

# RUMINATIONS

## Nathaniel Chipman and the Common Law

The large rocks in the pond near the farm where he grew up appeared to be moving. He could see the tracks on the bottom of the pond, indicating that some powerful force had driven them toward the shore. The observer returned to the spot year after year, noting the continuing progress of the stones. Finally he had the answer.

I had observed, that as the warm weather advanced in the spring, the ice at the north part of the pond, where it was exposed to the influence of the sun and southerly winds, disappears to a considerable distance, before it was disengaged from the south shore, by a tall and thick forest of hemlock and spruce, it was protected from the influence of both; and that when released from the shore, the ice was sometimes driven to the north by a southerly wind ... [and] this led me to believe that the ice was the agent in the removal of those stones.<sup>1</sup>

One spring he watched it happen, and heard a "grating noise of the gravel beneath, and plainly saw the motion of the stone, as well as the gravel and earth that was accumulated and accumulating before it."<sup>2</sup>

He talked about the phenomenon with other men of science, and was surprised to find, "that at a time when the ardor of philosophical research has left almost no corner or recess of the physical world unexplored, this should have been still considered as a wonderful secret of nature."<sup>3</sup> At that point, the scientist turned inward, drawing a lesson from the experiment.

But I believe it often happens, that while we are looking out for something more recondite and profound, we overlook the most obvious cause, which seems to solicit our notice—and perhaps as often reject it as an alien or a vulgar intruder, because we find no niche to accommodate it, in our favorite system.<sup>4</sup>

Nathaniel Chipman wrote this article in 1828 at the age of seventy-five.<sup>5</sup> He was living in Tinmouth at the time,

where he had spent most of his life.<sup>6</sup> He lived another fifteen years, and remained vigorous and inspired to the end of his days. In 1833, age eighty, he published *Principles of Law*, a new version of the book of legal philosophy he had written and published forty years earlier in 1793.<sup>7</sup> During the last decades of his life, Chipman lived in poverty and seclusion.<sup>8</sup> His only source of income was his revolutionary war pension.<sup>9</sup> When he died in 1843, he had outlived every man who served on the Vermont Supreme Court before 1813. His obituary explained, "The generation in which Judge Chipman held so conspicuous a place, has long since passed away, and he has himself lived so many years in seclusion that his existence was almost forgotten, save by those who never forget generous learning."<sup>10</sup> Five years before he died, he was referred to as "the late Chief Justice" in a reported Supreme Court decision.<sup>11</sup>

The mortal remains of Nathaniel Chipman rest on a hill in the Tinmouth Cemetery, near a large plinth with these words on it: "A principal founder of the civil institutions of this State, and framer of its fundamental laws."<sup>12</sup>

### His Long Life in Brief

He was born on November 11, 1752 in Salisbury, Connecticut, the eldest of ten children of Samuel Chipman and the former Hannah Austin. His father was a blacksmith.<sup>13</sup> Thomas Chittenden was a neighbor.<sup>14</sup> Chipman's education consisted of nine months of preparation for college with the Rev. Jonathan Lee. After he entered Yale at the age of twenty-one, his family moved to Tinmouth and settled on a farm.<sup>15</sup>

In a letter to a friend, written shortly after he began the study of law in Salisbury, Connecticut, after graduating from Yale in 1777, he wrote to a friend about his future plans.<sup>16</sup> "I shall probably settle in Bennington, where I shall indeed be *rara avis in terris*, for there is not an attorney in the state. Think Fitch, think what a figure I shall make, when I become the oracle of law to the State of Vermont."<sup>17</sup> He said it in jest, without any intention of having it repeated in

print, but his prediction proved true.

He was a product of his experience, education, and upbringing. Before he was an oracle of law, he was a soldier, serving on Washington's staff at Valley Forge, in 1778, and participating in the Battle of Monmouth.<sup>18</sup> He was a poet in his early years.<sup>19</sup> At Yale he learned Hebrew, Greek, and Latin, and his brother Daniel says that he read the Old Testament in Hebrew, the New Testament in Greek, Homer, Virgil, and the minor Greek and Latin poets, every year of his life thereafter.<sup>20</sup> He needed only five to six hours sleep a night, and routinely awoke early.<sup>21</sup> He was small of stature, and he had an air of haughtiness, although it was said he could talk to any man.<sup>22</sup>

Nathaniel Chipman moved to Vermont in the spring of 1779, and upon admission to the bar became Vermont's third lawyer, after Stephen Row Bradley and Israel Smith.<sup>23</sup> During his first years, and in between the various public offices he held, he practiced law.<sup>24</sup> He was not good with clients, according to his brother. "The fact seemed to be, that he had acquired so confined a habit of seeking after truth conscientiously, that he could not readily enter into the feelings of his client, imbibe his prejudices, and with him have a full connection of the justice of his cause, without which no advocate can make the most of a bad case."<sup>25</sup>

Chipman quickly assumed an important role in government, becoming the leader of a faction of political figures that challenged the established order, including the first leaders of the state, like the Allens and Chittenden. He also grew enemies. Visiting the office of Stephen Row Bradley at Westminster, where the legislature was meeting in the winter of 1780, Chipman was assaulted by Matthew Lyon. Lyon said any man who would say what Chipman had just reported did not have a spark of honesty, and Chipman called Lyon an "ignorant Irish puppy." Lyon then grabbed Chipman by the hair and broke the comb that held it in place, causing Chipman to grab a pen knife in defense. Before any real damage occurred, Bradley grabbed Lyon from behind, and flung him to the corner of the office with Chipman's help.

Chipman and Bradley then laughed at Lyon openly. Lyon became an enemy for life.<sup>26</sup>

Chipman was elected by Tinmouth voters as their Town Representative in 1784, 1785, 1808, and 1809.<sup>27</sup> The General Assembly chose him to serve on the Supreme Court four separate times, first at the age of thirty-three, in 1786.<sup>28</sup> After two years, he left the bench and worked as one of the commissioners appointed to negotiate the problem of New York claims to Vermont land, a prerequisite to Vermont joining the union.<sup>29</sup> He was elected to the Supreme Court a second time in 1789, but this did not interfere with his commitment to Vermont statehood. At the constitutional convention in Bennington in January, 1791, his speech led the members to the nearly unanimous vote in favor of statehood.<sup>30</sup> He was then appointed to carry the news to Congress.<sup>31</sup>

Nathaniel Chipman married Sarah Hill in 1791, and they had five sons and two daughters. Three of the sons died in infancy.<sup>32</sup> After statehood was achieved in 1791, Chipman was appointed Vermont's first U.S. District Judge. As he had little to do in that job, he used the time to produce *Sketches of the Principles of Government*, published in 1793, a book that has been called the first systematic study of law written in America.<sup>33</sup>

He was elected a third time to the Vermont Supreme Court in 1796, as chief justice. While serving on the Court, he also fulfilled a legislative drafting assignment given him by the Vermont General Assembly, as the principal author of the Revision of 1797, the first complete systematization of Vermont statutes since government started in 1777.<sup>34</sup> In 1797, the legislature elected Chipman one of Vermont's U.S. Senators.<sup>35</sup> Referred to by his peers as "Judge Chipman," he was a partisan of President John Adams. In the Senate it was said of Chipman that he needed "deep water to play in." He was respected.<sup>36</sup> He presented the nation with a very different face from the rough countenances of the revolutionaries formerly associated with the new state.

His last two one-year terms on the Supreme Court began in 1813. For the third time he was elected chief justice.<sup>37</sup> These two years produced Chipman's greatest work, the decisions by which he is best known and revered. He also served on the 1813 Council of Censors, and compiled a political brochure entitled *The Constitutionalist*, urging the creation of a Vermont Senate, an idea a

generation ahead of its time.<sup>38</sup> But the Federalist Party was about to collapse, and he lost his seat on the Court in 1815. That was his last public office.

