EMPIRE IN EQUITY

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*This Essay tells a story of how a contest for empire contributed to the law of justiciability in the U.S. federal courts. It begins in the eighteenth century in the Carnatic, a region in East India, winds its way through the territory of the Cherokee Nation in the nineteenth century, and eventually touches on the State of Tennessee in the twentieth. It is a story about a 1793 decision of the English Court of Chancery that American lawyers and judges would come to cite for the principles that courts will not address political questions and that equity will not intervene to protect political rights. This decision—*Nabob of the Carnatic v. East India Company*—would appear in judicial opinions concerning some of the nineteenth century's highest-profile controversies over political power. By the early-to-mid twentieth century, the case was cited as a—even the—foundational political question case, and Justice Felix Frankfurter would call it a "celebrated decision" in his 1962 dissenting opinion in* Baker v. Carr. *Notwithstanding* Baker*'s holding that some political rights claims are justiciable, the federal courts have not shaken the notion that equity should stay out of contests over political power. It has echoes in the modern political question doctrine and the law of standing in the federal courts. The principle that equity should not settle contests over political power sounds sensible enough. Yet as with any principle, this one takes some of its sense from the politics that shaped—and sustain—it. If the history of* Nabob of the Carnatic *and its subsequent citations are any guide, the question is not whether equity will intervene in contests for empire. The question instead is when equity will intervene, and for whom.*

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This work builds upon my prior work on parallel and sometimes connected developments in India during the period of British imperialism and in the early years of the United States as it laid the foundations for its own law of colonial rule. *See* Seth Davis, Eric Biber, & Elena Kempf, *Persisting Sovereignties*, 170 U. PA. L. REV. (forthcoming 2022). I thank my coauthors in that work for many helpful conversations about the history of British imperial rule.

"[T]he contest is distinctly a contest for empire."[1]

INTRODUCTION

Justice William Johnson often dissented and rarely cited case law.[2] This time, though, he concurred and had a citation ready. When a claim for equitable relief "is one of a political character altogether," a "court of justice" may not "take jurisdiction of the questions made in the bill."[3] Under that principle, the bill before the U.S. Supreme Court in *Cherokee Nation v. Georgia* was, Justice Johnson figured, just as if not more objectionable than the bill that had been before the English Court of Chancery in *Nabob of the Carnatic v. East India Company*.[4] Equity, as he put it, may not intervene in a "contest for empire."[5]

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1 Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 29 (1831) (Johnson, J., concurring).

2 *See* A.J. Levin, *Mr. Justice William Johnson, Creative Dissenter*, 43 MICH. L. REV. 497, 528 (1944).

3 *Cherokee Nation*, 30 U.S. (5 Pet.) at 28 (Johnson, J., concurring).

4 *Id.* at 29–30 (first citing Nabob of the Carnatic v. E. India Co. (1791) 30 Eng. Rep. 391; 1 Ves. Jun. 371; then citing Nabob of the Carnatic v. E. India Co. (1793) 30 Eng. Rep. 521; 2 Ves. Jun. 56; and then citing Nabob of Arcot v. E. India Co. (1793) 29 Eng. Rep. 841; 4 Bro. C.C. 181, 198). The Court of Chancery's 1793 decision to dismiss the bill was reported in Vesey Junior's reports, which labeled the case "Nabob of the Carnatic v. East India Co.," and in Brown's Chancery Cases, which labeled it "Nabob of Arcot v. East India Co." Arcot was the capital of the Carnatic.

5 *Cherokee Nation*, 30 U.S. (5 Pet.) at 29. Justice Johnson cited *Nabob of the Carnatic v. East India Company* as "the Nabob of Arcot's case," after Arcot, the capital of the Carnatic, a region in southeastern India on the Bay of Bengal, now eastern Tamil Nadu. *See id.* at 29–30; Pimmanus Wibulsilp, "I am Nawab of Arcot": Reconsidering the Political History of the Late Eighteenth Century Kingdom of Arcot Through the Eye of Nawab Muhammad Ali Wallajah (r.1749–1795), at 4 (Aug. 2, 2012) (M.A. thesis, University Leiden) (on file with

