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TABLE OF CONTENTS

THE MORRIS L. COHEN STUDENT ESSAY COMPETITION
WINNING ESSAY

Protecting Inland Waterways: From the Institutes of Gaius to Magna Carta
Gonzalo E. Rodriguez 1

LEGAL HISTORY

The Baltimore Incident and American Naval Expansion
Mark W. Podvia 27

BOOK REVIEWS

43

FROM THE EDITOR

For the past decade Unbound has been published as an annual. Beginning with this volume, Unbound: A Review of Legal History and Rare Books will be published twice yearly. Because of the change from an annual to a biannual publication, Unbound was not published in 2017.

In the future, issue number one will be published in April or May. Issue number two will be published in November or December.

Thanks to Jennifer Dubetz of the West Virginia University College of Law Library for her assistance in formatting this issue.

We hope that you will continue to enjoy our publication.
Protecting Inland Waterways: From the Institutes of Gaius to Magna Carta

by

Gonzalo E. Rodriguez*

Abstract

No single factor has had a more significant effect on the ebbs and flows of history than water. Water creates civilizations, and water brings them to extinction. Even today, thousands of years after we learned to harness the power of water, we continue to struggle in determining how to prioritize competing uses of water resources, how to make water available to all who need it, and how to protect it. These are questions that humans have faced since as long as history dares to recollect.

What factors guide civilizations in their decision whether, and to what extent, to regulate and protect inland waterways? This article looks at four legal codes from three distinct civilizations: From the Romans, The Institutes of Gaius and the Corpus Juris Civilis; from the Visigoth Kingdom, the Visigothic Code; and from the English, Magna Carta. This article proposes that, perhaps more so than inherited Roman tradition, two sets of factors influenced the extent to which these codes protected inland waterways: perceptions of water resource abundance and the propensity for navigability and trade of these civilizations’ inland waterways.

* The University of Alabama School of Law, J.D., 2018. I thank Professor Heather Elliott for her continuous and fluid support, and Dr. Paul Pruitt Jr. for reminding me that all streams have a source.
ABSTRACT ................................................................................................. 1
INTRODUCTION ............................................................................................ 2
I. A BRIEF RECOLLECTION OF THE PAST ................................................. 3  
   a. 161 CE: The Institutes of Gaius .................................................. 3 
   b. 528 CE: Justinian’s Corpus Juris Civilis .................................... 6 
   c. 643 CE: The Visigothic Code .................................................. 9 
   d. 1215 CE: Magna Carta ............................................................... 12 
II. COMPARING THE CODES ....................................................................... 16  
   a. Perceived Abundance of Water Resources ............................... 17 
   b. Propensity for Navigation and Trade of Internal Waterways ....................................................... 20 
III. CONCLUSION .......................................................................................... 24

“Time is a sort of river of passing events, and strong is its current; no sooner is a thing brought to sight than it is swept by and another takes its place, and this too will be swept away.”

--Marcus Aurelius

Introduction

No single factor has had a more significant effect on the ebbs and flows of history than water. Water creates civilizations, and water brings them to extinction. Even today, thousands of years after we learned to harness the power of water, we continue to struggle in determining how to prioritize competing uses of water resources, how to make water available to all who need it, and how to protect it. These are questions that humans have faced since as long as history dares to recollect. The Romans, Visigoths, and the English were no exception. These three civilizations created legal codes that presented different answers to the question of whether and to what extent should human interaction with water resources be regulated. Among these legal codes are The Institutes of Gaius, Justinian’s Corpus Juris Civilis, the Visigothic Code, and Magna Carta.

While all three of these civilizations shared a common historical bond—the history of both the Visigoths and the English being directly influenced by Rome—their answers to the question raised varies widely. And while their different geographic, political, and social realities could explain the differing approaches toward water re-

1 MARCUS AURELIUS, THE MEDITATIONS OF MARCUS AURELIUS IV 43 (George Long trans., 2001).
sources management, another question arises: Are there any commonalities guiding these civilizations’ decision to regulate inland waterways and their methods of doing so?

Part I of this article delves into a chronological review of these legal codes and the historical setting that gave rise to them. Part II of this article compares the features of these legal codes by focusing on perceptions of abundance as guided by climate, and the propensity for navigability and trade of these civilizations’ inland waterways. This article concludes by proposing that, perhaps more so than inherited Roman tradition, two sets of factors influenced the extent to which these codes protected inland waterways: perceptions of water resource abundance and the propensity for navigability and trade of their inland waterways.

A Brief Recollection of the Past

161 CE: The Institutes of Gaius

In 1816, German historian Barthold George Niebuhr traveled to the Cathedral of Verona in search of the Epistles of St. James. In his Letter to Savigny, Niebuhr explains his finding of a peculiar parchment while searching the cathedral’s archives.

The first thing that fell into my hands, on opening the chest containing the manuscripts, was a very thin little volume of extremely ancient single and double leaves of parchment, which, according to the title page, were collected from among dirt and rubbish by the said Diongi in 1758. Most of them are biblical fragments, from perhaps the sixth to the eleventh century, and a note, by the hand of their diligent collector, exhibits their contents. But almost instantly I espied among them two fragments of quite a different kind, whose nature he did not understand, and of which he was therefore omitted all notice. I have only copied this fragment that nothing might go overlooked. But now comes the main piece of news I have to announce to you: namely, that there is preserved at Verona, as much of Ulpian as would fill a small octavo volume; of which, however, I was only able to copy a single leaf by way of a specimen and attestation, which I here-with transmit to you for publication.”

2 Letter from Barthold George Niebuhr to Savigny (Sept. 4, 1816), in The Life and Letters of Barthold George Niebuhr 319-21 (Barthold G. Niebuhr, 1854).
Despite his palpable excitement, what Niebuhr had not realized was that the manuscript he came upon was not one of Ulpian's writings, but instead The Institutes of Gaius; a discovery deemed to be "the most interesting and valuable literary discovery of modern times."³

Gaius is a figure shrouded in mystery, often referred to as “the Blackstone of the Civil Law.”⁴ Though his Institutes were thought to be lost until Niebuhr’s discovery, historians were aware of his prominent stature as a Roman jurist.⁵ An edict from Emperor Valentinian III directed that Gaius’s opinions, along with those of another four jurists, should be the only ones cited in courts.⁶ Also, Justinian’s *Corpus Juris Civilis* directly cited The Institutes of Gaius as one of its authoritative sources.⁷

Of particular interest to this inquiry is the second book of The Institutes of Gaius, which deals with the laws of property.⁸ Things that are subject to a human right are either public—considered to be the property of no individual, for they are held to belong to the people at large⁹—or private—those things “subject to individual dominion.”¹⁰ Further, these properties are divided into corporeal things—those things that are tangible¹¹—and incorporeal things—

³ *Roman Jurists and Codes*, 1 AM. CIV. L. J. 86 (1873).
⁴ *Id.*
⁵ *Id.*
⁶ *Id.*
⁷ *See, e.g., J. INST. 4.18.5* (referring to Gaius as “*Gaius noster,*” which though translates to "our Gaius" is interpreted to mean "our friend Gaius"); *see also INSTITUTES OF ROMAN LAW BY GAIUS li* (Edward Poste trans., 1946) [henceforth “Poste”].
⁸ *See G. INST. 2.1.*
⁹ *Id.* at 2.11.
¹⁰ *Id.*
¹¹ *Id.* at 2.13 (For example, “land, a slave, clothing, gold, silver, and innumerable others.”).
those that are not tangible.\textsuperscript{12} Lastly, Gaius divided property as either "susceptible, or not susceptible of mancipation\textsuperscript{13} by sale."\textsuperscript{14}

While Gaius did not directly address matters of water ownership or usage, his opinions on servitudes indicate that, at least in some circumstances, water diversions were lawful.\textsuperscript{15} For instance, water could be used for watering cattle.\textsuperscript{16} Also, servitudes could be granted allowing for water to be conveyed "through the tenement of another."\textsuperscript{17} These servitudes were considered "rustic servitudes;" that is, servitudes attached to the land.\textsuperscript{18} This appears to indicate not only that Roman law allowed the diversion of waters by non-riparians, but also that these diversions were alienable.\textsuperscript{19}

It is likely that Gaius’s failure to mention the nature of ownership in running waters was by design, as these matters probably fell "within the province of positive law, as belonging to the jurisdiction of each particular state."\textsuperscript{20} However, Gaius’s consideration of servitudes relating to water use and diversions may be evidence that Roman law allowed for the use of water resources for agricultural needs and non-riparian uses.

\textsuperscript{12} Id at 2.14 (For example, “those which have an existence simply in law as inheritance, usufruct, obligation, however contracted.” To the same class belong servitudes.).

\textsuperscript{13} “Mancipation” refers to a formalistic procedure then required for the transfer of certain property. Poste, supra note 7 at 135-36. A property that was susceptible to mancipation could only be acquired by following these procedures, which included an imaginary sale “by means of the formal proceeding by bronze and balance.” Id. at 135. Only Roman citizens could acquire property through mancipation. Id. at 152. Those who did not enjoy the privileges of Roman citizenship could only obtain the property by prescription. Id.

\textsuperscript{14} G. INST. 2.14a (“[M]ancipable are land and houses in Italy; tame animals employed for draught and carriage, as oxen, horses, mules, and asses; rustic servitudes over Italian soil; but urban servitudes are not mancipable.”).

\textsuperscript{15} See id. at 2.14.

\textsuperscript{16} Id. ("pecorus ad aquam appulsus").

\textsuperscript{17} Id. ("aquae ductus").

\textsuperscript{18} Id.

\textsuperscript{19} See G. INST. 2.14a (characterizing rustic servitudes as mancipable).

\textsuperscript{20} Poste, supra note 7 at 127.
528 CE: Justinian’s Corpus Juris Civilis

In the year 528 A.D., Emperor Justinian gave the order to commissioners to begin working on a new legal code bearing his name.21 This compilation, which was to include the works of Emperor Theodosius II and his predecessors, cemented Justinian’s legacy in the annals of legal history.22 Explaining the need for its creation, the Codex stated that, “We discovered that the whole course of laws, which descends from the foundation of the City and the time of Romulus, had become so confused that it stretched on interminably and could not be compassed by the faculties of any human in nature.”23 Once completed in 529 A.D., the main code, the Codex Justinianus, abolished all previous collections.24 However, to keep years of juristic tradition, Justinian ordered the compilation of the Digesta seu Pandectae: a 50-volume collection of writings from ancient jurists that would be endowed with the full power and force of law.25

By 533 A.D., the commission compiled the 50-volume Digest.26 However, Justinian and his commissioners quickly identified a problem with the length of this work:

22 Id. Procopius, the secretary of one of Justinian’s generals, wrote a secret memoir in which he described the Emperor as a “weak, avaricious, rapacious tyrant,” and his court “as corrupt as was customary in the empire of the East.” Id. at 22. Some sources indicate that were it not for the Corpus Juris Civilis, Justinian would have been indistinguishable from most other Eastern Roman emperors. Id.
23 CODE JUST. 1.17.1.1 (Justinian 530).
24 SANDARS, supra note 21 at 23.
25 These works are commonly known as the Digests. See CODE JUST. 1.17.1.4-14 (Justinian 530). In giving the full force of law to the selected works of ancient jurists, the Codex states, “Thus, all the most learned jurists included in this codex shall have such authority as if their efforts had derived from imperial constitutions and had been uttered by Our divine mouth.” Id. at 1.17.1.6 (Justinian, 530). However, Justinian was not interested in praising the efforts of ancient jurists without also saving praise for himself. Id. (“Indeed, We rightly make all their works Our own, since all authority imparted them derives from Us; for he who improves something made without refinement deserves higher praise than he who first created it.”).
26 SANDARS, supra note 21 at 23.
We observed that the uneducated and those standing at the vestibule of the laws, hastening to enter its inner chambers (*arcana*), are unable to sustain the mass of such great wisdom. We deemed that a different, intermediate source of instruction should be prepared, so that instilled and imbued by it, as it were, with the first fruits of all the law, they might be able to enter its innermost recesses and behold the exquisite beauty of the law with eyes wide open.27

Thus, the Institutes—an abridged version of the Roman law set forth in the Codex and the Digest, yet still bearing the full force of law—were created.