He died on February 13, 1843, at the age of ninety. He was a man of action, but also a man of words. No one who has served on the Vermont Supreme Court wrote and published more than he did in his ninety years.

### ***Sketches of the Principles of Government (1793).***

This is a book of legal philosophy written for a national audience. The word "Vermont," or its special history, is missing from the text. From his prospect of the world in Tinmouth, Judge Chipman looked out on the world with a benign idealism that sprung from a basic faith in human nature. He rejected the "gloomy views" of society held by Europeans, believing people have a natural "relish for society" that is the foundation of law and order.<sup>39</sup>

Nathaniel Chipman took a very different view of the state of nature than other writers, like Locke and Blackstone.<sup>40</sup> Unlike Hobbes, Chipman refused to accept that human beings were naturally wicked while in a state of nature.<sup>41</sup> Unlike Locke, Chipman did not believe people were driven to government because of the rough unfairness of solitary life. Rather than submitting to government reluctantly, Chipman's representative person embraces it as a natural development of an urge to socialize. Rather than sacrificing natural rights by the establishment of government, human beings in Chipman's view were drawn intuitively to society, order, and organization as a fulfillment of their quest for happiness and social improvement.<sup>42</sup>

*Sketches* is more than Chipman's reflection of the ideas of classic writers on government and the state of nature. The book is a defense of Vermont statehood, of the decision of his state to adopt the U.S. Constitution and become one with the United States, without ever referring to Vermont directly. He speaks of the natural "urge to join in league with others, the necessity of cooperation and the merging of society through the implementation of law."<sup>43</sup> For Chipman, we are complex beings, "not made for independence."<sup>44</sup> We have a need "for the approbation of others."<sup>45</sup> This translates into dedication to government and law. "Care must always be taken to guard against all independence in the rules, on the sentiments of the people,

and to provide, that they shall administer, not their own power, but the powers of government."<sup>46</sup>

*Sketches* addresses a wide range of subjects, including: his belief that judges should not have to be elected, but rather should serve during good behavior; his opposition to the executive veto, and support for bicameralism; his belief that successors in power should avoid public investigations of the conduct of their predecessors, which can only lead to "mutual recriminations and powerful intrigues."<sup>47</sup> He includes chapters on the law of descent, taxation, and criminal punishment.<sup>48</sup> He thinks the laws of primogeniture are unnatural and argues that income, not property, should be the basis of taxes.<sup>49</sup> Nathaniel Chipman was a man of strong opinions. He saw the law as an operating system wonderfully adaptable to the needs of society.

### ***Reports and Dissertations (1793).***

The same year Nathaniel Chipman published his *Sketches*, he compiled a small book of decisions from his time on the Vermont Supreme Court for the years 1789 to 1791, and had it published under the title, *Reports and Dissertations*. It included reports of twenty-five cases from those years, plus a series of essays on law.<sup>50</sup> This is the first volume of reported cases of the Vermont Supreme Court. Although privately printed, it quickly became officially recognized as authority.

The Supreme Court was both a trial and appellate court in those years.<sup>51</sup> The *Reports* reflects this in its often spare reports of rulings of law involving disputed procedures and evidence. Rarely is the reader told the facts of the case. That was the province of the jury. The Court was there to provide a room for a hearing, and to guide the lawyers through the trial, but the jury decided the case.

As a judge, Chipman was a conservative. According to his brother Daniel, Chipman "had such a veneration for that system of jurisprudence which had been settled, and he was so strongly impressed with the necessity of adhering to it as a system, that no judge was ever more careful to adhere to the principles settled by decided cases."<sup>52</sup> Yet in his essays he faulted lawyers for "too great veneration" for precedents.<sup>53</sup> He wanted them to adhere to principles, not cases. In *Rhodes v. Risley* (1791), he admonished a lawyer for citing Kirby's Reports (from Connecticut) in his court,

as it was no authority here, no more than the decisions of any other state.<sup>54</sup> Because there were no leading decisions in Vermont on the point, Chipman announced that the Court would “lay aside custom, and go on the footing of common justice between the parties.”<sup>55</sup>

He served on the Court with two other lawyers, Noah Smith and Samuel Knight. This was the first time Vermont turned over its high court entirely to lawyers. To read these cases is to see the first light of day of the Vermont judicial system. Principles established during these years remain intact today.

The reported cases reveal a Vermont struggling for legitimacy, rough in manners, and imprecise in pleadings. An adultery conviction is overturned because reputation evidence was improperly admitted.<sup>56</sup> Records of proprietors, not witnesses, must be used to prove title.<sup>57</sup> A divorce is not final if the order is signed by a justice of the peace, rather than a judge of the Supreme Court.<sup>58</sup> An indictment for burglary in the nighttime is quashed for lack of a *noctante*.<sup>59</sup>

The actions of a constable taking a horse in a distress action to collect delinquent taxes are valid, and the challenge to his authority on the basis of his election by voice vote, rather than ballot, is dismissed in *State v. Marsh* (1789), the first reported Vermont case interpreting the Vermont Constitution.<sup>60</sup> An enforcement action against a pauper, to collect expenses for his keeping by a town, is unsupportable on principle. Chipman wrote,

The provision made by law for the relief of the poor is, in my opinion, a charitable provision. To consider it in any other light, detracts much from the benevolence of the law, and casts a reflection on the humanity of the richer part of the community. Poverty and distress give a man, by law, a claim on the humanity of society for relief; but what relief, if the town have a right immediately to demand repayment? and to imprison the pauper for life, in case of inability to pay? This, instead of a relief, would be adding poignancy, as well as perpetuity to distress. If this be so, certainly the law raises no promise.<sup>61</sup>

Here we find the first Vermont articulation of the rights of bona fide purchasers and the first use of “Beware, purchaser.”<sup>62</sup> In *Morris, ex dem. Ludlow v. Gill* (1790), Chipman declares that “[f]raud invalidates every transaction.”<sup>63</sup>

The most interesting Chipman decision from these years is *Jacob, ex dem. Paine & Morris v. Smead* (1791). This is a dispute over land between holders of a New York confirmatory grant and a New Hampshire charter. While showing no quarter to New York’s behavior during the recent decades, Chipman ruled in favor of that colony’s authority.<sup>64</sup> Windsor had surrendered its New Hampshire charter to New York, in seeking the confirmatory charter, and the title born of that charter must prevail. No sentimental attachment to revolutionary Vermont ideals could overcome the rule of law.

Four essays, called dissertations by Chipman, follow the reports. They discuss the common law, statute of conveyances, statute of offsets, and the negotiability of notes. There is also an appendix of forms. Chipman explained that he did not intend the essays to serve as precedents, but only as “private opinions upon points of very considerable importance in the administration of law and justice, in this State.”<sup>65</sup> In spite of this, Chief Justice Isaac Redfield accepted the dissertations as precedent in 1851, acknowledging that Chipman knew more about the statute of conveying than “any other man ever did,” and that his opinions have been shared by the profession and people since that time.<sup>66</sup>

Chipman returns to his attack on precedents in the first lecture, arguing how knowledge of principles is of far greater importance than knowledge of precedents only. “The latter may serve the form of the mere technical lawyer; the first leads to the fountains of justice, the existing relations of nature in society, and connects the principles of law with the true principles of morality.”<sup>67</sup>

These dissertations formed the basis for a series of lectures Judge Chipman gave at Middlebury College in 1816 and in later years as professor of law.<sup>68</sup> They took another form when Chipman published a new edition of the *Sketches* in 1833 (called the *Principles of Government*) and incorporated portions of them within that book.