Both contests for empire involved bills to enforce colonial powers' treaty promises. In 1791, attorneys for Muhammad Ali Khan Wallajah, the Nawab of the Carnatic, filed a bill in the Court of Chancery seeking an accounting of rents and profits from the Company, which possessed part of his territory in southeastern India as security for a loan.[6] After denying the Company's plea to bar the action in a 1791 decision, the Court dismissed the bill in 1793 because the Company's answer showed that the underlying contract was a "political" treaty between sovereigns.[7]

Forty years later, the Cherokee Nation filed a bill in the original jurisdiction of the U.S. Supreme Court, seeking to protect the Nation's territory in the southeastern United States from the State of Georgia.[8] The Supreme Court held that the Cherokee Nation was not a "foreign state" entitled to invoke to the Court's original jurisdiction.[9] Justice Johnson would have dismissed the bill instead for the same reason that the Court of Chancery dismissed the bill in *Nabob of the Carnatic*.[10]

This Essay tells the story of *Nabob of the Carnatic* and its subsequent citation by American lawyers and courts. It is a story about the relation between equity and politics, a relation no less vexed than that between equity and law, and a relation no less important in the United States today than it was in the British Empire in the eighteenth century. Specifically, it is a story of imperial politics that allows us more deeply to evaluate judicial reluctance to opine upon questions of political power.

The history of the Court of Chancery's decision is not, however, one that can dispel today's debates about the proper role of the U.S. federal courts. The U.S. Supreme Court has held that the traditional jurisdiction of the Court of Chancery in 1789 is a guide to the authority of the federal courts to issue equitable relief today.[11] The 1793 decision in *Nabob of the Carnatic* is relevant to that tradition, yet it was not

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the *Notre Dame Law Review*). For a discussion of the history of the Carnatic during the rule of Muhammad Ali Khan Wallajah, and discussion of the competing historical accounts of this period as one of decline versus resiliency among Indian polities, see *infra* notes 80–99 and accompanying text. Throughout, I use "nawab" to refer to the Nawab of the Carnatic, rather than "nabob," as the latter term was also once used in Britain to refer to employees of the East India Company who returned to Britain after amassing fortunes in India.

6 *Nabob of the Carnatic*, 30 Eng. Rep. at 391, 1 Ves. Jun. at 371.

7 *Nabob of the Carnatic*, 30 Eng. Rep. at 523, 2 Ves. Jun. at 60.

8 *Cherokee Nation*, 30 U.S. (5 Pet.) at 15.

9 *Id.* at 20.

10 *Id.* at 29 (Johnson, J., concurring).

11 *See* Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 318–19 (1999).

clear then, as it is unclear now, how broadly or narrowly one should read Chancery's dismissal of the bill in that case.

The Court's brief reported decision stated a rule against judicial enforcement of "political" treaties."[12] It said nothing about political questions or political rights. The ground of decision was consistent with a traditional understanding of treaties as a matter of the Crown's prerogative.[13] A "treaty between two sovereigns," the Court reasoned in *Nabob of the Carnatic*, "is not a subject of private, municipal jurisdiction."[14] Over the course of the nineteenth century, however, *Nabob of the Carnatic* became a case about political rights and political questions. American lawyers and judges debated its proper interpretation in some of the century's highest-profile controversies over political power.[15] Courts cited it in cases having nothing to do with international relations.[16] By the early-to-mid twentieth century, the case was cited as a—even *the*—foundational political question case.[17] Justice Felix Frankfurter called it a "celebrated decision" in his 1962 dissenting opinion

12 *Nabob of the Carnatic*, 30 Eng. Rep. at 523, 2 Ves. Jun. at 60; *see also Nabob of Arcot*, 29 Eng. Rep. at 849, 4 Bro. C.C. at 198 (1793) (reporting that Court of Chancery's decision "went on the facts disclosed by the Company's last answer, by which it appeared, that the whole was a political transaction"). For discussion of the grounds of decision and its potential implications concerning political questions or political rights, see *infra* notes 133–157 and accompanying text.

13 William S. Holdsworth, *The Relation of English Law to International Law*, 26 MINN. L. REV. 141, 141–42 (1942) (noting that during the sixteenth and seventeenth centuries, "rules of international law were regarded as matters which concerned the Crown, and fell within its wide prerogative in relation to foreign affairs," but explaining that by the eighteenth century common lawyers had begun to question this understanding).