Justinian’s Institutes were based on the Institutes of Gaius, but with certain modifications to fit the text and spirit of Justinian’s Codex and Digest.29 Of particular interest to this inquiry is Justinian’s expansion of the legal considerations surrounding bodies of water and their uses. In what is perhaps the most widely recognized statement regarding the nature of ownership in water resources, Justinian’s Institutes state that, “By the law of nature these things are common to mankind—the air, running water, the sea, and consequently the shores of the sea.”30

The Institutes differentiated between the different types of waters. While the sea and its shores were *res communis*,31 the Institutes

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27 CODE JUST. 1.17.2.11 (Justinian, 533).
28 Id.
29 SANDARS, _supra_ note 21 at 24.
30 J. INST. 2.1.1. “The use of the sea-shore, too, is also as public and as much subject exclusively to the law of nations as the sea itself; and therefore any person is at liberty to place on it a cottage, to which he may retreat, or to dry his nets there, and haul them from the sea; for the shores may be said to be the property of no man, but are subject to the same law as the sea itself, and the sand or ground beneath it.” _Id._ at 2.1.5.
31 In the Justinian Institutes, “the principal division is according as things are _in nostro patrimonio_; that is, belong to individuals; or _extra nostrum patrimonium_; that is, belong to all men (*communes*), or no men (*nullius*), or to bodies of men (*universitatis*).” _Id._ at 167. “Of things that are common to all any one may take such a portion as he pleases. Thus a man may inhale the air, or float his ship on any part of the sea. As long as he occupies any portion, his occupation is respected; but directly his occupation ceases, the thing occupied again becomes common to all.” _Id._ at 168.
state that, “All rivers and ports are public hence the right of fishing in a port, or in rivers, is common to all men.”32 Just like a river itself, the use of the banks of a river was considered public.33 However, the riverbank itself belonged to the proprietors of adjacent lands.34 These proprietors could put the soils to use and reap the benefits. Thus, should a proprietor’s use of their property impair the public use of the river or its banks, the proprietor “would be restrained by an interdict of the prætor.”35

In addition to establishing ownership principles over the different types of bodies of water and their shores and banks, the Corpus Juris Civilis expanded on Gaius’s view of water-related servitudes.36 Drawing from Neratius’s commentaries, the Digest states that not only can a servitude be granted to transport water through a channel across someone’s land, but, if the supply of water is sufficient, the servitude might be granted to multiple individuals.37 To ensure adequate supply, the right to the servitude might be exercised “on different days or at different times.”38 This appears to be strong evidence that Romans not only allowed for the conveyance of water to non-riparian tracts, but also that Roman law considered matters of water allocation to the owners of such servitudes, both in quantity and timing, so that they may benefit without harming other water users. Also, the Digest contemplated servitudes over ground water, allowing the grantee access to a private spring to draw water from it.39 Two inferences may be drawn from here: springs were considered private property, and servitudes could be granted to move ground water off-tract.

The Corpus Juris Civilis expounds a much more significant view of the ownership and use of the waters. The seas and sea shores were res communis, common to all. Thus anyone could use them for fishing, transportation, or even occupy them, but not appropriate

32 J. Inst. 2.1.2. The use of the word publicus indicates that the matter at question—for example, the use of the riverbanks—may be used by all the world. SANDARS, supra note 21 at 168. However, “[t]he particular people or nation in whose territory public things lie . . . exercise a special jurisdiction to prevent any one injuring them.” Id.
33 J. Inst. 2.1.4.
34 Id. at 169.
35 Id.
36 For a review of Gaius’s water servitudes, see supra note 15-19 and accompanying text.
37 DIG. 8.3.2.2 (Neratius, Rules 4).
38 Id. at 8.3.2.1 (Neratius, Rules 4).
39 Id. at 8.3.3.3 (Ulpian, Edict 17).
them. The rivers were *res publica*, meaning that while these could be used freely, the people in that territory had the jurisdiction to ensure that uses of the *res* did not prevent other similar uses. On the other hand, the riverbanks were the property of those who owned adjacent lands; however, they owed a duty to the public to ensure that their use of the riverbanks did not impinge on the common right to use the rivers. Lastly, the *Corpus Juris Civilis* is remarkable in that it allows for not only the diversion of streams but also for water allocations in terms of quantity and time, for those who have *aquis ductus* servitudes—a characteristic of many modern-day water regulatory systems.

**643 CE: The Visigothic Code**

Born from the remains of the Western Roman Empire, the Visigothic kingdom rose and fell within nearly two and a half centuries to the Muslim conquest of the Iberian Peninsula. However, this period was marked by revolutionary changes to Visigothic society. Once a nomadic race that was “for ages subject to institutions formed by the desultory acts of tumultuous assemblies, often dictated by caprice and enmity,” two generations transformed the Visigoths into a kingdom that “acknowledged obedience to a government partly imperial, partly theocratic.” As S.P. Scott comments, “[i]n the annals of no people so recently barbarian, is to be found more marked and substantial progress, from the primitive surroundings of pastoral and predatory life, to the tastes, the laws, the refinements, and the social usages of civilization.” Based on the Code of Euric and Alaric II’s *Breviarium Alaricianum*, the Visigoth Kings Chintasvintus and Recesvintus compiled the *Forum Judicum*, also known as the Visigothic Code. This final code of laws supports S.P. Scott’s views on the Visigoths. While the Code was unpolished, “written [in] monkish Latin, a barbarous jargon, extremely difficult to translate, and vastly different from the polished idiom of Tacitus and Cicero,” the Code’s contributions were so

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41 *The Visigothic Code* v (S.P. Scott, ed., 1910).
42 *Id.*
43 While the Code of Euric was lost, many of its parts were incorporated, though likely not *verbatim*, in the Visigothic Code. *Id.* at xxiv.
44 Alaric II’s code was mainly a compilation of the Codes of Justinian and Theodosius. See *id.*
45 *Id.*
46 *Id.*
great that “[a]ll modern systems of government are infinitely indebted to it, for it forms to-day the basis of the jurisprudence of a large portion of the civilized nations of the earth.”

Of particular interest to this inquiry is the Visigothic Code’s treatment of water resources and the property interests surrounding it. The Visigothic Code’s explicitly deals with the right to enclose streams. The Code prohibits individuals from fully enclosing a stream for their private benefit and against the interests of the community. According to the language of the Code, the purpose of this prohibition appears to prevent obstructions to navigation and fishing. Some individuals (namely, farmers) are allowed to partially enclose the stream in a situation where not doing so could allow for cattle to ford the stream and damage their crops, and the farmer’s failure to fence the stream prevents them from recovering damages if such damage by fording cattle were to happen. However, even in this situation, that individual may only be allowed to “build a fence as far as the middle of the channel, where the water is deepest, provided he leaves half of the body of the stream free for the use of others.” However, a riparian landowner need not cultivate crops to enclose a stream partially. So long as the landowner erects a fence that does not extend past the stream’s thread, thus allowing for the casting of nets to and for vessels to pass freely. Violations of this law could be corrected by government officials by removing the obstruction without affording the owner of the enclosure any procedural rights. Further, in situations where the landowners on each bank of the stream were farmers authorized to erect enclosures, they were required to place these in a staggered

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47 Id. at xlii.
48 See The Visigothic Code 8.4.28-29.
49 “No one shall, for his own private benefit, and against the interest of the community, obstruct any stream of importance; that is to say, one in which salmon and other sea-fish enter, or into which nets may be cast, or vessels may come for the purpose of commerce.” Id. at 8.4.29.
50 Id.
51 “Whoever cultivates land in a place traversed by a stream, where there is a ford through which cattle can pass, must enclose his crops with a fence.” Id. at 8.4.28.
52 Id. at 8.4.29. Chapter 29 then states that “no one shall” enclose a stream, but allows for individuals to enclose a stream up to the middle of the channel. Id.
53 Id.
54 Id.
manner so that the stream would remain unobstructed for the passage of vessels and the casting of fishing nets.55

Also, the Visigothic Code contains evidence that not only could water be legally diverted from its stream, but also provided for the punishment of those that unlawfully diverted from the channels of others.56 First, the Code identifies water diversions from streams as necessary for certain agricultural uses.57 Second, the Code sets forth damages for the secret or malicious diversion of water from another’s diversion channel.58 Thus, the rightful owner of the diversion channel may recover damages from the trespasser according to the size of the stream and the length of the unlawful diversion from the channel.59 Also, the owner of the unlawful diversion is required to return the diverted water to the rightful appropriator.60

The Visigothic Code’s laws on water concerned the protection of three primary values: free navigation, common fishing rights, and agricultural development. While the Code suggests that riparian property extended to the middle of a stream, the riparian owner’s use of the submerged waters was subservient to the common interest in navigation and fishing. Additionally, streams may not only be diverted, but the owners of water channels were protected against losses due to water theft.

55 Id. Regarding both 8.4.28 and 8.4.29, the Code labels these provisions as antiqua (ancient). This indicates that these provisions were “based upon the unwritten observances of ages, [and] without any evidence of the time of their adoption.” Scott, supra note 41 at xvii. Provisions identified as antiqua are those believed to originate from Roman sources. Id.
56 Id. at 8.4.31. In contrast to 8.41.28-29, this provision is not antiqua; that is to say, it was not carried over from Roman law, but rather a construct of Visigothic jurisprudence. In this instance, 8.4.31 was created by King Recesvintus. For a description of antiqua, see supra note 55 and accompanying text.
57 “There are many districts where little or no rain falls, and where water is supplied by streams; and it has been found that wherever such streams fail, no crops can be raised.” Id.
58 “Henceforth, wherever there are any important streams, and anyone secretly, or maliciously takes water from the channels of others, he shall pay a solidus for every four hours that said water runs.” Id.
59 If from an “important” stream, one solidus per every four hour that the water runs. Id. For smaller streams, one tremisa for every four hours. Id.
60 Id.
1215 CE: Magna Carta

The waxing and waning of influence by foreign powers indelibly marked the history of England, each contributing to the fabric of the nation’s history and lore. Historians credit the events following the Norman Conquest of 1066 as the turning point for that land, transforming England from being “an inconsequential island off the continent of Europe toward becoming a great nation that would send its men and language and laws around the world.”61 Perhaps one of the greatest driving forces behind England’s emergence as a worldwide power was the nation’s shift to a more centralized government under William the Conqueror’s rule.62

The rise of the Angevin monarchs brought about the exponential expansion of the Crown’s power over its subjects.63 Henry II ruled with an absolute power unknown to other European monarchs, devising procedures to “collect taxes, raise military forces, keep records, police the countryside, and administer justice.”64 However, Henry II’s achievements, for which many historians have lauded him as an exceptional administrator and organizer, did not ensure the success of his successors. Richard the Lionhearted inherited a kingdom so efficient that it could continue to operate successfully in his absence.65 And while Richard’s holy crusade drained the kingdom’s finances, his courage in battle earned him the allegiance of his barons.66 His successor, King John, did not enjoy the same support from the barons.67 John “had none of Richard’s excellence as a soldier . . . [and] was suspicious of all men, jealous of his barons, devious in pursuing his objectives, and calculatingly cruel.”68 John’s nature earned him more personal enemies than he

