 59
Judges-Lobbyists 63
### CONTENTS

Making a Living 64  
Brockenbrough's Law School 68  
Brockenbrough's Plight 69

#### Part Two  
Supporting and Accommodating the Judiciary

**Chapter 4 · Staffing and Managing Courts**  
Court Officers 77  
Marshals 77  
Clerks of Court 78  
Commissioners 85  
Court Criers 87  
Steamboat Inspectors 87  
Compensating Court Officers 88  
Administrative Quagmire 91  
Autonomy-Accountability 95

**Chapter 5 · Housing the Courts**  
From Tenancy to Ownership 97  
District of Maryland 99  
Eastern Virginia 101  
Norfolk 101  
Richmond 104  
Alexandria 106  
Western Virginia 109  
Wytheville 109  
Lewisburg 109  
Clarksburg 109  
Staunton 110  
Charleston 110  
Wheeling 111  
North Carolina 113  
Raleigh 113  
Edenton (District of Albemarle) 114  
New Bern (District of Pamlico) 114  
Wilmington (District of Cape Fear) 114  
South Carolina 115  
Columbia 115  
Laurens and Greenville 117  
Charleston 117  
Retrospect and Prospect 120

#### Part Three  
Courts at Work

**Chapter 6 · Maryland: Courts on the Patapsco**  
Exit Marshall, Enter Taney 123  
Baltimore: Courts, Terms, and the Supreme Court 124  
Taney's Attendance 129  
Caseloads and Workloads 131  
Judicial Democracy and Efficiency 134  
In Memoriam 136  
Court's Company and Reports 137  
Supreme Court Receptions 140
Chapter 7 · Eastern Virginia: Along the James to the Tidewater
   Seats of Court 147
      Richmond 147
      Norfolk 150
   Courts Open in Term and Out 150
      Circuit Court 152
      District Courts 153
   Press Coverage 157
   Circuit Riders: Barbour, Daniel and Taney 158
   Circuit Justice Attendance (or Absence) 160
   “Paper Trail” to the Supreme Court 162

Chapter 8 · Western Virginia: Across Valleys and Mountains
   Dispersed Seats of Courts 165
      Wheeling 167
      Clarksburg 169
      Charleston 169
      Staunton 169
      Lewisburg 170
      Wytheville 170
   Institutional Changes 171
   Travails of the Judges 173
   Sequencing Terms of Court 174
   Courts in Session 175
   Court Days 178
   Circuit Courts: Self-Judging 180

Chapter 9 · North Carolina: Waning and Waxing
   Judge Potter’s Shadow 185
   The Circuit Court 188
   Term-Scheduling Imbroglios 191
   On the Bench 192
   Trouble-shooting Circuit Justice 194
   Enter Asa Biggs 197
   Reviving District Courts 198

Chapter 10 · South Carolina: A Federal Presence
   Seats of Courts 203
   Justice Wayne on Circuit 206
   Circuit and Supreme Courts 209
   District Courts 211
   Gilchrist Presides 213
   Magrath: Judicial Dynamo 215
   Debtors, Aliens and the Honored Dead 217
   Mobilizing Grand Juries 221
   Judicial-Political Oration 223

Chapter 11 · Palmetto State Beehive: Atlantic Slave Traders in the Dock
   Landfall Charleston 225
   Context and Preparation 227
   Thrust and Parry 229
   Echo Proceedings: Columbia 231
   Maneuvers and Trial: Charleston 232
   A Political Trial 234
   Justice Wayne’s Charge 236
Judicial Coup de Main
Repercussions

Part Four
Parsing the Constitution

Chapter 12 · Judicial Powers and Limits
Judge and Jury
Inherent Judicial Powers?
Marbury and Original Jurisdiction
Expanding Admiralty’s Reach
“Brown Water” Admiralty
Judicial Temporizing: Swift’s Impact
Corporate Citizenship
African-American Citizenship?

Chapter 13 · Affirming Congressional Powers
Bankruptcy
Counterfeiting
Safety at Sea
Protecting Morals
Slavery’s Constitutional Shield
Dred Scott’s paradox
The Echo Prosecution Challenged
Treaty Power Questioned
Freezing Piracy’s Definition
Shrinking Commerce Power
Defending Constitutional Ramparts
Treaty Power Defended
Constitutional Theory Propounded
Affirming Commerce Power
Piracy Definable and Defined
Vindicating National Power
Commerce Power Upheld
Piracy Defined by Congress
Twenty Year Window Bar Quashed
Slave Trade “Strawman” Rejected
Constitutional Metamorphosis?

Chapter 14 · Demarcating Executive Bounds
Oversight of Treasury Officials
Curbing Prosecutorial Discretion
Restraining the Navy Secretary
Limiting War Powers
Reviewing Army Recruitment
General Kosciusko’s Contested Will
The Baltimore Mexican Company
Filibusters
Restraining and Deferring

Part Five
Among a Union of States

Chapter 15 · States-Centric Federalism?
Framework of Federalism
Diversity or Uniformity?
Criminal Proceedings: Whose Rules?
Harmonizing Concurrent Jurisdiction 326
Removal Jurisdiction: A “Will-O’-the-Wisp” 328
Federal Exclusivity? 331
Admiralty Jurisdiction Creep 333
Dry Land and Waters Beyond 337
Swift Distinguished 338
A Benign Federalism? 340

Chapter 16 · Confrontational Federalism: Slavery’s Hovering Presence 341
Sovereign Public Opinion Unleashed 341
South Carolina’s “Police Bill” 343
Taney Court Speaks—by Analogy 348
Roberts v. Yates 350
“Police Bill” Arrest of the Echo’s Africans? 353
Politically Incorrect Yankee 357
A Troublesome Accused: Slave Amy 358
God, Morals, State Police Powers 363