14 *Nabob of the Carnatic*, 30 Eng. Rep. at 523, 2 Ves. Jun. at 60.

15 *See* Georgia v. Stanton, 73 U.S. (6 Wall.) 50, 71 & n.† (1867) (citing *Nabob of the Carnatic* when dismissing Georgia's bill to enjoin the U.S. Secretary of State and two U.S. Army generals from implementing the Reconstruction Acts following the Civil War); Luther v. Borden, 48 U.S. (7 How.) 1, 56 (1849) (Woodbury, J., dissenting) (agreeing with the Court's majority that judges must defer to "the proper political powers" on certain "grave political questions" arising from Dorr's Rebellion in Rhode Island and citing *Nabob of the Carnatic* to support that conclusion); Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 740 (1838) (citing *Nabob of the Carnatic* to support jurisdiction in an intersovereign dispute over territorial boundaries); *Cherokee Nation*, 30 U.S. (5 Pet.) at 29 (Johnson, J., concurring) (citing *Nabob of the Carnatic* in support of dismissing Cherokee Nation's suit to enjoin Georgia from encroaching upon its territory).

16 *See, e.g.*, Werts v. Rogers, 28 A. 726, 736–37 (N.J. 1894) ("In the case of Nabob of Carnatic v. East India Co., 1 Ves. Jr. 371, 2 Ves. Jr. 56, it was held that the question presented was political, and involved no private rights.").

17 *See* Maurice Finkelstein, *Further Notes on Judicial Self-Limitation*, 39 HARV. L. REV. 221, 240 (1925) ("It is important to understand the *Nabob* case, and to realize that it laid the foundation for the doctrine that the courts will not interfere with political questions . . . .").

in *Baker v. Carr*.[18] After the *Baker* Court held that political rights were justiciable,[19] however, *Nabob of the Carnatic* all but disappeared from discussions of the jurisdiction of the federal courts.[20]

Even so, the federal courts have not entirely shaken the notion that equity should stay out of contests for empire. It echoes in the modern political question doctrine, which holds that partisan gerrymandering, while "nothing new," is nothing that the courts can review.[21] And though the nineteenth-century distinction between civil and political rights has faded,[22] the influence of the principle that equity will not protect political rights still lingers in the law of standing in the federal courts.[23]

The principle that equity should not settle contests over political power sounds sensible enough. Yet *Nabob of the Carnatic* and its subsequent citations are evidence that, as with any principle, this one takes some of its sense from the politics that shaped—and sustain—it.

In 1793, those politics were imperial politics. *Nabob of the Carnatic* contributed to the development of doctrine that aimed (and struggled) to distinguish political rights, which equity would not protect, from property rights, which equity would vindicate.[24] This doctrine

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Scholars would repeat Professor Finkelstein's claim up through the 1970s. *See, e.g.*, Edwin B. Firmage, *The War Powers and the Political Question Doctrine*, 49 U. COLO. L. REV. 65, 68 (1977) (arguing that a political question concept in *Nabob of the Carnatic* "was brought to America as part of the common law").

18 *See* Baker v. Carr, 369 U.S. 186, 288 n.21 (1962) (Frankfurter, J., dissenting) (labeling *Nabob of the Carnatic* a "celebrated decision").

19 *Id.* at 209 (majority opinion) ("Of course the mere fact that the suit seeks protection of a political right does not mean it presents a political question."). It was not the first time the Court had held that political rights were judicially enforceable. *See* Snowden v. Hughes, 321 U.S. 1, 11 (1944) ("Where discrimination is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights."). *Baker* involved political rights with respect to elections and the political process, not the sort of political rights to territorial sovereignty that were implicated in cases such as *Nabob of the Carnatic* and *Cherokee Nation*. *See infra* note 203 and accompanying text.

20 No federal court has cited *Nabob of the Carnatic* in a published opinion since 1964. *See* Hearne v. Smylie, 225 F. Supp. 645, 653 (D. Idaho 1964), *rev'd*, 378 U.S. 563 (1964).

21 Rucho v. Common Cause, 139 S. Ct. 2484, 2494–96 (2019).

22 *See* Mark Tushnet, *Civil Rights and Social Rights: The Future of the Reconstruction Amendments*, 25 LOY. L.A. L. REV. 1207, 1207 (1992).

