



America's Early Justices and How They Shaped the Supreme Court Tuesday, April 19, 2022, 7 - 8 p.m.

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[00:00:00] Tanaya Tauber: Welcome to Live at the National Constitution Center, the podcast sharing live constitutional conversations and debates hosted by the center in person and online. I'm Tanaya Tauber, senior director of town hall programs. Today's Supreme Court justices are arguably all household names, but have you heard of justices John Jay, James Wilson, or Bushrod Washington? On today's episode, a panel of historians and biographers will help us get to know some of America's earliest justices and their impact on American history.

[00:00:34] Gerard Magliocca is the Samuel R. Rosen professor at the Indiana University Robert H. McKinney School of Law, an author of *Washington's Heir: The Life of Justice Bushrod Washington*. Maeva Marcus is a research professor of law and director of the Institute of Constitutional Studies at George Washington University Law School. And Walter Stahr is the author of *John Jay: Founding Father*, as well as *Salmon P. Chase: Lincoln's Vital Rival*. Jeffrey Rosen, president and CEO of the National Constitution Center moderates. This conversation was streamed live on April 19th, 2022. Here's Jeff to get the conversation started.

[00:01:12] Jeffrey Rosen: Hello friends, welcome to the National Constitution Center and to tonight's convening of America's town hall. I'm Jeffrey Rosen, the president and CEO of this wonderful institution. Thank you so much for joining us, uh, Gerard, Maeva, and Walter. If I may, Gerard, let us begin with you. Why did you choose to write about justice Bushrod Washington, and why should our NCC friends be interested in him?

[00:01:39] Gerard Magliocca: Well, thanks, uh, Jeff for inviting me and it's wonderful to be here with such a great panel. Uh, I decided to write about Bushrod Washington for a couple of reasons. First, no one had written a book about him before, so that was a challenge. Uh, secondly, he was George Washington's nephew. And so this is a way of understanding George Washington that is different from other approaches you could take to him. Third is he was on the Supreme Court at a pivotal juncture for 30 years alongside John Marshall and had a very close relationship with John Marshall that predated their time on the court.

[00:02:14] And it was a way of approaching the Marshall court from a different vantage point and in doing so, I came to believe that Washington was really a pivotal partner for John Marshall and that we should understand what the court did in those years as being largely the product of a team that is John Marshall and Bushrod Washington, and that Washington really played an important role in kind of su- providing support for what Marshall was trying to do in building up the court as an institution. So Bushrod is, uh, interesting in his own right. He's interesting

because of the people he was close to. And he's also interesting because of some of the opinions that he wrote as a judge.

[00:03:05] Jeffrey Rosen: Wonderful. Thanks for that great introduction. And we will dig into both his opinions, his relationship with Marshall, and so much more during our discussion. Walter Stahr, same question to you. Uh, John Jay is better known perhaps than Bushrod Washington as a diplomat and a founding father. But why did you choose to write about John Jay and, and why should our friends, uh, be interested in him?

[00:03:25] Walter Stahr: Well, at first I was a practicing lawyer for a couple decades and I was living and working in Hong Kong when it kind of hit me that I, I wanted to write a book. And then I fished around for a subject. Um, I was originally thinking about Gouverneur Morris, another founding father, and I, but I thought, well, let's find the biographies of his friends. And Alexander Hamilton, Robert Livingston, John Jay, and I was shocked to learn that the most recent biography of John Jay was from the 30s. And I bought a used copy, um, and read it and it wasn't that good. I thought, oh God, e- even I could do better than this. [laughs]

[00:04:07] So I started, you know, researching and writing. I mean, Jay has this amazing career in state, federal and international. I mean, most people today kind of know he him for his role in writing the federalist papers or his role on the, as first chief justice. But he's basically the author of New York's first state constitution. He's the first chief justice of New York's highest court. He represents America abroad. Um, first in Spain during the revolution where he doesn't have much, much success. And then in France where he and Adams and Franklin have great success in negotiating the treaty that ends the war and establishes our boundaries.

[00:04:31] Then as soon as he kind of gets off the boat upon his return from France, he's tapped to be secretary for foreign affairs for the confederation. He's a leader of the movement to scrap the articles and create the constitution. So, although he's not a delegate in Philadelphia, he's, he, he, he doesn't get a statue there at the National Constitution Center. [laughs] I would argue that he's considerably more important than some of the lesser figures who do get statues, you know, who sort of showed up in Philadelphia and didn't do much. And then as Washington is forming the first federal government, you know, some people talk about Jay as secretary of treasury. Some people talk about him as, you know, secretary of state, but in part to help Washington find useful jobs for his friends, Jefferson and Hamilton, he says, uh, "No, I, I'd like to be chief justice."

[00:05:49] Um, and even that isn't the end of his career. He goes on as chief justice to negotiate Jay's treaty and goes on to be governor of New York. So a lot to research and write about it. It was, it was a fun process.