Part Six
Shepherding Economic Life in the Age of Enterprise

Chapter 17 · Courts and Property Creation 369
Property Rights and Economic Development 369
Patent Law in Court 369
Monopolies at Law and in Equity 372
In Court: “Inventors” and “Infringers” 374
Assignee Rights in Conflict 381
Judicial Divination 384
Woodworth’s Lobbying, Litigation, and Triumph 386
Copyrights in Court 389

Chapter 18 · Saving Marine Property 393
Morality, Self-Interest, Public Good 393
Ancient Law, American Practice 394
Defining Subjects of Salvage 394
Identifying Salvors 398
Salvage Criteria 400
Rewarding Risk-Takers 403
Salvage Courts 406

Chapter 19 · Facilitating Maritime Commerce 407
To Plow the Seas 407
Maritime Liens 408
Sectional Maritime Conflict 410
Transferring Losses to Whom? 412

Chapter 20 · Ordering and Safeguarding Lives at Sea 415
Maritime Labor Contracts 415
Wages or Salvage? 418
Labor Strife or Mutiny? 418
Shipboard Order vs. Brutality 420
Dead on Arrival 422
Health and Safety at Sea 423
Immigrants 423
Steamboats 426
Courts on the Water’s Edge 429
Chapter 21 · Debtor's Fresh Starts Gained and Lost
  Pitfalls of Capitalism 431
  To a National Bankruptcy Law 432
  Triumphant Whigs and Opponents 433
  Courts Besieged 435
  Creditors in Pursuit 437
  Judicial Dissonance 439
  Preferences for Friends and Neighbors 440
  Whither the Assets? 442
  Fate of "Slave Susan"? 443
  Discontents and Repeal 445
  State Sovereignty, Debtors at Bay 446

Chapter 22 · Sails, Steam, and Maritime Collisions
  Allocating Losses 449
  Sagas of the Bay and Sea 450
  Witnesses: Absent, Credible, Self-Serving, Incompetent 453
  Weighing a Melange of Facts 454
  Fixing Blame: The James Gray 456
  Wind, Steam, and Quest for Rules 457
  Steamer vs. Sailboat 458
  Promoting Civility 461
  Impaled Steam Tug 462
  Remedies 463

Chapter 23 · Safeguarding Transportation Systems
  Nineteenth-Century Infrastructure 465
  Shielding Baltimore's Canal 467
  Quashing a Consumer Revolt 470
  Rights-of-Way Lobbying 472
  B. & O's Lobbyist Litigates 474
  Corporate "Citizenship": The Letson Case 476
  Contractors at Risk 479
  Stockholders at Risk 480
  Passengers at Risk 481
  Municipalities at Risk? 484

Chapter 24 · A World of Contracts and Conveyances
  Status to Contract 487
  Whither the Cargo? 487
  Congress Intervenes 489
  Cargoes Not Loaded 489
  Lost Landed Cargoes 490
  Marine Insurers at Bay 492
  Contracts, Custom, and Justice 493
  Void Contracts 494
  Scent of Fraud 495
  Swan's 60,000-Acre Legacy 497
  Incest and Descent: "Grassy Cabin" 500
  Law — Justice Dilemma 501
  Ejecting the United States Government? 502
  Conflict Resolution 504
Part Seven
A Not So “Peaceable Kingdom”

Chapter 25 · Crimes, Procedures and Punishment

“Few and Defined” National Powers 507
Arrest and Confinement 509
Grand Juries 510
Scrutinizing Procedures 513
Federal Crimes 517
Mail Robbery 517
Obstructing the Mail 519
Suppressing Counterfeiting and Forgery 520
Murder, Manslaughter, Assaults 521
A Ship “Cast Away” 524
“Pirates of Penzance”? 526
End Game: Mercy, Prison, Gallows 529
Crime Control 533

Chapter 26 · The African Connection: Atlantic Slave Trade

Congress Acts — Repeatedly 535
War on the Illicit Trade 536
The Echo Cases: A Reprise 539
Captain Corrie’s Luck: A Reprise 541
In Halyburton’s Court 542
Captain Pendleton’s Voyage Home 544
Captain Brayley’s Singular Fate 545
Pursuing Slave Trade Investors 547
Taney’s Crusade 550
Ordinary Punishment: Forfeiture 553
Sifting the Evidence 555
Third Party Shippers 558
Charleston Nullification: Ketch Brothers 559
Magrath’s Last Slaver 561
The Least Included Offense 562

Chapter 27 · Africans in America: Flights to Freedom

The Founder’s Legacy 565
Fugitive Slave Act: 1793 566
Prigg Undone 567
Fugitive Slave Act: 1850 568
Implementing the 1850 Act 570
In the District of Maryland 570
A Deadly Path Taken 571
After Christiana 574

Part Eight
Twilight of the Old Republic

Chapter 28 · In Maryland: Courts, Conventions, War

Political Summer: 1860 579
Judges amid Political Upheaval 582
December Gloom 585
Whither Maryland, Nation and Courts? 587
War’s Intrusions 589
Questioned Loyalties 591
## CONTENTS

### Chapter 29 · In Eastern Virginia: Wary Judge, Peace Conference, and Storm King
- Political Season 595
- Judicial Business as Usual 597
- Election and Response 598
- Peace Conference and Judge Halyburton 599
- Halyburton Labors On 602
- Ides of March 604
- A Federal Presence? 606
- Halyburton in Gray 608

### Chapter 30 · In Western Virginia: Duty Performed — Hopes Dashed
- Riding to the Courts 611
- Election 1860 613
- Brockenbrough: Teacher-Ideologue 615
- Secessionist on the Hustings 616
- Peace Conference Commissioner 617
- False Spring: 1861 619

### Chapter 31 · In North Carolina: Secessionist Judge among Unionists
- Summer of ’60 623
- Election Autumn 628
- Awaiting Justice Wayne 629
- Whither North Carolina? 631
- Judicial and Political Limbo 632
- Guns of April 633
- Secession and Resignation 635
- Confederate Court Rises 636

