South Carolina Bar
Continuing Legal Education Division

The Outsized Influence South Carolina Lawyers Had in Our Nation's Founding

19-16

Thursday, February 21, 2019

presented by
The South Carolina Bar
Continuing Legal Education Division

http://www.scbar.org/CLE

SC Supreme Court Commission on CLE Course No. 192068

South Carolina's Oversized Role in America's Founding

Thursday, February 21, 2019

South Carolina State Museum, 301 Gervais Street, Columbia

This program qualifies for 5.0 MCLE credit hours, including up to 1.0 LEPR credit hour.
SC Supreme Commission on CLE Course #: 192068

8:30 a.m. **Registration**

8:55 a.m. **Welcome**

9:00 a.m. **Program Overview**
Joel W. Collins, Jr.
Collins & Lacy, PC, Columbia

9:15 a.m. **The Middle Temple and Inns of Court**
Laura C. Tesh
Columbia

9:45 a.m. **The Enlightenment Philosophers and Their Impact on the Founding Fathers**
South Carolina's Role in the American War of Independence
Joel W. Collins, Jr.
Collins & Lacy, PC, Columbia

10:15 a.m. **Break**

10:30 a.m. **Henry Laurens and John Laurens**
Thomas R. Gottshall
Haynsworth Sinkler Boyd, PA, Columbia

11:15 a.m. **Religious Tolerance in the Carolina Colony**
Honorable Richard M. Gergel
U.S. District Court, Charleston

12 p.m. **Lunch (included)**
Take time and visit the museum exhibits (complimentary access as program attendee)

12:45 p.m. **Charles Pinckney and Charles Cotesworth Pinckney**
Honorable P. Michael Duffy
U.S. District Court, Retired, Charleston

1:30 p.m. **John Rutledge and Edward Rutledge**
Thomas S. Tisdale, Jr.
Hellman Yates & Tisdale, PA, Charleston

2 p.m. **Break**

2:15 p.m. **Contempt of Court: A Turn-of-the-Century Lynching That Launched a Hundred Years of Federalism (Ethics)**
Mark Curriden
Dallas, TX

3:15 p.m. **Program Conclusion and Trivia Awards**

3:30 p.m. **Adjourn**
Take time and visit the museum exhibits (complimentary access as program attendee)

South Carolina Bar

Continuing Legal Education Division

The Enlightenment in Scotland, England and France and its Impact on the Development of Legal Philosophy in the American Colonies

Joel W. Collins, Jr.

THE OUTSIZED INFLUENCE OF SOUTH CAROLINA IN OUR NATION'S FOUNDING

Introduction

Continuing legal education programs help practicing lawyers in many ways. Some programs update lawyers on changes to the Rules of Evidence, Rules of Civil Procedure, the Rules of Criminal Procedure, and the Rules of Professional Conduct. Some CLE programs focus on new case law, especially cases which change or refine the common law. Other programs, like the Masters in Trial program presented by the American Board of Trial Advocates, help lawyers to develop and hone their courtroom skills. This program does not fit within any of these categories.

Sometimes practicing lawyers need to be re-inspired and reminded why they chose this noble profession as their life's calling. The purpose of this CLE program is to so inspire and remind. It includes a substantial amount of South Carolina history which is unique among the British colonies in North America, not to mention the other 49 states.

The Founding of Our Nation

Many lawyers in South Carolina do not know and appreciate the contributions made by South Carolinians in general and South Carolina lawyers in particular in our Nation's founding. In this program, you will meet South Carolinians who led the struggle for American independence. Some participated in the little-known Revolution of 1719, an event which squarely contradicts established and traditional American history about the origin and the earliest events of the American struggle for independence.

Many historians are satisfied that the movement in the British colony for independence from Great Britain began with the famous argument mounted by James Otis in 1761 when he challenged the British writs of assistance. These despised writs allowed warrantless searches of homes and businesses by British soldiers looking for smuggled goods. Historians from New England are proud to recall that a young lawyer sitting in the back portion of that Boston courtroom listening to Otis later wrote that "then and there, the child independence was born." That observer was none other than John Adams. But Adams was wrong. The Child Independence was conceived and born decades earlier in South Carolina.

Some of the leaders introduced in this program served as delegates to gatherings which were organized by the leaders of the British colonies in North America. Those gatherings include the Stamp Act Congress of 1765 in New York City, the First Continental Congress in 1774, and the subsequent Second Continental Congress, both held in Philadelphia, Pennsylvania and both meeting in Carpenters Hall. Others served in the Confederation Congress which followed the ratification of the Articles of Confederation. Others, arguably the most prominent of all, participated in the Constitutional Convention of 1787 at the Pennsylvania State House in Philadelphia, now known as Independence Hall.

Dr. Walter Edgar, the leading and towering historian of South Carolina, has documented the fact that there were more formally trained lawyers in the South Carolina colony than in all the other 12 colonies combined. This is because the South Carolina colony was by far the wealthiest. Prosperous planters who grew rice, indigo, and timber could afford to send their sons to England where they typically were educated at Cambridge University and the Middle Temple, one of the four Inns of Court where all barristers were trained. These young men obtained the best legal education available within the British Empire, and in all likelihood, the best legal education in the entire world at the time.

The Enlightenment

The eighteenth century is well known for the political philosophers who flourished, wrote, and shared ideas. These ideas challenged traditional notions of government and the rights of citizens. Most historians agree that the age of the English Enlightenment started with the Glorious Revolution in 1688 and continued throughout the eighteenth century. The English Enlightenment was preceded by the Scottish Enlightenment which featured the writings of George Buchanan and Francis Hutchinson. Lewis White Beck, author of a book about eighteenth century philosophy, stated in the introduction of his book:

> "Men in no other period in history before the twentieth century made so vigorous an effort to guide themselves by natural reason to natural ends, and for this reason, the eighteenth century seems to many of us closer than the nineteenth. Never before or since has there been so enthusiastic a condemnation of enthusiasm, so passionate a denigration of passion, so insistent a demand for clarity, sobriety, utility, civility, and humanity. No other age has been so convinced that it had reached, or was about to reach, maturity, or that it had thrown off, or was about

> to throw off, the heavy-handed tutelage of church, tradition, and despotism."

Young aspiring South Carolinians studied the teachings of enlightenment philosophers including John Locke, Thomas Hobbes, Baron de Montesquieu, Jean-Jacques Rousseau, David Hume, and Immanuel Kant. It was Montesquieu who championed the concept of the separation of powers and a system of checks and balances in government. It was John Locke who believed that reason and understanding set mankind above the rest of sensible beings and that man's ability to reason gave him the advantage to dominate the world. Locke believed in natural law, a concept which flowed from earlier philosophers including Plato, St. Thomas Aquinas, and Aristotle.

The American Declaration of Independence includes many notable passages, but none more soaring than the beginning of the second paragraph which reads:

> "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness. That to secure these rights Governments are instituted among Men, deriving their just powers from the consent of the governed. That whenever any form of government becomes destructive of these ends, it is the Right of the People to alter or abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to affect their Safety and Happiness."

These concepts come straight from the writings of the Enlightenment philosophers. The rights of citizens are not those granted or tolerated by their king, but rather the God-given rights they were born with and which cannot be taken from them. These rights are "unalienable" and cannot be lost or given away. Governments are not limitless. They derive their legitimacy and authority from the consent of the people who are subject to that government. This is the basis for the concept of "popular sovereignty."

The South Carolina Revolution of 1719

The Carolina colony, established in 1670 in Charlestown was made possible by a grant made by King Charles, II, on March 24, 1663, to eight of his friends. These men were political supporters of the reinstatement of the English Monarchy.

These eight Lords Proprietors had powers which were unique among all the British colonies. Their Charter granted them extraordinary authority including those contained in the "Bishop of Durham" clause. The Lords Proprietors had the power to declare war and conclude peace, to create towns and ports, to grant titles of honor, to establish an army and navy, to impose and collect taxes and customs duties and even the power to impose the death sentence. The Lords Proprietors were the initial owners of all land of the colony and had exclusive control over all trade with the Native Americans. The charter allowed commodities produced in the Carolina colony to be imported into England duty free for a period of time.

The leader of the Lords Proprietors was Anthony Ashley Cooper, the Earl of Shaftesbury. He named the two great rivers in Charleston for himself. We smilingly say Charleston is where the Ashley and Cooper Rivers come together to form the Atlantic Ocean.

Things did not go swimmingly for the new colony. Intense resistance arose from the local native tribes, usually referred to as the Yemassee Confederation. Other existential threats came from pirates, including Edward Teach, the notorious "Blackbeard," who raided sea-going vessels and seized the cargo as well as members of the crew.

The Fundamental Constitutions of Carolina (actually a single document) was drafted by Lord Anthony Ashley Cooper and his secretary, John Locke. It was more than a governmental framework. It was a document designed to attract settlers by guaranteeing them such things as religious toleration, natural citizenship, property rights, land grants and honorary titles. The Constitutions created a complicated system of eight separate courts, each with specific jurisdiction. It created a Parliament for the discussion of public issues, but it reserved onto the Lords Proprietors the final say on any controversy. The Fundamental Constitutions drew upon traditional English guarantees of fairness dating back at least as far as Magna Carta. It included the right to due process of law, the right to vote by secret ballot, the right to a trial by jury, and the right to impartial jury selection. The right to trial by jury was of paramount importance.

Having petitioned the Lords Proprietors for greater protection from the Native Americans and pirates, and having received no redress, leaders of the South Carolina Commons House of Assembly (North and South Carolina having been separated in 1712) met in Charleston in 1719 and declared themselves to be a "Convention of the People." They elected James Moore, Jr. as their governor and prepared a petition to

the British crown. They announced that they considered themselves unanimously of the opinion that they were no longer subject to governance by the Proprietors.

These South Carolina leaders knew and understood that what they were doing was, in the words of Dr. Walter Edgar, "treason pure and simple." They knew they could be executed by the Lords Proprietors for their actions. In their petition sent to the Crown, these brave South Carolinians pledged to each other "our lives and our fortunes." One can easily see how the last words of the Declaration of Independence drew upon this petition of the "Convention of the People" in South Carolina. One need only add the pledge of "our sacred honor" to the pledge of the South Carolinians to have the famous pledge at the end of the Declaration of Independence.

The Leadership of South Carolina

Dr. Walter Edgar has opined that after the Civil War, American historians, nearly all of them in the North, could not bring themselves to give credit to the southern states for any role they and their leaders played in establishing our nation. The choice was made to overlook the events occurring in the South during America's founding and especially the important role South Carolina played in winning the American War of Independence (a/k/a the American Revolutionary War). Dr. Edgar and many other hisorians confidently state the American War of Independence was won in South Carolina.

The legal systems in each of the British American colonies were replicas of the British system and included the application of the English Common Law. Four young South Carolina lawyers, each of them "Benchers" of the Middle Temple Inn of Court returned home and assumed leadership roles. They served as delegates to the Continental Congress. They signed the Declaration of Independence after it was adopted on July 4, 1776 (actual signatures were added on August 2, 1776). These South Carolinians were Edward Rutledge, Thomas Heyward, Jr., Thomas Lynch, Jr., and Arthur Middleton. A decade later, seven Middle Templars were delegates to the Federal Convention a/k/a the Constitution Convention. Three of those were South Carolinians. They were Charles Pinckney, his distant cousin Charles Coatesworth Pinckney, and John Rutledge, the older brother of Edward Rutledge. All three were Middle Templars. The fourth South Carolina delegate and signer of the Constitution was Pierce Butler.

The Stamp Act

Citizens of all thirteen British colonies were greatly offended by the Stamp Act of 1765 enacted by the British Parliament. This law compelled a new tax to be law paid by the American colonists. It required stamps to be affixed on all documents including legal pleadings, newspapers, playing cards, and other paper products. It further provided that anyone violating the Act would be charged with a crime, and the trial of such accused person would be in a British Admiralty Court where there would be no jury. The opposition to the Stamp Act is hard to exaggerate. A stamp collector was hanged in effigy in Charleston and a funeral precession moved through the city bearing a coffin labeled "American Liberty." The uproar led to the first convening of a meeting of delegates from all colonies. This was the first time the American colonies considered acting collectively regarding their relationship to their Mother Country. In fact, only nine colonies sent delegates. At the Stamp Act Congress, held in New York City, the rallying cry was "No Taxation Without Representation." No member of the British Parliament had ever been elected by the citizens of the American colonies.

One of the South Carolina delegates to the Stamp Act Congress was Christopher Gadsden. Upon returning to South Carolina, he addressed the crowd under a large oak tree in Charleston which later became known as the "Liberty Tree." At the Stamp Act Congress, the delegates discussed and then passed the "Stamp Act Resolves." Christopher Gadsden later became famous for designing an iconic yellow flag that depicted a coiled snake with the words "Don't Tread on Me."

The stamps shipped from England to South Carolina were impounded on a vessel and then off loaded to Ft. Johnson, a military installation in the Charleston Harbor. In fact, there were never any stamps sold in South Carolina. While stamps valued at approximately £102,050 were shipped to the colonies only £45 worth were sold and used, all of them in the Georgia colony.