[00:06:03] Jeffrey Rosen: Wonderful. Um, you raise a really interesting question. Why is it that Jay... Well, he doesn't have a statute 'cause he wasn't at the convention, but why, why is it that the three justices we're talking about tonight, Bushrod Washington and John Jay and James Wilson, who arguably had far more influence as you say, on the constitution itself than some of the actual delegates are less well known, and we'll explore that in of course, the conversation. Maeva Marcus, you've written about so many of the early justices, but I wanna ask you about

James Wilson. You have a great piece on Wilson as a justice. He was among the most important delegates to the convention who came up with the idea that we, the people of the United States as a whole are sovereign.

[00:06:46] Uh, and yet his influence on the court was less dramatic among other things because of his debts and, and he had a dramatic personal and, I'll, I'll let you tell the story. Um, why did you choose to write about Wilson and what was he like as a justice?

[00:07:00] Maeva Marcus: I didn't write about Wilson. We have about three pages on James Wilson [laughs] in our eight volumes, specifically on James Wilson, but he is a very interesting person. And I, uh, he came from Scotland in 1765 and then very quickly got involved in revolutionary activities in the '70s. He was very well educated. He had gone to St. Andrews in Scotland, philosophy, history, political theory, and all of that showed throughout his career. Uh, he was never trained specifically as a lawyer, but he became, he, he read law, I think with John Dickinson. But I'm trying to remember, I finished these volumes in 2006 and since then have been living in 20th century.

[00:08:00] So it's hard to remember all of this, but I think, uh, he certainly had a political theory when he was a delegate to the Constitutional Convention and was very important in that convention and in the Pennsylvania Ratifying Convention where he easily convinced them, uh, that they should vote for the constitution. And he very much wanted to be chief justice. There is no question. And George Washington was a very shrewd [laughs] administrator and understood character and understood what was needed and believed that the judiciary needed to be developed into a third coequal branch and that James Wilson was not the person to lead that branch because he was just too involved with his own problems, Western lands.

[00:09:09] He loved investing in Western lands and had huge amount of debt as a result of that. And he also was not, I, I would guess, [laughs] I wasn't there, not an easy person to talk to or to actually, uh, deal with the people because he was intellectually far superior, uh, to all of them. And so Washington chose Jay, but Wilson was very good about this. He accepted the fact that he was not chosen chief justice and he wanted to be an associate justice. And I would say he was one of the workhorses along with James Iredell of the early Supreme Court, because Wilson lived in Philadelphia and the capital of the United States was Philadelphia. So the Supreme Court met in Philadelphia for those, for nine of the 10 years.

[00:10:15] They met in New York the first year. And Wilson was always present when things happened and when things needed to be done in the capital or to take someone's place. And he was very, very good about doing circuit duty for other people when he could. Towards the end of his life when his debtors started to chase him, the second, you know, past 1795, 1796, he couldn't do it. He had to leave Philadelphia and go down south so that his creditors couldn't reach him. And he ended up, well, he had been in jail in New Jersey and his sons sprung him loose. Uh, he's the only justice I know of who had ever been in jail, but it, it was a very, very sad story.

[00:11:12] And he ended up in North Carolina with a relatively new wife. His first wife died in, I think 1786 and James Wilson went on circuit in Boston, met this young lady, James Wilson was 50 something years old and this young lady was 19. And he married her. And she did look after

him for the rest of his life. And if anybody wants to read a lovely book about life in North Carolina at the very end [laughs] or throughout, uh, the years that Wilson was on the court, my colleague, Natalie Wexler, wrote a novel called *A More Obedient Wife*, and it's about the Wilsons and the Iredells. And I recommend it to everybody because it gives a very good picture of life in the 1790s.

[00:12:11] And I always worry that people who talk about this court have no idea what life was like and think of the Supreme Court of today and therefore cannot really assess the worth of that court because they are judging it from a different, uh, standpoint. But, uh, Wilson did not have the effect on jurisprudence, which you think he would have given his intellectual abilities, because he just didn't engage enough with the court when he started to get so involved with all of these personal problems, Western lands, debts, et cetera. So he didn't leave much [laughs] uh, in the way of jurisprudence that, that we, uh, really use today. And in fact, nobody even thought about him.

[00:13:05] You know, he is one of the most important people at the constitutional convention. He was very in North Carolina, and I think he wasn't brought back to Philadelphia 'til about 100 years later when somebody remembered who he was and brought his body back to Philadelphia. [laughs] And so it's only lately that people have once again, taken an interest in James Wilson and they should take an interest in James Wilson but for many reasons, not only as a justice.

[00:13:36] Jeffrey Rosen: Wonderful summary of the life of an unappreciated founder. Thank you for the recommendation of the book, um, *The More Obedient Wife*, and let's have book recommendations throughout the show. Paige Smith has a biography of Wilson that I've just been reading for Wilson's influence on the phrase, the pursuit of happiness, because his reflections on the extent of legislative authority in Britain, uh, was one of the two documents that Thomas Jefferson had by his side when he wrote the declaration. And you're right about that amazing end of Wilson where he's in the tavern with his young wife dying of malaria after he's been sued by his fellow Supreme Court justice. Uh-

[00:14:17] Maeva Marcus: No, no, no, no. Well, it's not a Supreme Court. He, he was sued by Pierce Butler who was a Senator, I think in North Carolina.