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62 Id.
64 Id.
65 Id.
66 Id. at 45.
67 Id. at 46.
68 Id. Among John’s most infamous feats are the alleged arrangement of Arthur of Brittany’s killing—Arthur was not only John’s nephew, but likely heir to the English throne under the rules of primogeniture—, the appropriation of his mother and sister-in-law’s revenues, and the hanging of the sons of twenty-eight Welsh chieftains being held as hostages. Id.
could handle, from his barons to the Pope.\textsuperscript{69} About forty-five barons renounced their allegiance to John and marched on London.\textsuperscript{70}

Seeing his rule on the verge of collapse, John had little choice but to invite the barons to the negotiating table.\textsuperscript{71} It was this event that, by the hand of Stephen Langton, Archbishop of Canterbury and papal legate, led to the creation and signing of Magna Carta.\textsuperscript{72} Among the chapters of Magna Carta, two of them make specific reference to the waters in England. Interpreted to be a protection of free navigation on English rivers, Magna Carta’s 33\textsuperscript{rd} chapter states, “All fishweirs shall be entirely removed from the Thames and the Medway, and throughout England, except upon the seacoast.”\textsuperscript{73} As opposed to other chapters in Magna Carta, chapter 33 does not appear to be one of the baron’s demands intended to “rectify oppressive or extortionate behaviour on the part of the king or his officers,” for “there is no suggestion in the Charter, or anywhere else, that John and his agents had been filling English rivers with

\begin{footnotesize}
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  \item \textsuperscript{69} See id. at 46-51.
  \item \textsuperscript{70} Id. at 51.
  \item \textsuperscript{71} Id.
  \item \textsuperscript{72} Id. at 51-52. “Many of the chapters of Magna Carta concern the intricacies of feudal relationships, problems which are of no concern in modern times. Certain chapters, however, raise issues as vital today–and, in many parts of the world, as unresolved–as they were in the thirteenth century.” HOWARD, note 1 at 9.
  \item \textsuperscript{73} A.E. DICK HOWARD, MAGNA CARTA 33 (rev. ed. 1998). A fishweir is “a large V-shaped weir made of rows of upright poles, connected by transverse rods or beams, which were themselves interwoven with brushwood or withies. The poles were either sunk directly into the bed of the sea or river or set into low stone walls; the latter were often used for coastal weirs, which could be substantial structures. The two lines of poles did not meet, but were separated by a gap which was filled by a net, or more often, a wickerwork basket with a hole at one end. Fish entering the weir would be guided by its walls into the centre and then into the basket; a collar of inward-facing sticks at the point of entry acted as a valve to prevent their swimming out again.” Summerson, infra note 74 (citing A. WHEELER, THE TIDAL THAMES: THE HISTORY OF A RIVER 80 (1979); WATERFRONT ARCHAEOLOGY, COUNCIL FOR BRITISH ARCHAEOLOGY RESEARCH REPORT 76-87 (1991); A. O’Sullivan, Place, Memory and Identity Among Estuarine Fishing Communities: Interpreting the Archaeology of Early Medieval Fish Weirs, WORLD ARCHAEOLOGY 35, 449-68 (20030).
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obstructions.” Instead, this chapter appears to be a demand calling for “the exercise of the royal prerogative in ways advantageous to the king’s subjects, and in particular to the city of London, which was its principal (though not its sole) beneficiary.”

While the installation of fishweirs was of great importance as a source of food for London, it came with the drawback of limiting navigation in rivers. The prohibition against fishweirs was not novel. In fact, King Richard ordered the removal of all fishing weirs in the Thames during his reign because these created navigational difficulties to vessels carrying supplies for Richard’s campaigns in Normandy. Such was the problem with these structures that Archbishops Hubert Walter and Langton excommunicated those individuals responsible for erecting fishing weirs. However, chapter 33 of Magna Carta exempts from its prohibition fishing weirs built upon the seacoast. Two explanations can be presented for this exemption. First, coastal fishing weirs would typically be erected in shallow waters, thus creating less of a hindrance to navigation. Second, coastal weirs could not easily redirect the flow of fish in the same fashion as riverine weirs could. To be effective, coastal weirs had to be much larger than riverine ones, and in turn significantly more expensive. Thus, coastal weirs were “primarily the creations of secular and ecclesiastical lords, who had them constructed (particularly in the case of religious houses) to ensure that they had an adequate supply of fish, and also to provide them with a valuable commodity which could be sold on the open market.”

Chapter 47 of Magna Carta states that “[a]ll forests which have been created in Our time shall forthwith be disafforested. So shall it be done with regard to rivers which have been placed in..."
in Our time.”\textsuperscript{84} To be able to understand the meaning and purpose of this close, it is necessary to look both at the legal records of the time, as well as the realities surrounding what it was like to live in Henry II and John’s kingdom. Among many other qualities, both of these kings shared two particular interests: an appreciation for absolute power and a love of fowling.\textsuperscript{85} Such was their love for this sport that, to create for themselves a monopoly over the enjoyment of fowling along certain rivers, they placed many riverbanks across England “in defence.”\textsuperscript{86} By placing a river “in defence,” the king claimed “sole rights of any kind to the exclusion of the public . . . in regard to the object of such rights.”\textsuperscript{87}

While chapter 33 has always been linked to the common good of protecting the rivers as means of navigation, the justifications of chapter 47 have not always been so clear. Commentators have erroneously interpreted chapter 47 to deal with similar issues as chapter 33, namely fishing.\textsuperscript{88} However, the limited applicability of chapter 47 can be observed in the chapter’s own contents, as it also calls for the disafforestation of forests. Thus, “[i]f woods could be ‘afforested’ for hunting, rivers might be placed ‘in defence’ for hawking.”\textsuperscript{89} The conclusion that placing rivers “in defence” intended to restrict fowling (as opposed to fishing) rights can be inferred from legal documents of the time, in which John grants fowling permissions to the Earl of Hereford over rivers that had been placed “in defence.”\textsuperscript{90} However, this conclusion need not stand for

\textsuperscript{84} Howard, Magna Carta 47 (emphasis added).
\textsuperscript{86} See William S. McKechnie, Magna Carta: A Commentary on the Great Charter of King John, with a Historical Introduction 354 (1905).
\textsuperscript{87} Id. at n. 3.
\textsuperscript{88} Id. at 358.
\textsuperscript{89} Id. at 508.
\textsuperscript{90} See id. at 354, n. 2 (“Two links in the chain of evidence are worthy of emphasis: (a) Writs of 13th November and 1st December 1234, order repair of bridges for the transit of the king ‘along with his birds’ (\textit{cum avibus suis}). (b) A writ of 28th October 1283, gives \textit{aves capere} as the equivalent of \textit{riviare}. This writ contains a license to the Earl of Hereford during the present winter season to riviate and to take river-fowl of this nature (\textit{riviare et aves ripariaerum hu-jusmodi capere}) throughout the rivers Lowe and Frome which are in defence (\textit{in defenso}).”). In fact, these writs explain the need for
the principle that chapter 47 only prevented the king from foreclosing riverbanks only to fowl. If placing any object “in defence” granted the king “sole rights of any kind to the exclusion of the public . . . in regard to the object of such right,”91 then it is easily conceivable that the king had the power to place riverbanks “in defence” as it related to fishing purposes, for recreational purposes, or even as access points of navigation. Therefore, by requiring the king to withdraw any decrees placing rivers “in defence” during his reign, chapter 47 also forbade the king from placing riverbanks “in defence” for any other purpose.

The Magna Carta’s main protection of water resources concerns the values of free navigation. This can be observed in chapter 33’s requirement for the removal of fishing weirs. While fishing weirs in rivers were more likely to affect the navigability of English waters, thus requiring their removal, coastal fishing weirs did not create the same impediment. And though the precise motivation behind chapter 47 might have been exclusively aimed at fowling and the costs associated with repairing bridges for the king’s use, the chapter’s prohibition over placing riverbanks “in defence” with no exception had the effect of preventing the king from restricting people’s access to water resources for any purpose.

Comparing the Codes

While a direct comparison of these codes may provide insight as to shared values regarding the protection of water resources, such a comparison is rarely helpful without accounting for the realities that necessitated those enactments. In comparing the approaches taken by each code, this section briefly considers the characteristics that may have shaped each people’s understanding of the need and extent of laws protecting water resources. Among these fea-

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91 See supra note 87 and accompanying text.
tures are (1) climate and perception of abundance of water resources, and (2) necessity of rivers for internal navigation. Because the chapters of the Institutes of Gaius and the Corpus Juris Civilis previously discussed only applied to Rome, their protections will be discussed together.

**Perceived Abundance of Water Resources**

As is the case with most ancient civilizations, Rome was founded, and it expanded, geographically along the water resources that were immediately available.\(^2\) Most notable is the Tiber, for that Rome was built on its eastern bank.\(^3\) However, while water was reasonably available to Romans, its quality began to decrease as the city’s population continued to expand.\(^4\) Not only was the Tiber used as the disposal site for waste and dead bodies for those that did not have access to Roman sewers, but periodic floods would cause for Roman sewers to overflow, contaminating the Tiber and reducing its utility as a source of water for consumption.\(^5\) For this reason, Rome began to construct a network of awe-inspiring aqueducts, many which still stand and function.\(^6\) These realities turned the Romans into a people that heavily interacted with its environment and modified it to meet its water supply needs. And Roman law reflects these realities. The Corpus Juris Civilis contains many opinions from jurists that create ownership rights depending on the type of body of water, differentiate between the communal rights to the use of streams and the ownership of the riverbeds, and broadens previous notions of servitudes to allow for complex water allocation schemes.\(^7\)

On the other hand, the Visigoths counted neither with the aqueduct infrastructure nor the relatively mild weather of Rome.\(^8\) The quick expansion of the Visigothic Kingdom required an increase in the agricultural productivity of the Iberian peninsula, and this, in

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\(^2\) *See* Frontinus, *The Aqueducts of Rome* 4 (“For four hundred and forty-one years from the foundation of the City, the Romans were satisfied with the use of such waters as they drew from the Tiber, from wells, or from springs.”).

\(^3\) *See* id.


\(^5\) *See* id.

\(^6\) *See* id.

\(^7\) For a discussion of these elements, see *supra* pp. 3-9.

\(^8\) For information on the Visigoth’s reliance on surface water for agricultural purposes due to the lack of reliable rainwater, see *supra* notes 57-59 and accompanying text.
turn, brought about “a considerable ruraisation of life and economy.” These realities become apparent upon reading the Visigothic Code, for many of its provisions, in one way or another, are related to the agricultural needs of the kingdom. Additionally, as earlier discussed, the Visigothic Code makes specific reference to the fact that certain areas of the kingdom do not receive rainfall sufficient on itself to sustain agricultural production.

The circumstances in England present yet another very different setting. When looking at Magna Carta, chapters 33 and 47 protect only the access to and use of streams. Neither the Magna Carta nor any English legal code before it spoke of water diversions or allocations, protections for water diversion channels, or any other such development of water resources.

When comparing the features of Roman, Visigoth, and English laws protecting water resources, it is necessary to take into consideration each civilization’s perception as to whether water resources are abundant. While perhaps an imperfect metric, I propose that one way of doing so is by looking at the climate zones on which these civilizations primarily stood. The United Kingdom falls almost entirely within the Cfb classification which indicates warm weather climate, fully humid, with warm summers. Italy’s two main climate zones are Cfb–warm and humid climate–and Csa–characterized by warm temperature climate dry, hot summers.