### Chapter 32 · In South Carolina: The Alpha and the Omega
- A Roiled Political Scene 639
- Magrath on the Bench 640
- Autumn Contingencies 641
- Railroad Politics 643
- “Temple of Justice” Closed 644
- Extinguishing the Federal Presence 646
- Secessionist Spear-Carriers 648
- The Orator Orates 649
- State Sovereignty Convention 650
- Secretary of State Magrath 652
- To The Bench Again 655
- Retrospect and Prospect 657

### Appendices

**Appendix A** · Judges of United States Courts in the Mid-Atlantic South: 1836–1861 665
**Appendix B** · U.S. Circuit Court for the District of Maryland, Sittings by Circuit Justice and District Judge: 1836–1860 670
**Appendix C** · Sources for U.S. Court Officers — All Districts: 1836–1860 671
**Appendix D** · Sources for Court Officers: District of Maryland 674
**Appendix E** · U.S. Circuit Court for the Eastern District of Virginia: Ended Causes by Subject, 1836–1860 675
**Appendix F** · U.S. District Court for the Eastern District of Virginia: Ended Causes by Subject, 1836–1860 676
**Appendix G** · Sources for U.S. Court Officers: Eastern District of Virginia 677
**Appendix H** · Court Session Days. United States District Court for the Western District of Virginia, Charleston Division: 1843–1860 678
**Appendix I** · Court Session Days. United States District Court for the Western District of Virginia, Clarksburg Division: 1836–1860 679
Appendix J  ·  Court Session Days. United States District Court for the Western District of Virginia, Staunton Division: 1836–1860 680
Appendix K  ·  Court Session Days. United States Court for the Western District of Virginia, Wheeling Division: 1843–1860 681
Appendix L  ·  Court Session Days. United States District Court for the Western District of Virginia, Wytheville Division: 1839–1860 682
Appendix M  ·  Sources for U.S. Court Officers: Western District of Virginia 683
Appendix N  ·  Sources for U.S. Court Officers: District of North Carolina 684
Appendix O  ·  U.S. District Court for the District of South Carolina. Session Days of the District and Admiralty Courts: 1836–1860 685
Appendix P  ·  U.S. Circuit Court for the District of South Carolina. Final Judgments: 1836 to 1860, Inclusive 686
Appendix Q  ·  Sources for U.S. Court Officers: District of South Carolina 687
Index of Cases 689
Index of Persons 697
Index of Subjects 715
Tables

Table 1. Population Growth in the United States: 1830–1860
Table 2. Number of Members in the U.S. House of Representatives and Electoral Votes
   by Census: 1830–1860 and Election Year
Table 3. Collective Portrait of Judges Appointed to Districts in Mid-Atlantic South, 1836–1858
Table 4. Judicial Service on the U.S. Court for the Eastern District of Virginia: 1813–1844
Table 5. Judicial Compensation by District in U.S. Dollars: 1789–1855
Table 6. Congressman John Letcher’s Comparison: Eastern and Western Districts of Virginia, 1819–1850
Table 7. Gross Fees and Emoluments Received by Clerks of Circuit and District Courts
   in U.S. Dollars: 1842–1850
Table 8. Clerk’s Salary Schedule ($) Recommended by the Department of the Interior: 1854
Table 9. District of Maryland Terms of Court: 1789–1860
Table 10. Terms of the United States Supreme Court: 1836–1860
Table 11. U.S. Circuit Court for the District of Maryland Mean Sittings Percentages: 1836–1860
Table 12. Combined District and Circuit Court Case Flows during 1856, reported to the
   Secretary of the Interior by Clerks of Courts
Table 13. Proceedings in U.S. District Courts under the Bankruptcy Act of 1841,
   repealed 1843, reported by Clerks of Courts, February–April, 1846,
   to James Buchanan, Secretary of State
Table 14. U.S. Circuit Court for the District of Maryland, Mean Caseloads per
   Term and Term Lengths: 1836–1860
Table 15. U.S. Circuit Court for the District of Maryland, Criminal Cases as Proportion
   of Total Final Judgments: 1836–1860
Table 16. Officers of U.S. Courts in the Mid-Atlantic South: 1836–1861, District of Maryland
Table 17. Origins by District of U.S. Supreme Court Business, 1836–1860
Table 18. U.S. Supreme Court Disposition of Cases Originating in the Circuit Courts by District, 1836–1860
Table 19. Eastern District of Virginia. Terms of Court: 1789–1860
Table 20. U.S. Circuit Court for the Eastern District of Virginia: Ended Causes per Month, 1836–1860
Table 21. U.S. District Court for the Eastern District of Virginia: Ended Causes per Month, 1836–1860
Table 22. Officers of U.S. Courts in the Mid-Atlantic South: 1836–1861, Eastern District of Virginia
Table 23. U.S. Court for the Eastern District of Virginia at Norfolk. Number of Days in Session: 1836–1850
Table 24. Western District of Virginia, 1819–1860, Terms of Courts
Table 25. Circuit Court Cases Pending on the Trial Dockets of Courts in the
   Western District of Virginia: 1836–1838
Table 26. Officers of U.S. Courts in the Mid-Atlantic South: 1836–1861, Western District of Virginia
Table 27. Mean Total Court Session Days per Year for Courts of the Western District of Virginia: 1836–1860
Table 28. District of North Carolina, Terms of Court: 1790–1860
Table 29a. U.S. Circuit Court for the District of North Carolina, Mean Term Caseloads, Court Days,
   Judges’ Attendance during Five Year Intervals, 1836–1860 Inclusive
Table 29b. U.S. Circuit Court for the District of North Carolina, Sittings and Caseloads: 1836–1860
Table 30. United States Supreme Court, Opening Day Attendance of
   Associate Justice James M. Wayne: 1836–1860 incl.
Table 31. Officers of U.S. Courts in the Mid-Atlantic South, 1836–1861, District of North Carolina
Table 32. Business of the U.S. Court for the District of North Carolina, Albemarle Division: 1836–1860
Table 33. Business of the U.S. Court for the District of North Carolina, Pamlico Division: 1858–1860 201
Table 34. Business of the U.S. Court for the District of North Carolina, Cape Fear Division: 1858–1860 202
Table 35. District of South Carolina, Terms of Court: 1789–1860 205
Table 36. Statutory Sequence of Sixth Circuit Courts: 1836–1860 208
Table 37. Session Days: District Court of South Carolina, 1843–1852, 1858–1860 212
Table 38. Officers of U.S. Courts in the Mid-Atlantic South: 1836–1861, District of South Carolina 213
Table 39. Canal and Railroad Mileage: 1850–1860 467
Table 40. United States Circuit Court for the District of North Carolina: Criminal Cases, 1836–1860 508
Graphs