[00:14:25] Jeffrey Rosen: Oh. I'll, I'll, I'll take it from you.

[00:14:28] Maeva Marcus: Take a look. [laughs]

[00:14:28] Jeffrey Rosen: He was sued, he was sued, he was sued by, I think, Butler who I think sat on the court and dying of debt, he, um, is convinced that he wants to defend his legacy. And he says, "At least it should be said that I wasn't indolent." Which is his defense of his remarkable conduct, but I'll, I'll be interested about whether all of you think that it was his avarice and his over extension, which was so well noted that's prevented us from properly appreciating his legacy. Gerard, you begin the book, uh, Bushrod Washington with a remarkable defense that justice Washington makes of slavery. Uh, he's respected his uncle's wishes that general Washington, President Washington free his own slaves. And yet Bushrod Washington, uh, defends the institution of slavery.

[00:15:14] Tell us what his position was, and then the, relate that remarkable story to his relationship with John Marshall and, and broadly his influence on the Marshall court.

[00:15:27] Gerard Magliocca: In 1821, Bushrod, who has inherited Mount Vernon from his uncle, uh, gathers his enslaved people together and tells them that he will not be freeing them. The reason for this is because George had freed his enslaved people in his will. And so there was an expectation among the, those who were enslaved there that Bushrod had brought to Mount Vernon after Martha Washington's death, that they too would be freed. They also had a reason to believe that because justice Washington was the head of the American Colonization Society, which was an or- an organization that was dedicated to setting up the colony of Liberia and encouraging the immigration of free blacks to Africa, which meant to some degree that people would be freeing their enslaved people so that they could go to Liberia.

[00:16:24] Nevertheless, uh, Washington gathered them and said, "Look, I'm not going to do that." And in part that was because he was s- struggling for money, basically. Uh, he had inherited Mount Vernon, which was basically on the brink of, well, it was a money loser let's say, and he didn't really have the means that George Washington had used to keep Mount Vernon going. And also Bushrod Washington was a lawyer and not businessman of any skill. So he, he had a harder time with that. Anyway, um, so of course, eventually he sold some of his enslaved people in part to be able to pay debts and such.

[00:17:07] And this drew enormous criticism because of course one, he was a sitting Supreme Court justice, two, he was George Washington's nephew. How could he do such a thing? And he wrote a public letter. It, it, it kind of a defensive, slightly guilty letter in which he said, "Well, look, I tried hard not to break up people's families. And, but you don't understand all the problems that I have because of, uh, the financial position that I'm in. It's, definitely he, you know, he was George Washington's heir both in his, in Washington's virtues and in his vices. His virtues were commitment to country, sober temperament, dedication to building up the institutions of the new United States, but the vices were slavery. And of course he owned slaves all his life.

[00:18:01] George Washington had owned them all his life, so did John Marshall, right? So the book tries to say that on one hand, he was the inheritor and also the practitioner of this terrible legacy. On the other hand, he did write an opinion in *Corfield versus Coryell* that became for many people, the foundation of the civil rights that the freed slaves should receive when the 14th Amendment was under discussion after the Civil War. So on, you see both the sort of at judicial legacy, which was much more sort of expansive or became so in terms of thinking about the rights of black people in contrast to his treatment of black people personally. Um, I should add that of course, uh, part of the story of the book is that there was one enslaved person that he freed, only one, and that was West Ford, who was a Washington by blood, almost certainly.

[00:19:04] Now, whether he was Bushrod Washington's son or half brother or nephew, we'll never know, but it's pretty certain that, that he was one of them. And he's someone who lived at Mount Vernon as a free man for many years and indeed inherited land from Mount Vernon from

justice Washington. So that's all part of the story that I tried to relay in the book, judicial, personal and sort of institutional.

[00:19:32] Jeffrey Rosen: Fascinating. And as you note in the book, he studied with James Wilson as well, which was a connection between those two great founding fathers. Walter, tell us about Jay as chief justice. Uh, Adams says he'd long known and esteemed Wilson, but he prefers Jay. President Washington chooses Jay 'cause he trusts him more than Wilson and he, he's, he's so esteemed in all these ways. He didn't serve all that long, but what was he like as chief justice of the United States?

[00:20:06] Walter Stahr: All of these early justices suffer in comparison to John Marshall and, you know, there, there really aren't many cases from that period that are still cited today. I, I went and did some research to see if they've been cited recently and, uh, the most important case, Georgia v. Chisholm, um-

[00:20:27] Maeva Marcus: Chisholm v. Georgia. [laughs]

[00:20:29] Walter Stahr: Sorry. Chisholm v. Georgia. Yes. It has the dubious distinction of being overturned by a constitutional amendment almost immediately. And so, you know, it doesn't get cited much other than in cases about the 11th Amendment. It's sort of cited as part of the background, um, uh, justice Alito cited it recently in a dissent in terms of talking about the, uh, you know, the, the reason why federal courts were necessary to provide a, a neutral forum, um, for interstate disputes. And then as you alluded to, he decamps after not very long. In 1794, there's an imminent war with, uh, Great Britain and, um, Washington and Hamilton ask him to go to England and try to negotiate a peace treaty.