The essay on the common law serves to interpret, and limit, a 1787 act of the Vermont legislature.<sup>69</sup> While he acknowledges that a thorough knowledge of the common law is “indispensable for our Court,” he warns against too quick acceptance of its principles, to the extent that they are “repugnant to the Constitution, or any act of the Legislature of this State.”<sup>70</sup> He declares that common law officers are

nonexistent in Vermont, as statute has filled in all the spaces in their authority. While admitting that “Men correct, or give up with reluctance, those things which have cost them much pains in learning,” he prays that no court in this state “ought ever to pronounce sentence of death upon the authority of a common law precedent, without the express authority of a statute.”<sup>71</sup>

The remaining essays are rich in detail and remarkably practical in providing advice on how to interpret acts of the legislature from 1788, explaining the intent and the practice that might follow from them. He explains Vermont’s statute on conveyances and the principle that “the first in diligence [in recording] shall be the first in right,” in contests over deeds.<sup>72</sup> He describes the rules on offsets, and reports the purpose of applying this practice in contract law. “It serves to control the litigious spirit of suitors, by involving their interest alternately in a full settlement of every litigated demand, with a great saving both of time and expenses.”<sup>73</sup>

These were the words of a former Chief Justice, now U.S. District Judge, responsible for the proper functioning of the courts. But there is another motive. Chipman is teaching now, in the dissertations. Only that form, unlike the early decisions, allowed him to reveal the order and structure of law. In them he was not a philosopher or even a judge. He was a lawgiver.

## 1 D.Chip.

In 1824, Daniel Chipman published the first official reports, in two volumes, of the decisions of the Vermont Supreme Court. Daniel was acting under authority from the General Assembly, who in 1823 authorized the appointment of a reporter and appropriated money for the publication. Daniel was appointed, and used the opportunity to create a record of his brother’s leading cases, including some of those previously printed, explaining that the 1793 volume was “out of print, and but a small portion of the profession are possessed of [it].”<sup>74</sup>

Daniel was the most loyal of brothers. Although he had a busy law practice, his efforts to see his oldest brother’s work memorialized, along with his 1843 biography of the judge, reveal his dedication to preserving his brother’s contributions as an oracle of law in Vermont. His first volume of Reports contains the judicial legacy of Nathaniel Chipman.

Robert Mello has properly described Vermont's first Chief Justice, Moses Robinson, as establishing the rule of law in Vermont.<sup>75</sup> Nathaniel Chipman was Joshua to Robinson's Moses. He led Vermont, in his relatively short tenure on the bench, into the promised land.<sup>76</sup> That land was largely unchartered. Law libraries included only a few volumes, usually little more than Blackstone and Justinian, and statutes.<sup>77</sup> Chipman, we have seen, refused to treat decisions from other jurisdictions as precedents, except as they revealed the underlying principlessoughttobe decided. Chipman carved those principles, as espoused in the *Sketches* and his other work, into the mantle of a Vermont jurisprudence, leaving an indelible mark on the courts, its judges, and the evolution of Vermont common law. In *State v. Parker* (1813), he wrote:

The common law, exclusive of positive law, enacted by statute, depends on principles. Precedents and maxims, serve to embody and illustrate principles, to give them a fixed certainty, and afford a facility in applying them to cases as they arise, not coming within any former precedents. I conceive that these principles will be found amply sufficient for their decision, while they preserve the analogy and symmetry of the system. The only difficulty lies in applying the proper principle, and in applying it with due regard to analogy, which is the connecting link, and, indeed, the *sine qua non* of every other system, as well as that of the law; and, without which, instead of a system, we should have merely a catalogue of individual cases, affording no illustration of principles—no data for general conclusions.<sup>78</sup>

The Nathaniel Chipman cases reported in 1 D.Chip. are from three separate periods. The earliest is from the period 1789-1791 (Jan.). There are nine cases from 1796-1797 and seventy-two decisions from 1813-1815. The differences are striking. The earlier decisions are largely rulings on evidence and charges to the jury. Those beginning in 1813 resemble reports of the decisions rendered by the court today. Facts are summarized; law is reviewed and applied to the facts.

The volume is a good introduction to the early history of Vermont as seen through the lives of people. They fight over small amounts of money. Law is largely private. Government exists, but

beyond taxes is rarely seen. The poverty of early Vermont is seen in the number of cases involving imprisonment for debt, escapes from the liberties of the gaol yard, collections of gaol bonds, and claims of support for the poor between different towns. Suits over land titles were also common throughout Vermont's early decades. Proprietors' records were hard to find, and many landowners could only benefit from bad recordkeeping as a way of defending their rights to settle the land.<sup>79</sup>

Chipman the judge was also Chipman the philosopher. In a 1789 decision, for instance, Chipman ruled that a gaol bond conditioned on the good behavior of the prisoner and his payment of extravagant fees for his meals was unenforceable. "The bond is," he wrote, "totally bad, as being against law, the common principles of right; and in every view highly oppressive."<sup>80</sup>

Vermont was very young. People were just beginning to learn how to deal with each other. A man walked into the sheriff's office to pay a debt. As soon as the money passed between them, the man reached over and seized it from the sheriff to collect a debt owed him by the original debtor. Chipman explained, "It was held by the Court, that money, collected by an officer on an execution, cannot be attached out of his hands. On the receipt, the officer becomes a debtor to the plaintiff, not for the identical pieces of money, but for the sum."<sup>81</sup>

Chipman insisted on precision and strict conformity to the laws. He held lawyers to a strict discipline in special pleading. The language of common law pleading may seem arcane, and the punishment for mistakes was severe, a far different result from the latitude enjoyed today with notice pleading. "When a plaintiff traverses a plea in bar, he cannot give evidence matter in avoidance of the plea, but can only avail himself of that evidence by replication."<sup>82</sup> Service on parties must follow the statute directly to avoid dismissal.<sup>83</sup> A deposition signed after the witness was sworn to the truth he deemed insufficient when it should have been certified that it contained the truth, the whole truth, and nothing but the truth.<sup>84</sup> A deposition taken in New Brunswick by a justice of the peace was invalid where that official had no authority in that province.<sup>85</sup> Claiming "Joseph Bowdish has made out a false account against me, and sworn to it, he can prove it," when plaintiff meant to say, "I can prove it" in an action for slander, was deemed fatally defective.<sup>86</sup>

A claim pleaded as an ejectment should have been written as an "assise."<sup>87</sup>

The decision in *Wilcox v. Sherwin* (1797) has special interest. It is the only reported instance of Nathaniel Chipman being overruled by the other sitting judges in all of his years on the Court. Judges Enoch Woodbridge and Lot Hall disagreed with him on the ultimate question of whether the defendant, a tax collector who drove a heifer from private property, attempting to collect a delinquency, should be held personally liable for the offense. They said no; he voted in the affirmative. On most points, however, the Court agreed with Chipman.