Graph 1. U.S. Circuit Court for the District of Maryland: Session Days and Attendance by Roger B. Taney on the Circuit Court for the District of Maryland, 1836–1860
Graph 2. Ended Cases: U.S. Circuit Court, District of Maryland (1836–1860)
Graph 3. U.S. Circuit Court for the District of Maryland: Total Session Days per Year, 1836–1860
Graph 4. U.S. Supreme Court Appellate Case Filings, per Year by Origins: 1836–1860
Graph 5. U.S. Circuit Court for the Eastern District of Virginia: Ended Causes by Subject, 1836–1860
Graph 6. Ended Cases: U.S. Circuit Court, District of Virginia (1790–1819) and Eastern District of Virginia (1820–1860)
Graph 7. U.S. District Court for the Eastern District of Virginia: Ended Causes by Subject, 1836–1855
Graph 8. Ended Cases by Type: U.S. District Court, District of Virginia (1790–1819) and Eastern District of Virginia (1820–1860)
Graph 9. U.S. District Court for the Western District of Virginia, Session Days at Places of Court by Year, 1836–1860
Graph 10. Ended Cases: U.S. Circuit Court, District of North Carolina (1836–1860)
Graph 11. U.S. Circuit Court for the District of South Carolina, Final Judgments: 1836–1860
Graph 12. U.S. Admiralty and District Courts for the District of South Carolina, Session Days per Year, 1836–1860
Graph 13. U.S. District Court for the District of South Carolina. Session Days by Month of the District and Admiralty Courts, 1836–1860
Graph 14. U.S. District Court for the District of South Carolina. Session Days per Year: 1836–1860
Maps

Map 1. Circuit Alignments from 1802 to 1842: Fourth, Fifth and Sixth Circuits 11
Map 2. Circuit Alignments from 1842 to 1863: Fourth and Sixth Circuit with transfer of the Fifth to the Old Southwest 19
Map 3. Baltimore, Maryland: Masonic Hall (at arrow) and future site of the U.S. Court House, corner of North and Fayette streets. 100
Map 4. Richmond, Virginia: City Hall, Capitol and Custom-Court House completed in 1858. 105
Map 5. District of Columbia with Virginia portion prior to retrocession in 1842. 107
Map 6. United States Courts: District of Maryland, 1836–1860 124
Map 7. United States Courts: Districts of Eastern Virginia and Western Virginia, 1836–1860 148
Map 8. Baltimore and Ohio Railroad Routes in 1843 168
Map 11. United States Courts: District of South Carolina, 1836–1860 204
Map 12. Atlantic Maritime Frontier: Cape May to Key West 395
Map 13. Charleston Harbor and Approaches (1858) 451
Map 14. Railroads and Canals in Maryland in 1840 468
Map 15. Baltimore and Ohio Railroad: routes to the Ohio River (1847) 473
Map 16. Norfolk, Virginia from Fort Monroe to Gosport Navy Yard 538
Map 17. West African Coast: Porto Praia to Benguela 543
Map 18. Charleston Harbor and fortifications (1861) 653
Illustrations