[00:21:18] And he's not real enthused about that, but he agrees and goes. Um, you know, I was thinking about it in preparation for today. In a sense, he sets a precedent there that then gets followed various other times in our history, for example, in 1876, when the justices agree to help resolve the election dispute or 1960s when Earl Warren agrees to supervise the Warren commission. And then they also set an important precedent on the other side. In the neutrality crisis, uh, Washington and Jefferson wanted the justices to answer a long list of kind of abstract questions. And there was a lot of precedent in English law for that, but Jay and the other justices, um, thinking about it said, said, no, um, that's not our job. We decide cases and controversy.

[00:22:12] So in a sense, he both helps establish kind of what the court will not do and what the court will do. And it's also incredibly important when you just think about if you've ever been involved in starting something from scratch, you know, Jay and the other justices are starting something from scratch. Um, and they do a pretty good job of that so that by the time John Marshall comes, there's a functioning court for them to, um, to build upon

[00:22:45] Jeffrey Rosen: Maeva, first of all, you, you have a bunch of, uh, i- important corrections and you were absolutely right about Pierce Butler. I was confusing him with the new deal era-

[00:22:57] Maeva Marcus: Yes. [crosstalk 00:22:50]-

[00:22:59] **Jeffrey Rosen:** ... justice, who, who was in fact called Pierce Butler, but the Pierce Butler you were referring to was-

[00:23:06] **Maeva Marcus:** Yeah. [crosstalk 00:22:54]-

[00:23:07] **Jeffrey Rosen:** ... as you say, a founding father and US Senator.

[00:23:11] **Maeva Marcus:** Yeah.

[00:23:11] **Jeffrey Rosen:** And we, it would be great for you to maybe give us a sense of that Chisholm and Georgia case, which Walter just mentioned.

[00:23:21] **Maeva Marcus:** [crosstalk 00:23:03]-

[00:23:21] **Jeffrey Rosen:** Why was it significant? Uh, Wilson played a part in it and wasn't he, I, I, I asked, uh, [inaudible 00:23:09] our dear friend, I, I always, uh, asked him-

[00:23:33] **Maeva Marcus:** Yeah.

[00:23:34] **Jeffrey Rosen:** ... wasn't Wilson correct that the idea of state sovereign immunity was repudiated by the constitutional embrace of national sovereignty? And, and in that, in that sense, wasn't the fact that the decision was overturned by the 11th Amendment and unfortunate repudiation of Wilson's vision?

[00:23:52] **Maeva Marcus:** Well, Jeffrey, I agree you. Uh, Wilson and his colleagues were absolutely correct. And even Iredell, who is always said to be a dissenter was not dissenting on the question of whether a state could be sued. He was dissenting on a procedural question whether Congress should say something first to set the procedure for suing a state, how do you do it? Who do you sue? Do you sue the governor? Do you sue the secretary? You know, the, whoever is an official of the state. That's what Iredell was upset about. But Chisholm v. Georgia was decided in favor of the national government.

[00:24:34] Georgia could be sued in a federal court and they all agreed on that. And then you get this whole business as with the profound shock, it was overturned immediately. It wasn't. That's why I wanted to tell you, somebody sent a form of the 11th Amendment to Congress. Now, remember Congress was not in session all the time. So yes, it takes time, but Congress tabled it, they did nothing about it. So that gave the opponents of suing state's time to get together, uh, and bring it to Congress once again. But by this time, instead of having the amendment say, you can't sue a state in federal court, it's the current form of the amendment shall not be construed. And that gives judges leeway to do many things.

[00:25:26] As 200 years of 11th Amendment litigation will show you, and I can't talk about all of that. But the interesting part is the states took their time to approve the amendment. The requisite number of states finally did it in 1795, but no one knew about it. Remember, we didn't have newspapers and TV. These states were along the seaboard and they did what they wanted and nobody knew anything. And so states continued to be sued in the Supreme Court 'til 1798. And what is interesting about Chisholm is that Georgia, which refused to appear at first in the case of Chisholm v. Georgia because it said it couldn't sued, what the Supreme Court did after

saying yes, the '93 case said, "Yes, you can be sued." They issued the following year, a default judgment against Georgia saying, "You didn't appear. You owe Mr. Chisholm X amount of money, pay up."

[00:26:27] Well, Georgia paid up. That's what I want you to know. They followed this. [laughs] I mean, states were worried. I mean, they understood what the constitution said about a national government and they didn't want judgements outstanding. New York paid a judgment during this time that the Supreme Court issued in *Oswald v. New York*. So you have to go into this in a very big way without just saying, "Oh, states can't be sued." I agree with you entirely. Under the original constitution, states could be sued. And now we have, you know, all this litigation showing in which circumstances states can be sued, which officials, how to get around it, all of that kind of thing.