When the defense tried to prove the collector's authority, the plaintiff's attorney objected, stating that by pleading the general issue, defendant was foreclosed from offering justification for the trespass unless it had been specially pleaded. Chipman disagreed. This is not a rule of law, but a rule of mode, in his view. "It is not founded on those principles of the common law, which are the principles of common justice, and agreeable to which, decisions of right are made by Courts between man and man."<sup>88</sup>

The legality of the tax became an issue, and the Court unanimously ruled that without a law granting the tax there was no authority to collect it. Chipman here wrote the first Vermont expression of what became known as Dillon's Rule. "The power of a town, as a corporation, is not general; it is limited both as to the subject matter and the mode of exercising it. For instance, should the inhabitants presume to vote a tax to raise a sum of money, for the purpose of establishing a manufactory, the subject not being within the powers given by law to towns, the vote would be illegal and void."<sup>89</sup> He declared, "towns ... derive their power from the law solely."<sup>90</sup> The Court signaled its intention to hold towns to a high standard of compliance with law.<sup>91</sup>

Chipman was convinced the collector should pay the damages to the landowner. He was sure enough of this to seek the guidance of the common law. "These I take to be the principles of the common law, as old as the law itself—principles which are not subject to the controul of the Court, nor in the power of the Court to alter without legislative aid."<sup>92</sup> But in this he was overruled.

Chipman's decision in *Hale v. Griswold* (1797) is the first recorded instance in Vermont of the Court deferring to the

judgment of an inferior court, in this case the county court.<sup>93</sup> The Supreme Court was at the same time unhappy with the county's decision to assess special fees against the plaintiff, beyond its authority. "To refuse justice to a party, or to render judgment against him, for a refusal to pay fees illegally demanded, is certainly wrong. It may be a wrong of the Judges, but a party taking a judgment always takes it at his peril."<sup>94</sup>

The first recognition of precedent in Vermont is found in a 1797 decision, where Chipman agreed with defense counsel (his brother Daniel) that the cause is settled by unnamed "precedents in this Court."<sup>95</sup> In 1814, Chipman named a reported Vermont precedent, one of his own decisions, and ruled it was determinative of the legal question before the court.<sup>96</sup>

The Chipman court was the first to announce its intention of policing the profession of law. When a witness was called, defense counsel (Daniel again) objected, claiming this an unfair surprise. The Court was not impressed with the claim, but stated, "Should there appear to have been a surprise through any secret or unfair practice, it will be in the power of the Court to prevent any injustice on that account."<sup>97</sup>

There are other firsts. Fraud must be specifically pleaded.<sup>98</sup> Illegal contracts are void.<sup>99</sup> Standing must be narrowly construed.<sup>100</sup> What you should have pled, you cannot raise in a new action (issue preclusion).<sup>101</sup> Courts must have jurisdiction to act.<sup>102</sup> Part performance can defeat the statute of frauds.<sup>103</sup> Notice to one partner is notice to all.<sup>104</sup>

Chipman is the first Vermont judge to cite legislative history in interpreting a statute. In *State of Vermont v. Campbell* (1814), he explained his view of treating the Revised Laws (1797).

Now the whole code of revised laws, intended to form a system, are to be construed, by comparing and reconciling one part with another, as though the whole were contained in one act. By an examination and comparison of the several acts, it is clear that the legislature did not intend that a fine or penalty, should, because not appropriated, be considered as belonging to the State.<sup>105</sup>

Chipman could not stay away from discussing the common law. In *Young v. Shaw* (1814), he found solace in the expansiveness and advantages of the common law, in describing the authority

of the judiciary.

It is said that the courts of this State, do not derive any power from the common law, but all their powers are conferred by statute, and, although they have common law powers, yet those powers are conferred by statute; but this is not precisely so. The establishment of Courts, is provided for by the constitution. They are organized, and their powers, defined, modified, limited or extended by statute, as it was supposed, the nature of the government required, and as would best secure a due and prompt administration of justice.

The provisions of the constitution are very brief, on this subject, and have a constant reference to the common law, without which they would be unintelligible. Had the legislature simply organized the several courts, without further provision, relating to their powers or mode of proceeding, they would have had, as necessarily incident, all the powers of similar common law courts, not inconsistent with the nature of the government, and the general provisions of the constitution. Where the legislature have by statute, undertaken to declare, ascertain, limit, extend or modify these powers, the statute must govern. In every case of incidental powers, not acted upon by the legislature, the common law, as applicable to the institution of the court, is the only rule and guide.<sup>106</sup>

The first two cases exercising judicial review in Vermont appear under Chipman's name in 1 D.Chip. The first is *Dupy, qui tam v. Wickwire* (1814), which invalidates an act directing that a deposition be read at trial, as an unconstitutional interference with the judiciary department. Both the Vermont and U.S. Constitutions were implicated, although ultimately the Court agreed that the deposition could be read.<sup>107</sup> The second is *Starr v. Robinson* (1814), voiding an act discharging a sheriff from the debt owed a creditor for an escape from the liberties of the prison on the grounds that it was retrospective, and a violation of the contract clause of the U.S. Constitution.<sup>108</sup> You can tell these are dangerous waters. Restraint is always the best policy. As Chipman wrote, "And certainly, the Court ought anxiously to avoid any construction of a law, which would imply in the legislature, either as ignorance of their powers and

duties, or a design to violate the national constitution."<sup>109</sup>

When plaintiff claimed a right to sue in the name of an assignee of a specialty contract, Chipman sounded insulted. "To allow this, would be to expunge from the law, the maxim, that a chose in action is not transferable ... To sustain this action would be to remove the ancient land marks of the law in pleadings, and remove the ancient and long established boundaries of actions."<sup>110</sup> Voiding a promise of marriage by an "infant" (the man was twenty years old) might seem hard, wrote Chipman, apologetically, "but the rules of law are general—they are calculated for the general State, for the general good of society, and are not to be warped to serve a particular case."<sup>111</sup>

Yet practices that never had any point would collapse if challenged, such as insisting on original deeds as evidence in court, where a copy from the official records would suffice.<sup>112</sup> Chipman wrote, "There can be no justifiable reason for permitting a practice so inconvenient and unprecedented."<sup>113</sup>

After 1815, Nathaniel Chipman held no public office. He did not return to the practice of law. He taught law at Middlebury. He began to lose his hearing.<sup>114</sup> And he had one more gift to present.

### ***Principles of Government: A Treatise on Free Institutions (1833)***

Forty years after his *Sketches* were published, Nathaniel Chipman finished a new edition, entitled *Principles of Government: A Treatise on Free Institutions*, in 1833. In those forty years, Chipman had served in the U.S. Senate and four more years on the Vermont Supreme Court; he had served in the Vermont General Assembly as Tinmouth's representative and on the 1813 Council of Censors. He was eighty years old, and largely forgotten. Vermont had left behind its revolutionary era, and it was very different. Vermont's population had swelled from 85,000 in 1791 to 280,000 in 1830.<sup>115</sup> The Federalist Party was defunct. The nation, and the state, had new problems to tackle. Yet Chipman felt strongly that he still had a contribution to make. The "great end of this book," he wrote, is "to refer all necessary civil institutions to such natural and moral principles as may give satisfaction to every serious inquirer."<sup>116</sup>

Chipman's ambition was to reorganize the *Sketches* to produce "an elementary

treatise on that kind of government which has been adopted in these United States," as there was no book on that subject available at the time.<sup>117</sup> He thought he would produce an entirely new book, but a close reading of the changes reveals a more modest accomplishment. Very little of the *Sketches* is removed from the *Principles*, with a few significant exceptions. The chapter on Thomas Paine is excised. Stephen Feldman attributed this to Paine's eclipse as a respected figure in American history following the publication of his *Age of Reason* in 1794. To Chipman, religion was fundamental, and those who sought to weaken its power were irredeemable.<sup>118</sup>