99 King, supra note 40 at 190.
100 See id.
101 See supra notes 57-59 and accompanying text.
102 See supra pp. 12-15 (discussing protections for navigational purposes and access to streams).
103 Id.
104 Markus Kottek et al., World Map of the Köppen-Geiger Climate Classification Updated, 15 Meteorologische Zeitschrift 259, 259 (2006). The Köppen-Geiger climate classification system is the most frequently used classification of its type. Id. Under this system, areas are divided into climate zones according to an array of measurements of temperature and precipitation. Id. at 260-62.
105 Id.
106 Id. In this analysis, I consider only the climate zones of Italy, and not those of the entire Roman Empire. My reason for doing so is based on the concept of Roman citizenship. After the Social Wars, full citizenship was granted to all free people in the Italian peninsula who had not fought against Rome. See Donald L. Wasson, Roman Citizenship, Ancient Hist. Encyclopedia (Jan. 27, 2016), http://www.ancient.eu/article/859/. It would not be until 212 CE that Emperor Marcus Aurelius Antonius, also known as
Meanwhile, the Visigoth Kingdom extended throughout central, southern, and eastern Spain; areas that fall exclusively within the Csa zone—warm temperature climate with dry, hot summers—and Bsk—cold steppe/desert climate. These facts could indicate a climate/abundance based explanation to water resources laws. As mentioned above, the climate of England, characterized by high precipitation and mild weather, would suggest a water abundance mindset; thus, dictating the legality of water withdrawals or diversions was likely not within the interests of Magna Carta. On the other hand, the Visigoth Kingdom spanned through the driest and hottest parts of Spain; all while trying to sustain a primarily agricultural society. As such, it is understandable that the Visigothic Code would contain not only an implied authorization of water diversions but express provisions allowing for the recovery of damages by individuals who were harmed because of another’s interference with their water diversion channels. The Institutes of Gaius and the Corpus Juris Civilis, however, present a third and interesting possibility. Though the climate of the Italian Peninsula varies greatly, the climate along the Mediterranean coast is very similar to that of inland Spain. However, water-related laws in these codes do not appear to protect water resources and their consumptive uses as is the case in the Visigothic Code. Instead, Roman laws are primarily concerned with the legal right of modifying the environment and diverting water as a characteristic of ownership rights arising out of the ownership of land. Thus, while the climate of coastal Italy would suggest a non-abundance framework similar to Spain, I posit that the different ways in which Roman legal codes

Caracalla, that Roman citizenship would be extended to all male residents of the empire. Id. However, by this time, most of the authoritative writings upon which the Corpus Juris Civilis would be based on were already written, and the jus civile did not apply equally to Romans, Latini, and Socii. See, e.g., supra note 13 and accompanying text (here, Gaius indicates that non-Roman citizens were not able to acquire property in the same way as Romans). I posit that if a code of law were created to apply only to a specific group of people within a specific geographic area, then that code would be based upon the realities of the geographic area to which it applies—peninsular Italy, and not the entire Roman Empire. Therefore, even though all free men within the Roman empire were granted full citizenship at the time of the Edict of Caracalla, the laws that applied to them, having been created before such time, were created only with the regulation of affairs within the peninsula in mind.

107 Kottek, supra note 104 at 260-62. The last Arian Visigothic king would go on to conquer the Suevic kingdom, which included the wetter portions of the Iberian Peninsula.
differ from the Visigothic Code may be in part due to an artificial framework of abundance created by the Romans’ affinity for building massive aqueducts to satisfy their water-supply needs.108

**Propensity for Navigation and Trade of Internal Waterways**

Although rivers were a common method of internal transportation in Ancient Rome, their propensity for navigation was limited and uncertain.109 Insufficient flows due to seasonal variations in precipitation made river navigation difficult during some parts of the year, as some riverbeds would entirely dry up in the summertime.110 The characteristics of some rivers greatly reduced the type of vessels suitable for navigation; some rivers had such strong currents that would prevent self-propelled navigation, while the accumulation of silt in some streams made these suitable only for flat-bottomed barges.111 Even the Tiber, its eastern bank being the site where the city of Rome developed, suffered this problem; once a waterway important for Roman navigation extending 252 miles inland, continued silting rendered the Tiber suitable only for small

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108 “The romans could not have built cities as big as they did without aqueducts–and some of their cities wouldn’t have existed at all. Romans sometimes built cities on dry plains. They’d find a spring in the mountains and take that water into the city, which would not have been possible without the transported water.” Watering Ancient Rome, NOVA (Feb. 22, 2000), http://www.pbs.org/wgbh/nova/ancient/roman-aqueducts.html. However, the water-supply needs of Rome could be better styled “water-supply wants.” Saying that the Romans had a bath culture is perhaps an understatement. While mass public bathing complexes “with vast colonnade and wide-spanning arches and domes” were a feature of large cities, even the smaller Roman towns would have their own public baths. See Mark Cartwright, Roman Baths, ANCIENT HIST. ENCYCLOPEDIA (May 02, 2013), http://www.ancient.eu/Roman_Baths/. For example, the Baths of Caracalla, second in size to Trajan’s Baths, included a one-meter-deep Olympic-size swimming pool and could accommodate up to 8,000 visitors per day. Id. These signs of opulence support the idea that while the Romans lived in a climate zone that could otherwise create a non-abundance framework, their ability to modify their natural environment in ways never before seen allowed Romans to live in a framework of perceived abundance.


110 Id.

111 Id.
craft, and only as far inland as Rome.\textsuperscript{112} However, even with limited navigability, these rivers played an important role in providing small riverine communities continuity and connection to larger cities, links necessary for communication and access to economic opportunities.\textsuperscript{113} Where rivers became too shallow for large trading ships, ports would be built as sort of “clearing houses,” serving as a transfer site for goods from seafaring ships to smaller barges suitable for inland navigation and vice versa. And while the Corpus Juris Civilis is known for grandiose statements of communal ownership of water resources,\textsuperscript{114} the Code’s more concrete legal protections points toward an interest to protect the limited propensity for navigability found in these unreliable streams.\textsuperscript{115} Without protecting these streams, both internal and external trade could suffer.

The Iberian Peninsula was “preeminent for [its] navigable rivers serving as routes of communication and transport.”\textsuperscript{116} The propensity for navigability of these waterways “afforded a rather substantial foundation for an extensive commerce with the outside world,”\textsuperscript{117} which included trading between the Roman colonies in the Peninsula and Africa, Italy, and France.\textsuperscript{118} However, with the Visigothic invasion of the Iberian Peninsula, trade and industry “received a serious check.”\textsuperscript{119} Some say that “but for the few Jews, Greeks, and Romans who had survived the barbarian invasion, commerce would have probably vanished from the peninsula.”\textsuperscript{120} In fact, archaeology shows that the Visigoth kings almost entirely

\textsuperscript{112} ITALY, MALTA, AND SAN MARINO: WORLD AND ITS PEOPLES 724 (2010).
\textsuperscript{113} CAMPBELL, supra note 109 at 200.
\textsuperscript{114} See supra notes 23-27 and accompanying text.
\textsuperscript{115} See J. INST. 2.1.4; see also CAMPBELL, supra note 109 at 215 (“The government tried to ensure that rivers were kept open for navigation and that no action by any individual diminished or disrupted the water flow. Under the Digest heading ‘On rivers and the prevention of any action on a public river or riverbank that might interfere with navigation,’ the general rule is affirmed: Therefore, if the water is drawn away so that the river becomes smaller and is less navigable, or if it is made wider and being spread out becomes shallower, or if it is made narrow and flows more rapidly, or if anything else is done that disturbs navigation, makes it more difficult or entirely prevents it, there will be a place for the interdict.”).
\textsuperscript{116} CAMPBELL, supra note 109 at 247.
\textsuperscript{117} Leon Ardzrooni, Commerce and Industry in Spain During Ancient and Mediaeval Times, 21 J. POL. ECON. 432, 434 (1913).
\textsuperscript{118} Id.
\textsuperscript{119} Id.
\textsuperscript{120} Id. at 435.
abandoned large-scale public work projects involving water resources such as the construction of dams, dikes, and irrigation canals.\textsuperscript{121} Large earth dams constructed by the Romans for the purpose of retaining water year-round in seasonal streams were not maintained by the Visigoths.\textsuperscript{122} This indicates that the Visigoths, being neither a seafaring people nor as technologically savvy as their Roman predecessors, did not put the Iberian Peninsula’s waterways into full productive use. However, even though one could take this evidence to demonstrate that the Visigoths cared little for riverine navigation, the Visigothic Code may say otherwise. The Code specifically prohibits the obstruction of any stream of importance, which is defined as “one in which salmon and other sea-fish enter, or into which nets may be cast, or \textit{vessels may come for the purpose of commerce}.\textsuperscript{123} Further, the Code provides for damages against those who invade the rights of others by obstructing a stream in violation of this law.\textsuperscript{124} Thus, while other streams not considered to be “of importance” could potentially be fully obstructed without violating the law, those streams with a propensity for navigability were protected.

Although many centuries after Magna Carta, John Taylor eloquently expressed these words which exemplify the English view over the value of navigable streams: “There is not any Town or City, which hath a Navigable River at it, that is poore; nor scarce any that are rich, which want a River with the benefit of Boats.”\textsuperscript{125} A wealth of evidence exists which supports the importance of inland waterways for commerce within England.\textsuperscript{126} While “[t]he records show that a diverse range of miscellaneous merchandise was transported along the rivers, and virtually every conceivable commodity appears to have been carried . . . the emphasis [was] on heavy bulk and commodities.”\textsuperscript{127} The English made extensive use

\begin{itemize}
\item \textsuperscript{121} Karen E. Carr, Vandals to Visigoths: Rural Settlement Patterns in Early Medieval Spain 140 (2002).
\item \textsuperscript{122} Id. at 131.
\item \textsuperscript{123} The Visigothic Code 8.4.29.
\item \textsuperscript{124} Id. (calling for penalties up to ten \textit{solidi}).
\item \textsuperscript{125} John Taylor, A Discovery By Sea (1623).
\item \textsuperscript{127} Id. at 382.
\end{itemize}
of their waterways as sources of power for milling and navigation. However, the use of streams for navigation took precedence over mills and fishweirs. This precedence is shown in Magna Carta; Chapter 33 does not call for the removal of only those fishing weirs that fully obstructed navigation, but instead, it demanded that all fishing weirs be entirely removed throughout the whole of England. As earlier discussed, the prohibition over fishweirs only applied to internal waterways, as those on the seacoast were explicitly excepted from removal in the charter.

When looking at the protections afforded to rivers for purposes of navigation by the English, Romans, and Visigoths, two factors appear to carry an important weight: the river’s propensity for navigability, and its actual use for trade. The highest mark appears to be set by the Corpus Juris Civilis; most Roman inland waterways were suitable only for limited forms of navigation and during limited periods of time. And while this would be expected to create a barrier for trade uses, the Romans extensively used their waterways to transport goods in both directions. This combination of limited navigability propensity and high trade usage of waterways may have created the need for laws that protect Roman streams from any diminution that would lessen their usefulness for navigation, thus explaining the Corpus Juris Civilis’ strong stance on any modifications to rivers that could hamper their propensity for navigability.