[00:27:15] Right after the amendment was made known in 1798 and was only made known because John Adams said to a secretary of state, "Whatever happened to that amendment." And so he wrote to all the state officials, and by that time there were more states in the union. So one more state had to approve the amendment before it could become part of the constitution, but that's the story of the 11th Amendment and *Chisholm*. But I so- I sort of would also like to say something as, as about Jay as chief justice, because I agree with Walter entirely that you have to look at this as an institution that is beginning and believe me, they all understood that everything they did as George Washington understood in terms of the executive was going to be a precedent.

[00:28:14] And John Jay was very concerned with ethics. You know, they wrote Circuit, which people won't know about [laughs] today, but they also served as judges of the circuit courts, it was sort of, it's a sort of intermediate tier, but it was a, they were trial courts, but they went to different courts of the United States. And Jay would not allow the justices to stay with friends when they were in different cities, states, towns, because he did not like the appearance of any favoritism or knowing people. He was very, very careful about that kind of thing. The other thing he was careful about, which is very interesting, I think is prayer. John Jay did not believe, uh, and Walter, you can tell me, uh, right or wrong [laughs] in prayer before government meetings.

[00:28:29] He did not believe that prayer should be part of the government. The court, the Supreme Court did not begin with a prayer. The circuit courts did not begin with a prayer except for New England. And Jay was present, but it was the first year, the, or two that this happened. And they didn't want to antagonize the citizens, [laughs] who all came to hear court cases. It was kind of entertainment at the time. And so in New England, somebody was allowed to, quote, 'address the throne of grace before the court session began,' but Jay was dead set against it.

[00:28:30] Jeffrey Rosen: Fascinating, thanks very much for that really interesting institutional background and, uh, reminder of, of Jay's vision of ethics, uh, for the court. Gerard, I, I don't wanna leave Bushrod Washington without getting a sense of his constitutional philosophy. He studied with James Wilson, who you, I think persuasively argue was the most underappreciated founding father. He imbibed presumably from Wilson this philosophy of natural law from the Scottish enlightenment. He embodied it in this *Corfield and Coryell* decision, which must have

been really interesting for you to write about because John Bingham, when he wrote the 14th Amendment, invoked Bushrod Washington's opinion in *Corfield and Coryell* as the central protection for rights of national citizenship.

[00:28:30] So just give us a sense of what Bushrod Washington and James Wilson's constitutional philosophy was and to what degree they were successful in, in writing it in, into this case, *Corfield and Coryell*.

[00:28:30] Gerard Magliocca: So Bushrod Washington was a Federalist like Wilson and George Washington. Indeed, just talking about the 11th Amendment, Bushrod, uh, called it a sacrifice to state pride. He, he wasn't a big fan because he was more interested in asserting national authority as a kind of important structural protection for liberty. While Bushrod Washington did study under James Wilson, you have to say that George Washington was probably a far more important influence on Bushrod simply by virtue of his family leadership, as well as just the fact of many years of kind of close interaction between them, correspondence, uh, that really began when Bushrod was set up with James Wilson by George Washington.

[00:28:30] George Washington paid James Wilson's princely sum that, uh, someone described it that he demanded to be Bushrod's, uh, mentor. But in other words, it's hard to imagine Bushrod Washington taking a much different philosophy toward the constitution than George Washington, uh, or would've taken someone of very incredible intellectual independence and fortitude maybe to do that. He then carried that onto the court. And in that sense, he was like-minded with John Marshall, who was also a Federalist. You know, when you come to a case like *Corfield*, the interesting thing to me about *Corfield* and the definition of fundamental rights that Bushrod Washington describes in *Corfield*, which is what makes it famous is that it's the product of someone who was changing his mind about the case.

[00:28:30] So the most exciting thing I found when I researched this book was a secret journal that, uh, was Bushrod, uh, contained his notes from, uh, many cases. It had been sitting in a museum in Chicago for decades, and no one had really paid any attention to it. And I was there. I turned the page and what did I see in front of me? *Corfield versus Coryell*, right? And then the notes began and that's as close as I'm ever gonna get to hitting a jackpot, I think, for, for anything.

[00:28:30] And what you learn there is that one of the reasons he decided to explain why he thought certain rights were fundamental under the privileges and immunities clause of the constitution is that the claim in the case was that harvesting oysters in New Jersey waters, if you lived in Pennsylvania was a fundamental right. And he had a hard time thinking that through, because he said to himself in his notes, you could see him writing out, well, if you can use the waters to travel and anybody has the right to do that, why can't you also take oysters out of them? Right? What's the difference? So he ended up concluding that, okay, they are different, but to explain or defend that, he then went on to articulate, well, here are things that are fundamental rights as opposed to say, harvesting oysters in another state's water.