Some parts of the *Principles* are new. The lectures in *Reports and Dissertations* (1793) are added, either in whole or part.<sup>119</sup> A chapter on "Of the right of Opinion" is entirely new to print.<sup>120</sup> Chipman's subject is religious liberty. Offended by the Roman Catholic record of religious intolerance, Chipman treated the right of private opinion as a sacred right, "with which society can, on no pretence, authoritatively interfere, without a violation of the principles of nature."<sup>121</sup> He meant both religious and political opinion. He was no liberal, however; he ended with the conclusion that licentiousness in the press "may be restrained and punished, not only without danger, but with additional security to the liberty of speech and of the press."<sup>122</sup>

Chipman had read William Paley's *Principles of Moral and Political Philosophy* (1785). After disagreeing with Locke, Blackstone, and Montesquieu, as he had done in the *Sketches*, Chipman added Paley as a target. He was intrigued by Paley's view that human happiness depends on social affections, but concluded Paley's model of social organization relied too much on moral obligation, and not enough on civil law.<sup>123</sup> When Paley attempted to defend slavery, Chipman was clearly disappointed.<sup>124</sup>

The *Principles* differ from the *Sketches* in the treatment of God. He has a greater presence in the latter work.<sup>125</sup> Law is just the beginning of obligation toward virtue. Every person is "led to seek the approbation and to dread the censure of that Omniscient Being, who is the Author of nature, and nature's laws; from whom he received his own existence, and to whose goodness he is indebted for all his enjoyments, for all his products of happiness."<sup>126</sup>

The *Principles* reveal a mind unencumbered by age. Chipman's additions sharpen the arguments and expand the original ideas, although the heart of his philosophy has not changed. Age and experience have taught him greater humility. His changes to the discussion of Montesquieu in the first chapter, for instance, reflect a greater tolerance for contrary ideas to his own.<sup>127</sup> His views on native American Indian tribes reveal a broader understanding of their nature, although even in 1793 Chipman had demonstrated an appreciation for their virtues, particularly their dedication to hospitality shown to guests.<sup>128</sup> His views on slavery are more pronounced in the *Principles*. "Not only does [slavery] violate rights and principles allowed natural, but it fails in that safe and sure test of every law of nature, and of all civil institutions as founded in those laws, its tendency to promote the general interest and happiness of the society where it prevails ..."<sup>129</sup>

In the chapter on the "appetite for society," Chipman adds a long section explaining its origins in childhood, in familiarity and imitation. This is how he begins the section:

This appetite, which may with equal, or perhaps, more [properly] be denominated a propensity to society, is common to all men;—and although I have compared it to instinct, in the lower order of animals it is I conceive, in its origin a susceptibility merely of certain mental impressions, that, such as excite feelings in the mind, either agreeable or disagreeable, according to the constitution of nature.<sup>130</sup>

The *Principles* is the medium by which Chipman expected to be remembered. A new edition was published by Da Capo Press in 1970, as part of the series of classics in American Constitutional and Legal History. The book has a small place in major histories of the development of law in America. But its impact was not as great as Chipman hoped. Today it is hard to read and appreciate as a whole philosophy. It does not delight as much as the reported decisions, although both are written in the same voice. It works so hard to prove its points, but in the end it is less likely to convert, and more likely to amuse, as an antiquarian experience rather than a fundamentally philosophical treatise.

With a burst of energy, Chipman followed the *Principles* with an eighty-page essay entitled, "Observations on

Mr. Calhoun's Expose of his Nullification Doctrines," in 1833. The work was not published until 1843, when Daniel came out with his *Life of Chipman*, but those who read it in manuscript at Chipman's home were more than impressed by the sharpness of his position.<sup>131</sup>

### Afterwards

One way to measure a life is to listen to what is said about a person after it is over.

Chipman the man may have been forgotten, but his legacy remained in the courts. As early as 1831, his decisions were treated as impregnable fortresses.<sup>132</sup> His forms also carried great weight, as the years passed. No judge would question a levy that used the form found in the back of the *Reports and Dissertations* (1793).<sup>133</sup>

He was honored by his successors. Judge Isaac Redfield considered Chipman an eminent jurist.<sup>134</sup> Redfield even relied on what Chipman said third hand about an issue: "I was told at the time by older and more experienced judges, that such had been the general view of the profession, and, among others, of the late Nathaniel Chipman,—whose opinions have long been regarded with great respect by this court,—and so I acquiesced in the decision."<sup>135</sup>

At the occasions of the dedication of his monument at Tinmouth, then U.S. Senator Luke P. Poland wrote that Chipman was the "father of Vermont jurisprudence."<sup>136</sup>

Some fissures appeared in the marble bust. Judge Milo Bennett showed disdain in overturning one of Chipman's decisions, saying, "The remark of Judge Chipman," holding the opposition, wrote Bennett, "is extra-judicial."<sup>137</sup> In a subsequent case, Bennett thought Chipman's view "that a plea, stating a commitment of the debtor in execution, without showing that he still remained a prisoner, is bad," constituted an "unsound" opinion, "however much we are disposed to reverence the memory and admire the learning of the late Ch. Justice."<sup>138</sup>

When Chipman's obituary appeared in the *Rutland Herald* in 1843, the author, whose remarks were celebratory but candid, wrote, "Without deciding on their correctness, we may at least safely say that his notions with regard to the powers and interpretation of the Constitution, and form of government, generally, best adapted to the situation of the American people, were not hastily

adopted."<sup>139</sup>

Judge Seneca Haselton relied on Chipman's essay on the common law to understand that "fines," as used in the Vermont Constitution, is a term synonymous with "punishments" in a criminal appeal in 1911. He accorded great weight to the writer "in view of the influence of Nathaniel Chipman on the establishment of our institutions."<sup>140</sup>

Judge John Rowell called Chipman "that great lawyer," in discussing his 1797 revision of the laws, agreeing with Chipman in recognizing that common law felonies need not be prosecuted by indictment as a matter of constitutional law, and that Chipman was right because he "was prominently active in public affairs during the formative period of the Constitution, and must have been imbued with its spirit and meaning."<sup>141</sup>

The most recent reference to Nathaniel Chipman in the Supreme Court canon is in a 1989 decision by Justice Frank Mahady. Citing Chipman's *Reports & Dissertations*, the judge refers to Chipman as a "contemporaneous authoritative commentator" on the subject of the meaning of section 39 of the Vermont Constitution relating to the proportionality of fines and the meaning of that term.<sup>142</sup>

Nathaniel Chipman was our rock. On his principles and his rigorous dedication to the refinement of the common law, the Vermont judicial system was built and sustained. He was our Marshall and our Blackstone in one body.

Easy as it is to idolize Chipman, to do so is to treat him as a statue, and he deserves more than that. Go back to Tinmouth Pond and look at those stone trails. Nathaniel Chipman waited patiently to see the rock move. He took the time to marvel at the order he saw in nature. He saw the same order in the law.

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<sup>1</sup> Nathaniel Chipman, *On Moving Stones in Lakes, Ponds, &c.*, 14 J. SCI. & ARTS 303 (1828).

<sup>2</sup> *Id.* at 304.

<sup>3</sup> *Id.* at 305.

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

<sup>5</sup> Note: As a writer of sketches of judges and justices, I have purposefully held off tackling the subject of this essay until I felt I was ready. Nathaniel Chipman is so magnificent a figure in Vermont legal history that it seems impetuous to attempt to encapsulate his productive life in a few thousand words. The time has come. At the Fifteenth Annual

Vermont Judicial History Seminar this year in Tinmouth, on June 13, the Society visited the Chipman monument, and Chief Justice Paul Reiber delivered a few remarks at the occasion.