An enterprising lawyer in Charleston brought a lawsuit upon learning that he could not file a lawsuit on behalf of his client. Without the mandatory stamps affixed, no legal pleadings could be filed. His lawsuit over this, known as *Jordan v. Law*, alleged that the Stamp Act was a violation of the guarantee given by King John in Clause 40 of Magna Carta. That clause states "To No One Will We Sell, To None Will We Deny or Delay Right or Justice." (King John referred to himself with the royal "We").

A brave South Carolina court consisting of four appointees of the Governor and one English judge issued a ruling finding that the Stamp Act had "delayed and denied justice" and was therefore a violation of Clause 40, one of the guarantees of Magna Carta. This was an unprecedented event in the anals of both British and American law. Arguably, it set the stage for the later ruling of the United States Supreme Court in the famous case of ***Marbury v. Madison*.**

The War Comes to South Carolina in 1776

On June 28, 1776, a week before the Declaration of Independence was adopted, eleven British warships with 2900 British fusiliers approached the Charleston Harbor. They bombarded the fort on Sullivan Island at the north entrance of the harbor. This fort is now named for its commander during that battle, Colonel William Moultrie. Fort Moultrie was a Palmetto tree log fortress, 16ft. thick, made of palmetto logs and sand. During the bombardment, this fort was not destroyed because its soft and spongy palmetto tree logs absorbed the British cannon balls without shattering. Sgt. William Jasper made a name for himself by leaping over the wall during the battle to retrieve the colony's flag after it was shot down. Jasper County, South Carolina is named for him.

Another reason for the American victory was the fact that there was little or no breeze. This prevented the British ships from maneuvering so as to take a broad side position for its cannons. Yet, another reason was the miscalculation of the depth of the water at low tide. The British had planned to land soldiers on the Isle of Palms and have them wade over to Sullivan's Island. The water in the inlet was too deep to allow them to implement this plan. During the battle, one of the British ships was destroyed by its crew to prevent capture.

The celebrated Battle of Sullivans Island became the first major victory of an American patriot military unit over British naval forces. Following this historic stand, South Carolina added the palmetto tree to the middle of its indigo blue flag. This flag had previously been adorned only by a gorget in the upper left-hand corner. A gorget was a piece of medieval armor protecting the throat of jousting or warring knights. It came to be a symbol of heroism and bravery. Col. Moultrie's men all wore blue caps with a gorget pin. Those who think it is a crescent moon are mistaken. The gorget is much more curved than a crescent moon. Today, the South Carolina flag, with its palmetto tree and gorget is the second most easily recognized state flag in America. It follows only that of the Lone Star state, Texas.

In the early years of the war, battles were fought primary in the northern colonies of Massachusetts, New York and New Jersey. There was the famous ride of Paul Revere, the Battle of Lexington, and the Battle of Concord. On June 17, 1775, two months after the battles of Lexington and Concord, the famous Battle of Bunker Hill was waged. This was the "Shot Heard Round the World." It was also the first occasion when British soldiers engaged in battlefield atrocities. Such atrocities also happened in South Carolina.

The British Southern Strategy

In 1778, having largely been unsuccessful in the battles in northern colonies, the British adopted their "Southern Strategy." They decided to bring the bulk of their army consisting of as many as 10,000 soldiers, south, and wage a campaign with the help of loyal British subjects in both Georgia and South Carolina. The plan was to take those colonies and then to march up the eastern Atlantic coast, quashing the rebellion in the American colonies, one-by-one from south to north.

Initially this strategy was successful. Savannah fell in 1779 and Charleston was taken after a siege in May 1780. After an extended negotiation, the American commander in Charleston, General Benjamin Lincoln, surrendered to the British. Approximately 6,000 Americans were given parole and released to return home. In a huge error of judgment, the British commander, Sir Henry Clinton, revoked these paroles. He required all these American patriots to pledge loyalty to the crown and, if ordered to do so, to fight for the British against their fellow American patriots. This was, of course, more than they could stand. It may have been the worst mistake of the British.

Three months after the surrender of Charleston, the British won a decisive victory in Camden where American General Horatio Gates was defeated despite having a perceived military advantage. This led to the decision by Commander-in-Chief General George Washington, to replace Gates with General Nathaniel Green, the leader he had wanted in the first place. Under Green and other patriot leaders, especially General Daniel Morgan, the tide of the war began to change.

South Carolina's Leadership

It has been documented by Dr. George D. Fields, Jr., former president of Spartanburg Junior College, and director of the South Carolina Military Heritage Project, that there were 254 battles and skirmishes in South Carolina, more than in any other colony. Following the war, there were more widows in South Carolina

than in other state. In the year 1780 alone, approximately 1,000 Americans were killed in the war, 66% of whom died in South Carolina. In that same year, approximately 2,000 Americans were wounded, 90% of whom fell in South Carolina. These figures do not include the number of loyalists from South Carolina who fought for the British. In the Ninety Six District following the war, there were approximately 1200 widows. To put this in context, one should remember that the entire population of all thirteen American colonies at the time of the War of Independence, was estimated at 4 million people, approximately the same size as South Carolina at the turn of the 21st Century.

South Carolina produced several outstanding leaders during the war, most notably, Francis Marion, Andrew Pickens, and Thomas Sumter, all of whom ultimately became generals. A monument to these three great leaders stands on the State House grounds in Columbia on the Sumter Street side of the Capitol.

There is a famous story, depicted in a painting which hangs in the nation's capitol. It depicts a young British Lieutenant, meeting General Francis Marion in his swamp hideout to negotiate a prisoner exchange. The British lieutenant was taken to Marion blindfolded. After a successful prisoner exchange negotiation, General Marion invited the British officer to join him and his men for dinner. This dinner consisted exclusively of baked sweet potatoes and branch water. Upon returning to his unit, this British lieutenant wrote to his superiors a letter in which he stated "I have met the great Marion. We negotiated a prisoner exchange. These men live in the swamp. They wear rags. They eat roots. They serve without pay. What chance have we?"

Meanwhile, back in London, opinions differed about what British policy should be toward the rebellious American colonies. British merchants questioned the purpose of the war when the cost of insuring their cargo rose by over 600% in 3 years. On April 7, 1778, William Pitt, the Younger, the first Earl of Chatham, and a member of the British House of Lords, made an impassioned speech on April 7, 1778, in which he stated, "My Lords, if I were an American, as I am an Englishman, while foreign troops were landed in my country, I would never lay down my arms -- never, never." It was Pitt who earlier led the Parliament to repeal the Stamp Act in 1766.

To show their appreciation, the South Carolinians raised £1000 and sent it to London for the creation and erection of a statute in honor of William Pitt. Because of his great support of the American cause, the American city of Pittsburgh, Pennsylvania bears his name. William Pitt never sat foot on American soil.

The Imprisonment of the Signers of the Declaration of Independence

Following the fall of Charleston in 1780, three of the South Carolinians who signed the Declaration of Independence, Arthur Middleton, Edward Rutledge and Thomas Heyward, Jr., were charged with treason and imprisoned in the British dungeon of the Provost Guard, now known as the basement of the Exchange Building in Charleston. The other signer, Thomas Lynch, Jr., had earlier perished in a shipping accident. These three young South Carolina lawyers were thereafter held in a British prison in Florida.

The Battle of Huck's Defeat

In his book, *Partisans and Redcoats*, Dr. Walter Edgar stated that one of most important events to rally support for the American patriot cause was the battle on June 12, 1780, at the Williamson Plantation in what is now York County. A British captain, Christian Huck, decided to make camp in the yard around the plantation home. Because he did not post adequate lookouts, the patriots were able to surround the Williamson plantation property by sneaking up during the night. Using split-rail fences to steady their aim, the patriots launched their attack at dawn. Captain Huck emerged from the house, wielding a sword, shouting, "You damn rebels better disperse or I will put every man of you to the sword." Thereupon Thomas Carroll, a sharp-shooting American back countryman fatally shot Huck in the head or neck. The patriots won overwhelmingly. As news of this huge victory spread, support for the patriot cause surged. This incident became known as the "Battle of Huck's Defeat."

The Battle of Cedar Springs

Coincidentally, the next day, another important battle occurred at Cedar Springs in the Spartanburg District. Jane Black Thomas, was the mother of a patriot officer and the wife of another officer who was ill and being held at the British fort in Ninety Six. She overhead women at the clothesline talking about a planned surprise attack the British would launch against her son's unit at Cedar Spring. Although she was over 60 years old, she seized and mounted a horse. She rode it bare-back over 60 miles to Cedar Spring to warn her son of the planned attack. Unfortunately, the poet William Longfellow was not around to celebrate her heroism by writing a poem as he did to immortalize the ride of Paul Revere.

Heeding the warning of his mother, Thomas and his troops built roaring bonfires at their camp site making it appear as if they were in camp. They hid in the nearby hillside, where they took up positions with their rifles. When the British arrived they found no one in the camp. The Americans, using the fires to illuminate their targets, picked off the British soldiers and won another substantial victory.

One of the advantages the American patriots had was the fact that their long hunting rifles were accurate up to 300 yards, whereas the British muskets with their bayonets were accurate only to about 100 yards. Of course, the hunting rifles were not capable of affixing bayonets.

Buford's Massacre or the Battle of the Waxhaws

Over six weeks before the Battle of Huck's Defeat and the Battle of Cedar Springs, Lt. Colonel Banastare Tarleton and his British legion, surrounded and defeated a band of Virginia volunteers near the South Carolina settlement known as the Waxhaws in present day Lancaster County. Refusing to accept Buford's surrender and ignoring their pleas for quarter, nearly all of these patriots were slaughtered. A term later used by the patriots in the war was "Tarleton's Quarter," meaning that prisoners would not be taken and that all enemy combatants would be killed. After the Battle of the Waxhaws, also known as "Buford's Massacre," Lt. Col. Tarleton wrote to General Cornwallis, and stated, "I summoned the corps – they refused my terms – I have cut 170 officers and men to pieces."

The Battle of Kings Mountain

Dr. Walter Edgar has recounted stories of many heroic South Carolinians, none more admirable than James Williams of the Ninety Six District. He was a well-read man who had books in his library on Magna Carta, as well as British law books. It is not known whether he considered himself to be lawyer. He wrote to his son, however, in 1779 and stated "I have been obliged to take to the field in defense of my rights and liberties and those of my children. I am not doing this as a matter of choice, but of necessity. I would rather suffer anything than to lose my birthright and that of my children." This letter captures the intense passion for liberty felt by Americans at this time. James Williams was killed in the Battle of Kings Mountain.

On October 7, 1780, the patriots won the Battle at Kings Mountain in Spartanburg County. The British forces were led by Major Patrick Ferguson, a Scotsman, known as the best marksman in the English army. Ferguson's army was surrounded as they made camp at the top of Kings Mountain. The Americans fought

their way to the top and ultimately killed Major Ferguson. A visitor today at the Kings Mountain battle field site can see Ferguson's cairn on top of the mountain. After he was killed, the Americans stripped Ferguson's body of all clothing and some urinated on his corpse.

The Battle of Cowpens

Soon after Kings Mountain, there was arguably the most important battle of the entire American War of Independence. This was the battle at Hannah's Cowpens in what is now Cherokee County. Among the heroes of Cowpens was General Andrew Pickens, appointed by Governor John Rutledge to lead the American force. General Pickens had earlier signed a parole pledging not to fight against British. He concluded he was legally and morally justified in abandoning that parole when his own property was attacked and destroyed by the British. He rode into a British camp and nobly advised the commander of his decision to revoke his parole. Because he was so well respected, he was allowed to ride out of the camp instead of being arrested and charged with treason or taken as a prisoner of war.

The American battle plan was to deploy their troops in three separate and parallel lines. The militia fired one or more rounds and then withdraw. It is believed that Lt. Col. Tarleton, thinking that this was another instance of Americans fleeing the battle field, rode recklessly into the trap which had been set. Referring to this battle, Dr. Walter Edgar wrote, "At Cowpens for the first time in the revolution, an American army defeated a force of mostly British regulars." It was at Cowpens that British regulars were seen to throw down their weapons and flee the battlefield.

The Crossroads

It has been documented by Dr. George L. Irwin, based on his study of contemporaneous correspondence and maps that the "Crossroads" referred to by both Tarleton and Cornwallis in their correspondence and in their post war memoirs was the intersection at the famous Wagon road running north and south intersected with the Indian Occaneechie Path which ran east to west. This intersection is on top of the hill in what is now the town of Chester, South Carolina. Dr. Edward Lee of Winthrop University, a noted scholar of this era, wrote in his book "The War was won in the South Carolina back country and Chester County is the heart of the back country." Within 45 minutes of Chester, there are nine battlefields of the American War of Independence.

Shortly after the Battle of Cowpens, Lord Cornwallis achieved perhaps a small victory at Guilford's courthouse in North Carolina. He then led his army of about 2500 men northward. At Yorktown, Virginia his army essentially depleted and lacking in supplies, became trapped on a peninsula. Cornwallis was unable to be resupplied by British ships from New York because of a French Naval blockade and the victory of the French Navy on September 5, 1781, at the Battle of Virginia Capes. Lord Cornwallis, upon surrendering his weakened army to General George Washington on October 19, 1781, was taken a prisoner of war. He was later part of a prisoner of war exchange where he was returned to the British in exchange for South Carolinian Christopher Gadsden who had been held in the Tower of London following his capture in Charleston.