[00:28:30] So I, I think that's an example of how you get a major change in constitutional law or statement about constitutional principle because you have doubts and you're not certain about

what the answer should be. And I think he carried that through in other aspects of his judicial career, you know, uh, one thing when he would hold jury trials or, um, write opinions, especially as a circuit judge, he would often say, "You know, I'm not sure if I'm right. I, I've done the best I can. This is the conclusion I've come to, but maybe I'm wrong, you know?" And, and you don't really hear many people saying that nowadays. I mean, uh, really any where in the judiciary, and I think it's kind of a refreshing thing and, and reflects kind of well on his sort of sensibility as a judge that he probably, you know, carried over. Perhaps he carried it over from Wilson. I can't say.

[00:28:50] Jeffrey Rosen: Completely fascinating. What a wonderful discovery of Bushrod Washington and changing his mind. And you really have emphasized the importance of Corfield and Coryell. So I'm gonna read the central paragraph that was quoted so often during the debates over the 14th Amendment as you describe in your book on John Bingham, uh, James Madison on the 14th Amendment. And then in a moment, I'm gonna ask you Walter, what the influence of this decision was on Chief Justice Chase during the Civil War. So Bushrod Washington says in 1823, uh, "We feel no hesitation in confining these expressions to privileges and immunities, which are in their nature, fundamental, which belong of right to the citizens of all free governments.

[00:30:41] What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, and this is the sentence that was always quoted, be comprehended under the following general heads, protection by the government, the enjoyment of life and liberty with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety. Subject, nevertheless, to such restraints as the government may justly prescribe for the general good as a whole, I'm s- I'm, I'm speaking with excitement here because I had forgotten, 'cause I haven't read this clause for a bit that the right to pursue happiness and safety is itself considered a privilege or immunity of citizenship and a natural right connecting Corfield to the natural law philosophy of the declaration." Amazing. So, uh, Walter, Chief Justice Chase, how important was Coryell to him?

[00:32:56] Walter Stahr: Well, even b- before he becomes justice, um, you know, Chase has a long career as what we would call a pro bono civil rights lawyer, um, before the Civil War. I can't say, oh, he cited it in that brief or that brief, 'cause we don't have a lot of his briefs, but he was familiar with the case. And he was, was um, in, in arguing for, uh, black rights, both in courts and in political fora before. Um, the Corfield comes up most notably in the Slaughter-House cases, um, decided near the end of Chase's tenure on the court in 1873. I mean, everyone, both the majority opinion and the, the three descents in that case sites Corfield.

[00:34:49] I mean, it's, it's, it's seen as kind of the, the paradigmatic statement of what privileges and immunities mean. Now, it's, it's in a different bit of the constitution when justice Washington was interpreting and it was in the original constitution. Now it's in the 14th Amendment, but people think that that is what it means. They just disagree violently over the majority in Slaughter-House basically kind of reads privileges and immunities, very narrowly says, "Look, it's just these few federal things." Whereas chief justice Chase and, um, the other dissenters think that it is, is considerably broader and, and reaches in particular the rights of the, the butchers in

New Orleans who wanted to pursue their trade without submitting to the state imposed monopoly.

[00:36:44] I should note that Chase himself does not write an opinion. He just joins that a field. By this time his health is not good. And indeed, within, poof, a couple weeks after that decision is announced, he'll be dead of a stroke.

[00:37:24] Jeffrey Rosen: Wow. Remarkable and so important to emphasize the disagreement about the scope of the privileges or immunities clause and in the meeting of Coryell and Slaughter-House. I won't peek out too much by summarizing the debate for our friends except to say it's a central question in constitutional law. As, uh, Walter said, the majority in Slaughter-House basically read the privileges or immunities clause as if it only protected rights that were preexisting in the federal constitution. Whereas the dissenters said, "No, it includes all of these natural rights that were recognized in Slaughter-House." And in that sense, basically applied the bill of rights against the states because the right to make and enforce contracts to sue and be sued and to engage in rights that are fundamental between state to state is protected by privileges and immunities.

[00:39:32] Walter Stahr: As your friend, Professor A- [Amar 00:39:01] has noted, almost all legal s- legal scholars today left right and center agree with the dissenters and not the majority in Slaughter-House.

[00:40:00] Jeffrey Rosen: That's a crucial question. Even Robert Bork and others recognize that everyone agrees, um, essentially that Slaughter-House was wrong and there's some vigorous attempts to get the Supreme Court to overturn it. Justice Thomas has expressed, uh, some mild interest but suggested it might be too late. And it's one of those cases where the original understanding is clearly inconsistent with the majority decision.

[00:40:59] Maeva, I'll let you talk about the significance of Corfield in whatever way you think best. But I, I have to ask you, 'cause I was so excited to remember the pursuit of happiness language in, in Corfield. And then I, I found it in Slaughter-House as well, where the decision says that the 14th Amendment places under the guardianship of the national government a protection against monopolies, which are invasion of privileges, which encroach on liberty of citizens to acquire property and pursue happiness and were voided common law. Do you have any thoughts about whether this idea that pursuing and obtaining happiness and safety was a natural right was embraced at all on the early Supreme Court?