<sup>6</sup> FRANKLIN BOWDITCH DEXTER, 3 BIOGRAPHICAL SKETCHES OF THE GRADUATES OF YALE COLLEGE 662 (1903) He lived in Tinmouth until 1791, when he moved to Rutland, switching places with his brother Darius, also a lawyer. He switched back and returned to Tinmouth in 1803, and resided there for the remainder of his life. DANIEL CHIPMAN, THE LIFE OF NATHANIEL CHIPMAN, LL.D. 66 (1846), 66. Nathaniel Chipman's public life distracted him from the operation of his father's farm, and he was forced to sell it to live. *Id.* at 6-7. In 1844, this land was the subject of a dispute over a widow's right to land acquired by her and her husband. Attorneys argued that the statute of 1797 should be read to establish a tenancy in common, but Judge Royce declined to accept that argument. *Brownson v. Hull*, 16 Vt. 309, 312 (1844).

<sup>7</sup> NATHANIEL CHIPMAN, PRINCIPLES OF GOVERNMENT: A TREATISE ON FREE INSTITUTIONS (1833).

<sup>8</sup> VT. WATCHMAN & STATE J., Nov. 6, 1872, issue 3, col. c.

<sup>9</sup> CHIPMAN, LIFE, *supra* note 6, at 66. This pension, funded by the federal government, was established in 1818. See JOHN PHILLIPS RESCH, SUFFERING SOLDIERS 93-118 (2000) for more on the pension.

<sup>10</sup> Letter to the Editor, *The Late Nathaniel Chipman*, VT. WATCHMAN & STATE J., March 10, 1843 [Obituary].

<sup>11</sup> *Dixon v. Parmelee*, 2 Vt. 185, 191 (1828) (Hutchinson, J., concurring).

<sup>12</sup> DEXTER, *supra* note 6, at 663.

<sup>13</sup> CHIPMAN, LIFE, *supra* note 6, at 6. One of his ancestors was Ward Chipman, who served as a commissioner under the treaty of Ghent, ending the Seven Years' War, settling the northeastern boundary. *Id.* See also E.P. Walton, *Address at the Unveiling of Chipman Monument*, RUTLAND HERALD, Oct. 6, 1873. Two of Nathaniel's brothers—Cyrus and Lemuel—became doctors; the other three—Darius, Samuel, and Daniel—lawyers. *Tinmouth*, 3 VT. HIST. GAZETEER 1142.

<sup>14</sup> DEXTER, *supra* note 6, at 661.

<sup>15</sup> *Id.* at 660; CHIPMAN, LIFE, *supra* note 6, at 6-8.

<sup>16</sup> Aleine Austin's biography of Matthew Lyon includes a footnote suggesting that the young Chipman studied law with Tapping Reeve as a private student before Reeve opened Litchfield Law School, along with other men who became lawyers in Vermont and formed the spine of a new generation of leaders, at odds with the revolutionary leaders such as the Allens and Thomas Chittenden. ALEINE AUSTIN, MATHEW LYON: NEW MAN OF THE DEMOCRATIC REVOLUTION, 1749-1822, at 162 (1981).

<sup>17</sup> CHIPMAN, LIFE, *supra* note 6, at 30. "I cannot but laugh to think what a flash we shall make when we come to be members of Congress," he wrote in another letter. *Id.* at 31.

<sup>18</sup> *Id.* at 23, 26-27.

<sup>19</sup> *Id.* at 12-23, 27-29.

<sup>20</sup> *Id.* at 11-12, 82-83.

<sup>21</sup> *Id.* at 9, 34.

<sup>22</sup> Walton, *supra* note 13; Obituary, *supra* note 10.

<sup>23</sup> Walton, *supra* note 13.

<sup>24</sup> Nathaniel Chipman served as state's

attorney for four years from 1781 to 1785, before his brother Darius was elected to that office. LEONARD DEMING, CATALOGUE OF THE PRINCIPAL OFFICERS OF VERMONT 75 (1851).

<sup>25</sup> CHIPMAN, LIFE, *supra* note 6, at 35.

<sup>26</sup> Annals of Congress, Feb. 1798, 999-1000; JAMES FAIRFAX McLAUGHLIN, MATTHEW LYON 215 (1900). McLaughlin speculates on the reason for the antipathy between Chipman and Lyon, commenting, without explaining, that the hatred stemmed from Chipman's "desire to get back into his own custody a bogus letter which he once wrote and palmed off on the people of the Grants as a genuine epistle." *Id.* He also speculates that Lyon was upset that Chipman was blaming Lyon for involvement in the Haldemand affair (treatings of Vermont officials with British authorities during the Revolutionary War) when Chipman was no less involved in the scandal. McLaughlin took Lyon's side in his dispute with Chipman, portraying Chipman as a self-indulgent tyrant to Lyon's heroic, temperamental democrat.

<sup>27</sup> DEMING, *supra* note 24, at 20, 51.

<sup>28</sup> D. CHIPMAN, 1 REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME COURT OF THE STATE OF VERMONT vi-vii (1824).

<sup>29</sup> CHIPMAN, LIFE, *supra* note 6, at 70-95.

<sup>30</sup> In his speech, Chipman explained the benefits of statehood. He said that civilization proceeds more rapidly when small independent states join together and that "without a common judge, the weak are jealous of the strong—and endeavor by art and cunning to supply their want of power ... The name of foreigner becomes but another name for an enemy." But with unification, the "passion of revenge, now no longer necessary for the protection of the individual, is suspended ... " 2 RECORDS OF THE GOVERNOR AND COUNCIL OF THE STATE OF VERMONT 468 (1875).

<sup>31</sup> *Id.* at 485.

<sup>32</sup> DEXTER, *supra* note 6, at 662. One of his sons, Henry Chipman, became a lawyer in South Carolina until, being disgusted with slavery, they moved to Michigan, where Henry became a judge. *Id.*

<sup>33</sup> BENJAMIN FLETCHER WRIGHT, AMERICAN INTERPRETATIONS OF NATURAL LAW 243 (1931).

<sup>34</sup> CHIPMAN, LIFE, *supra* note 6, at 109, 113. Nathaniel Chipman also worked on the first compilation of Vermont laws, beginning in 1784, and published in 1787. Walton, *supra* note 13. Although that early volume reprinted laws, it was not a revision, as the 1797 text was.

<sup>35</sup> CHIPMAN, LIFE, *supra* note 6, at 113.

<sup>36</sup> Obituary, *supra* note 10.

<sup>37</sup> CHIPMAN, LIFE, *supra* note 6, at 113. During his last service on the Supreme Court, the legislature established a *nisi-prius* system, where one of the judges sat for a term in one of the counties as a trial judge and all the judges then sat in that county for "the trial of issues of law and cases in Chancery." 1 D. CHIPMAN 32, 135. This experiment was abandoned in 1821. *Id.* at 33.

<sup>38</sup> THE CONSTITUTIONALIST OR AMENDMENTS TO THE CONSTITUTION PROPOSED BY THE COUNCIL OF CENSORS SUPPORTED BY THE WRITINGS AND OPINIONS OF JAMES WILSON, LL.D. (1814). Nathaniel Chipman's election to the Council of Censors in 1813 led him to champion the creation of a Vermont Senate, one of the proposals the Council made in its Report. THE RECORDS OF THE VERMONT COUNCIL OF CENSORS 289-291 (P. Gillies & D.G. Sanford eds., 1991). Although

published anonymously, the *Constitutionalist* is attributed to Chipman. *Id.* at 84; "An act for allowing and regulating offsets," Oct. 21, 1788, 14 STATE PAPERS OF VERMONT 405-406. The arguments in favor of the creation of a Senate are largely taken from the writings of James Wilson, former Associate Justice of the U.S. Supreme Court and Professor of Law at the College of Philadelphia. CONSTITUTIONALIST, at 2. Arguing for the creation of a Senate, Chipman quotes Wilson, who quotes Judge Strange:

It is the glory and happiness of our excellent constitution, that, to prevent any injustice, no man is concluded by the first judgment; but that, if he apprehends himself to be aggrieved, he has another court, to which he may resort for relief. For my part, I can say, that it is a consideration of great comfort to me, that if I do err, my judgement is not conclusive to the party; but my mistake may be rectified, and so no injustice be done.