Considering the vast number of English waterways with a propensity for navigability and their known use for internal and external trade, Magna Carta’s protections do not fall far behind. At first glance, it would appear that Magna Carta’s protections were not as extensive as the protections in Corpus Juris Civilis. However, this comparison would not be entirely accurate. The abundance of water throughout England meant that water diversions of the sort prohibited in Corpus Juris Civilis were not common. Instead, Magna Carta focused on solving the main problem to navigability in English streams: fishweirs. This prohibition was

128 JULIA CRICK et al., A SOCIAL HISTORY OF ENGLAND, 900-1200 45 (year).
129 Id. at 189.
131 Id.
132 See supra note 117 (“Therefore, if the water is drawn away so that the river becomes smaller and is less navigable, or if it is made wider and being spread out becomes shallower, or if it is made narrow and flows more rapidly, or if anything else is done that disturbs navigation, makes it more difficult or entirely prevents it, there will be a place for the interdict”).
extensive. Magna Carta required the removal of every inland waterway fishweir across all of England. And while fishweirs could be built to only partially obstruct a river, this prohibition did not except such structures. Further, Magna Carta’s prohibition of fishweirs spanned across all rivers in England, even those that were perhaps non-navigable or navigable only to small crafts. At the lower end of the spectrum, we find the Visigothic Code’s protections for streams. While many waterways in the Iberian Peninsula were navigable, the Visigoths’ engagement in riverine or maritime trade was, at best, limited. Thus, while the Visigothic Code provides protection from obstructions to navigable streams, individuals were free to obstruct the stream up to its thread. Further, streams without a propensity for navigability were likely not protected from obstructions.

Conclusion

“All roads lead to Rome,” says an idiom of old. And to an extent, it certainly applies to this case. The Iberian Peninsula ruled by the Romans for hundreds of years, and the Visigoths inherited much of the physical and legal infrastructure of the land from their predecessors. Similarly, Rome played an important role in the early days of England, and the architect of Magna Carta was well-versed in Roman law. Yet, when we look at the way in which the Romans, Visigoths, and the English protected their inland waterways, roads tend to meander and become obscured in the horizon.

While it is possible that Roman legal traditions could have influenced the development of legal protections for inland waterways in the Iberian Peninsula and England, other factors appear to be of more consequence. In England and Rome, places where water abundance frameworks were likely at play due to climate or intensive manipulation of the natural environment, the legal codes analyzed do not prioritize consumptive uses of water over themselves or instream uses. However, in the Visigoth Kingdom, a place likely under a non-abundance framework, consumptive uses—namely, agriculture—were favored. Following from this, the degree to which instream uses—namely, navigation—were protected varied according to the inland waterways’ propensity for navigability and trade. England, with vast networks of navigable waterways that were extensively used for trade, focused on prohibiting obstacles to free navigation. Rome, also exploiting its waterways as a means of trade but confronted by the limited propensity for navigability of its rivers, focused on preventing diminutions of flow. Meanwhile, the Visigoths, enjoying waterways more navigable than Rome but using them to a much lesser extent, allowed for partial obstruction and did not regulate actions that diminished their flow.
While it would not be correct to draw hard lines, the Institutes of Gaius, the *Corpus Juris Civilis*, the Visigothic Code, and the Magna Carta’s protection of inland waterways may be connected by two sets of factors. First, perceptions of water abundance, whether naturally caused by climate or artificially by modifications of the natural environment, may have played a role in shaping legal restrictions over and prioritizations of consumptive uses of water. On the other hand, the propensity for navigability and trade of inland waterways may have determined how each of these civilizations regulated instream uses and actions that could be adverse to these.
The Baltimore Incident and American Naval Expansion

by

Mark W. Podvia*  

In January 1891, following months of political dispute and deadlock, a civil war broke out in the Republic of Chile. Forces loyal to President José Manuel Balmaceda, which included most of the Chilean Army, battled forces loyal to the Chilean Congress.¹ Those forces, supported by British and other foreign interests, included most of the Chilean Navy.²

On February 4, 1891, it was announced that the United States was dispatching two naval vessels—USS Baltimore and USS Pensacola—to Chile “to look out for American interests during the present insurrection.”³ The Baltimore, anchored in Toulon, France, had the longer journey; USS Pensacola was then off Montevideo,

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² The causes of the seven-month war, along with the details of the fighting, go well beyond the scope of this article. For a full account of the struggle see BRIAN LOVEMAN, CHILE: THE LEGACY OF HISPANIC CAPITALISM (1979). The United States backed the forces loyal to the president.

³ Cruisers Sent to Chile: The Baltimore and Pensacola to Protect American Interests, N.Y. TIMES, Feb. 5, 1891, at 3.
Uruguay, serving with the South Atlantic squadron. The New York Times noted that “the latest intelligence from Chile indicates that the insurrection is being subdued, it is probable that the trouble will be all over before either of the vessels gets there.”

The civil war did end relatively quickly, although not in the manner predicted by the newspaper. On August 28, 1891, rebel forces defeated a larger loyalist army in the Battle of La Placilla. Less than one month later, on September 19, 1891, President Balmaceda committed suicide in the Argentine legation.

On October 16, 1891, Captain Winfield Scott Schley, commander of the Baltimore, determined that he could safely allow members of the cruiser’s crew to go ashore in Valparaiso for long-overdue leave. Approximately 115 members of the ship’s crew were permitted to go ashore for 24 hours.

At approximately 8:00 p.m. that evening, Captain Schley received word that his men had been attacked “at a number of points about the city” by “vast crowds of longshoremen, boatmen and others.” One American sailor had been killed, others suffered wounds. Numerous sailors “had been arrested and dragged to the police stations without any regard to whether they were wounded or not.”

Thus began an incident that brought the United States and the Republic of Chile to the brink of war. While such a conflict would be unthinkable today, it was not in 1891. Further, had war come there is no guarantee that the United States would have been victorious.

Following the United States Civil War, the American navy entered a period of rapid decline. Laid up at the end of hostilities, the navy’s only armored warship capable of deep-water operations,

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4 The U.S. Navy was then so small and spread so thin that the departure of the Baltimore left the United States without a single substantial warship in European waters.
5 *Cruisers Sent to Chile*, supra note 3.
7 *LOVEMAN, supra* note 1, at 209.
8 *WINFIELD SCOTT SCHLEY, FORTY-FIVE YEARS UNDER THE FLAG* 222 (1904).
9 Id. at 223.
10 A second American sailor died from his wounds a few days later.
11 Id.
USS *New Ironsides*, was accidentally destroyed by fire on December 16, 1865. The navy retained a fleet of monitors—armored shallow-draft vessels—however, they were designed for coastal operations, not for service on the high seas.\(^12\) For deep-water operations the navy depended on sail and steam powered wooden-hulled cruisers, any of which would have been easily bested by an armored warship.

It is usually thought that the birth of America’s “New Navy” began with the 1890 publication of Alfred Thayer Mahan’s landmark treatise, *The Influence of Sea Power Upon History: 1660–1783*. While this book certainly had—and continues to have—a very prominent influence on not only U.S. naval strategy but worldwide naval strategy, the U.S. Navy had actually begun to emerge from obsolesce in 1883. In that year Congress authorized the construction of the so-called ABCD ships—the protected steel cruisers USS *Atlanta*, USS *Boston*, USS *Chicago*, and the dispatch boat USS *Dolphin*.\(^13\)

These ships were unarmored, but they were a significant improvement over the wooden ships that had previously constituted America’s deep-water navy. When Secretary of the Navy William C. Whitney left office in 1889, he reported that “[w]e cannot at present protect our coast, but we can return blow for blow, for we shall soon be in condition to launch a fleet of large and fast cruisers against the commerce of an enemy, able to inflict the most serious and lasting injury thereon.”\(^14\)

The protected cruiser USS *Baltimore* was authorized by Act of Congress on March 8, 1886.\(^15\) The ship was laid down on May 5, 1887, launched on June 10, 1888 and commissioned on July 1, 1890.\(^16\)

\(^{12}\) The namesake of the monitor type of warship, the USS *Monitor*, was lost in 1862 while under tow during a storm off Cape Hatteras. Her wreck was located in 1973 and has since been partially salvaged.

\(^{13}\) 22 Stat. 479. These vessels were originally equipped with both sails and steam engines; the sails were later removed.

\(^{14}\) BENJAMIN FRANKLIN COOLING, USS OLYMPIA: HERALD OF EMPIRE 8 (2000).

\(^{15}\) CONWAY’S ALL THE WORLD’S FIGHTING SHIPS: 1860-1905 151 (ROBERT GARDINER ET AL. EDS, 1979). The term “protected cruiser” implies that the vessel was armored; it was not. Protection was instead supplied by strategically placed coal bunkers.

\(^{16}\) Id.
Her 4413 ton steel hull, capable of 19 knots, carried a main ar- 
armament of four eight-inch and six six-inch guns.\textsuperscript{17}

It was this vessel that was in Chilean waters during much of that 
nation’s Civil War. By the time hostilities ended, the cruiser’s crew 
had been trapped aboard the cramped ship for approximately five 
months. As was already stated, on October 16, 1891, Captain 
Schley allowed 115 members of the \textit{Baltimore’s} crew to go ashore for a long-overdue leave.\textsuperscript{18}

According to Schley, his executive officer reported that at approxi- 
mately 5:30 p.m. he observed the crewmen ashore and “not one of 
the men [had] fallen in with [or] was in the slightest degree under 
the influence of drink.”\textsuperscript{19} This seems highly doubtful given the long 
period that the men had been confined aboard the \textit{Baltimore}.\textsuperscript{20}

That evening an argument at Valparaiso’s True Blue Saloon be- 
tween Boatswain’s Mate Charles Riggin and one or more Chileans 
developed into a fight.\textsuperscript{21} The fight grew and continued into the 
streets where Riggin was pulled from a streetcar by a mob and 
killed. Six other sailors from the \textit{Baltimore} were seriously 
wounded; one of them, William Turnbull, later died of his 
wounds.\textsuperscript{22} Thirty-five American seamen were arrested by Val-
paraiso police.\textsuperscript{23}

Captain Schley later wrote that his initial inclination was to turn 
the cruiser’s guns on Valparaiso and fire on the city. He relented 
after “it was pointed out to him that such action would involve the 
lives of thousands of innocent women and children who were in no 
way responsible”\textsuperscript{24} for the attack. He instead chose to rely on dip-
lomatic channels to settle matters.

\begin{footnotes}
\item \textsuperscript{17} Id. As with the earlier ABCD ships, \textit{Baltimore} was initially 
equipped with both sails and steam engines.
\item \textsuperscript{18} SCHLEY at 222, \textit{supra} note 8.
\item \textsuperscript{19} Id.
\item \textsuperscript{20} One news account reported that “both sides had been drinking 
freely.” \textit{Gallant “Baltimores:” Although Unarmed they Show their 
\item \textsuperscript{21} John Bassett Moore, \textit{The Late Chilian Controversy}, 8 Pol. Sci, Q. 
467, 484 (1893).
\item \textsuperscript{22} \textit{Immediate Reparation: Chile Must Give Satisfaction for Killing our 
Sailors}, DAILY EVENING BULL. (San Francisco), Oct. 27, 1891, at __.
\item \textsuperscript{23} \textit{Chile’s Affront: A Deliberate Insult to the American Flag}, DAILY 
EVENING BULL. (San Francisco), Oct. 24, 1891, at p. 3.
\item \textsuperscript{24} SCHLEY at 223, \textit{supra} note 8.
\end{footnotes}
Had the *Baltimore* fired on the city, it is very possible that the ship would have been captured or sunk by vessels of the Chilean navy, a powerful force that had recently defeated the Peruvian navy in the War of the Pacific. The fleet included two capital ships: the central battery ship *Almirante Cochrane*, and the armored turret ship *Huascar*. A powerful new Chilean battleship, *Capitan Prat*, was then nearing completion in France. A number of protected and unprotected cruisers, gunboats and torpedo craft also flew the Chilean flag.