[00:42:49] Maeva Marcus: No. They, they did not litigate anything [laughs] like this throughout the... The only mention of it was in *Calder v. Bull* where there was a disagreement and, and not specifically the pursuit of happiness, but whether natural law or things that were s-positive law, things that were specified, uh, should take precedence in dealing with a particular problem. That's the only time I've ever seen it mentioned. I think the early court was involved with things like judicial review. How about that? [laughs] That was important in the first decade. And even though John Marshall gets all the credit because he wrote it down, it was James Wilson who was the first to exercise it.

[00:44:38] It was in Philadelphia, it was in a ridiculous sounding case, uh, a revolutionary war veteran who was disabled and wanted his pension. And there was a statute that allowed him to go to court and ask for his pension. And he did this in Philadelphia and Wilson absolutely refused to hear it. He said, "This is not something the judiciary does." And all the justices wrote to President Washington and said, "You can't ask us to listen to these veterans and say whether these veterans should get a pension because that's not a judicial task and it is unconstitutional." But these were all advisory opinions. They were in letters to the president.

[00:46:23] Wilson was the only one who did it officially in the courtroom, said, "I'm not considering this case. That's the end of it." And then the case came before the Supreme Court because the attorney general, Edmond Randolph just went to court and said, "You have to order that court in Philadelphia, the circuit court to listen to this veteran." And if you get Dallas, Dallas's reports, there's a paragraph about how the Supreme Court divided on a procedural vote. It was three, three, there was six justices in the first court. And it has been assumed from that point that the question was, could the attorney general come into court and ask the court to order another court when there was no client?

[00:48:17] There was no- nobody, you know, it wasn't a, an adversarial thing. He just, it was what they do in England. It was what they did in Virginia. You go to court and you ask them to do something. And it's been assumed that the court said no. In the United States, we have the adversarial system, plaintiff, defendant. And that is not true because it turns out that the question was simply, could the attorney general do this without first seeking the permission of the president? That was the question and that's what they divided on. But nobody knew that 'til we found the letters that told us that a few years ago. [laughs] But as many justices say, we are not gonna go back and change this. David Shapiro loved to put it in his heart in Wexler, but [laughs] you know, we're not, we're not gonna overturn this.

[00:48:54] It looks like the adversarial system was inevitable. It wasn't. But also that was the beginning of judicial review. And eventually the court just didn't decide the case because they didn't wanna step on Congress's toes. I mean, they say that, we'll wait, we'll put it off another **[inaudible 00:44:17]**. And they only met in February and August and usually for a few days to a few weeks at the most. And by the time they met, Congress changed the law and did what the judges wanted. And so judicial review was accepted. And then the Supreme Court in 1796 considered a case called *Hilton v. United States*, which considered the constitutionality of the carriage tax case.

[00:48:54] It was a case that put taxes on carriages. But what's interesting about the case is that both the opponents of the tax, Madison, and the proponents, Hamilton, and other people, they both wanted the Supreme Court to make the decision one way or the other, which means the Supreme Court had the power of judicial review and everyone recognized it in 1796.

[00:48:54] Jeffrey Rosen: Wonderful. Thank you very much indeed for that. And that story of the history of judicial review is central. Um, lots of great questions in the Q&A box. This is, I think gonna be our final round. So I'll ask each panelist to take up whatever questions they feel best. I can't resist answering Barry **[inaudible 00:45:41]**, how did early courts define the right to

pursue happiness? It's interesting that in the Slaughter-House case, Justice Field's dissent cites Blackstone and says that only is a free government in the American sense of the term under which the inalienable right of every citizen to pursue his happiness is unrestrained except by just equal and impartial laws.

[00:48:54] And he says that that's the definition of civil liberty. The great end of all human society is that state in which each individual has the power to pursue his own happiness. According to the dictates of his interest, unrestrained except by equal, just and impartial laws. And that citation is to Blackstone who also uses the phrase, pursuing your true and substantial happiness. So it was essentially pursuing the ordinary occupations of life, pursuing your calling on equal terms with other citizens was the legal definition.

[00:48:54] And then we have a great question about what we think about the portrayal of James Wilson in the musical 1776. And I'll let anyone else, uh, weigh in, but it was a, uh, liable, completely unfair that he was made to be such an anxious buffoon, because we know that in fact, he was the most well educated certainly, and perhaps the most brilliant of all the founders. And it was only because of his unfortunate avarice in death that he's been forgotten in history, but we're giving him some love tonight. Uh, Gerard, final thoughts on Bushrod Washington, his significance and what you want our friends to remember him for.

[00:48:54] Gerard Magliocca: Well, I think there wouldn't have been a Marshall court without Bushrod Washington. No chief justice can do it all himself. Ask John Roberts. And, uh, John Marshall though is given this extraordinary credit as if he did everything on the Marshall court and everyone else on that court was just sort of not doing very much at all. Now, some of that was because of the way they structured their opinions in having them almost always be written or in the name of the chief justice. But when you look at sort of behind the scenes, to the extent that we can at the letters and other things that were exchanged among the justices and especially between Washington and Marshall, you see that Washington was very important.