The British Evacuation of South Carolina

Following the surrender at Yorktown, there were still British militia strongholds in South Carolina including the communities of Ninety Six and Georgetown. By the end of the year 1781, however, the British had either lost or abandoned those strongholds as well. In early 1782, the British evacuated Charleston, taking 5000 former slaves and 4200 loyalists with them back to England, to Bermuda, to Canada or to other British lands.

The Constitutional Convention

The Constitution Convention also known as the Federal Convention was the result of widespread concern for the weaknesses and deficiencies of the Articles of Constitution. After a failed meeting in Annapolis, Maryland in 1786, a new convention was called for May of 1787 in Philadelphia. A total of 73 delegates were selected from 12 of the 13 states. Rhode Island sent no delegates. 55 delegates attended all or part of the four-month long convention. Of those 55 delegates, 34 were lawyers. On September 17, 1787, 42 delegates were present. 39 of them signed the Constitution. Three of them refused to sign, primarily because there was no bill of rights in the Constitution at that time.

South Carolina Bar

Continuing Legal Education Division

Henry Laurens and John Laurens

Thomas R. Gottshall

Henry Laurens (1724 – 1792) and John Laurens (1754 – 1782)

Thomas R. Gottshall, Haynsworth Sinkler Boyd, P.A.

SUMMARY: Henry Laurens

- President of Commons House of Assembly (1775) and President of General Committee
- Vice President of South Carolina, under the Constitution of 1776
- Delegate to Second Continental Congress (1777 – 1778), President of Second Continental Congress from November 1, 1777 through 1778, and Signer of the Articles of Confederation
- Envoy to the United Provinces of the Netherlands, intercepted at sea, charged with Treason held in the Tower of London (1780 – 1781)
- Peace Commissioner in France to conclude with British and French the Revolution (1782 – 1783)

SUMMARY: John Laurens

- Attended Middle Temple, London (1774 – 1776)
- Aide to Washington; took part in numerous battles, including Brandywine and Germantown (September 1777), while his father was in Congress; also at Valley Forge and the Battle of Monmouth
- With Washington at Yorktown, where he negotiated Cornwallis surrender terms along with French officer
- Proposed arming black soldiers in exchange for their freedom
- On of last persons killed in the Revolution in 1782 at the Battle of the Combahee River, aged 27

CHRONOLOGY

1724: Henry Laurens born in Charleston
1744 - 1747 apprenticed to London Counting House of James Crokatt to learn business
1749: Solicited slave trade business in letters to four Liverpool merchants on behalf of Charleston firm of Austin & Laurens
1750: Married Eleanor Ball of Charleston, eventually having 13 children, 4 of which survive to adulthood
1757: First elected to SC Commons House of Assembly, and continuously until Revolution, except when in England
1762: Commenced business relationship with London merchant Richard Oswald, whose slave business involves the ownership of Bance Island in Sierra Leone near the Windward Coast of Africa; Oswald appears later to attempt help at Tower of London and as a Peace Commissioner for England
1769: Henry Laurens gave up the slave trade, his firm having sold perhaps 10,000 slaves into SC
1760s: Lots of turmoil between Commons House of Assembly and Royal Governor, including Wilkes Fund, Stamp Act, etc.
1771 – 1774: In England to see to education of children, who are there and in Geneva
1772: Lord Mansfield, Lord Chief Justice of the Court of the King's Bench issued ruling in case of Somerset v. Stewart which held that the Common Law of England did not support slavery, on

Petition for Writ of Habeas Corpus for a black being held on a ship and who was to be sold in the Caribbean

Trinity Term, June 22, 1772. Lord Mansfield:

The state of slavery is of such a nature, that it is incapable of now being introduced by Courts of Justice upon mere reasoning or inferences from any principles, natural or political; it must take its rise from positive law [statutory law]; the origin of it can in no country or age be traced back to any other source: immemorial usage preserves the memory of positive law long after all traces of the occasion; reason, authority, and time of its introduction are lost; and in a case so odious as the condition of slaves must be taken strictly, the power claimed by this return was never in use here; no master ever was allowed here to take a slave by force to be sold abroad because he had deserted from his service, or for any other reason whatever; we cannot say the cause set forth by this return is allowed or approved of by the laws of this kingdom, therefore the black must be discharged.

1775: Elected President of First Provincial Congress and President of General Committee of thirteen members of the legislative body, essentially holding an executive position
1776: Elected Vice President under the SC Constitution of 1776, which first uses the name General Assembly

1777:

- January 10: elected delegate for SC to Second Continental Congress in Philadelphia
- July 21: reaches Philadelphia
- September: Washington loses Battles of Brandywine and Germantown, outside of Philadelphia (John Laurens is with him and wounded at Germantown)
- September: Congress flees Philadelphia to York, Pa where it meets from September 30, 1777 to June 27, 1778)
- October 19: Gen Nathaniel Greene won the month long Battle of Saratoga with surrender of British Gen. John Burgoyne; parole of Burgoyne became an issue
- November 1: following resignation of John Hancock, Henry Laurens elected President of the Second Continental Congress
- November 15: signed Articles of Confederation in York, Pa (where for the first time "United States of America" was used), along with four lawyers from SC; not ratified until 1781
- Through 1778 as President of Congress, Laurens acted as country's executive: problems with Greene's leniency to Burgoyne (the Saratoga Convention), the Conway Cabal, review of expenditures of Silas Deane and Robert Morris; received dispatches from Washington

1780: Appointed to Congress as Envoy to United Provinces of the Netherlands; his ship intercepted on September 3; taken to Tower of London on October 6 on charges of Treason at Philadelphia and the high seas

October 19, 1781: Surrender of Lord Cornwallis at Yorktown; John Laurens appointed a negotiator to deal with Cornwallis (who ironically since 1779 had been the Constable of the Tower of London); Cornwallis gets to London, January 1782, after having embarked to travel to NYC on November 3

1781: On December 31, Henry Laurens paroled from Tower of London on grounds of poor health (Richard Oswald visited and suggested he apologize, which he did not do)(he was being held as a state prisoner and not a prisoner of war, to which classification he objected); Lord Mansfield issues a Writ of Habeas Corpus to the Warden of the Tower of London

1782: Final formal release of Henry Laurens on April 27, 1782 (formally exchanged for Cornwallis who had been paroled after Yorktown and was now in England; earlier idea of an exchange for Burgoyne had not worked out

August 27, 1782: John Laurens killed in SC at Battle of the Combahee River, aged 27

1782 – 1783: Henry Laurens recuperates his health and is back and forth between England and France as Peace Commissioner

November 1782: present for conclusion of preliminary talks and supports clauses regarding to fisheries and that the British not leave with slaves (had just learned of son's death); not present for formal signing, but is part of famous painting with John Jay, John Adams, Benjamin Franklin and William Temple Franklin, his grandson – secretary

December 8, 1792: Henry Laurens dies at Mepken plantation

CHILDREN OF HENRY LAURENS

- Mary Laurens married Dr. David Ramsay, famous SC historian of the Revolution: she read the New Testament in Greek with her sons and in French with her daughter
- Eleanor Laurens married Charles Pinckney on 18th birthday, April 27, 1788 (a signer of the Constitution and later governor several times of SC); she died four years later in childbirth; her son Henry Laurens Pinckney was eventually editor and owner of the Charleston Mercury

Bibliography For Henry Laurens and John Laurens

Books:

Edgar, Walter. South Carolina, A History. Columbia: University of South Carolina Press, 1998.

Massey, Gregory D. John Laurens and the American Revolution. Columbia: University of South Carolina Press, 2000.

McInnis, Maurie, ed. In Pursuit of Refinement, Charlestonians Abroad, 1740 – 1860. Columbia: University of South Carolina Press, 1999.

Moore, Frank. Materials For History printed From Original Manuscripts, With Notes and Illustrations. New York: The Zenger Club, 1861. (Republished by Forgotten Books: The Correspondence of Henry Laurens, of South Carolina).

Phillips, Kevin. 1775, A Good Year for Revolution. New York: Penguin Books, 2012.

Wallace, David Duncan. The Life of Henry Laurens, With A Sketch of the Life of Lieutenant-Colonel John Laurens. New York: The Knickerbocker Press, 1915. (Republished by Forgotten Books).

Articles and Other Sources:

Kelley, Joseph P. "Henry Laurens: The Southern Man of Conscience in History." In The South Carolina Historical Magazine, vo. 107, No. 2 (Apr., 2006, pp. 82-123).

Morgan, Kenneth. "Slave Sales in Colonial Charleston." In The English Historical Review, vol. 113. No. 453 (Sep., 1998, pp. 905-927).

Salley, A.S., Jr. "Delegates to the Continental Congress from South Carolina, 1774 – 1789." Columbia: The State Company, 1927.

Taylor, C. James. "Henry Laurens, February 24, 1724 – December 8, 1792." In South Carolina Encyclopedia. University of South Carolina, Institute for Southern Studies, 2016.

On line:

Account Book of Austin & Laurens, April 1750-December 1758, Beinecke Rare Book Library, Yale University, on line (digital copy of library original): https:brbl-dl.library.yale.edu/vufind/Record/3477172.

"Henry Laurens and the British Slave Trade to Charleston, SC., African Slavery and the House of Austin & Laurens. Category Archives: Charleston, South Carolina (Wordpress.com).
Rupert, Bob. "Henry Laurens' 15 Months in the Tower." In Journal of the American Revolution. (https://allthingsliberty.com/author/bob-ruppert/)

Various Wikipedia articles.

South Carolina Bar

Continuing Legal Education Division

Religious Tolerance in the Carolina Colony

Honorable Richard M. Gergel

OD

pressed misgivings about permit-
be wielded by the same set of fal-
ander James Carlyle, *A History of*
1 (Edinburgh: Blackwood, 1928).
82), in which the Supreme Court
: and sectarian power in an opin-
sing decisions concerning saloons

"A bright era now dawns upon us"

Jewish Economic Opportunities, Religious Freedom, and Political Rights in Colonial and Antebellum South Carolina

Richard and Belinda Gergel

By the dawn of the American Republic, in the year 1800, Jews had settled down the eastern seaboard, with significant Jewish communities in the major eastern cities of Philadelphia and New York. But the largest, most sophisticated, and probably most affluent Jewish community in the United States resided in Charleston, South Carolina. A number of Jews had also settled at that time in the port city of Georgetown, South Carolina, and in the early decades of the nineteenth century small Jewish communities were established in such inland South Carolina towns as Columbia, Sumter, and Camden. Prior to the Civil War, Jews were elected mayors of Georgetown three times and Columbia twice, and Jewish state senators and state representatives represented Charleston, Sumter, Chesterfield, and Kershaw counties. This chapter explores the remarkable origins of the Carolina colony as a haven of tolerance and opportunity for its early Jewish settlers and the subsequent development within South Carolina of one of America's most significant and politically active antebellum Jewish communities.

The "Darkness" of Old Europe

One cannot appreciate the Jewish attraction to the New World without understanding the extraordinary burdens and disabilities that Jews suffered in most European countries during the seventeenth and eighteenth centuries. A broad array of official and officially sanctioned discrimination and harassment against Jews was part of the fabric of European life. In Spain and Portugal, Jews faced the choice of exile, conversion, or death in the notorious Inquisitions of the late 1400s and early 1500s. Many Jews lived in those countries as supposed converts to Christianity. Known as Marranos, these "secret Jews" practiced their religion by stealth with the sure knowledge that, if discovered, they could face terrible punishment, including death. Jews in Italy were mostly confined involuntarily to ghettos and lived under the wrath of the

Catholic Church's unabashed anti-Semitism. In April 1775, two weeks after the beginning of the American Revolution, Pope Pius VI issued an edict prohibiting any Jew of Rome to be outside the Jewish ghetto for even one night. This same edict forbade any Jew to engage in any form of business or commerce outside the ghetto.[1]

Jewish life in Germany was also dismal. As late as the eighteenth century, Jews in Frankfurt were confined to the ghetto, and the gates were locked each evening and on Sundays and holidays. Jews were forbidden to be members of any guild or to work as merchants. A special "body tax" was placed on all goods, animals, and Jews passing through the ghetto gates of Dresden in 1776. As a result, the celebrated philosopher Moses Mendelssohn, on a visit to the city, was taxed as if he were "a Polish ox." Jews in Austria were required until 1781 to wear a badge identifying themselves as Jews. Moreover, Austria required synagogues to allow Christian missionaries at will to proselytize during Jewish religious services. When one synagogue on Yom Kippur Eve, the holiest day of the Jewish year, threw a minister out of its sanctuary, the Austrian authorities responded by destroying the synagogue and branding and exiling its leaders.[2]

England and Holland provided a measure of tolerance for their Jewish citizens and allowed Jews to engage in a broad range of business and commerce. But even in these countries, bastions of religious liberty in an otherwise hostile Europe, Jews were viewed as aliens and mostly lived in sections of town separated from their Christian neighbors. Indeed, Jews were not allowed to be citizens of England until 1740. Many Jews came to London during this era from other parts of Europe, acquired a command of English, and set sail for the English colonies in the West Indies as well as the new American colonies. The hope of these Jewish immigrants, as well as the other immigrant religious dissenters of this era, was to escape the intolerance and narrow-mindedness of Old Europe, particularly the dominating and unceasingly hostile role of the established churches against nonbelievers.[3]