Fig. 1. Associate Justice James Moore Wayne (1835–1867), allotted to the Sixth Circuit 13
Fig. 2. Chief Justice Roger Brooke Taney (1836–1864), allotted to the Fourth Circuit 13
Fig. 3. Associate Justice Philip Pendleton Barbour (1836–1841), allotted to the Fifth Circuit 15
Fig. 4. District Judge Peter Vivian Daniel (Eastern District of Virginia, 1836–1841); Associate Justice, allotted to the Fifth Circuit (1841–1843), allotted to the Ninth Circuit (1843–1860) 17
Fig. 5. District Judge John Glenn (District of Maryland, 1852–1853) 27
Fig. 6. District Judge William Fell Giles (District of Maryland, 1853–1879) 29
Fig. 7. District Judge John Young Mason (Eastern District of Virginia, 1841–1844) 33
Fig. 8. John Beverly Christian, defeated Tyler nominee (Eastern District of Virginia, 1844) 35
Fig. 9. District Judge James Dandridge Halyburton (Eastern District of Virginia, 1844–1861) 37
Fig. 10. District Judge Isaac Samuels Pennybacker (Western District of Virginia, 1839–1845) 38
Fig. 11. District Judge John White Brockenbrough (Western District of Virginia, 1846–1861) 39
Fig. 12. District Judge Henry Potter (District of North Carolina, 1802–1857) 42
Fig. 13. District Judge Asa Biggs (District of North Carolina, 1858–1861) 44
Fig. 14. District Judge Robert Budd Gilchrist (District of South Carolina, 1839–1856) 50
Fig. 15. District Judge Andrew Gordon Magrath (District of South Carolina, 1856–1860) 52
Fig. 16. Washington Race Course (and dueling ground), Charleston, S.C. 62
Fig. 17. Vistas of Old Virginia's east-west geo-political divide 66
Fig. 18. Summarily superseded Clerk of the Circuit Court for the District of North Carolina Sion Hart Rogers (1857) 79
Fig. 19. Rules and Regulations in Bankruptcy (District of North Carolina, 1842) 85
Fig. 20. Ammi Burnham Young, Supervising Architect of the U.S. Treasury, 1852–1862 98
Fig. 21. Norfolk City Hall, Norfolk, Virginia, completed in 1850 102
Fig. 22. A. B. Young-designed U.S. Custom-Court House, Norfolk, Virginia, completed in 1858 103
Fig. 23. Old City Hall, Richmond, Virginia 104
Fig. 24. A. B. Young-designed U.S. Custom House, Alexandria, Virginia, completed in 1859 108
Fig. 25. Augusta County Court House, Staunton, Virginia, completed in 1836–1837 110
Fig. 26. Plans of the A. B. Young-designed U.S. Custom-Court House, Wheeling, Virginia, authorized by Congress in 1854 112
Fig. 27. Carolina Hall, Columbia, South Carolina 116
Fig. 28. Charleston County Court House, Charleston, South Carolina 118
Fig. 29. Vista of Baltimore, Maryland from the Washington Monument completed in 1829 125
Fig. 30. James Mason Campbell's collected opinions of Fourth Circuit Justice Roger B. Taney, delivered in the District of Maryland 139
Fig. 31. Vista of Richmond, Virginia on the James River in the 1840s 149
Fig. 32. Vista of Norfolk, Virginia on the Elizabeth River 150
Fig. 33. Richmond, Fredericksburg & Potomac Railroad's Richmond terminal at Eighth and H streets 159
Fig. 34. U.S. Navy frigate Constitution visited by Roger B. Taney on circuit in the Eastern District of Virginia 160
Fig. 35. Vista of Wheeling, Virginia on the Ohio River in late 1840s 167
Fig. 36. Wythe Court House in Wytheville (Evansham), Virginia, completed in 1820 170
Fig. 37. Ohio County Court House in Wheeling, Virginia 174
Fig. 38. Greenbrier County Court House in Lewisburg, Virginia, built in 1837 179
Fig. 39. District Judge Henry Potter (District of North Carolina, 1802–1857), at an advanced age 187
Fig. 40. Fifth Circuit Justice Peter V. Daniel (1841–1843)  
Fig. 41. Vista of Wilmington, North Carolina on the Cape Fear River in the 1850s  
Fig. 42. Vista of Charleston, South Carolina at the junction of the Ashley and Cooper rivers in the 1850s  
Fig. 43. Greenville County Court House in Greenville, South Carolina, completed in the 1850s  
Fig. 44. Newspaper notices in 1847 of decrees of the U.S. District Court for the District of South Carolina re: suspected slavers Merchant and Robert Wilson  
Fig. 45. Admiral Chester W. Nimitz, grandson of Karl Heinrich Nimitz naturalized in the U.S. District Court for the District of South Carolina in 1850  
Fig. 46. James Conner, U.S. Attorney, District of South Carolina, 1856–1860  
Fig. 47. Pamphlet publication of the prosecution in the District of South Carolina of crew members of the slaver Echo (ex-Putnam of New Orleans) in 1858  
Fig. 48. Jeremiah Sullivan Black, Attorney General of the United States (1857–1860)  
Fig. 49. Pamphlet publication of the criminal trial of crew members of the slaver Echo (ex-Putnam of New Orleans) in the Circuit Court for the District of South Carolina, April Term, 1859  
Fig. 50. Schooner Wanderer, captained by William C. Corrie  
Fig. 51. Vista of Broad Street scene, Charleston, South Carolina in 1850s  
Fig. 52. Sixth Circuit Justice James Moore Wayne (1835–1867) in the 1850s  
Fig. 53. James Louis Petigru (1789–1863), Charleston, South Carolina barrister  
Fig. 54. Fourth Circuit Justice Roger B. Taney (1836–1864) in the late 1850s  
Fig. 55. Pamphlet publication of District Judge Andrew G. Magrath’s opinion in United States v. Corrie advertising his sensational holding  
Fig. 56. Slaver Wanderer, subject of failed criminal prosecution of its captain William C. Corrie  
Fig. 57. Cast iron cooking kettle from the Wanderer  
Fig. 58. U.S. Navy warship Delaware in dry dock at the Gosport Navy Yard  
Fig. 59. Fort Moultrie in Charleston Harbor, Charleston, South Carolina  
Fig. 60. General Thaddeus Kosciusko (1746–1817)  
Fig. 61. General Francisco Xavier Mina (1789–1817)  
Fig. 62. A History of a Suit at Law authored by James Conner, U.S Attorney for the District of South Carolina  
Fig. 63. Publication of proceedings in United States v. Clements and Reid in collected cases heard in Richmond, Virginia  
Fig. 64. Fort Monroe, Virginia in 1862  
Fig. 65. Steamer Huntsville  
Fig. 66. Burning of abolitionist mail in 1835, Charleston, South Carolina  
Fig. 67. Sixth Circuit Justice William Johnson (1771–1834), author of Elkinson v. Deliesseline (C.C.D.S.C. 1823)  
Fig. 68. Cartoon depicting reception in South Carolina of a northern opponent of the “Police Bill”  
Fig. 69. Africans from the captured slaver Echo (ex-Putnam of New Orleans) awaiting disposition in 1858, Charleston, South Carolina  
Fig. 70. Hoisting of the Echo Africans aboard the Navy steamer Niagara bound for Liberia  
Fig. 71. Publication in the Quarterly Law Journal (Richmond, Va.) of the criminal prosecution of Slave Amy (C.C.E.D.Va. 1859)  
Fig. 72. Ladd, Webster & Company sewing machine, subject of patent infringement suit  
Fig. 73. Coal car patent filed in 1847 by Ross Winans  
Fig. 74. Singer Sewing Machine showroom  
Fig. 75. Charles Goodyear, inventor of rubber vulcanization  
Fig. 76. William Woodworth’s 1828 planing machine patent  
Fig. 77. Woodworth’s improved planning machine design for a re-issue patent in 1845  
Fig. 78. Ballad, The Old Arm Chair, subject of copyright pirating case  
Fig. 79. Associate Justice Joseph Story (1811–1845), Supreme Court admiralty law expert, including law of marine salvage  
Fig. 80. Firemen of Charleston South Carolina’s Phoenix Fire Engine Company, marine salvage claimants in The Huntsville (D.C.D.S.C. 1860)  
Fig. 81. Vista of Wheeling, Virginia during the 1850s  
Fig. 82. Cover design, Minutes of the U.S. District Court for the District of South Carolina (1849–1860)  
Fig. 83. Taney antagonist Associate Justice Benjamin Curtis (1851–1857)
ILLUSTRATIONS xxv