23 *See* Saginaw Cnty. v. STAT Emergency Med. Servs., Inc., 946 F.3d 951, 957 (6th Cir. 2020).

24 *See* 14 RULING CASE LAW § 66 (William M. McKinney & Burdett A. Rich eds., 1916) ("[W]hile it is true that the familiar rule requiring the existence of a property right to justify the granting of [equitable] relief is generally adhered to, yet, in many instances, it seems as

tried to avoid questions of sovereignty beyond equity's capacity to address. But far from avoiding questions of sovereignty, the Court of Chancery addressed them in *Nabob of the Carnatic*. Most obviously, in dismissing the bill, the Court held that the East India Company had authority to act as "independent state" within India.[25] As Muhammad Ali Khan Wallajah's court chronicler once put it, the Company began as "merchants" and ended up as "rulers."[26] More subtly, but no less importantly, the Court's holding that "political" treaties are not "a subject of private, municipal, jurisdiction"[27] supported the British Empire—an empire that was built through treaties[28]—against colonized peoples' competing claims of sovereignty. As we shall see, the Court addressed questions of political power in the course of disclaiming jurisdiction.[29] In avoiding a contest for empire, equity lent a hand to its construction.

I. EQUITY AND POLITICAL POWER

In 1916, the editors of *Ruling Case Law*, a once-widely-cited treatise billed as "a compendium of the entire body of law,"[30] stated a "general rule that a court of equity has no jurisdiction in matters of a political nature," and, therefore, that "no injunction to protect a person in the enjoyment of a political right or to assist him in acquiring such a right will be granted."[31] The first citation for this general rule was the U.S. Supreme Court's 1867 decision in *Georgia v. Stanton*, which in turn offered *Nabob of the Carnatic* as its first citation for the "distinction between judicial and political power."[32]

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if such adherence were only superficial . . . ."); *id.* § 76 (identifying "general rule that a court of equity has no jurisdiction in matters of a political nature").

25 Nabob of the Carnatic v. E. India Co. (1793) 30 Eng. Rep. 521, 523; 2 Ves. Jun. 56, 60.

26 *See* 1 BURHAN IBN HASAN, TUZAK-I-WALAJAHI, SOURCES OF THE HISTORY OF THE NAWWABS OF THE CARNATIC x (S. Muhammad Husayn Nainar trans., 1934).

27 *Nabob of the Carnatic*, 30 Eng. Rep. at 523, 2 Ves. Jun. at 60.

28 *See* Robert Travers, *A British Empire by Treaty in Eighteenth-Century India*, *in* EMPIRE BY TREATY: NEGOTIATING EUROPEAN EXPANSION, 1600–1900, at 132, 132 (Saliha Belmessous ed., 2015) (discussing "emergence of a novel style of 'empire by treaty' in India during the second half of the eighteenth century").

29 *See infra* note 212 and accompanying text.

30 *See* 1 RULING CASE LAW, *supra* note 24, at vii (1914).

31 *See* 14 *id.* § 76 (1916).

32 73 U.S. (6 Wall.) 50, 71 & n.† (1867) (citing Nabob of the Carnatic v. East India Co. (1791) 30 Eng. Rep. 391, 393–402; 1 Ves. Jun. 371; 375–93).

Nabob of the Carnatic thus plays an important role in the story that equity tells itself about political power. The Court of Chancery's traditional office was to protect property rights.[33] This was a necessary constraint on equity's sweeping authority to craft remedies. Political rights—that is, rights that "pertain solely to the political administration of government"—are not property rights.[34] Therefore, they are not within the traditional jurisdiction of equity.

In this story, *Nabob of the Carnatic*, decided only four years after the Judiciary Act of 1789, is relevant to the jurisdiction of the federal courts today. Article III of the U.S. Constitution extends the federal "judicial Power" to various "Cases" and "Controversies," including "to all Cases, in Law and Equity" arising under federal law.[35] Among the earliest federal statutes, the Judiciary Act of 1789 afforded federal courts "cognizance" of some "suits of a civil nature . . . in equity."[36] The Supreme Court has stated that "[t]he suits in equity of which the federal courts have had 'cognizance' ever since 1789 constituted the body of law which had been transplanted to this country from the English Court of Chancery."[37] Both the Court and lower federal courts have cited *Nabob of the Carnatic* as evidence of that the Court of Chancery traditionally would not have answered political questions or protected political rights.[38]

II. CONTESTS FOR EMPIRE

The Court of Chancery decided *Nabob of the Carnatic* in a time of turmoil for the British Empire. The decade before, Britain lost thirteen of its North American colonies. Since then, it had allied with some Indian sovereigns and battled with others who had in turn allied

33 *See, e.g.*, *In re* Sawyer, 124 U.S. 200, 213 (1888).