Following an investigation of the matter by Captain Schley, the United States, acting through Minister Patrick Egan, presented a note to the Chilean government demanding an apology and reparations for the attack upon the sailors of the *Baltimore*. The press reported that the note was “a notification, put in a friendly way, given according to direct orders received from the State Department at Washington, that the United States demands an immediate explanation of the whole affair and reparation for the injuries inflicted.”

Matters might have been quickly settled under an able diplomat. However, according to most accounts, the words “able diplomat” did not describe Patrick Egan:30

> [T]he U.S. minister proved to be a singularly maladroit defender of American interests. Patrick Egan, an Irish-born, naturalized U.S. citizen, had served as minister to Santiago for three years. Egan did not enjoy high regard in his adopted homeland. Numerous American newspapers, including the *Nation*

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25 *Conway's All the World's Fighting Ships, 1860-1905* 410 (1979). *Almirante Cochrane*’s armament included six eight-inch guns, and her armor was up to nine inches thick. Her sister ship, *Blanco Encalada*, had been sunk by a torpedo during the Civil War.  
26 *Huascar* was captured from Peru by Chile during the War of the Pacific. Carrying two eight-inch guns and two 4.7 inch guns, the vessel survives today as a museum ship.  
27 *Captain Prat* carried a main armament of four 9.4 inch guns.  
28 *A Demand Made on Chile: Reparation for the Attack on American Sailors*, N.Y. Times, Oct. 27, 1891, at 1.  
29 Id.  
30 One of the few sources that was less critical of Minister Egan is Osgood Hardy, *Was Patrick Egan a "Blundering Minister"?*, 8 HISP. AM. HIST. REV. 65 (1928).
and Harper’s, described the envoy as a thief and Tammany Hall hack.\textsuperscript{31}

Some in the incoming government of Jorge Montt suggested the recall of the American Minister. Egan had sided with sitting President Balmaceda during the Civil War, convinced that the Congressionalists favored Great Britain. Matters worsened when, following the defeat of Balmaceda’s forces, Minister Egan allowed loyalist refugees safe haven in the U.S. legation.\textsuperscript{32} Julio M. Foster, a representative of Chile’s new government, was quoted as saying that “Mr. Egan should have been recalled long ago. Had another man been sent to Chile as soon as it was discovered how Mr. Egan was meddling with Chilean affairs, there would be no sort of trouble between these two countries.”\textsuperscript{33}

The New York Times reported that the Chilean reply to Egan’s note was “couched in very strong language,” and denied Chilean responsibility for the attack.\textsuperscript{34} It was also reported that the language of the Chilean response was “defiant, scornful, and insolent” and that the U.S. government was expecting “to have serious trouble with Chile.”\textsuperscript{35} In fact the reply was not as defiant as the U.S. press claimed. While denying United States authority over the investigation, the reply stated, in part, that “the administrative and judicial authorities have been investigating the affair, that judicial investigation under Chilean law is secret, and the time is not yet arrived to make known the result.”\textsuperscript{36}

On November 1, 1891, it was announced that the USS Kearsarge had been ordered to sea bound for the island of St. Thomas.\textsuperscript{37} The Times reported that the move was the first step in “in the direction of Chile.”\textsuperscript{38}

\textsuperscript{32} Henry Clay Evans, Chile and its Relations with the United States, 143 (1927).
\textsuperscript{33} Egan Must be Dismissed: His Mischief-Making Powers Out of Place in Chile, N.Y. Times, Sept. 30, 1891, at 1.
\textsuperscript{34} Chile Will Not Explain: No Responsibility Accepted in the Baltimore Affair, N.Y. Times, Oct. 28, 1891, at 1.
\textsuperscript{35} Chile’s Evasive Answer: Studied Contempt Its Principal Feature, N.Y. Times, Oct. 30, 1891, at 1.
\textsuperscript{36} Id.
\textsuperscript{37} The Kearsarge Ordered to Sea, N.Y. Times, Nov. 1, 1891, at p. 1.
\textsuperscript{38} Id.
In December, 1891, the USS *Baltimore* left Chilean waters. It was reported that “[t]he officers and crew of the *Baltimore* are probably the happiest lot of men in the navy” as the cruiser sailed for San Francisco.\(^39\) The USS *Yorktown*, soon to be joined by USS *Boston*, remained in Chilean waters to protect American interests. The *Baltimore* arrived in San Francisco on January 5, 1892, badly in need of an overhaul.\(^40\)

The United States was taking steps to gather naval strength should the dispute with Chile come to war. It was reported that “[w]hen the *Boston* joins the *Yorktown*, and the *San Francisco* and *Baltimore* return from the North, together with the *Charleston* from Honolulu, and when the squadron of evolution establishes itself at Montevideo as a convenient station for proceeding to the South Pacific if necessary, with Admiral Gherardi’s squadron in reserve in the West Indies, Chile will probably ascertain that some suitable response to our original request for reparation is about due.”\(^41\) It was also reported that large amounts of gun powder was being sent to San Francisco “to form a reserve supply, to be drawn on in case of hostilities”\(^42\) and that workers in the projectile shop at the Washington Navy Yard were working four hours overtime per day.\(^43\)

On Christmas Day, 1891, the *Times* reported that “[i]t is coming to be the general opinion in Washington that war with Chile is inevitable. It was until recently thought that Chile would maintain a defiant attitude until the last moment and then back down, but now hope of a peaceful settlement is growing daily less, and there is little doubt that actual force will have to be used to obtain that satisfaction which diplomacy has failed to obtain for the gross insult to the United States involved in the murder of the *Baltimore’s*

\(^39\) *Cruisers to Watch Chile: The Baltimore Coming Home, but Other Vessels to Take Her Place*, N.Y. TIMES, Dec. 12, 1891, at 3.

\(^40\) *The Baltimore at Home: Capt. Schley Confirms the Stories of the Mob’s Attacks*, N.Y. TIMES, Jan. 6, 1892, at p. 1. The newspaper reported that after more than a year in service “the appearance of the ship showed the necessity of overhauling, for her sides and bottom are covered with weeds and her sides are badly in need of paint.”

\(^41\) Untitled, N.Y. TIMES, Dec. 15, 1891, at p. 4.

\(^42\) *Hurrying Powder West: A Large Shipment Ordered to San Francisco*, N.Y. TIMES, Jan. 1, 1892, at p. 3.

\(^43\) *Preparations to Meet Chile: Still Going on, Despite the Denials in Washington*, N.Y. TIMES, 28 Dec., 1891, at p. 1.
seaman." The article also reported that “there has been considerable talk of the probability of Peru being drawn into the war on the side of the United States.”

However, the New Year brought hopeful signs that war between the United States and Chile might be avoided. The Times reported that “rumors of an intention on the part of the Chilean Government to make an apology to the United States for the Baltimore assault.”

The results of the Chilean inquiry into the matter were released on January 19, 1892. The report found that “the fight owe[d] its origin to two drunken Baltimore sailors striking a Chilean sailor.” However, while the report rejected American claims that the fight was started by Chileans, it did not absolve the Chileans of responsibility for the killing of the two American sailors. Instead the report recommended that four Chileans who participated in the killings be imprisoned, the longest to a term of ten to fifteen years.

On January 23, 1892, it was reported that President Benjamin Harrison had sent an ultimatum to Chile demanding that the Baltimore matter be settled or the United States would break off diplomatic relations with Chile. Three days later the Times reported that the Chilean government had issued a reply to the U.S. demands. Chile withdrew the earlier note submitted after the attack as well as its request calling for Minister Egan’s recall. In addition it “propose[d] that the affair of the attack on the Baltimore’s sailors in Valparaiso be submitted to the arbitration of some

44 Looks Like a Chilean War: Little Hope Now of a Peaceful Settlement, N.Y. TIMES, Dec. 25, 1891, at 1.
45 Id. Peru had lost territory to Chile following the War of the Pacific; a Chilean loss to a U.S.-Peruvian alliance could have resulted in the restoration of that lost territory to Peru.
46 Chile May Now Explain: Rumors that that Country Wishes to Apologize, N.Y. TIMES, Jan. 6, 1892, at p. 1.
47 Result of Chile’s Inquiry: Details of the Decision of the Promoter Fiscal, N.Y. TIMES, Jan. 20, 1892, at p. 3.
48 Id.
49 Our Country’s Demand: An Ultimatum Received by the Chilean Government, N.Y. TIMES, Jan. 24, 1892, at p. 5.
50 Chile has Backed Down: A Very Humble Reply to the President’s Ultimatum, N.Y. TIMES, Jan. 26, 1892, at p. 1.
51 Egan remained as U.S. Minister to Chile until 1893.
neutral nation” or “that the matter be submitted to the decision of the Supreme Court of the United States.”\textsuperscript{52}

The Chilean reply was immediately accepted by President Harrison.\textsuperscript{53} The New York Times noted that “there seems to be no dispute about the spirit in which it is conceived.”\textsuperscript{54}

If that spirit had been exhibited from the beginning, the controversy would at no time have threatened the peace. Now that it has been exhibited, there is no reason why the controversy should not soon be forgotten, nor why the two republics should not resume the relations of amity and good-will that they have always heretofore maintained.\textsuperscript{55}

Originally buried in Chile, the body of Boatswain’s Mate Charles Riggin—one of the men killed by the Valparaiso mob—was later exhumed and returned to the United States at the request of “persons in Philadelphia who wished to bury it with suitable honors in American soil.”\textsuperscript{56} At about the same time that his body arrived for burial, Chile paid an indemnity of $75,000.00 in gold to the United States.\textsuperscript{57} The payment was “distributed among the families of the two seamen who lost their lives and to the surviving members of the crew wounded in the affair.”\textsuperscript{58}

One thing that the \textit{Baltimore} incident brought to light was the need for a canal connecting the Atlantic and Pacific Oceans. When the \textit{Kearsarge} left New York City it was noted that “[i]t would take [the ship] about ten weeks to reach Valparaiso, if she maintained her average speed of 1,000 miles a week.”\textsuperscript{59}

\begin{quote}
Even if we had a powerful navy the great obstacle to success in such an emergency is the great distance our vessels would have to travel. Their shortest
\end{quote}

\begin{flushright}
\begin{itemize}
\item \textsuperscript{52} Id.
\item \textsuperscript{53} \textit{Chile’s Apology Accepted: Formal Notice given that it is Satisfactory}, N.Y. TIMES, Jan. 31, 1892, at p. 1.
\item \textsuperscript{54} \textit{The Chilean Settlement}, N.Y. TIMES, Jan. 28, 1892, at p. 1.
\item \textsuperscript{55} Id.
\item \textsuperscript{56} \textit{Honors to Riggin’s Body: The Sailor was Killed by a Valparaiso Mob}, N.Y. TIMES, Aug. 11, 1892, at p. 1. The sailor’s body lay in state at Independence Hall before being buried in Philadelphia’s Woodlawn Cemetery.
\item \textsuperscript{57} \textit{Chile Pays Indemnity: An Offer of $75,000 Accepted by our Government}, N.Y. TIMES, Jul. 20, 1892, at p. 4.
\item \textsuperscript{58} Id.
\item \textsuperscript{59} \textit{Kearsarge}, supra, note 37.
\end{itemize}
\end{flushright}
route would be through the Straits of Magellan, the passage of which, however, could be easily barred, as the Chileans have a colony at a place in the straits called Punta Arenas (Sandy Point) and could render the straits impassible to our ships with a single torpedo boat. Thus our navy in the Atlantic would have to run the great risk of the passage around Cape Horn, and it is evident that as long as there is no interoceanic canal our Government will have to maintain a navy in the Pacific as well as one in the Atlantic. The key to this situation is the Nicaragua Canal, the only feasible scheme to give us a waterway between the two oceans.60

The United States began work on a canal connecting the two oceans at Panama in 1904, taking over an earlier failed effort by the French.