Fig. 84. Northwestern European immigrants arriving in American ports, including Baltimore, Maryland 424
Fig. 85. Fourth Circuit Justice Roger B. Taney (1836–1864) in 1856 425
Fig. 86. Sinking of The Pulaski off North Carolina 426
Fig. 87. Associate Justice Joseph Story (1811–1845), leading promoter of the Federal Bankruptcy Act of 1841 434
Fig. 88. District Judge John Young Mason (E. D. Va. 1841–1844) (bust) 436
Fig. 89. Augusta County Court House, Staunton, Virginia, major repository of bankruptcy cases arising in the Western District of Virginia 443
Fig. 90. Packet steamer Southerner 452
Fig. 91. Courtroom sketch of colliding vessels’ positions in Saunders v. The Hanover (D.C.E.D.Va. 1855) 455
Fig. 92. U.S. mail steamer Louisiana 459
Fig. 93. Cover, Mitchell’s New Traveller’s Guide (1853) 465
Fig. 94. Vista of Baltimore Harbor during the 1840s 469
Fig. 95. James River and Kanawha Canal at Richmond, Virginia 471
Fig. 96. Vista of Wheeling, Virginia in 1857, with Baltimore & Ohio Railroad train shed and Wheeling and Belmont Bridge 476
Fig. 97. Newspaper masthead (1851) depicting railroad circling the State House, Columbia, South Carolina 478
Fig. 98. Stage coach hurtling over the National Road in Maryland 482
Fig. 99. James Swan (1754–1830) 498
Fig. 100. Vista of Harper’s Ferry, Virginia 502
Fig. 101. Fourth Circuit Justice Roger B. Taney (1836–1864) in 1848 515
Fig. 102. Fort Monroe, Virginia 522
Fig. 103. Case file jacket, United States v. Edward Clavell (C.C.D.Md. 1855), mistreatment of seaman 524
Fig. 104. Masonic Hall (Temple) completed 1822, site of U.S. courts in the District of Maryland and of bizarre 1841 piracy case 527
Fig. 105. United States Penitentiary for the District of Columbia opened in 1831 531
Fig. 106. Gosport Navy Yard outside Portsmouth, Virginia across the Elizabeth River from Norfolk, Virginia 537
Fig. 107. U.S. Navy steam sloop San Jacinto of the African Squadron 542
Fig. 108. Judicial order to U.S. marshal for the Eastern District of Virginia directing attachment of the slaver schooner Alice Rogers 546
Fig. 109. “Sharp-built” clipper style schooners, typical of those constructed in Baltimore for the Atlantic slave trade 551
Fig. 110. Shipping articles of the William G. Lewis and published notice of judicial hearing on disposition of the suspected slaver 556
Fig. 111. Cape Coast Castle on the West African coast 557
Fig. 112. Cartoon depicting sectional conflict over enforcement of the 1850 Federal Fugitive Slave Act 569
Fig. 113. William Parker's "safe house" in Lancaster County, Pennsylvania, site of the 1851 "Christiania Tragedy" 573
Fig. 114. Reverdy Johnson (1796–1876), leading Maryland barrister 586
Fig. 115. Pro-southern Baltimore mob attack on April 19, 1861 on the Sixth Massachusetts Regiment 588
Fig. 116. Fort McHenry, Baltimore Harbor, and Taney’s Merryman Opinion 590
Fig. 117. Constitutional Union party’s 1860 standard bearers: John Bell and Edward Everett 599
Fig. 118. Newspaper publication of hearings in the Eastern District of Virginia on libels of suspected slavers Triton of New Orleans and Storm King 603
Fig. 119. A. B. Young-designed U.S. Custom-Court House, Richmond, Virginia, opened in April 1858 605
Fig. 120. District Judge James Dandridge Halyburton (E.D. Va. 1844–1861) 608
Fig. 121. Vista of Wytheville, Virginia in the 1850s 613
Fig. 122. Willard Hall’s adjacent to Willard Hotel, Washington, D.C., site of 1861 Peace Conference 617
Fig. 123. A. B. Young-designed Custom-Court House, Wheeling, Virginia completed in 1859 620
Fig. 124. April 1861 broadside recruiting Lexington, Virginia residents to enlist in the militia 621
Fig. 125. District Judge Asa Biggs, District of North Carolina (1858–1861) in 1857–1858, and his home in Williamston, Martin County, North Carolina 623
Fig. 126. U.S. Custom-Court House, Wilmington, North Carolina, opened in the late 1840s 624
Fig. 127. Wake County Court House, Raleigh, North Carolina opened in 1837, site of the U.S. Circuit Court for the District of North Carolina, and cast bell from 1795 Court House 629
Fig. 128. General Rules of Pleading and Practice Adopted by the Circuit Court in the District of North Carolina (1858–1860) 630
xxvi  ILLUSTRATIONS