CONSTITUTIONALIST, at 9.

<sup>39</sup> NATHANIEL CHIPMAN, SKETCHES OF PRINCIPLES OF GOVERNMENT 92 (1793).

<sup>40</sup> His views were not generally adopted in later legal writing. For instance, Chipman was, in the words of one analyst, "far more extreme" in his belief in the natural right of property than Chancellor Kent. JOSEPH DORFMAN, THE ECONOMIC MIND IN AMERICAN LAW 505 (1959).

<sup>41</sup> SKETCHES, at 13.

<sup>42</sup> SKETCHES, *supra* note 39, at 12. Chipman believed that "society, government, association, and ultimately law were perceived not only as necessary but natural, keenly suited to human appetites." WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA 28 (1996).

<sup>43</sup> SKETCHES, *supra* note 39, at 62-63.

<sup>44</sup> *Id.* at 82.

<sup>45</sup> *Id.* at 85.

<sup>46</sup> *Id.* at 90.

<sup>47</sup> *Id.* at 125-127, 140, 161.

<sup>48</sup> *Id.* at 182, 190, 217.

<sup>49</sup> *Id.* at 189, 207.

<sup>50</sup> NATHANIEL CHIPMAN, REPORTS AND DISSERTATIONS (1793) (hereafter N.Chip.).

<sup>51</sup> The decisions include charges to juries. *Pierson v. Hovey & Hibbard*, N.Chip. 40 (1791).

<sup>52</sup> CHIPMAN, LIFE, *supra* note 6, at 201.

<sup>53</sup> MORTON HORWITZ, 1 THE TRANSFORMATION OF AMERICAN LAW 24 (1977, 1992); Nathaniel Chipman, *Dissertation on the Act Adopting the Common and Statute Laws of England*, in CHIPMAN, LIFE, *supra* note 6, at 226.

<sup>54</sup> *Rhodes v. Risley*, N.Chip. 44 (1791). This is also the only case in the 1793 Reports indicating any dissent on the Court. Elijah Paine, who replaced Noah Smith in 1791, disagreed.

<sup>55</sup> *Id.* at 46.

<sup>56</sup> *State v. Annice*, N.Chip. 9 (1789).

<sup>57</sup> *Stedman ex dem. M'Kenzie v. Putney*, N.Chip. 9 (1789).

<sup>58</sup> *Parker v. Parker*, N.Chip. 17 (1789).

<sup>59</sup> That is, the allegation that the crime occurred in the nighttime. *State v. Mather*, N.Chip. 18-19 (1789).

<sup>60</sup> *State v. Marsh*, N.Chip. 17 (1789).

<sup>61</sup> *Selectmen of Bennington v. M'Gennes*, N. Chip. 25, 26 (1791).

<sup>62</sup> *Ivers, ex dem. Ivers v. Chandler*, N.Chip. 32 (1790); *Rhodes*, N.Chip. 44.

<sup>63</sup> *Ivers*, 1 N.Chip. 32.

<sup>64</sup> *Jacob, ex dem. Paine & Morris v. Smead*, N.Chip. 51 (1791).

The Governor of New York, and the authority of that Province were guilty of the highest oppression and injustice toward the New Hampshire grantees. They held the titles derived through the Governor of New Hampshire to be void. They were able to enforce this opinion by violent laws, and by the arbitrary decisions of their Courts. In consequence of these measures, they extorted large sums of money from the New Hampshire grantees and settlers, for what they called a confirmation. This was practiced upon the proprietors of Windsor. It is insisted that the injustice of this demand ought to invalidate the New York grant. It is wholly a new doctrine, that the greatness, or, if you will, the enormity of the consideration given, should invalidate a grant. If it be not a legal reason, it is certainly a favorable argument for the grantees, in support of their grant.

*Id.* at 55.

<sup>65</sup> SKETCHES, *supra* note 39, at 59.

<sup>66</sup> *Gorham v. Daniels*, 23 Vt. 600, 610-611 (1851).

<sup>67</sup> SKETCHES, *supra* note 39, at 59.

<sup>68</sup> CHIPMAN, LIFE, *supra* note 6, at 204; DEXTER, *supra* note 6, at 662.

<sup>69</sup> "An act adopting the common and statute law of England," March 8, 1787, 14 STATE PAPERS OF VERMONT 238-239.

<sup>70</sup> REPORTS AND DISSERTATIONS, *supra* note 50, at 62.

<sup>71</sup> *Id.* at 64, 67.

<sup>72</sup> *Id.* at 79. This essay relates to "An act for authenticating and registering Deeds and Conveyances," March 8, 1787, 14 STATE PAPERS OF VERMONT 218-221.

<sup>73</sup> REPORTS AND DISSERTATIONS, *supra* note 50, at 84; "An act for allowing and regulating offsets," Oct. 21, 1788, 14 STATE PAPERS OF VERMONT 405-406.

<sup>74</sup> 1 D.Chip. 35.

<sup>75</sup> Robert Mello read a chapter of his biography of Moses Robinson in April of 2009 in a Research in Progress Seminar to the Center for Research in Vermont at the University of Vermont.

<sup>76</sup> Nathaniel Chipman served a total of seven years and four months on the Supreme Court in total, spread over twenty-nine years (1786 to 1815).

<sup>77</sup> *Walton, supra* note 13.

<sup>78</sup> *State v. Parker*, 1 D.Chip. 298, 301 (1814).

<sup>79</sup> *Doe ex dem. Pearsal v. Thorp*, 1 D.Chip. 92 (1797) (parole evidence of a deed allowed, based on long precedent, but deed is better evidence); *Everts v. Brown*, 1 D.Chip. 96 (1797) (sale by one joint tenant not valid); *Doe ex dem. Briton v. Lawrence and Clark*, 1 D.Chip. 103 (1797) (no legal division of a town if meeting deemed illegal by the proprietors); *Everts v. Allen*, 1 D.Chip. 116 (1797) (defective declaration without inclusion of proprietors' records); *Wells v. Brewster*, 1 D.Chip. 147 (1813) (no standing to challenge acts of proprietors unless your rights are affected); *Strong v. Paine*, 1 D.Chip. 201 (1814) (no right to make up lands cut off by another town's proprietors' divisions in overlapping boundaries).

<sup>80</sup> *Lyon v. Ide*, 1 D.Chip. 46, 48 (1790).

<sup>81</sup> *Conant v. Bicknell*, 1 D.Chip. 50 (1790).

<sup>82</sup> *Campbell v. Hyde*, 1 D.Chip. 65 (1797).

<sup>83</sup> *King, Administrator of Ingersoll v. Van*

*Gilder*, 1 D.Chip. 59 (1797).

<sup>84</sup> *Burrroughs v. Booth*, 1 D.Chip. 106 (1797).

<sup>85</sup> *Bown & Eddy v. Bean*, 1 D.Chip. 176 (1814).

<sup>86</sup> *Bowdish v. Peckham*, 1 D.Chip. 144 (1813).

<sup>87</sup> *Judd v. Leonard*, 1 D.Chip. 204, 205 (1814). An "assize" or "assise" is a form of writ, although the term also is applied to a 12-man jury that decides disputes upon their own investigation of the facts, in English law, a practice that did not emigrate here with the rest of the baggage of the common law. BLACK'S LAW DICTIONARY (REVISED FOURTH EDITION 1968), 154-155.