34 Fletcher v. Tuttle, 37 N.E. 683, 688 (Ill. 1894).

35 U.S. CONST., art. III § 2, cl. 1.

36 Judiciary Act of 1789, § 11, ch. 20, 1 Stat. 73, 78.

37 Guar. Tr. Co. of N.Y. v. York, 326 U.S. 99, 105 (1945); *see also* Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 318–19 (1999).

38 *See* Georgia v. Stanton, 73 U.S. (6 Wall.) 50, 71 n.† (1867); Hearne v. Smylie, 225 F. Supp. 645, 653–54 (D. Idaho 1964), *rev'd*, 378 U.S. 563 (1964) ("It seems no overstatement to say that in 1789, the High Court of Chancery would have been greatly shocked at the suggestion that equity might afford injunctive relief under the facts at bar.").

with the French.[39] January 28, 1793, the date of Chancery's final decision in *Nabob of the Carnatic*,[40] was one week after revolutionaries executed Louis XVI in France, and just a few days before the French Republic declared war on Britain.[41] Already by this time, the rank corruption of the British East India Company and many of its leading officials had become apparent and politically explosive in the imperial metropole.[42]

At the center of much this controversy was Muhammad Ali Khan Wallajah, the Nawab of the Carnatic. By the account of *Tuzak-i Wallajahi*, the Nawab's official court chronicle, he had "helped and protected the English whenever they were in trouble," drawing them into the complex hierarchies of political power within the Mughal Empire.[43] The "bond of union between" him and the British "was a brotherly treaty," one that the British Crown had promised would be "permanent and firm."[44]

In the late 1740s and early 1750s, Muhammed Ali battled with Chanda Sahib, a Nawayat prince allied with the French East India Company, for control of the Carnatic, a region in what today is eastern Tamil Nadu.[45] Muhammed Ali had provided the British with military support before, and now he allied with the British East India Company in his fight for the nawabship of the Carnatic.[46] The Company's troops, under command of Robert Clive, then an office clerk and "and part-time soldier" and later the first British Governor of Bengal,[47] helped

39 JOHN KEAY, INDIA: A HISTORY 397 (2000).

40 *See* Nabob of the Carnatic v. East India Co., (1793) 30 Eng. Rep. 521; 2 Ves. Jun. 56; Nabob of Arcot v. E. India Co. (1793) 29 Eng. Rep. 841; 4 Bro. C.C. 181.

41 *See* WILLIAM DOYLE, THE FRENCH REVOLUTION: A VERY SHORT INTRODUCTION 52(2001) (explaining that "on 21 January 1793 the former king [Louis XVI] went to public execution," and that "[w]ithin days of the execution Great Britain and the Dutch Republic joined the Republic's enemies"); Kevin H. O'Rourke, *The Worldwide Economic Impact of the French Revolutionary and Napoleonic Wars, 1793–1815*, 1 J. GLOBAL HIST. 123, 125 (2006) ("[O]n 1 February 1793, the French National Convention declared war on Great Britain.").

42 *See* NICHOLAS B. DIRKS, THE SCANDAL OF EMPIRE: INDIA AND THE CREATION OF IMPERIAL BRITAIN 77 (2006) (discussing Edmund Burke's "fiery speech about the corruption represented by the collusion between the nawab of Arcot and his creditors," which Burke delivered on February 28, 1785).

43 2 HASAN, *supra* note 26, at 51.

44 1 *id.* at 106, 124.

45 R.P. Jackson, *Muhammad Ali, Nawab of the Carnatic (1752–1795 A.D.) and His Copper Coins*, 10 THE NUMISMATIC CHRONICLE AND JOURNAL OF THE ROYAL NUMISMATIC SOCIETY 146, 148 (1910).