Fig. 129. Robert Paine Dick, U.S. Attorney for the District of North Carolina (1854–1861) 632
Fig. 130. Chowan County Court House, Edenton, North Carolina 634
Fig. 131. Slave-built Charleston & Savannah Railroad with tracks through swamps completed in 1860 643
Fig. 132. No. 23 Chalmers Street, site of the U.S. Courts for the District of South Carolina after 1845 and of District Judge Andrew G. Magrath’s “Temple of Justice” speech on November 7, 1860 645
Fig. 133. Musical composition promoting secessionist impulse in South Carolina 648
Fig. 134. Ex-U.S. District Judge Andrew Gordon Magrath (1856–1861) during the Secession Winter of 1860–1861 650
Fig. 135. Charleston Mercury “Extra” of December 20, 1860 651
Fig. 136. Bombardment of Fort Sumter, April 12, 1861 656
Fig. 137. Banner adorning the 1860 South Carolina Secession Convention 657
Using a wide range of primary and secondary sources, Professor Peter Fish has again drawn for us an impressive portrait of Federal Justice in the Mid-Atlantic South: United States Courts from Maryland to the Carolinas, 1836–1861. Volume II of this ongoing historical project is divided into eight parts, several of which discuss issues which echo current concerns. The volume comprehensively considers the various judicial institutions, judges, and company, including grand and petit juries, and their respective treatment of the relatively narrow scope of cases then within federal jurisdiction — much of which was anchored to the adjacent navigable and coastal waters and far-furled seas, at a time when major technological advances and increasingly tumultuous political events augured ill for maintenance of the national fabric, notwithstanding the efforts of circuit-riding Supreme Court Justices to maintain intact that fabric originally spun by the Founders in Philadelphia during the summer of 1787.

Professor Fish focuses on the work of the federal courts in the districts of Maryland, Virginia, West Virginia, North Carolina, and South Carolina — courts that since 1866 have comprised the United States Court of Appeals for the Fourth Circuit. Each district had a resident district judge who presided over courts scattered within his district and who joined with the circuit-riding Supreme Court Justice, primarily Chief Justice Roger B. Taney of Maryland and Associate Justice James M. Wayne of Georgia, to constitute the circuit courts in their allotted circuits.

In Parts One and Two, Professor Fish examines the politics that enveloped circuit re-alignments in and after the age of President Andrew Jackson, as well as those surrounding judicial appointments and failed appointments, longevity problems, and chronic compensation issues exacerbated by geographical differences. Mundane matters of judicial administration are also discussed. Professor Fish probes the interventionist roles of Circuit Justices, the time-worn autonomy-accountability dichotomy, and the actual housing of the courts as the federal government transitioned from tenancy to ownership of premises in selected ports of entry including Richmond, Virginia, where the original 1858 edifice remains a part of the federal courthouse now named after native Virginian Lewis F. Powell, Jr., Associate Justice of the Supreme Court of the United States (1971–1987).

In Part Three, Professor Fish examines the court business in each of the five districts, using court sitting days and judges’ attendance as measures of performance. Each district is given a chapter, with special attention given to the Western District of Virginia, with its six places of court widely dispersed over the district’s mountains and valleys. Part Three culminates with Chapter 11, the “Palmetto State Beehive,” which provides us with a fascinating study in the judicial process taking place in South Carolina during the antebellum period. Focusing on the trial held in South Carolina in the late 1850s of the crew of the slave vessel Echo charged with piracy, a capital crime, Professor Fish adroitly portrays the interactions between the resident district judge, the circuit-riding Supreme Court Justice, the Attorney General of the United States, the hard-pressed federal district attorney, and the team of defense attorneys assembled for this major political trial of the national government’s power to quash the Atlantic slave trade and thereby delegitimize the South’s most “peculiar institution” of slavery.

In Part Four, Professor Fish turns to cases arising in the mid-Atlantic South that illuminate the powers of the judiciary under a Constitution sufficiently elastic that inherent powers might devolve on the courts; that admiralty jurisdiction might extend to non-tidal “brown waters”; and that out of state corporations might be sheltered by federal courts. Congressional powers characteristically received judicial affirmation, whether in crime control, safety at sea, or controlling the Atlantic slave trade. Exercises of executive power, on the other hand, might receive close scrutiny, even if its exercise of that power fell within what later was denoted the realm of “war powers.”

State-nation relations are tracked in Part Five, in the context of what Professor Fish terms “states-centric federalism,” a system characterized by “benign federalism” reflected in the adoption of many state judicial practices and procedures. Professor Fish examines the federal judicial lacuna that surfaced when an enterprising real estate developer sought to evict the commandant of Fort Monroe, Virginia from some of the fort’s beachfront property but which case could not then be removed from the state courts. Similar “benign federalisms” give way to confrontational federalism, such as when the national government, having custody of Africans landed from a captured slave vessel, faces state demands for their surrender — presumably preparatory to their sale into slavery — to local South Carolina officials acting under that state’s famous “Police Bill.”
Far-reaching changes in the American economy wrought by major technological advances, especially in transportation and infrastructure, receive thorough treatment in Part Six. Professor Fish therein explores the role played by the courts in adjudicating patent and copyright disputes, featuring in the former category inventors, assignees, and infringers in disputes swirling around Singer’s sewing machine, Goodyear’s vulcanized rubber, and Woodworth’s much litigated planing machine. Issues arising out of maritime commerce are also discussed. Considered too are problems of loss in a capitalist economy where debtors, in the wake of the nation’s most devastating depression prior to 1929, sought relief under the second national bankruptcy act, spawning judicial dissonance in its interpretation and application and portending desperate outcomes for debtors’ slave property subject to creditors’ reach. Losses at sea arising out of collisions confronted judges with a morass of conflicting self-serving or non-existent facts, not to mention heated contests between those among them who clung to the fading age of sail on the one hand and those who embraced the emerging age of steam.