On April 18, 1892, Representative Lucas M. Miller of Wisconsin addressed the U.S. House of Representatives on the need for a stronger navy in light of the Baltimore incident:

Mr. Chairman, the proposition to gradually increase our Navy I am confident will receive the cordial endorsement of the American people. Ever since the trouble with Chile I have been satisfied that our Navy should be materially increased. The fact is, that trouble would not have happened if we had a more powerful navy.61

Noting that the Chileans regarded their navy “as absolutely superior to ours,” Representative Miller stated that had the Baltimore crisis resulted in war “we are justified in concluding that Chile could have damaged us seriously.”62 He pointed out that British sailors would never have been subject to attacks such as those made upon U.S. sailors:

Do you think under like circumstances the sailors of Great Britain would have been subjected to so outrageous and disgraceful an attack as was made upon our sailors in the streets of Valparaiso? We all

60 The Key to the Situation: How the Nicaragua Canal would be of Use to our Navy, N.Y. TIMES, Nov. 11, 1891, at p. 1.
61 23 CONG. REC. 3397 (1892).
62 Id.
know nothing of the kind would have happened, and had such an attack been made we all know that a British fleet would have very soon appeared in the harbor of Valparaiso, and if suitable reparation had not been made the British fleet would have leveled that city to the ground.\textsuperscript{63}

Miller then called for the construction of “vessels that will excite the admiration of our people and the admiration and wonder of the people in all parts of the world, and impress upon distant and surrounding nations the necessity of paying proper respect and consideration to the American citizen.”\textsuperscript{64}

Senator Matthew Butler of South Carolina made similar remarks in the United States Senate. On May 17, 1892, he stated the following:

Pending our Chilean difficulties not very long ago the fact was stated, and I suppose it can be substantiated, that if Chile succeeded in getting out a vessel she was building in France, known as the \textit{El Capitan Prat}, and got it around on the Pacific coast, she would have walked into the harbor of San Francisco without comparative opposition—the little Government of Chile; and I do not suppose it would require any very great amount of calculation to estimate the damage she would have done to that city in a very few hours.\textsuperscript{65}

When told that American warships could have challenged the Chilean fleet, Representative Butler explained that the U.S. cruisers “are not armored at all. They are not protected ships; they are simply cruisers.”\textsuperscript{66}

References to the \textit{Baltimore} incident continued to appear in the \textit{Congressional Record}. On February 15, 1895 Representative Adolph Meyer of Louisiana stated that the near-war with Chile—a country that then possessed “some 18 war vessels and 21 torpedo boats”—had taught the United States “an impressive and much-

\textsuperscript{63} Id.
\textsuperscript{64} Id.
\textsuperscript{65} 23 \textit{Cong. Rec.} 4315 (1892).
\textsuperscript{66} Id. Senator Butler explained, probably correctly, that “[t]he only possible chance that any vessel of the United States has afloat now, except the monitors, would be to ram an enemy and sink the ship.”
needed lesson.” After reviewing the history of American sea power, Meyer called for a substantial increase in the size of the U.S. fleet:

Sir, this country is able to create and maintain a navy. It is second to no country in the world in wealth; it is equaled only by Russia of the civilized nations in population, and its resources and capacity to be a leading naval power are much superior to those of any country in the world. If we prefer to occupy a subordinate and a helpless position as the seventh naval power in the world it is our own choice and our own folly and shame. To be among the very first is our natural position, and we ought to occupy it.

On March 2, 1895, “An Act making appropriations for the Naval Service for the fiscal year ending June thirtieth, eighteen hundred and ninety-six” was adopted. The Act provided funds for the construction of “two seagoing battle ships designed to carry the heaviest armor and most powerful ordnance upon a displacement of about ten thousand tons, to have the highest practicable speed for vessels of their class, and to cost, exclusive of armament, not exceeding four million dollars each.” In addition, the act authorized the construction of “six light-draft composite gunboats of about one thousand tons displacement.”

The next year Congress authorized the construction of “three seagoing coast-line battle ships designed to carry the heaviest armor and most powerful ordnance upon a displacement of about eleven thousand tons.” That act also authorized the construction of 13 torpedo-boats and “two submarine torpedo boats of the Holland type.”

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67 27 CONG. REC. 2261 (1895).
68 Id.
69 28 Stat. 825, 841(1895).
70 Id.
71 Id. For comparison, the Iowa class battleships constructed during the Second World War were approximately 46,000 tons.
73 Id. at 379. Funding for the two submarines was contingent on the successful testing and acceptance by the Navy of a boat designed by engineer John P. Holland. That vessel, USS Holland, was launched in 1897 and accepted by the Navy in 1900.
On the evening of February 15, 1898, an explosion sank one of the Navy’s new second-class battleships, USS *Maine*, then in harbor at Havana, Cuba, killing 260 officers and crewmen. Although a court of inquiry could not pinpoint the exact cause of the explosion, most Americans blamed the destruction on a Spanish mine.74

The United States Navy at the time of the loss of the *Maine* was a much different force than that which would have faced Chile in 1891. It possessed four first-class battleships—*Indiana*, *Massachusetts*, *Oregon* and *Iowa*—and *Texas*, a second-class battleship. In addition, two battleships of the *Kearsarge* class75 had been launched but not yet completed, and three battleships of the *Illinois* class had been laid down. The new battleships were backed by six new monitors, two armored cruisers and a host of other vessels, including USS *Baltimore*. The United States had the “Big Stick”76 that it had not possessed less than a decade earlier.

The United States declaration of war against the Kingdom of Spain found USS *Baltimore* serving with Admiral George Dewey’s Asiatic Squadron. The *Baltimore*, carrying ammunition for the squadron from Yokohama, Japan, arrived in Hong Kong to rendezvous with the fleet just three days before war was declared on April 25, 1898.77 While Dewey’s ships were largely unarmed, they were far superior to the Spanish fleet based at Manila.

On April 27, 1898 the Asiatic Squadron weighed anchor and proceeded to the Philippines where, on May 1, Dewey’s ships engaged the Spanish Pacific Fleet.78 *Baltimore* played a significant role in

74 In 1974 an inquiry lead by U.S. Navy Admiral Hyman G. Rickover determined that the explosion was most likely caused by the spontaneous combustion of bituminous coal in the bunker adjoining the battleship’s six-inch reserve magazine and that there was “no evidence that a mine destroyed the *Maine*.” H.G. RICKOVER, HOW THE BATTLESHIP MAINE WAS DESTROYED 91 (1976).
75 Named after the Union sloop that sank that Confederate raider CSS *Alabama* during the Civil War and was wrecked in 1894, USS *Kearsarge* was the only United States battleship not named after a state.
76 Theodore Roosevelt did not actually use the phrase until January 26, 1900. In a letter to Henry L. Sprague he wrote “Speak softly and carry a big stick; you will go far.” Roosevelt claimed that the phrase was a West African proverb.
78 *Id.* at 15
the fight, following Dewey’s flagship, USS *Olympia*, in line astern.\(^{79}\) Although outnumbered, Dewey’s six warships were more than a match for the Spanish fleet and shore fortifications; the enemy ships surrendered within hours. United States causalities in the Battle of Manila Bay were one dead due to heatstroke and nine wounded.\(^{80}\)

The former commander of the *Baltimore*, Winfield Scott Schley, likewise achieve fame during the Spanish-American War. Commissioned a Commodore on February 6, 1898, Schley was placed in command of the “Flying Squadron,” consisting of the USS *Brooklyn*, *Massachusetts*, *Texas*, *Minneapolis*, *New Orleans*, and *Scorpion*, and ordered to pursue a Spanish squadron under the command of Admiral Pascual Cervera y Topete. Schley’s squadron finally caught up to the Spanish fleet on May 26, 1898, blockading it at Santiago, Cuba. There his ships were joined by the main body of the United State Atlantic Fleet under the command of Rear Admiral William Sampson.

On July 3, 1898, Admiral Cervera’s ships attempted to slip past the American blockading fleet. Commodore Schley was then in command of the U.S. ships, Admiral Sampson having departed for a meeting with the commander of the U.S. ground forces in Cuba, General William Rufus Shafter. Schley, aboard USS *Brooklyn*, ordered the fleet to “[c]lose in and engage the enemy.”\(^{81}\) Within hours every one of the Spanish vessels—four cruisers and two destroyers—was sunk; only one American died.\(^{82}\)

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\(^{79}\) Dewey’s flagship, the last surviving warship from the Spanish-American War, is today preserved at the Independence Seaport Museum in Philadelphia, Pennsylvania.

\(^{80}\) In recognition of his victory at Manila Bay, the United States Congress authorized the rank of Admiral of the Navy for Dewey. It is the highest U.S. naval rank, outranking the World War II five-star rank of Fleet Admiral.

\(^{81}\) HENRY WATTERSON, HISTORY OF THE SPANISH-AMERICAN WAR 153 (1898).

\(^{82}\) Considerable controversy developed following the battle after Admiral Sampson, who was not present during the fight, claimed credit for the victory. The American public, however, rightly saw Schley as the hero of the battle, recognizing with “admiration the valiant acts of the Commodore, ready in his place, quick and dauntless to meet the enemy, with his life in his hand, and who was the conspicuous figure to lead in the actual fighting—the figure of deathless courage that all the world hails as a hero.” Id. at 185.
The American fleet would continue to grow in size after the Spanish-American War. In 1907 President Theodore Roosevelt sent the battleships of the U.S. Atlantic Fleet—16 vessels accompanied by torpedo-boat destroyers and various fleet auxiliaries—on a 14-month world cruise. The cruise established the United States as “a world power, capable of projecting its influence.” By the conclusion of the First World War the United States Navy rivaled Britain’s Royal Navy in size.

The Spanish-American War was not the end for the outdated but still-useful Baltimore. Converted to a minelayer in 1915, the former cruiser served in British waters following America’s entry into World War I. There the ship laid 1260 anti-submarine mines off the north coast of Ireland and in the North Sea. She was the first ship in the American Mine Force to undertake mine laying operations in European waters. Joining the Pacific Fleet in 1919, USS Baltimore was decommissioned at Pearl Harbor in September

Schley was later promoted to rear admiral and given command of the South Atlantic Squadron. He retired from the Navy in 1901 and died in New York City in 1911.

See JAMES R. RECKNER, TEDDY ROOSEVELT’S GREAT WHITE FLEET (1988). The battleships did make a coaling stop in Chile, but docked in the port of Punta Arenas rather than Valparaiso. One incident did occur during an otherwise positive visit; a drunken U.S. Marine struck two Chilean naval officers during a luncheon. Rear Admiral Robley D. “Fighting Bob” Evans, commander of the fleet, immediately wrote a letter of apology to Chilean Rear Admiral Juan M. Simpson and the incident was forgotten. Id. at 45-6.

The World Cruise of the Great White Fleet: Honoring 100 Years of Global Partnerships and Security 87 (Michael J. Crawford, ed., 2008). The battleships of the Great White Fleet were already outdated at the time the fleet sailed, Britain having launched its first all-big-gun battleship, HMS Dreadnought, in 1906. However, the US was already building its own Dreadnought-type battleships, USS South Carolina and USS Michigan.

Capt. Reginald R. Belknap, The Yankee Mining Squadron or Laying the North Sea Mine Barrage 110 (1920).