An Island of Religious Tolerance

In 1663 King Charles II of England granted to eight English noblemen a massive tract of land lying between the Virginia colony and the Spanish settlement in Florida. This land grant, known as the Charter of Carolina, was in appreciation for the role these men, now known as the Lords Proprietors, had played in Charles II's ascendency to the throne in 1660, following the execution of his father, Charles I, during the Commonwealth period of British history. From the beginning the Lords Proprietors viewed the colony as a business proposition, and there was little of the religious fervor and mission that was associated with the establishment of many of the other colonies, such as the Massachusetts Bay Colony. The key question for the Lord Proprietors was how to persuade residents of Europe or the early colonies of the New World to set sail for the vast and undeveloped wilderness of Carolina. An obvious and promising source of potential settlers was religious dissenters, who often found themselves in unending battles with the established churches of their home countries.[4]

il 1775, two weeks after the begin-
ued an edict prohibiting any Jew
ıe night. This same edict forbade
nerce outside the ghetto.[1]
ıs the eighteenth century, Jews in
es were locked each evening and
members of any guild or to work
ll goods, animals, and Jews pass-
s a result, the celebrated philoso-
taxed as if he were "a Polish ox."
badge identifying themselves as
ɔw Christian missionaries at will
n one synagogue on Yom Kippur
ster out of its sanctuary, the Aus-
gogue and branding and exiling

:ance for their Jewish citizens and
and commerce. But even in these
rwise hostile Europe, Jews were
n separated from their Christian
ens of England until 1740. Many
arts of Europe, acquired a com-
s in the West Indies as well as the
immigrants, as well as the other
:ape the intolerance and narrow-
ting and unceasingly hostile role

ht English noblemen a massive
he Spanish settlement in Florida.
was in appreciation for the role
played in Charles II's ascendency
his father, Charles I, during the
beginning the Lords Proprietors
ere was little of the religious fer-
ɔlishment of many of the other
e key question for the Lord Pro-
ɔr the early colonies of the New
ıess of Carolina. An obvious and
ssenters, who often found them-
rches of their home countries.[4]

This pragmatic need and desire to lure Dissenters to the Carolina colony coincided with the selection of Anthony Ashley Cooper, Lord Ashley (later Earl of Shaftesbury), as the leader of the Carolina colony enterprise. Ashley, one of the most skilled and thoughtful public figures of his day, employed his close friend and confidant, John Locke, to serve as chief secretary of the Carolina colony project. Locke was one of the most brilliant and original political philosophers of his time and, along with Lord Ashley, a champion of religious tolerance. Driven by the pragmatic desire to recruit new settlers to the wilderness of Carolina and by the idealism of the Enlightenment, Locke participated in drafting the Fundamental Constitution of the Government of Carolina in 1669. In a world of seemingly unremitting religious strife, the Fundamental Constitutions reflected an extraordinary sentiment of inclusiveness and tolerance essentially unknown at that time.[5]

The Fundamental Constitution of July 21, 1669, provided that any seven or more persons "agreeing in any Religion, shall constitute a church or profession." This straightforward grant of the right to organize any religion was accompanied by prohibitions against the disturbing of "any Religious Assembly" and the "use of any reproachful, Reviling, or abusive language" against any religion. Leaving no ambiguity regarding their target audience, the Lords Proprietors expressly provided these protections to "heathens, Jews, and other dissenters from the purity of Christian Religion."

These remarkable provisions were justified on two separate and independent grounds. First, there was the practical problem that settlers from different places would "unavoidably be of different opinions concerning matters of religion," and tolerance was necessary so that "civil peace may be maintained amidst diversity of opinion." Second, the drafters expressed the hope that these Dissenters "from the purity of Christian Religion" might come to Carolina and have "an opportunity of acquainting themselves with the truth and reasonableness of its doctrines." This seeming openness to Jews and dissenting Protestant groups did not extend, however, to Catholics, who faced significant social and legal adversities in early colonial South Carolina.[6]

The striking and explicit reference in the Fundamental Constitutions to Jews and the protection of their right to worship has caused some scholars to speculate that these provisions were a not-so-subtle effort to recruit to the Carolina colony members of the Barbados Jewish community, who by this time were thought to monopolize the very lucrative trade on the island. Jews then constituted 54 of the 404 households on Barbados and obviously possessed skills and knowledge in establishing international trade and commerce that would have been invaluable to a new colony in Carolina. Whether Barbadian Jews actually came to Carolina in the early days of the settlement is not known, but clearly immigrants from Barbados were a part of the colony's early population.[7]

The Fundamental Constitutions did not lead to a rush of immigration to Carolina. Charleston, the colony's first town, was founded only a year after the first

Fundamental Constitution was drafted, and its initial development was not rapid. But events across Europe in the late seventeenth century had led many Dissenters to explore New World settlement, and the word that Carolina was open and accepting to Dissenters spread widely. Indeed, after King Louis XIV of France revoked the Edict of Nantes in 1685, effectively eliminating freedom of religion for the French Huguenots, significant numbers of them immigrated to the Carolina colony.[8]

Although the Fundamental Constitutions were never formally adopted by the colonists, their significance to the colony's development was substantial. Jacob Rader Marcus, the preeminent twentieth-century scholar of American Jewish history, referred to the Fundamental Constitutions as "a document without counterpart elsewhere in the North American colonies, which provided specifically—and liberally—for Jews." Rabbi Barnet Elzas, in his early *Jews of South Carolina* (1905), described the Fundamental Constitutions as a "veritable Magna Charter of liberty and tolerance." More recently, James Hagy, in his definitive history of Charleston's early Jewish community, noted that while the colonists never ratified the Fundamental Constitutions, the document provided the basic law of the colony for thirteen years and "set the tone for religious interactions in Carolina." James Underwood, in his exhaustive four-volume history of South Carolina's constitutions, notes that the Fundamental Constitutions struck a "tolerant note" and "encouraged a climate of tolerance." Simply stated, the Fundamental Constitutions represented the first time in human history that religious liberty was made a constitutional right.[9]

By the 1690s, Dissenters, particularly French Huguenots and Jews, were present and actively engaged in the life of the Carolina colony. The first documented presence of a Jew in South Carolina was a translator for then Gov. John Archdale, presumably a Sepharidic Jew (one of Spanish or Portugese origin), who assisted the governor in 1695 in communicating with Indians from the Spanish colony of Florida. Legal developments, both in the English Parliament and in the colonial legislature, provided further assurances of broad economic opportunities for religious minorities. In 1696 a proposal came before Parliament to exclude all non-British-born subjects from trade within the colonies. For Jews and Huguenots, then becoming among the leading traders and merchants in Charleston, this was a potentially devastating blow. A group of London-based Jews and Huguenots intervened with parliamentary leaders, and the proposal quickly died.[10]

Perhaps recognizing the fragility of their legal position, sixty Huguenots and four Jews jointly petitioned the governor of the Carolina colony the following year, 1697, for citizenship rights. Gov. Joseph Blake endorsed the petition and recommended adoption in an address to the colonial legislature. The legislature responded by adopting legislation granting citizenship rights to all aliens, their wives, and children, regardless of their nation of origin. The legislation noted that a number of Dissenters petitioning for citizenship had come to the colony for religious freedom. Shortly thereafter, colonial records reflect that two Charleston Jews, Simon Valentine and Abraham Avila, were issued citizenship papers. It is notable that citizenship rights for

Jews in the Carolina colony were granted more than forty years before such rights were given to Jews residing in England.[11]

Establishment of the Church of England and Limitations on the Franchise and Office Holding

In the early 1700s, significant tensions arose between the Anglicans and other Protestant denominations over the standing and prerogatives of the Anglican Church. After a particularly vituperative 1703 election, in which certain Dissenter groups complained of electoral fraud and misconduct by the Anglicans, the colony's legislature was convened on short notice by Gov. Nathaniel Johnson in May 1704 to consider legislation that required members of the legislature to take the sacrament of communion in accord with the rites of the Anglican Church. Since the nature of communion was a major point of contention between Anglicans and dissenting Protestant groups, this legislation was designed to exclude Christian Dissenters from the colonial legislature. The legislation passed 12 to 11, with seven members absent. The battle soon crossed the Atlantic, with the House of Lords requesting that the queen veto the bill. Eventually, the queen referred the matter to the Board of Trade, which declared the act null and void.[12]

The Anglicans, now holding a majority of the seats in the colonial legislature, moved in November 1704 to make the Church of England the established church of the colony. The same act had no religious qualification for voting but prohibited aliens from voting or holding office. Since a significant number of the Dissenters—and many of the Jews—were not British subjects, this legislation effectively eliminated their right to vote or hold office. The legislation reaffirmed the right, however, of aliens to own property and engage in commerce. Subsequent electoral legislation in 1716, 1721, 1745, and 1759 required all voters and officeholders to be professing Christians.[13]

What significance did these eighteenth-century legislative acts limiting the right of franchise and the holding of public office have on the lives and opportunities of the Jews of South Carolina? While the electoral limitations seem strikingly out of character with earlier constitutional and legislative provisions, the fact of the matter is that they had minimal impact on the colony's Jewish citizens. At the time of the adoption of the first of the offensive election-law changes in 1704 (and until South Carolina elected its first Jewish officeholder in 1774), no Jew in human history had been elected to public office anywhere. The real issue for South Carolina's early Jewish community—and its potentially future Jewish immigrants—was economic opportunity, and at no time were Jews denied the right to own property, engage fully in commerce, or make contracts. South Carolina was and remained a place Jews could do business. Furthermore, despite the Anglican Church's effort to obtain establishment status, Jews were never harassed or prevented from organizing religious services, practicing their customs, or operating synagogues. Indeed, despite these electoral-law restrictions on Jewish suffrage and office holding, Charleston's Jewish

population grew steadily throughout the eighteenth century, making the city by the year 1800 the largest and most vibrant center of Jewish life in North America.

Charleston as a Major Center of Jewish Life

In the first half of the eighteenth century, Charleston was transformed from a small port town on the edge of a wilderness into a bustling and growing city with great economic opportunities. For Jews seeking a welcoming location for immigration, there were, practically speaking, few options at that time. As Jacob Rader Marcus noted, "south of New York, in effect, there was no place which appealed to Jews until Charleston rose and opened her doors to them."[14] Jews initially arrived in small numbers and engaged primarily in trade and commerce. It is, therefore, not surprising that the four Jews who petitioned for citizenship in 1697 were merchants. By 1715 Jewish merchants were engaged in shipping kosher beef out of Charleston Harbor to Jewish settlers in other communities. The pace of Jewish immigration quickened in the 1730s and 1740s, as Charleston grew into the South's largest city, with upwards of seven thousand residents.[15]

As the South Carolina colony grew and thrived, Jews in London associated with the city's major synagogue, Bevis Marks, began to explore the possibility of creating a Jewish settlement in Carolina. Beginning in the 1730s and continuing in fits and starts for the next two decades, these efforts never led to the establishment of a distinct Jewish settlement. However, these Bevis Marks colonization activities apparently did result in the arrival of a group of London Jews in Charleston during the 1730s under the leadership of Moses Cohen (who played a leadership role in the next two decades in establishing the colony's first synagogue) and the purchase of one hundred thousand acres of land by London merchant Joseph Salvador in the Ninety-Six District of South Carolina. This land, known popularly as the "Jews Land of South Carolina" and lying near the modern-day town of Greenwood, never was used as a Jewish colony, although Joseph Salvador himself moved onto the land in an apparent effort to settle this vast area of inland South Carolina. As an interesting historic footnote, Joseph Salvador's nephew, Francis Salvador, was elected from the Ninety-Six District as a member of South Carolina's First Provincial Congress in 1774, marking the first time a Jew was elected to public office.[16]

The growth of Charleston's Jewish community, totaling perhaps twelve households in 1749, created sufficient numbers for the minyan of ten adult males necessary to conduct Jewish religious services. In or around 1749 (the precise date being somewhat in dispute), the Jewish community of Charleston formed a congregation, which was to become known as Kahal Kadosh Beth Elohim ("The Holy Congregation of the House of God"). The congregation met in its early years in a small wooden home near Queen Street in downtown Charleston and followed the strictly orthodox protocol for services of the Minghag Sephardim, a prayer book generally followed by Spanish and Portuguese Jews. The Charleston synagogue, from its inception, was closely aligned with the Bevis Marks Synagogue of London, then one of the major centers of Jewish learning in the world. Bevis Marks provided much of the prayer

liturgy and order of service (conducted primarily in Spanish and Hebrew) and later arranged for the congregation's early prayer leaders. In fact, the influence of Bevis Marks on the early days of Beth Elohim was so profound that, when the congregation finally constructed its first synagogue in 1794 on Hasell Street, it built a nearly exact replica of the Bevis Marks London sanctuary.[17]