The new and improved instrumentalities of commerce emerging during the “transportation age” also sparked controversy. Taney and Wayne on circuit, as well as district judges, took a decidedly protective view of the emerging modes of transportation, whether they were canals facing catastrophic natural disasters in hard times or railroads seeking valuable rights of way or corporations doing business across state lines. On the other hand, judges availed themselves of the travel conveniences afforded by common carriers, a reality that likely led Circuit Justice Taney to impose liability for negligence on the owners of an overturned stagecoach plying the National Road from Baltimore to Wheeling. Contracts dominated economic life during this time as well, and a variety of them are probed here, including conveyances of and titles to real property. One such case examines a title challenge to the ownership of a portion of strategic Harper’s Ferry. That prime property becomes the target of an ejectment suit by speculators in a case that implicates the precarious political life in the Border State of Maryland where the district judge, having been previously rebuffed by military authorities, absents himself from the bench in the famous case of Ex parte Merryman to attend a church conference wherein he overtly reveals his loyalties. Then there is the hand-wringing district judge in Richmond who presides over the last capital piracy trial of Atlantic slave traders south of the Potomac at the very moment of President Lincoln’s inauguration, and confronts the last ditch effort by the new President’s Secretary of State to maintain a federal presence in his courtroom. Meanwhile, in the Old Dominion’s Western district, the legal educator-secessionist district judge becomes one of the state’s more frustrated commissioners to the failed Peace Conference held in Washington’s Willard Hotel, yet remains inordinately long on the federal bench before donning a robe of gray as does his counterpart in the Eastern District. Professor Fish then turns to North Carolina where another ardent secessionist district judge anxiously awaits the arrival of Circuit Justice Wayne and prepares for the Georgian’s grand jury charge predictably calling for fidelity to the Union founded on the rock of the Constitution of 1787. No such charge is forthcoming, but the district judge remains prepared with a countercharge in defense of state sovereignty and secession, a goal that he pursues to the end as a member of the Old North State’s secession convention and as a resolute judge in gray. As for South Carolina, Professor Fish dubs it the “alpha and omega” of the nation’s greatest constitutional crisis. Tracked are the strategic steps taken by a politically astute and exceptionally competent district judge who essentially becomes a spear-carrier for secession of the Palmetto State; the peculiar role played by railroad politics; the hovering presence of Unionist Wayne; the closing of the federal “Temple of Justice” on telegraphed news of Lincoln’s election; the resignation of the judge and other federal officials; and the phenomenal political survival of the ex-United States judge.

All in all, Volume II is a fitting tribute by Professor Fish to those who have promoted and participated in the ongoing development of the history of our circuit, one of America’s oldest. Among those responsible for the pursuit of our circuit’s history are the late Clement F. Hayworth, Jr., former Chief Judge of the Fourth Circuit; the late William F. Swindler, John Marshall Professor of Law Emeritus at Marshall-Wythe Law School, William and Mary University; the members of the original History Committee, comprised of the Honorable J. Harvie Wilkinson, III, the late John D. Butzner, Jr., the late Sam J. Ervin, III, the late
Donald S. Russell, and the late H. Emory Widener, along with our long-serving and dedicated Circuit Executive, Samuel W. Phillips. With their aid, Professor Fish has substantially contributed to our knowledge of the Fourth Circuit in good times and bad, in peace and in war, and in the balancing of law and politics in an America on the cusp of a dramatic transformation.

William B. Traxler
Chief Judge of the
U.S. Court of Appeals
for the Fourth Circuit
Publication of this second volume of my study of the United States courts in the mid-Atlantic South reflects a variety of support provided over a long period of time by many who have contributed to the project's realization. First and foremost is the U.S. Court of Appeals for the Fourth Circuit, sponsor of a comprehensive work on the historic federal judicial institutions, their judges and court officers that have served the people of Maryland, the Virginias and the Carolinas in the present Fourth Circuit since 1789. I owe a heartfelt debt of gratitude to Circuit Executive Samuel W. Phillips, a member of the first class of U.S. Circuit Executives and the first one certified and when appointed by the Fourth Circuit Judicial Council, the first in the nation under the Circuit Executive Act of 1971. His patience and support has been a constant comfort. For the substantial financial support provided by the Court through its Chief Judges in facilitating work on this project of long duration, I am grateful. And, I am especially grateful to the Provost of Duke University Peter Lange for the generous subvention of the production of the manuscript of this volume because, as every author knows, it is one thing to write the story, but quite another to produce it. Others have also figured importantly in bringing this work to fruition. Among them are David F. Levi, Dean of Duke University School of Law who enabled me to teach in the Law School a seminar on the courts of the Fourth Circuit; Michael Munger, Chairman of the Department of Political Science, who authorized a substantial reduction in my teaching as part of a three-year “step-down” to retirement in 2011; and Melanie Dunshee, Director of the Goodson Law Library who graciously provided work space for me in the Law Library.

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Library staff has been especially attentive including Jennifer Behrens and Marguerite Most in Duke's Goodson Law Library and Elizabeth Dunn in the former Rare Book, Manuscript, and Special Collections Library of the William R. Perkins Library at Duke and since re-named the David M. Rubenstein Special Collections Library in honor of a magnificent gift given in 2011 by Mr. Rubenstein. Generous with their time and interest were staff members of the National Archives and Records Administration—Charles Reeves of the Southeast Regional Library in East Point, Georgia and Jefferson Moak of the Mid-Atlantic Regional Library in Philadelphia, Pennsylvania wherein are housed the records of the federal courts of the mid-Atlantic South.

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I would be remiss if I did not note the influence of my mentor at The Johns Hopkins University, the late Thomas P. Stran Professor of Political Science Carl Brent Swisher (1897–1968). The biographer of Roger B. Taney, Circuit Justice for the Fourth Circuit, and author of a monumental study of the United States Supreme Court under Chief Justice Taney as an integral part of the Oliver Wendell Holmes Devise History of the Supreme Court, Professor Swisher’s contributions to our understanding of the development of American judicial institutions endures through time and space.