Id. at 34. A wartime song praised the former cruiser: “The Baltimore was the first away, / She traveled a thousand miles a day, / To show the Allies the lively way, / Of the Yankee Mining Squadron.”
1922.87 Used for a time as a receiving ship, the rusting former cruiser was still present when Japanese forces attacked Pearl Harbor on December 7, 1941.88 The gallant old vessel was sold in 1942; her partly-scrapped hulk was scuttled at sea on September 22, 1944.89

87 Department of the Navy—Naval Historical Center, USS Baltimore (Cruiser # 3, later CM-1), 1890-1942, https://www.ibiblio.org/hyperwar/OnlineLibrary/photos/sh-usn/usnsh-b/c3-cm1.htm (last visited Nov. 29, 2016).
88 WALTER LORD, DAY OF INFAMY (1957), 54. Lord incorrectly wrote that Baltimore was “a veteran of Teddy Roosevelt’s Great White Fleet,” she was not.
89 Department of the Navy—Naval Historical Center, supra note 87.
Books reviewed in this issue:


The game of baseball has long been regarded as America’s National Pastime. However, the sport of baseball has had its share of legal controversies over the years. Baseball Meets the Law: A Chronology of Decisions, Statutes and Other Legal Events details the impact that the law—cases, statutes, regulations and other law-related events—have had on the sport.

Organized chronologically, the book begins by looking at the origins of baseball, 1791 to 1850. In 1791, the town of Pittsfield, Massachusetts, enacted a bylaw that banned playing with bats and balls near a newly-constructed meeting. Ironically, a similar ordinance was adopted in Cooperstown, New York, in 1816; that ordinance banned playing ball on the future site of the Baseball Hall of Fame.

It did not take long for the sport of baseball to become better organized. The Olympic Town Ball Club in Philadelphia adopted a Constitution in 1837; 21 years later the National Association of Baseball Players was organized in New York City. It also did not take long for corruption to enter the sport: in 1865 the first known fixed game was played between the New York Mutuals and the Brooklyn Eckfords.

A time of professionalization and the rise of leagues followed the Civil War. The Cincinnati Resolute Base Ball Club—later to become the Cincinnati Red Stockings, the first all-professional baseball team—was formed in 1866. The year 1871 saw the formation of the National Association of Professional Base Ball Players, the first league of professional baseball teams; 1876 saw the founding of the National League.

The book continues through the years, highlighting historical happenings involving the sport. These include the first patent for a catcher’s mask (1878); the formation of the American League (1900); the first Presidential first pitch (1910); the signing of the first woman to a professional baseball contract (1931); the signing of Jackie Robinson (1945); and the reading of “Casey at the Bat” into the Congressional Record (1988). The historical listings end with the 2015 denial of Pete Rose’s reinstatement request.
The book includes two appendices. The first provides a selective alphabetical list of lawyers involved with baseball. The second appendix provides a selective chronology of the infamous Black Sox scandal. The book includes extensive endnotes and a detailed bibliography.

Every lawyer with an interest in sports law in general and in baseball in particular should read this book. It belongs in every academic library.

“Take me out to the ball game....”

Mark W. Podvia
Interim Co-Director, Head of faculty Services, Curator of Rare Books and Archivist
West Virginia University College of Law Library
Morgantown, West Virginia

Once, when I was stuck somewhere with time to kill and a Bible, I opened the Good Book at random to the Book of Leviticus, which instructed me regarding the conditions under which I could kill or enslave a vanquished foe, take the women of vanquished tribes as multiple wives, and so on. Reading Leviticus was a somewhat interesting but mostly difficult, disorienting archaeological experience, revealing a time and mindset so far removed from my own that I had trouble appreciating the very different priorities and preoccupations of a remote and ancient people. Leviticus did not speak to me very well across the gulf of time.

Somewhat to my surprise, I had a similar experience while reading Leibniz’s *New Method of Learning and Teaching Jurisprudence*. I suspect most other modern readers would, too.

This in itself may be a useful historical lesson. Humans too often assume that all roads and pathways of history basically, and properly, lead to wherever we are today, and that our present priorities and preoccupations are appropriate, inevitable, and presumably were shared by our predecessors.

So it is perhaps illuminating to be reminded that Gottfried Wilhelm Leibniz (1646-1716)—legendary genius and polymath of early modern Central Europe, philosopher and co-discoverer of calculus (independently of his contemporary, Isaac Newton)—actually inhabited an intellectual universe that in many ways shared relatively little with our own regarding social, political, intellectual, and even legal assumptions and priorities. Rather like 19th century Victorians, described as backing into the future—moving forward reluctantly while looking backward and longing for the past—Leibniz and his mid-Enlightenment contemporaries seem relatively uninterested in most of what concerns us today, or in moving in that direction, and more inclined to revere, even seek to recreate, the ancient Classical past—notably imperial Rome, not democratic Athens—as well as the medieval Holy Roman Empire.

So, for instance, Leibniz matter-of-factly accepts slavery and that slaves are “not to be considered as a person, but as a thing” (p. 52); because slavery existed throughout the Biblical and Classical
worlds, the devout Leibniz likely accepted it as natural, inevitable, and the will of God (rather like antebellum slaveowners in the American South). Similarly quaint to modern readers is a statement that because criminal sentencing first requires a confession, criminals found guilty of course must be compelled to confess through torture as necessary (p. 66). Leibniz also accepts, and seemingly reveres, the rigid aristocratic and Church hierarchy of his day—including in his fawning Dedication to a potential aristocratic patron he sought to impress (pp. lxxix-lxxxii). More of the book is devoted to theology and canon law than to law as we think of it today (and the remainder concerns Roman law), a reminder that to scholars of the day, these all remained closely intertwined, while the separation of church and state was still a relatively new-fangled (and possibly heretical) idea. Leibniz’s participation in a continent-wide scholarly community speaking and writing in Latin hearkens back to the medieval era at a time when modern nation-states were still only taking shape.

Part I of the treatise briefly reviews 1660s-vintage general educational theory, including the inculcation of memory and habit by repetition, mnemonics, and such. Here as elsewhere, Leibniz seeks to analyze matters down to their elements and basic definitions, like his contemporaries Hobbes and Locke. The 21-year-old Leibniz, however, adds no particularly striking or novel insights, so the commentary is mostly of antiquarian interest today.

Part II turns to jurisprudence. Extensive sections of Leibniz’s treatise effectively constitute a lengthy annotated bibliography (e.g., pp. 66-115), including Leibniz’s opinions on a great many earlier or contemporary scholars and who among them got things right or wrong regarding particular aspects of Church doctrine, canon law, or similar issues of concern to early modern European scholars that may be of interest to intellectual, legal, or Church historians or theologians seeking to carefully reconstruct the mentalité of those times and associated doctrinal debates (and comments on figures of note, from Aristotle and Cicero to Hobbes and Grotius, can be found using a thorough name index). Non-specialists likely will find such commentary extremely dry and arcane.

So much space in a slender volume is devoted to bibliography that fuller comments on particular topics of interest, such as the Catholic-Protestant schism, natural law, logic, grammar, and hermeneutics, tend to be brief and sparsely interspersed. Unlike most present legal scholars, Leibniz saw legal history as fundamental to legal education, but only ecclesiastical history and pre- and post-Justinian Roman history really mattered. Overall, Leibniz shows a quasi-religious, proto-positivist faith in the fundamental truth and
order of Law, but also complains how humans have messed it up through the years. Noting cluttering of the Law with extraneous interpretive glosses over centuries, Leibniz briefly proposes a system of brush-cutting and bibliographic reorganization to distill the true, useful essence of the law in a more compact form, including a quasi-mathematical or symbolic logic system of categorizing cases and arguments (p. 175). Such ideas are little developed, however. Contrary to what readers might hope from the title, Leibniz’s treatise provides little usable insight for re-envisioning legal education in the present, and only a somewhat disorderly mixed bag of tips for preparing legal scholars of the 1600s buried among all the bibliographic annotations.

To say that Leibniz’s 1667 treatise speaks relatively little to present-day concerns is emphatically not to denigrate editor and translator Carmelo Massimo de Iuliis’s impressive scholarly and linguistic feat of working with countless resources in at least six different languages (German, French, Italian, Latin, Greek, and English) to produce the first complete English translation of the work, which should be valuable for Anglophone scholars of Leibniz and his times. The lengthy and thoroughly researched editor’s introduction also likely helps the non-specialist reader understand the work’s significance better than the work does itself.

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In preparation for writing this review, I asked a student worker in my library to bring me the largest textbooks on reserve, “and when I sat down to read I saw that the books were hoary and mouldy, and that they included old [Farnsworth’s] wild [Contracts Cases and Materials], the terrible [Civil Procedure: Doctrine, Practice and Context] of [Stepehen Subrin], [first] published in [2000], the shocking [Administrative Law, the American Public Law System: Cases and Materials], [first] printed in [1985] at [St. Paul], and worst of all, the unmentionable [Constitutional Law] of the mad [Dean Erwin Chemerinsky], in [the] forbidden [fifth edition]; a book which I had never seen, but of which I had heard monstrous things whispered.”

In all seriousness, reflecting on the textbooks I used in law school, my aesthetic sensibilities are offended by the fact that—in the thousands of pages of printed material—one very rarely happens upon an image. This is hardly a new problem. As the law and culture scholar Steve Redhead has written, whereas law is a literary pursuit, “the contemporary cultural terrain is defined almost exclusively in visual terms.” Furthermore, law, which is increasingly esoteric and technical, is increasingly difficult to translate into visual terms, or so they say. It is no wonder, then, that a divide exists between law and the visual arts.

Now, however, a catalogue comes forth from the storied collection of Yale’s Lillian Goldman Law Library that reveals the forgotten and clandestine history of law’s love affair with the image. Arranged by Michael Widener, the Goldman Law Library’s rare book librarian and one of the foremost authorities on the subject of rare legal texts, and Mark S. Weiner, a law professor at Rutgers and a noted legal historian, this volume is as approachable as it is attractive. The images—which the authors tell us must have appeared inside a book in order to be included—are organized into chapters according to their function, from the more serious “Teaching the Law” to the playful “Laughing—and Crying—at the Law.” Introductory essays by Jolande E. Goldberg of the Law Library of Congress and Erin C. Blake of the Folger Shakespeare Library lend context to the

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collection of images, describing the historical situation that gave rise to the artistic depiction of law.

There are too many images to do any of them justice, yet it would be a travesty to describe none of them. My favorites included a set of illustrations taken from the *Bambergensis*, an early-16th-century legal treatise that led to the “unification of criminal law in the Holy Roman Empire.” Two engravings depict various methods of torture that, evil though they may look, actually represent the imposition of limits on the practice under the reforms of the jurist Johann von Schwarzenberg (6.01). Another highlight is an 18th-century handbook on legal self-representation—“plus ça change, plus c’est la même chose”—printed in the Swiss city of Basel: an innocent man comes before a court and faces four judges marked by ignorance, drunkenness, avarice, and lasciviousness, respectively (9.09). Last, but not the least of which, is a beautiful red jungle fowl perched at the end of an early-19th-century Peruvian lawyer’s manual (10.11). A fine and delicate flourish befitting a profession that prides itself on precision, accuracy, and attention to detail.

To return, for a moment, to my original complaint, I wish to add that the same basic legal concepts are taught in law schools across the United States every year. There can be no doubt that a beautifully illustrated tree depicting the law of inheritance would be as useful and amusing today as it was during the Renaissance. The same can be said for sketches and engravings depicting rights and prohibitions or diagrams conceptualizing complicated regulatory schemes. Yet, they are notably absent from our textbooks with few exceptions. Might it be that it is art that has grown too abstract for the law?

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93 “The more things change, the more they stay the same.” Jean-Baptiste Alphonse Karr, LES GUÊPES 278, 305 (Calmann Lévy ed., 1891) (July 1848 or Jan. 1849) (traditionally ascribed to the January 1849 edition of Karr’s journal Les Guêpes, I have found evidence to suggest that the phrase first appears in the July 1848 edition).