<sup>88</sup> *Wilcox v. Sherwin*, 1 D.Chip. 72, 75-76 (1797).

<sup>89</sup> *Id.* at 83.

<sup>90</sup> *Id.* at 84.

<sup>91</sup> The same approach is seen when the Court refuses to recognize a town constable without a formal certification of his election, in *Doe ex dem. Broughton v. Blackman and Beardsley*, 1D.Chip. 109 (1797).

<sup>92</sup> *Wilcox v. Sherwin*, 1 D.Chip. at 84.

<sup>93</sup> *Hale v. Griswold*, 1 D.Chip. 107 (1797).

<sup>94</sup> *Id.* at 108.

<sup>95</sup> *Hiecock v. Hiecock*, 1 D.Chip.133, 134 (1797).

<sup>96</sup> *Hubbard v. Leonard*, 1 D.Chip. 216 (1814) (citing *Hastings v. Hodges & Parker*, 1 D.Chip. 124).

<sup>97</sup> *State v. Bishop*, 1 D.Chip. 120, 126 (1797).

<sup>98</sup> *State v. Johnson*, 1 D.Chip. 129, 130 (1797) (accused of being a "common cheat," but not with any particular crime, the Court dismissed the charge, insisting that fraud be pleaded "[s]o definitely that the Court can see what the crime is." *Id.*).

<sup>99</sup> *Badger v. Williams*, 1 D.Chip. 137 (1797) (money promised to mother if her daughter will not testify against plaintiff in a rape case); *Selectmen of St. Albans v. Curtis*, 2d, 1 D.Chip. 164 (1813) (need for a controversy).

<sup>100</sup> *Wells v. Brewster*, 1D.Chip. 147 (1813).

<sup>101</sup> *Van Ness v. Fairchild*. 1 D.Chip. 153, 156 (1813).

<sup>102</sup> *State v. Jeffrey*, 1 D.Chip. 169 (1813) (matter belonged in county court).

<sup>103</sup> *Meach v. Stone & Perry*, 1 D.Chip. 182 (1814). This, one of Chipman's longest decisions, is also one of his most eloquent. Unlike present decisions, this one feels fresh, unencumbered by precedent and long custom, as if the Chief Justice were writing on a blank canvas, yet fully aware of the weight first decisions have on the development of law.

<sup>104</sup> *Barney v. Currier, More & Jewett*, 1 D.Chip. 315 (1814).

<sup>105</sup> *State of Vermont v. Campbell*, 1 D.Chip. 218, 221 (1814).

<sup>106</sup> *Young v. Shaw*, 1 D.Chip. 224, 226 (1814).

<sup>107</sup> *Dupy, qui tam v. Wickwire*, 1 D.Chip. 237, 238-239 (1814).

<sup>108</sup> *Starr v. Robinson*, 1 D.Chip. 257 (1814).

<sup>109</sup> *Id.* at 261.

<sup>110</sup> *Read v. Young*, 1 D.Chip. 244, 246 (1814).

<sup>111</sup> *Pool v. Pratt*, 1 D.Chip. 252, 255 (1814).

<sup>112</sup> *Ferris, Ferris, Haviland & Pearsall, Administrators of E. Haviland v. Child and Farrand*, 1 D.Chip. 336 (1814).

<sup>113</sup> *Id.* at 337.

<sup>114</sup> *Walton, supra* note 13.

<sup>115</sup> EDWARD CONANT, *THE GEOGRAPHY, HISTORY, CONSTITUTION AND CIVIL GOVERNMENT OF VERMONT* 107 (1915).

<sup>116</sup> CHIPMAN, *PRINCIPLES*, *supra* note 7, at 60.

<sup>117</sup> *Id.* at iii. A copy of the *Principles* is available at Google Books. <http://book.google.com/books?id=1F4YVickiUsC&prints ec=frontcover&dq=nathaniel+chipman+principles&lr=#PPA32,M1>.

<sup>118</sup> STEPHEN M. FELDMAN, *AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM: AN INTELLECTUAL VOYAGE* 74 (2000).

<sup>119</sup> The chapter entitled *Of the Right of Property* in *PRINCIPLES*, *supra* note 7, at 67, is found in *CHIPMAN, LIFE*, *supra* note 6, at 285-292; *General idea of Law—Of the Law of Nature*, in *PRINCIPLES*, at 158-170, is a version of Lecture 1 in *CHIPMAN, LIFE*, at 237.

<sup>120</sup> *PRINCIPLES*, *supra* note 7, at 97-106.

<sup>121</sup> *Id.* at 97.

<sup>122</sup> *Id.* at 106.

<sup>123</sup> *Id.* at 28-32.

<sup>124</sup> *Id.* at 96.

<sup>125</sup> *Id.* at 32-37, for instance.

<sup>126</sup> *Id.* at 36.

<sup>127</sup> *Id.* at 5; *SKETCHES*, *supra* note 39, at 18. Chipman deletes his rebuke of Montesquieu that he “seems to be too found of simplifying.”

<sup>128</sup> *PRINCIPLES*, *supra* note 7, at 10-15; *SKETCHES*, *supra* note 39, at 22-32. Chipman’s criticism of some writers “whose love of virtue exceeded their information” on the life of “savages” is excised in the *Principles*. *SKETCHES*, at 31; *PRINCIPLES*, at 14.

<sup>129</sup> *PRINCIPLES*, *supra* note 7, at 93.

<sup>130</sup> *Id.* at 16-17. See also the long addition Chipman made to the chapter on the coincidence between natural and civil liberty. *Id.* at 55-61.

<sup>131</sup> *CHIPMAN, LIFE*, *supra* note 6, at 293-375.

<sup>132</sup> *University of Vermont v. Executor of Reynolds*, 3 Vt. 542, 560-561 (1831). There, *Paine & Morris v. Smead*, 1 D.Chip. 56 (1797) settles whether a landowner can question an allocation of land long after settlement and waiver of any objection on his part. *Id.*

<sup>133</sup> *Administrator of Seymour v. Beach*, 4 Vt. 493 (1831). Judge Charles K. Williams wrote, “The levy appears to be in the form given by Judge Chipman in his reports, published in 1793, which has been generally adopted by officers in this state in making their returns of levies of executions on real estate; and although it has frequently been intimated, that if it was a form recently adopted, it might not stand a strict scrutiny, yet it has always been decided to be good, both in the courts of our own state, and in the circuit court of the United States. It cannot now be overturned without disturbing the title of much real estate, holden under levies made in this form.”

*Id.* at 497.

<sup>134</sup> *Sherman v. Johnson*, 20 Vt. 567, 571 (1848).

<sup>135</sup> *Mann v. Holbrook* 20 Vt. 523, 525 (1848).

<sup>136</sup> *The Chipman Monument*, *RUTLAND HERALD*, Oct. 4, 1873.

<sup>137</sup> *Pawlet v. Town of Sandgate*, 19 Vt. 621, 630 (1847).

<sup>138</sup> *Kinsman v. Page*, 22 Vt. 628, 632 (1850).

<sup>139</sup> *Obituary*, *supra* note 10; *Walton*, *supra* note 13.

<sup>140</sup> *State v. Burlington Drug Co.*, 84 Vt. 243, 249-250 (1911). The phrase “establishment of our institutions” suggests Haselton had visited the Tinmouth Cemetery.

<sup>141</sup> *State v. Simpson*, 78 Vt. 124, 131 (1905).

<sup>142</sup> *State v. Saari*, 152 Vt. 510, 524 (1989).