Charleston's port expanded rapidly during the 1750s and 1760s, becoming one of the busiest ports in the New World. By the 1770s, the city's population had grown to ten thousand, and signs of great wealth were emerging. One visitor to Charleston during this time observed that "in general . . . the grandeur, splendor of buildings, decorations, equipages, numbers of commerce, shipping, and indeed in almost everything, it far surpasses all I ever say or ever expect to see in America." Charleston's Jewish community also grew during this period, totaling by the time of the American Revolution perhaps two hundred persons and forty to fifty households. Jewish merchants were actively engaged in shipping and trade; some had ties to trade in Curacao, the British West Indies, Barbados, and Havana. Other merchants began expanding up the Carolina coast and into the backcountry. In 1761 two Charleston Jews, Phillip Hart and Samuel Isaacs, sailed into Winyah Bay and opened a business in Georgetown.[18]

Charleston's Jews began organizing more substantial communal organizations, reflecting the growing size and affluence of the community. The initial prayer leader of the congregation was Moses Cohen, who apparently had some religious training and ties to Bevis Marks. Cohen was an unpaid volunteer who made his living as a shopkeeper. Cohen served the congregation until his death in 1762 and was succeeded by another volunteer reader and businessman, Isaac Da Costa. When Da Costa resigned his position in 1764 over some internal quarrel within the congregation, the synagogue's leaders turned to Bevis Marks for a professional replacement. In August 1766, Abraham Alexander, the son of the Bevis Marks rabbi, arrived in Charleston. Alexander was the Congregation of Beth Elohim's first salaried prayer leader and was titled its hazan, which was roughly equivalent to the present-day role of the rabbi. Alexander served the congregation until 1784. According to Jacob Rader Marcus, with the selection of Alexander as hazan, "the congregation had acquired a full complement of officials, both honorary and paid; it had emerged a fully developed community in every sense of the word."[19]

Charleston's Jewish community developed other organizations to support communal life. In 1754 Isaac Da Costa established a Jewish cemetery. This was followed in 1784 by the creation of the Hebrew Benevolent Society, which was the first Jewish charitable organization of its kind in America. According to James Hagy, the establishment of the Hebrew Benevolent Society told the greater community "that the Jews intended to take care of their own people." The society would later play a significant role in various public disasters, most notably several yellow-fever epidemics in the antebellum era. In 1801 Charleston Jews formed the Hebrew Orphan Society, which had a long and noble history of helping orphans and needy children within the Jewish community. The Orphan Society's aid was reportedly extended to the

near-destitute Charleston shopkeeper's son Judah Benjamin, who would later attend Yale University and serve as a U.S. senator from Louisiana and secretary of state of the Confederacy.[20]

By the early 1790s, Charleston Jews were ready finally to build their own synagogue, befitting what was fast emerging as one of the New World's premier Jewish communities. Designed as a near model of the legendary Bevis Marks Synagogue of London, the striking building was located on Hasell Street, right off bustling King Street. The cornerstone of the building was laid in 1792, and the synagogue was consecrated in 1794 to great fanfare that included various civil, religious, and political figures of Charleston. The interior of the sanctuary contained a centrally located reading desk, traditional with Sephardic worship, and balconies for women to separate the sexes in accord with orthodox religious practices. The synagogue served the community until 1838, when the notable structure burned to the ground.[21]

By 1800 Charleston had the largest Jewish population of any city in America, with perhaps as many as six hundred Jewish residents. Charleston maintained its status as having the largest Jewish population in America for at least two decades, with one scholar noting that one-third of all Jews in America in 1818 lived in the lowcountry of South Carolina. For all practical purposes, Charleston at the turn of the nineteenth century had become the unofficial "Jewish capital of America," with one historian describing the city's Jewish community as "the largest, most prosperous, and probably most sophisticated Jewish community in the New World." This prosperity, both in Charleston generally and in the Jewish community, declined after 1830 as the development of the steamship made Charleston less critical in the world of international shipping.[22]

As the Charleston Jewish community grew and prospered, with many of its members now native-born Americans, questions arose regarding the strict Sephardic prayer service followed at Beth Elohim, all of which was in two foreign tongues, Spanish and Hebrew. In December 1824, a group of forty-seven Charleston Jews petitioned the leadership of Beth Elohim regarding the need to reform the traditional religious service. In particular, the group advocated the use of English to promote a "more rational means of worshiping." The group, headed by playwright and intellectual Isaac Harby, was obviously influenced by reform movements being advanced in major European Jewish communities of Holland, Germany, and Prussia. When the Beth Elohim leadership was dismissive of the petition and refused even to respond to it, the group left the congregation en masse and formed the Reformed Society of Israelites in 1825.[23]

The Reformed Society began conducting religious services that departed dramatically from the traditional Sephardic rituals. Services were predominately in English and included a sermon, then unknown in Jewish practice. The religious service included a choir, hymns, and musical instruments, and reportedly the men did not wear head covers. The Reformed Society continued for approximately a decade, with the group dissolving and its members returning to Beth Elohim, where they effectively took over the congregation with constitutional changes adopted in 1836. With

the ascendency of the reformers within the Congregation of Beth Elohim in 1836, Charleston became the first Reform synagogue in America, predating the establishment of Reform congregations in Baltimore and New York by nearly a decade. Many of the modes of worship and liturgical styles first introduced in Charleston by the Reformed Society soon swept other parts of the country and provided the foundation of the first genuinely American Jewish movement, Reform Judaism, which today is the largest denomination of Judaism in the United States.[24]

Participation in the Political Process

As the American Revolution approached, Jews in South Carolina had realized an unprecedented level of financial success and social acceptance, yet they remained subject to colonial statutes limiting the right to vote and hold office to Protestants. Some scholars have suggested that it is likely these restrictions were frequently ignored since it would be difficult to believe that some of the state's most successful and respected businessmen were barred from the polls. They note, quite accurately, that when Francis Salvador was elected to the First Provincial Congress in 1774, and reelected the following year to another term, he was allowed to take office without incident, despite the statutory requirement that all officeholders be of the Protestant faith.[25]

The persistence of religious qualifications for voting and holding office became even more indefensible when members of the Jewish community enthusiastically responded to the call of arms of the colonists against the British in the Revolutionary War. Jews of South Carolina, in proportion to their numbers, had more officers in the revolutionary cause than their fellow Jews of the twelve other states. One company had so many Jewish volunteers that, although the majority of solders were Christians, it was dubbed the "Jew Company." Most prominent of the Jewish patriots for the revolutionary cause was State Representative Francis Salvador, who in addition to being the first Jew in human history to be elected to public office, was also a member of his local militia. While riding on an expedition battling Indians aligned with the British, Salvador was shot three times and then scalped while still alive. His death on July 31, 1776, made him another "first"—the first Jew to die in the cause of American independence. One Jewish veteran of the Revolutionary War later observed that the "conduct of the Hebrews during the late revolution" with "their steady adherence to the American cause" was "substantial proof of their patriotism and attachment."[26]

Even with the enthusiastic support of the Jewish community for the cause of American independence, religious qualifications persisted following the Declaration of Independence. In 1776 South Carolina's first Constitution as an independent state maintained existing requirements that voters and officeholders be members of the Protestant faith. The religious test for voting was eliminated two years later in the Constitution of 1778 and was replaced by a requirement that the voter believe in God and own at least fifty acres of land. The religious test for public office holding persisted, however, both in postrevolutionary South Carolina and in all twelve other states.[27]

The striking durability of the religious oath requirement for public officeholders finally succumbed to the idealism surrounding the federal constitutional convention of 1787. Charles Pinckney of South Carolina proposed to the convention what was to become Article 6, section 3. His proposal, which varied slightly from the version finally adopted, provided that "no religious test or qualification shall ever be annexed to any oath of office under the authority of the United States." Pinckney explained to the delegates that the abolition of religious tests is "a provision the world will expect from you, in the establishment of a System founded on Republican Principles, and in an age so liberal and enlightened as the present." The section was adopted by the convention by a large margin and, while vigorously debated in some states' ratification conventions, did not ultimately interfere with the formal adoption of the Constitution.[28]

A new state constitutional convention, convened in 1790, was obviously influenced by the vigorous advocacy of Pinckney, who was by then governor, against all forms of religious tests or oaths. The new state Constitution of 1790 eliminated all religious tests or requirements for voting and holding office and guaranteed that "the free exercise and enjoyment of religious profession and worship, without discrimination or preference shall forever hereafter be allowed within this State to all mankind." The 1790 Constitution further authorized the incorporation of religious groups. Shortly after its adoption, Beth Elohim petitioned for and was granted incorporation status. With the adoption of the 1790 Constitution, South Carolina eliminated the last vestiges of electoral disabilities of non-Protestant voters and office seekers.[29]

Although the removal of the religious oath requirements for office holding did not result in the immediate election of Jewish public officials, there is no question that Charleston's substantial and sophisticated Jewish community was becoming increasingly assimilated and accepted by the larger Christian community. Moreover, as inland South Carolina began developing in earnest during the early decades of the nineteenth century, Jewish businessmen were often among the early and active leaders of these communities. When the state legislature established Columbia as the new state capital and authorized an auction of the new town's lots in 1786, seven Charleston Jews were among the purchasers. Jewish businessmen were an integral part of the early business activities of Columbia, and the new state capital became very rapidly a second center of Jewish life in South Carolina. By 1830 Columbia had the highest concentration of Jews to the total population of any city in the United States and had a number of Jewish physicians practicing within the town. Jews had long been part of the life of the pre-Revolutionary War port town of Georgetown and were by the turn of the nineteenth century prominent members of the town's business and civic community. Jewish attorneys had also migrated to Sumter and Camden by the 1820s and were respected voices in the public affairs of those inland communities.[30]

With this widespread tolerance and acceptance of Jewish businessmen and professionals across South Carolina in the early nineteenth century, it, at first, seems hardly surprising that Jews soon began seeking and being elected to public office. It is notable, however, that except for South Carolina, none of the original thirteen states

experienced any widespread election of Jews to public office during the antebellum era. Moreover, in the only other state with any significant number of Jewish elected officials before the Civil War, Louisiana, many of the most prominent Jewish officeholders were natives of South Carolina.[31]

In 1810 Myer Moses, a prominent Charleston businessman, banker, and major in the militia, was elected to the South Carolina House of Representatives. Moses was an active member of the Jewish community of Charleston and an outspoken advocate of Jewish immigration to South Carolina. His son, Franklin Moses Sr., an attorney, established his law practice in Sumter during the 1820s and in 1842 was elected to the South Carolina State Senate from Sumter County, where he would serve for two decades as one of the state's most powerful public officials. Franklin Moses Sr. later was elected a circuit judge and in 1868 became the first Jewish chief justice of any state supreme court.[32]

Franklin Moses Sr. was by no means the only Jewish South Carolina state senator elected during the antebellum era. Chapman Levy, an attorney, businessman, and veteran of the War of 1812, was elected to the South Carolina House from Kershaw County in 1829 and was thereafter elected to represent the county in the State Senate in 1836. Levy was an unapologetic Unionist and vigorously defended the Union during the Nullification Crisis of the 1830s. Levy was also active in nearby Columbia, where he owned a substantial brick business, headed the local masons' lodge, and participated in the founding of Columbia's Jewish burial society in 1822. In fact, the burial place of Levy's first wife, Flora, is the oldest recorded grave in Columbia's historic Hebrew Benevolent Society Cemetery.[33]

Moses Cohen Mordecai of Charleston followed Levy's path to State office, serving first in the House and later winning election to the State Senate. Mordecai was a businessman, international trader, and shipowner. His election as Charleston's senator is particularly notable because in that era political power rested in the General Assembly. (The governor was elected by the General Assembly and had no veto power.) Furthermore, each county had but one senator. Charleston was then by far the state's largest and wealthiest city, and the office of Charleston County senator was a position of great power and prestige. When the city of Columbia (the hometown of Mordecai's wife, Isabella) was burned following Gen. William Tecumseh Sherman's capture of the state capital in February 1865, Mordecai was summoned to assist in directing the city's relief efforts.[34]

Another sign of early acceptance of Jewish public officials was the 1817 election by the General Assembly of Lyon Levy as the state treasurer, a post he held for five years. Levy, a native of England and a member of the board (*adjunta*) of Kahal Kadosh Beth Elohim Synagogue, was a longtime employee of the Treasurer's Office, where he started as a lowly clerk in 1806. Obviously Levy's election as state treasurer was a source of great honor for him and his family, as reflected by the reference on his tombstone that his election was "a reward for his integrity."[35]

Philip Phillips, a native of Charleston, began his law practice in Chesterfield County, a rural area near the North Carolina border. Phillips was elected in 1834 to

the South Carolina House representing Chesterfield County and served one term. He thereafter moved to Mobile, Alabama, where he was elected to the U.S. Congress. Described by Elzas, as "perhaps the greatest native-born American Jew," Phillips subsequently remained in Washington following his service in Congress (except during the Civil War) and became one of the premier appellate-court lawyers in America, handling more than four hundred cases before the U.S. Supreme Court. On his death, the U.S. Supreme Court Bar paid tribute to Phillips, noting that he was "by common consent, one of the greatest" and "the personification of the ideal of a great lawyer."[36]

Although Jews served in the General Assembly throughout the antebellum era, representing counties from Charleston to the most inland, isolated communities, it is arguable that their greatest impact was at the local level, where Jewish members of local governments became a relatively common feature of South Carolina political life. Georgetown, the second oldest Jewish community in South Carolina, elected its first Jewish mayor, Solomon Cohen, in 1818. This was followed by the election of Abram Myers in 1826 and Aaron Lopez in 1836. Columbia elected a local merchant, Judah Barrett, to city council in 1827, and Dr. Mordecai Hendricks DeLeon was elected to the first of two terms as mayor in 1833. Dr. DeLeon, one of the city's most respected physicians, reportedly had Columbia's finest personal library and was a protégé and confidant of South Carolina College's brilliant and outspoken president Thomas Cooper. Nearly twenty years after Dr. DeLeon's election, in 1850, Columbia elected a second Jewish mayor, Columbia businessman Henry Lyons. Additionally, in nearby Camden, a pre–Revolutionary War town, Hayman Levy was elected mayor in 1843.[37]

The widespread electoral success and social acceptance of Jews in South Carolina in the pre–Civil War era, while impressive, cannot obscure the presence of some discriminatory attitudes and intolerance toward Jews during this time period. Some of this can be seen in the credit reports prepared during this era by the R. G. Dun Company. Local correspondents collected these reports with the presumption that they were confidential. Jewish merchants were routinely identified by their religion and a number of the reports contained disparaging stereotypes. One report characterized a business as "a little Jew shop," and another observed "as you know, Jews are sometimes slippery." A report concerning a successful Columbia merchant, Lipman Levin, referred to him as "a sharp, keen, shrewd Jew . . . just as sharp as a razor" but concluded that "if he were not a Jew, I should be willing to trust him."[38] These attitudes did not, however, significantly impair the ability of the Jewish businessmen to succeed in, and in many instances dominate, areas of the mercantile trade in Charleston, Columbia, and on the main streets of numerous South Carolina small towns.