[00:48:54] And Marshall said as much many times that he really relied on Washington as a collaborator and a partner on all sorts of projects, including the book that they wrote about George, that he, that Marshall wrote about George Washington where Bushrod was his editor. And so, you know, the opinions of the Marshall court really should be seen as the products of a team and the, and a collective effort. You know, law is a collective enterprise. No one person can sort of make the law in a democracy anyway. And so I think Bushrod is an important figure because of his relationship with Marshall. And that's what I hope people take away from the book.

[00:48:54] Jeffrey Rosen: Wonderful. Thank you very much for that. Uh, Walter, uh, what takeaways should we have on chief justice, Jay, that there are some questions about him, including what changed, uh, [inaudible 00:48:46] from an itinerant job under Jay and to a true Supreme Court under Marshall. Uh, [Jonathan Parz 00:48:52] asked about Jay's sending a memorandum refusing to give advisory opinions before he went to England to negotiate. These are your final thoughts. I'll like you to leave us with whatever you think is most relevant.

[00:49:03] Walter Stahr: Well, on, on the itinerate court, I mean, in the sense the court is still itinerate through, you know, [laughs] for a long, long time, I mean, Jay, would've been very happy. Um, and I think indeed all the members of the early court would've been very happy if, if the, you know, that lovely Supreme Court building which we now know had been built in, oh, say 1790, and they could have just parked themselves there and, and kind of had a life akin to the current justices. But, but really, woof, I don't know, nine tenths of their work was out on the circuits. And that's still the case when you get to my more recent subject, Salmon Chase.

[00:49:30] Some of his most important decisions as chief justice are his circuit decisions, um, in Virginia and Maryland and elsewhere, Jay is important as chief justice, but really it's the whole life that if, if he had only been chief justice, it would not have been worth my while to write a book. And it would not be worth people's while to read the book, but you're gonna get all the way from the Stamp Act through the Marshall court is gonna, you know, Jay is alive and, and involved in. So it's an amazing story if I do say so myself. [laughs]

[00:49:30] Jeffrey Rosen: Well, you ma- you made a great case for it in, in your wonderful book. And that's a really important point that for many of these, uh, people we're talking about, certainly for Jay and pa- and for Wilson too, if he'd just been on the court, not worth, uh, necessarily re- reading about, but when you look at the life and context among the towering founding fathers. Maeva, the last word in this wonderful discussion is to you and among other things, uh, [Mary Toski 00:50:37] asks, any recommendations on materials high school students might manage on the early courts?

[00:49:30] Maeva Marcus: Well, on, on my court, not much. [laughs] So, um, I, I do have a book that I edited recently called, *With Liberty and Justice For All? The Constitution in the Classroom*. And I recommend that it's, it was supposed to be published April 6th, now it's May 22nd, but it has lots of primary sources in it and a wonderful essay by Mary Builder on the constitutional period and the, the early court. So I would recommend that, uh, to her. Uh, from my point of view, the early court is really important. You mentioned advisory opinions, and of course we have the famous letter from the court that says separation of powers, courts can't give advisory opinions.

[00:49:30] However, Chief Justice Jay talked to President Washington before they ever decided that. Chief Justice Jay wrote a draft of a neutrality proclamation. He was the one who advised them first, let the president issue a proclamation. Then let Congress pass the Neutrality Act. And then the court, which has all of these cases in the pipeline can come up and do exactly the same thing and say exactly the same thing, but as judges in a case. And that will make us look much stronger to the European nations. And that was very important to them then. And it worked out that way. And in the, the case that they did, *Glass v. Sloop Betsey*, it brings up another point, Marshall and the opinion of the court.

[00:49:30] The fact of the matter is the early Supreme Court understood that too. In that opinion, in 1794, they kept saying, "And the court says," it wasn't by one person. It was an opinion. It was a decree of the court and it had four paragraphs. And every paragraph said, "And the court says." And later in the decade, Chief Justice Ellsworth always had things that said, "By the court." The

opinion of the court was born in the first decade, not during the Marshall era. People should really know things like that. [laughs]

[00:49:30] Jeffrey Rosen: Wonderful. They should indeed. And you, and thank you for helping all of us know that. Thank you, Maeva Marcus, uh, Walter Stahr, and Gerard Magliocca for an engaging discussion on this really important and much too little understood period of the early court. You've inspired all of us to learn more. And we look forward to learning more with all of you. Uh, Gerard, Walter, Maeva, thank you so much for joining and thank you friends for taking an hour to learn and grow together.

[00:49:30] Tanaya Tauber: This episode was produced by **[Melody Rowell 00:53:42]**, Lana Ulrich, John Guerra, and me, Tanaya Tauber. It was engineered by **[Dave Stotz 00:53:47]**. Visit constitutioncenter.org/jb to see a list of resources mentioned throughout this episode, find the full lineup of our upcoming shows and register to join us virtually. You can join us via Zoom, watch our live YouTube stream or watch our recorded videos after the fact in our media library at constitutioncenter.org/constitution.

[00:49:30] If you like the show, please help us out by reading and reviewing us on Apple Podcasts or by following us on Spotify. On behalf of the National Constitution Center, I'm Tanaya Tauber.