One area of considerable sensitivity to Jewish merchants was the Sunday closing laws, which were designed to require the cessation of all business and trade on the Christian Sabbath. Many of the Jewish merchants of this era closed their stores on Saturday, the Jewish Sabbath, and found the requirement to be closed on Sunday as well an unjust economic burden in violation of the state constitutional guarantee of the "free exercise and enjoyment of religious profession and worship, without

crimination or preference." The Sunday-closing laws were adopted from the earliest days of the colony, an interesting fact in light of the colony's tradition of religious tolerance. In fact, Law Number One, adopted by the South Carolina legislature in 1682, required the observance of the Sabbath on Sundays. This act was ratified and expanded in 1685 and 1712.

Suffice it to say, this was an issue that Jewish merchants and their Christian neighbors saw in fundamentally different ways.[39] From a formal legal standpoint, the issue arose with some intensity first in Columbia, in 1833, when city council adopted an ordinance requiring the closing of businesses on Sunday and prohibiting trade with persons of color on that day. Jewish merchants loudly objected to the proposed ordinance, and then many ignored its closing requirements. This led to the arrest of three businessmen, two of whom were Jewish. A trial was conducted by city council, and all three were convicted. Among those charged and convicted was Alexander Marks, a prosperous merchant and brother of a prominent Columbia physician and educator, Dr. Elias Marks.

Marks challenged his conviction in court, asserting that it violated his guarantee of freedom of religion and freedom from religious discrimination found in Article 8 of the South Carolina Constitution. The court rejected Marks's argument and upheld the Sabbath closing law on the dubious basis that the prohibition or all labor and commerce on Sunday was unrelated to the Christian Sabbath.[40] The Sunday Sabbath prosecutions reverberated through Columbia's next municipal election, in which a competing slate of candidates included two Jewish businessmen for council seats. One of the protest candidates, Henry Lyons, won his council seat. This began Lyons's longtime service as an elected city official, ultimately culminating in his election as Columbia's second Jewish mayor in 1850.[41]

The issue of Sunday closing laws surfaced again in Charleston in 1845, when an Orthodox Jew, Solomon Benjamin, operating a business on East Bay Street, was arrested for selling a pair of gloves to a customer on Sunday. There was also the allegation that he showed the customer other merchandise, including pantaloons. The matter was tried before a Charleston city recorder, who concluded that the city did not have the authority under the 1790 State Constitution to adopt a broad ban on business activity on the Christian Sabbath. The city appealed the decision to the South Carolina Court of Appeals, which reversed the court decision on what the appellate court itself described as a "Christian construction" of the State Constitution. The Court of Appeals ultimately concluded, like the earlier court in the Columbia case, that there was no discrimination because all religions were compelled to close on Sunday. The Sunday closing laws, also known as "blue laws," continued essentially unchanged in South Carolina until they were relaxed in 1983.[42]

While many even today differ on whether enforcement of Sunday closing laws constitutes an act of intolerance toward Jews or a show of respect toward the Christian majority, the conduct of Gov. James Hammond following the issuance of the governor's 1844 Thanksgiving Day proclamation unquestionably constituted a disturbing episode of virulent anti-Semitism inconsistent with the normal civil discourse

of that era on such matters. At that time there was no set day to celebrate Thanksgiving. Instead, in South Carolina, the governor would annually issue a proclamation urging the citizens to participate in a particular day of prayer and thanksgiving. When Gov. Henry Middleton issued a proclamation in 1812 urging all Christian ministers to have religious services honoring a day of thanksgiving, leaders of Beth Elohim in Charleston wrote the governor complaining that their omission was an insult to the Jewish community. Governor Middleton respectfully responded that the wording of his proclamation had been an "oversight" and he requested that the Congregation of Beth Elohim join other religious groups in a setting aside the day of prayer and thanksgiving. The congregation accepted the governor's explanation and conducted religious services on the specified day of thanksgiving as requested.

Thirty-two years later, in 1844, Gov. James Hammond issued a Thanksgiving Day proclamation asking all citizens to set aside a day to "offer up their devotions to God the Creator, and his son Jesus Christ, Redeemer of the World." Leaders of the Charleston Jewish community initially attempted to approach Governor Hammond informally about the proclamation, but he ignored their efforts. Finally the community prepared and publicly issued a statement attacking Hammond's proclamation for its insensitivity and lack of appreciation of the state's traditions of religious tolerance. The statement concluded by observing that it was a good thing that his days in office were "about to expire."[43] In fact, as this controversy over the proclamation simmered, Hammond found himself in a extraordinary personal and political crisis over an allegation by his late wife's family, the Hamptons, that he had sexually abused his four teenage nieces. As his term as governor ended, Hammond was under threat from the father of his nieces, none other than Wade Hampton II, one of America's wealthiest men, and Hampton's sons, who warned they intended to "horsewhip" him if they found him in Columbia, because of the shame he had inflicted on the Hampton girls and their family.[44]

In Hammond's last days in office, he responded to the public statement of the Charleston Jewish community by claiming that their goal was to remove the name of Jesus Christ from the official communications of the government. Hammond stated that the Jews should understand they lived in a "Christian land" and that he was the"chief magistrate of a Christian people." He then accused his Jewish critics of having "the same scorn for Jesus Christ which instigated their ancestors to crucify him." A stunned Charleston Jewish community convened a public meeting and issued another statement expressing their "pain" over the governor's response.[45]

It is instructive that a few weeks after Hammond's vituperative statement to the Jewish community of Charleston, a new governor, William Aiken, assumed office. Aiken, a resident of Charleston, was a member of the state's landed gentry and closely aligned with the politically influential Jewish business community of Charleston. Within weeks of his inauguration, Aiken issued a new Thanksgiving Day proclamation, this one urging "all denominations of Christians, and all other persons of whatever sect or persuasion" to set aside the day for prayer and devotion to "offer up thanks to the Almighty God."[46] With this subtle show of tolerance and sensitivity, far

more typical of the era than Hammond's statement, the Aiken proclamation brought the controversy to an end.

"This city our Jerusalem, this happy land our Palestine"

When attempting to evaluate attitudes and opportunities from an era in the distant past, particularly one that begins at the very dawn of the European settlement of North America, it is often difficult to capture truly the tone and sense of that time. Indeed, it is easy to see the past through the prism of modern sensibilities and developments and impose our twentieth- and twenty-first-century biases onto seventeenth-, eighteenth-, and nineteenth-century worlds. When looking at the story of the early Jewish experience of South Carolina, a fair question to ask is whether the colony and young state were best characterized by the guarantees of religious freedom in the Fundamental Constitutions and the widespread election of Jewish public officials, or whether the true nature of South Carolina was more accurately reflected by the establishment of the Anglican Church in the early colonial era and the blatantly anti-Semitic comments of Gov. James Hammond?

The greater weight of the historic records supports the conclusion that South Carolina was a special and, at times, an extraordinary place for its Jewish citizens during the colonial and antebellum eras. A few nondebatable historic facts bolster that conclusion. First, South Carolina was the first government anywhere to make religious freedom a constitutional right. Second, more Jews immigrated to South Carolina in the colonial and early antebellum eras than to any other state or colony in North America. In other words, Jews voted their endorsement of South Carolina as a land of tolerance and opportunity with their feet. Third, Jews were able to build an extraordinary infrastructure of businesses in the early development of the state that was, perhaps with the exception of the later creation of Louisiana, unrivaled on the American continent. Fourth, Jews built upon that tremendous early economic base as the foundation for the future remarkable electoral successes, which were so widespread that it is difficult to describe them as some type of historic fluke. This electoral success included many "firsts," but perhaps none more significant than Francis Salvador's election in 1774 as the first Jew in human history elected to public office. The simple truth is that Jews enjoyed tremendous tolerance and acceptance in early South Carolina and used their native talents and passion to build one of America's great original centers of Jewish life.

In many ways, South Carolina became early America's incubator for religious freedom and expression. The Fundamental Constitution (1669) signaled the world's dissenter communities that they were welcome in South Carolina, which then begat Charleston's vibrant and prosperous early Jewish community. This community developed America's first genuinely American Jewish movement, Reform Judaism, which thereafter profoundly influenced the direction of American Judaism. Moreover, South Carolina's tolerance and acceptance of its Jewish citizens inspired widespread Jewish civic and political involvement, leading ultimately to the most significant

number of Jewish elected officials in any of the original states during the antebellum era. Finally, out of this incubator of religious freedom came South Carolinian Charles Pinckney, who successfully led the adoption in the U.S. Constitutional Convention of the provision prohibiting religious oaths or tests for holding public office.

Another validation of the conclusion that early South Carolina afforded its Jewish citizens an unparalleled level of acceptance and tolerance are the statements made contemporaneously by Jewish leaders. In 1816 Charleston intellectual Isaac Harby, who later founded the Reform Jewish movement in America, wrote Secretary of State James Monroe expressing his distress about Monoroe's removal of an American consul, who was Jewish, as representative to Tunis because of his religion. Harby, speaking from his special perch in Charleston, explained to Monroe that Jews "are by no means to be considered a religious sect, tolerated by the government; they constitute *a portion of the people*. . . . Quakers and Catholics, Episcopalians and Presbyterians, Baptists and Jews, all constitute *one great political family*" (emphasis added).[47]

This sense of inclusion, of being part of the fabric of the society, is echoed in many statements of South Carolina Jewish leaders and ordinary citizens of that era. At the dedication of the new Beth Elohim sanctuary in 1844, the congregation's rabbi, Gustavus Poznanski, told the assemblage of the state's political, religious, and civic leaders the profound attachment that Jews had for Charleston and South Carolina: "This synagogue is our temple, this city our Jerusalem, this happy land our Palestine."[48] In another community address, delivered in Columbia in the year 1849, Henry S. Cohen perhaps best summarized this extraordinary, almost spiritual feeling that Jews felt toward South Carolina, sobered by the reality of how their fellow Jews still suffered across the world: "A bright era now dawns upon us, rendered brighter in contrast with the darkness by which we have heretofore been surrounded. . . . In contemplating, as Israelites, our position in this land, to us truly a 'land of milk and honey,' we may justly exclaim, with Israel of old, 'the Lord hath brought us forth out of Egypt with a mighty hand and an outstretched arm, He hath brought us into this place, and hath given us this land.'" [49]

Notes

1. Jacob Rader Marcus, *The Colonial American Jew, 1492–1776*, 3 vols. (Detroit: Wayne State University Press 1970), 1:10–12; James William Hagy, *This Happy Land: The Jews of Colonial and Antebellum Charleston* (Tuscaloosa: University of Alabama Press, 1993), 29.

2. Marcus, *The Colonial American Jew*, 1:13; Daniel Lazare, "Estranged Brothers: Reconsidering Jewish History," *Harper's* (April 2003).

3. Marcus, *The Colonial American Jew*, 1:14–31; Hagy, *This Happy Land*, 29.

4. James Lowell Underwood, *The Constitution of South Carolina*, vol. 3: *Church and State, Morality and Free Expression* (Columbia: University of South Carolina Press 1992), 3–9; Abram Vossen Goodman, "South Carolina from Shaftesbury to Salvador," in *Jews in the South*, ed. Leonard Dinnerstein and Mary Dale Palsson (Baton Rouge: Louisiana State Press, 1973), 29–30.

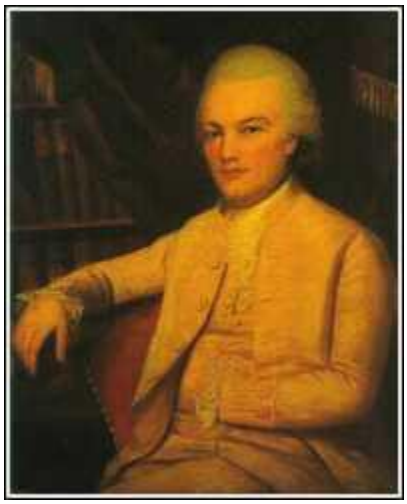
South Carolina Bar

Continuing Legal Education Division

Charles Pinckney and Charles Cotesworth Pinckney

Honorable P. Michael Duffy

A Biography of Charles Pinckney 1757-1824



Charles Pinckney, the second cousin of fellow-signer Charles Cotesworth Pinckney, was born at Charleston, SC, in 1757. His father, Col. Charles Pinckney, was a rich lawyer and planter, who on his death in 1782 was to bequeath Snee Farm, a country estate outside the city, to his son Charles. The latter apparently received all his education in the city of his birth, and he started to practice law there in 1779.

About that time, well after the War for Independence had begun, young Pinckney enlisted in the militia, though his father demonstrated ambivalence about the Revolution. He became a lieutenant, and served at the siege of Savannah (September-October 1779). When Charleston fell to the British the next year, the youth was captured and remained a prisoner until June 1781.

Pinckney had also begun a political career, serving in the Continental Congress (1777-78 and 1784-87) and in the state legislature (1779-80, 1786-89, and 1792-96). A nationalist, he worked hard in Congress to ensure that the United States would receive navigation rights to the Mississippi and to strengthen congressional power.

Pinckney's role in the Constitutional Convention is controversial. Although one of the youngest delegates, he later claimed to have been the most influential one and contended he had submitted a draft that was the basis of the final Constitution. Most historians have rejected this assertion. They do, however, recognize that he ranked among the leaders. He attended full time, spoke often and effectively, and contributed immensely to the final draft and to the resolution of problems that arose during the debates. He also worked for ratification in South Carolina (1788). That same year, he married Mary Eleanor Laurens, daughter of a wealthy and politically powerful South Carolina merchant; she was to bear at least three children.

Subsequently, Pinckney's career blossomed. From 1789 to 1792 he held the governorship of South Carolina, and in 1790 chaired the state constitutional convention. During this period, he became associated with the Federalist Party, in which he and his cousin Charles Cotesworth Pinckney were leaders. But, with the passage of time, the former's views began to change. In 1795 he attacked the Federalist backed Jay's Treaty and increasingly began to cast his lot with Carolina back-country Democratic-Republicans against his own eastern aristocracy. In 1796 he became governor once again, and in 1798 his Democratic-Republican supporters helped him win a seat in the U.S. Senate. There, he bitterly opposed his former party, and in the presidential election of 1800 served as Thomas Jefferson's campaign manager in South Carolina.

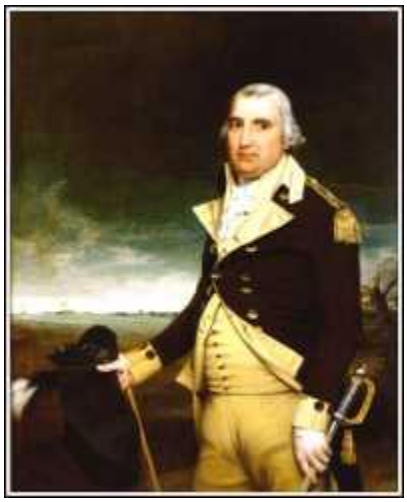
The victorious Jefferson appointed Pinckney as Minister to Spain (1801-5), in which capacity he struggled valiantly but unsuccessfully to win cession of the Floridas to the United States and

facilitated Spanish acquiescence in the transfer of Louisiana from France to the United States in 1803.

Upon completion of his diplomatic mission, his ideas moving ever closer to democracy, Pinckney headed back to Charleston and to leadership of the state Democratic-Republican Party. He sat in the legislature in 1805-6 and then was again elected as governor (1806-8). In this position, he favored legislative reapportionment, giving better representation to back-country districts, and advocated universal white manhood suffrage. He served again in the legislature from 1810 to 1814 and then temporarily withdrew from politics. In 1818 he won election to the U.S. House of Representatives, where he fought against the Missouri Compromise.

In 1821, Pinckney's health beginning to fail, he retired for the last time from politics. He died in 1824, just 3 days after his 67th birthday. He was laid to rest in Charleston at St. Philip's Episcopal Churchyard.

A Biography of Charles Cotesworth Pinckney 1746-1825



The eldest son of a politically prominent planter and a remarkable mother who introduced and promoted indigo culture in South Carolina, Charles Cotesworth Pinckney was born in 1746 at Charleston. Only 7 years later, he accompanied his father, who had been appointed colonial agent for South Carolina, to England. As a result, the youth enjoyed a European education.

Pinckney received tutoring in London, attended several preparatory schools, and went on to Christ Church College, Oxford, where he heard the lectures of the legal authority Sir William Blackstone and graduated in 1764. Pinckney next pursued legal training at London's Middle Temple and was accepted for admission into the English bar in 1769. He then spent part of a year touring Europe and studying chemistry, military science, and botany under leading authorities.

Late in 1769, Pinckney sailed home and the next year entered practice in South Carolina. His political career began in 1769, when he was elected to the provincial assembly. In 1773 he acted as attorney general for several towns in the colony. By 1775 he had identified with the patriot cause and that year sat in the provincial congress. Then, the next year, he was elected to the local committee of safety and made chairman of a committee that drew up a plan for the interim government of South Carolina.

When hostilities broke out, Pinckney, who had been a royal militia officer since 1769, pursued a full-time military calling. When South Carolina organized its forces in 1775, he joined the First South Carolina Regiment as a captain. He soon rose to the rank of colonel and fought in the South in defense of Charleston and in the North at the Battles of Brandywine, PA, and Germantown, PA. He commanded a regiment in the campaign against the British in the Floridas in 1778 and at the siege of Savannah. When Charleston fell in 1780, he was taken prisoner and held until 1782. The following year, he was discharged as a brevet brigadier general.

After the war, Pinckney resumed his legal practice and the management of estates in the Charleston area but found time to continue his public service, which during the war had included tours in the lower house of the state legislature (1778 and 1782) and the senate (1779).

Pinckney was one of the leaders at the Constitutional Convention. Present at all the sessions, he strongly advocated a powerful national government. His proposal that senators should serve without pay was not adopted, but he exerted influence in such matters as the power of the Senate to ratify treaties and the compromise that was reached concerning abolition of the international slave trade. After the convention, he defended the Constitution in South Carolina.

Under the new government, Pinckney became a devoted Federalist. Between 1789 and 1795 he declined presidential offers to command the U.S. Army and to serve on the Supreme Court and as Secretary of War and Secretary of State. In 1796, however, he accepted the post of Minister to France, but the revolutionary regime there refused to receive him and he was forced to proceed to the Netherlands. The next year, though, he returned to France when he was appointed to a special mission to restore relations with that country. During the ensuing XYZ affair, refusing to pay a bribe suggested by a French agent to facilitate negotiations, he was said to have replied "No! No! Not a sixpence!"

When Pinckney arrived back in the United States in 1798, he found the country preparing for war with France. That year, he was appointed as a major general in command of American forces in the South and served in that capacity until 1800, when the threat of war ended. That year, he represented the Federalists as Vice-Presidential candidate, and in 1804 and 1808 as the Presidential nominee. But he met defeat on all three occasions.

For the rest of his life, Pinckney engaged in legal practice, served at times in the legislature, and engaged in philanthropic activities. He was a charter member of the board of trustees of South Carolina College (later the University of South Carolina), first president of the Charleston Bible Society, and chief executive of the Charleston Library Society. He also gained prominence in the Society of the Cincinnati, an organization of former officers of the War for Independence.

During the later period of his life, Pinckney enjoyed his Belmont estate and Charleston high society. He was twice married; first to Sarah Middleton in 1773 and after her death to Mary Stead in 1786. Survived by three daughters, he died in Charleston in 1825 at the age of 79. He was interred there in the cemetery at St. Michael's Episcopal Church.

South Carolina Bar

Continuing Legal Education Division

Contempt of Court: A Turn-of-the-Century Lynching That Launched a Hundred Years of Federalism (Ethics)

Mark Curriden

Contempt of Court & the ABA Model Rules

[**CLE Ethics**]

On August 27, 1908, the American Bar Association adopted the original Canons of Ethics. Two days later, at an oral argument in *U.S. v. Shipp*, Supreme Court Justice Oliver Wendell Holmes publicly commented that it was a shame that the ABA's actions came too late to help Ed Johnson. Nine decades later, Delaware Supreme Court Chief Justice Norman Veasey, who chaired the ABA's Ethics 2000 Commission, stated that Noah Parden embodied a lawyer's responsibility to his/her client. Across the country, judges – state and federal, trial and appellate – have commented that there is no better example of how lawyers should and should not behave than the century old case of Ed Johnson. Jurist, such as the Hon. Roger Gregory, Patrick Higginbotham, and Judith Kaye, have stated that Parden and his partner, Styles Hutchins, and how they handled this case, should be the role model for all lawyers.

These judges say the Johnson/Shipp case is a clear reminder of why we became lawyers and how lawyers, in the words of the Preamble of the ABA's Model Rules of Professional Conduct, have a "special responsibility for the quality of justice." A good example occurs early in the case (pages 60-61) when the trial judge, Samuel McReynolds, chooses and appoints two lawyers because he knows they do not have the skills to win the case. The judge gets the approval of the district attorney, Matt Whitaker, before making the appointment official.

Preamble and Scope:
[2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.

(Pages 70-71) – The first lawyer appointed by Judge McReynolds to represent Johnson, Robert T. Cameron, tells the newspaper that he didn't want to represent Ed Johnson, that he was being forced to represent Johnson by the judge, that he hoped his clients wouldn't hold his involvement in the case against him (he made this statement after one of his best paying clients fired him), and that he hadn't made up his mind yet on the guilt of his client.

(Pages 71-72) – In a letter to the newspaper, Johnson's second lawyer, W.G.M. Thomas, writes that he didn't want to represent Johnson either, that he is doing so to obey the orders of the judge, that he is working to ascertain the guilt or innocence of Johnson, and that if Johnson is guilty, then he should die.

(Page 63) – Attorneys Cameron and Thomas do not object when the judge tells them that the case will go to trial in seven days. Nor did they object when the judge told them that they wouldn't have to do much work because Johnson's guilt was certain.

(Pages 122-127, 162-163) – Defense attorney Thomas goes behind his co-counsel's back to the judge and prosecutor, seeking the appointment of three additional lawyers to advise the defense on whether to provide an appeal. Thomas and these three new lawyers advise Johnson to waive his rights to appeal and accept the death sentence.

[6] As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

(Pages 5-19, 173, 220) – Parden wrote about the case at length in Chattanooga's black-owned newspaper, *The Blade*, in an effort to better educate the public about the court system. He also spoke at churches and community functions. We know as much as we do about this case because of Parden's extensive writings.

(Pages 5-19, 150-187) – Parden was very mindful of the deficiencies in the administration of justice and the need for protection of the rule of law, as required above. It was this interest and commitment that led Parden and Hutchins to file this extraordinary, historic federal *habeas* petition at a time when such petitions were considered frivolous, and raising constitutional objections on issues that would resonate for the next century. This entire story is the struggle over this paragraph.

[7] Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.

[9] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

(Pages 5-19, 136-187, 219, 234, 243-245) – Parden and Hutchins were clearly led by their personal conscience, morals, and beliefs, as well as a desire to improve the law and the legal profession. These lawyers knew accepting this case would destroy their practice, their financial livelihoods, and even threaten the lives of them and their families. This was the most politically and racially divisive case in decades. The homes and offices of these lawyers were destroyed. They had to flee Chattanooga for their lives. And their client was lynched. Through it all, these lawyers demonstrated their professionalism and commitment to the protection of the rule of law and the defense of their client's rights. Throughout all of this, Parden and Hutchins developed an extraordinary legal strategy (filing the federal *habeas* petition, convincing the U.S. District Court to let them question witnesses under oath, and then their direct appeal to the Supreme Court of the United States) that forever changed the criminal justice system in this country.

As Paragraph 16 states, **"The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law."**

(Pages 159-160) – District Attorney Whitaker personally attacked Parden calling him a liar, and stating that Parden's claims were "made of a desire to misrepresent the judiciary and made with a malignant purpose and a wicked heart."

Client-Lawyer Relationship
Rule 1.1 Competence - A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

(Pages 60-61) – The two original lawyers appointed by Judge McReynolds – Robert Cameron and W.M. Thomas – allowed themselves to be used by the judge. Cameron had tried only a handful of cases in his life, and those were no-fault divorces. He had never handled a criminal case and he certainly wasn't qualified for this one. Thomas openly admitted he didn't try criminal matters.

(Pages 70-71) – The first lawyer appointed by Judge McReynolds to represent Johnson, Robert T. Cameron, tells the newspaper that he didn't want to represent Ed Johnson, that he was being forced to represent Johnson by the judge, that he hoped his clients wouldn't hold his involvement in the case against him (he made this statement after one of his best paying clients fired him), and that he hadn't made up his mind yet on the guilt of his client.

(Pages 71-72) – In a letter to the newspaper, Johnson's second lawyer, W.G.M. Thomas, writes that he didn't want to represent Johnson either, that he is doing so to obey the orders of the judge, that he is working to ascertain the guilt or innocence of Johnson, and that if Johnson is guilty, then he should die.

(Page 63) – Attorneys Cameron and Thomas do not object when the judge tells them that the case will go to trial in seven days. Nor did they object when the judge told them that they wouldn't have to do much work because Johnson's guilt was certain.

(Pages 122-127, 162-163) – Defense attorney Thomas convinces the judge to appoint three additional lawyers to help him convince Johnson that he should waive his right to appeal. Thomas claims that he has done his duty as a lawyer in representing Johnson at the trial, but that this obligation or responsibility does not continue. Thomas admits that the lynch mob influenced his decision-making.

(Pages 3-19, 150-187) – By contrast, Parden and Hutchins put everything at stake for their client and for the protection of the rule of law. Not only did the lynch mob not influence Parden and Hutchins, it made them more determined. They faced significant racial hatred, and even some in the black community felt they should back away. Instead, these lawyers actually intensified their efforts. The thoughtfulness and preparation Parden and Hutchins put in this case despite the extraordinary circumstances, was truly historic and a model for all lawyers.

Rule 1.7 Conflict of Interest: General Rule – The commentary (p. 1) on this rule is particularly interesting because it states, "Loyalty and independent judgment are essential elements in the lawyer's relationship to a client." As noted above, Thomas and Cameron had no loyalty to their client and were far from independent, as their recommendations to their client and their actions in their representation of their client repeatedly demonstrated that they were influenced by the fear of the mob and by their fear of personal or financial harm that they might suffer. (Paragraph two of the commentary specifically states that "A lawyer may not allow business or personal interests to affect representation of a client.") By contrast, Parden and Johnson nearly sacrificed their careers and their lives to defend their client.

Rule 1.9 Conflict of Interest: Former Client – A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(Page 260) – Lewis Shepherd, who did zealously advocate for Johnson during the trial, suddenly shows up representing one of the leaders of the lynch mob in the contempt trial before the U.S. Supreme Court.

Rule 2.1 Advisor – In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

See response to Rule 1.1.

Rule 3.1 Meritorious Claims and Contentions – A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

(Pages 3-19, 150-187, 250-270) – This is interesting on two fronts. First, under the existing law in 1906, Parden and Hutchins were clearly reaching in their federal *habeas* petition. And the Attorney General of the United States was clearly reaching when he brought the contempt case against Shipp and the others. But both were very legitimate. Most argued at the time that both actions were frivolous and not in good faith. These were the very reasons that Thomas argued post jury verdict that there should be no appeal of the verdict and that his client should be hanged.

Rule 3.6 Trial Publicity
(Page 79) – District Attorney Whitaker makes highly racist and prejudicial statements to the newspapers that were published the morning of the Johnson trial designed to heavily influence the jury pool.

CONTEMPT OF COURT CLE PROGRAM

OUTLINE OF ETHICS/PROFESSIONALISM ISSUES

Ethical Issues Under the Rubric of Due Process

- Before the trial proceedings began, the trial judge improperly and prejudicially announced to the court appointed attorneys defending Ed Johnson that neither a Motion to Continue nor a Motion to Change Venue would be granted and that the judge would be angry if such motions were made. In so doing, the judge coerced and intimidated court appointed counsel so that they did not seek a continuance or a change in venue when justice demanded both to secure a fair trial. The bias of Judge McReynolds, his racist remarks, and lack of judicial independence due to public pressure was a huge factor.

- Judge's appointment of incompetent counsel—neither had ever tried a criminal case let alone a capital case. Canon 1A—"A judge should participate in establishing, maintaining and enforcing high standards of conduct."

- Judge's insistence on having trial in 11 days—not sufficient time for defense to prepare. Canon 3B(7)—a judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. This also applies to the judge bullying the court appointed counsel into not making motions to continue or change venue.

- The Johnson/Shipp case is clear reminder of why we became lawyers and how lawyers and judges have "a special responsibility for the quality of justice." Preamble, ABA Model Rules of Professional Conduct. Here, the trial judge, Samuel McReynolds picks two lawyers because he knows they do not have the skills to win the case and abdicates this reponsibility.

- Canon 3B(2)—"a judge shall not be swayed by partisan interests, public clamor or fear of criticism". Here, Judge McReynolds decisions to hold trial so quickly and the appointment of inexperienced counsel was obviously influenced by the public outcry and media attention surrounding the alleged offense.

- The judge gets the approval of the District Attorney, Matt Whittaker, before making the appointment of counsel official. Abdication of judicial independence. Canon1—A judge should uphold the Integrity and Independence of the Judiciary.

- Johnson was denied a public and fair trial by an impartial jury in that only selected members of the community were allowed into the courthouse which was kept under armed guard by the Sheriff's Department; the jury consisted of only white men with African Americans being improperly and systematically excluded from jury service. The three white court appointed counsel were intimidated into

failing to challenge the denial of Johnson's fundamental constitutional and due process rights

- Johnson was denied fundamental fairness at his trial in that the complaining witness, the victim, could not swear under oath that Johnson was the man who attacked her; and, one of the jurors was so enraged that he had to be physically restrained from physically attacking Johnson as he uttered: "If I could get my hands on him, I would tear his heart out!" Johnson's court appointed lawyers did not request and the court did not grant a mistrial.

- Following his conviction of capital murder and imposition of the death penalty, Johnson's court appointed lawyers abandoned him. Moreover, despite the complete lack of due process and fairness in the proceedings, Johnson's court appointed lawyers, fearing community outrage and the danger of a lynching, persuaded Johnson to not exercise his constitutional right to appeal his conviction. Johnson's court appointed counsel failed to competently and diligently advise and represent Johnson. ABA MRPC, Preamble, cmt [2]: "As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system." Moreover, the court accepted Johnson's waiver of his right to appeal, knowing that it was not an intelligent and voluntary waiver, but coerced out of fear of being lynched. Under no stretch of the imagination, even in 1906, was this a knowing, intelligent and voluntary waiver.

- Under current constitutional law and the rules of conduct, court appointed counsel are required to pursue the defendant's right of appeal even when there is no merit unless granted leave of court to withdraw. *Anders v. California*. Granted, counsel is bound by the client's decision not to appeal a conviction, but here Johnson's counsel talked Johnson out of exercising his right to appeal a conviction when an appeal had substantial merit. ABA Rule 1.16 allow a lawyer to withdraw from representation only for good cause or if withdrawal can be effected without material adverse effect. Johnson's counsels' conduct was tantamount to an improper withdrawal from representation under the current rules and constitutional precedent.

Professionalism/Ethics

- By contrast, Parden and Hutchins put everything at stake—their reputations, careers and safety—for their client and for the protection of the rule of law. ABA Model Rules of Professional Conduct, Preamble, cmt. [2]: "As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system."

- MRPC, Preamble, cmt. [4]: "In all professional functions a lawyer should be competent, prompt and diligent."

- MRPC, Preamble, cmt. [6]: "As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest."

- Noah Parden wrote at length about Johnson's case in Chattanooga's black-owned newspaper in an effort to educate the public about the legal system. He spoke about the case at length at social and church functions. Much of what we know about Johnson's case may be attributed to Parden's extensive writings. Parden was very mindful of the deficiencies in the administration of justice and the need to protect the rule of law. It was this commitment that led Parden and Hutchins to file this extraordinary, historic federal habeas petition at a time when such legal actions were considered frivolous.

- ABA MRPC, Preamble, cmt. [7]: "Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service."

- ABA MRPC, Preamble. cmt.[9] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

- Parden and Hutchins were clearly driven by their personal conscience, morals and beliefs, as well as a desire to improve the law and profession. These lawyers knew that accepting this case would threaten their practice, livelihoods and even the personal safety of their families. The homes and offices of these lawyers were destroyed. They had to flee Chattanooga for their lives and their client was lynched while the case was in the USSC. Through all this, these lawyers demonstrated their courage, moral convictions, professionalism and commitment to the rule of law. Parden and Hutchins developed an extraordinary and novel legal strategy by filing a federal habeas petition and convincing the district court judge to allow them to question witnesses under oath, and then they took a direct appeal to the Supreme Court of the United States.

- As the ABA Preambles to the Rules of Conduct state: "The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law." ABA MRPC, cmt. [16]; Parden and Hudgins conduct of the Johnson case went far above the minimum standards set by the Rules of Conduct.

- When a lawyer is appointed by a court or requested by a bar association to undertake representation of a person unable to obtain counsel, whether for financial or other reasons, the lawyer should not seek to be excused from undertaking the representation except for compelling reasons. Compelling reasons do not include such factors as the repugnance of the subject matter of the proceeding, the identity or position of a person involved in the case, the belief of the lawyer that the defendant in a criminal proceeding is guilty, or the belief of the lawyer regarding the merits of the civil case

Duty to Accept Unpopular Cases or Clients

- Johnson's original court appointed counsel did not decline to take Johnson's case, but they may just as well have, given the level and quality of their service to Johnson. As a practical matter, they abandoned him and thus violated the spirit if not the letter of these rules:

.

- ABA MR 6.2: A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as: (a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law; (b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or (c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

- Cmt. [1] "A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer's freedom to select clients is,

however, qualified. All lawyers have a responsibility to assist in providing *pro bono publico* service. See Rule 6.1. An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients. A lawyer may also be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services."

- ABA MR 6.2, cmt. [3]: "An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty and confidentiality . . . ."

Duty of Competent Representation

- The two original lawyers appointed by Judge McReynolds—Robert Cameron and W.M. Thomas were not competent to handle a capital murder defense. Cameron had tried only a handful of cases in his career and those were no-fault divorces. He had never handled a criminal case and was certainly not qualified for Johnson's case. Thomas openly admitted he didn't try criminal matters.

- ABA Model Rule 1.1: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

Applying the Ethical Issues in Today's Legal Environment

- It is the rule of law and our judicial system that sets the United States apart from much of the rest of the world. As Supreme Court Justice Sandra Day O'Connor warned in the recent Supreme Court decision in *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004), involving an American citizen who was detained as an enemy combatant, "It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad."

- In June 2008, the U.S. Supreme Court ruled in *Boumediene v. Bush* that detainees at Guantanamo Bay have a right to appeal their detention in federal courts. Yet, facing Kafkaesque obstacles, lawyers representing detainees at the Guantanamo facility have been fighting for more than six years for meaningful, confidential access to their clients, and some have never actually met their clients. Detainees dubbed "enemy combatants" are not entitled to access to classified evidence against them. Some detainees have been held without formal charges for more than six years. Some have refused outright to cooperate or even communicate with their appointed counsel, severely hampering their defense. Pro bono attorneys have continued, despite these conditions, to persevere in efforts to provide due process and other basic protections for these clients. Lawyers from several private law firms have been honored for their pro bono service.

- Elizabeth Wohlford, Esquire in her article "Representing Repugnant Clients: Every Lawyer's Duty?" writes: Naturally, a lawyer must be concerned about the financial impact of or public reaction to publicly sensitive representation. Yet if law school loans prevent an attorney from protecting the Constitution and the efficient administration of justice, then that attorney is in the wrong profession and should never have incurred those loans in the first place." American Bar Association, *GP Solo*, No. 7, Vol.22 (Oct./Nov. 2005).

- The late Frank W. Dunham, Jr. succumbed to brain cancer and died in 2006 but not after having defended two notorious terrorism suspects, Zacarias Moussaoui and Yaser Esam Hamdi. Dunham and his lawyers battled the government all the while his client despised and personally attacked Dunham and his team. In spite of all the obstacles, Mr. Dunham personally argued before the U.S. Supreme Court the case of Hamdi, a U.S. citizen held as a combatant by the military. That case produced an important decision that upheld the government's power to detain Hamdi but allowed that he could challenge that detention in U.S. courts. Hamdi was released and flown to Saudi Arabia.

Ethical Duties of the Prosecutor

- The prosecutor in a criminal case shall: (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause; (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel

- ABA Model Rule 3.8, cmt [1]: "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons." Va. Rule 3.8 is identical except *that it excludes the duty of taking special precautions to prevent and rectify the conviction of innocent persons.*

- On the morning of the trial, District Attorney Whitaker makes highly racist and prejudicial statements to the newspapers were published the morning of Johnson's trial calculated to heavily influence the jury pool.

- ABA Model Rule 3.6 (a): A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

- (b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

Ethical Issues Regarding the Habeas Proceedings

- ABA Rule 3.1 (Meritorious Claims and Contentions): A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

- Under the law as it existed in 1906, Parden and Hutchins were clearly stretching in their federal habeas petition. Also, the Attorney General of the United States was clearly reaching when he initiated contempt proceedings against Shipp and others. Most argued at the time that these actions were frivolous and not well grounded in law or fact, and not brought in good faith.