46 KEAY, *supra* note 39, at 379.

47 *Id.*

Muhammed Ali's forces prevail and secure control of the Carnatic.[48] The Company's aid was dearly bought, however. The Nawab borrowed more and more from Company officials at usurious rates, spent more and more to purchase the favor of members of the English Parliament,[49] and mortgaged more and more of the Carnatic, till it all came crashing down.

A. Imperial Conflicts on Two Continents

The Court of Chancery's decision in *Nabob of the Carnatic* was not the only writing about the Carnatic to circulate in nineteenth-century America. To the contrary, imperial conflicts in the Carnatic were known to Revolutionary-era Americans and even romanticized in meter and rhyme. As late as 1893, attendees at the annual meeting of the General David Humphreys Branch of the Connecticut Society of the Songs of the American Revolution were subjected to one such poem, a reading from the works of Philip Freneau, "Poet-Laureate of the American Revolution."[50] Freneau's middling verse included these lines about a Pennsylvania privateer that defeated British warships at the Battle of Delaware Bay in 1782:

> From an Eastern Prince she takes her name,
>
> Who smit with freedom's sacred flame,
>
> Usurping Britons brought to shame,
>
> His country's wrongs avenging.[51]

The ship was the *Hyder Ally*,[52] and its namesake was Haider Ali, the Sultan of Mysore,[53] whose armies repeatedly defeated British forces in the Carnatic between the late 1760s and early 1780s.[54] Revolutionary-

48 *See* Wibulsilp, *supra* note 5, at 30–31.

49 *See* DIRKS, *supra* note 42, at 61–80 (2006); N.S. RAMASWAMI, POLITICAL HISTORY OF CARNATIC UNDER THE NAWABS 11–12 (1984).

50 SAMUEL E. BARNEY, SONGS OF THE REVOLUTION: A PAPER READ BEFORE THE GENERAL DAVID HUMPHREYS BRANCH OF THE CONNECTICUT SOCIETY OF THE SONS OF THE AMERICAN REVOLUTION 15 (1893) (labeling Freneau the "poet-laureate of the American Revolution").

51 *Id.* at 11 (reproducing Philip Freneau's poem "Sailor's Invitation"). For a description of the Battle of Delaware Bay, see 2 GARDNER W. ALLEN, A NAVAL HISTORY OF THE AMERICAN REVOLUTION 588–91 (1913).

52 *See* ALLEN, *supra* note 51, at 588–91.

53 *See* Blake Smith, *Revolutionary Heroes*, AEON (Dec. 7, 2016), https://aeon.co/essays/why-american-revolutionaries-admired-the-rebels-of-mysore [https://perma.cc/6M8N-ZJFS]. The Sultan of Mysore's name is occasionally spelled "Haider."

54 *See* KEAY, *supra* note 39, 395–97.

era Americans followed the news from the Mysore wars. A year after declaring independence, for instance, the U.S. Continental Congress even "contemplated sending troops" to aid Mysore and its French allies against the British in India.[55]

But the Americans would not join the conflict in India. Instead, after the Thirteen Colonies' successful revolution in North America, the British consolidated their empire in India,[56] and U.S. trade with India "flourished" over the next half-century.[57] For more than a decade after their successful revolution, Americans would continue to discuss Mysore's wars against the British,[58] with the odd "tribute" here and there to Haidar Ali, one of which found its way into the North Carolina courts.[59]

That strange case—involving a racehorse that shared its Mysorean namesake with the ship celebrated by Freneau's verse[60]—was decided the same year as another case that proved far more important for American law. The year was 1793, the case was *Nabob of the Carnatic v. East India Company*, and the struggle for empire in India was at the heart of the matter.[61]

B. The Mughal Empire and the East India Company

The story behind *Nabob of the Carnatic* is one of rampant corruption in the building of a British "empire by treaty" in India.[62] From 1600 to 1858, the Company led that imperial project, which began in

55 Smith, *supra* note 53.

56 *See* P.J. MARSHALL, THE MAKING AND UNMAKING OF EMPIRES: BRITAIN, INDIA AND AMERICA C. 1750–1783, at 377 (2005).

57 *See* Rajender Kaur & Anupama Arora, *India in the American Imaginary, 1780s–1880s*, *in* INDIA IN THE AMERICAN IMAGINARY, 1780s–1880s, at 3–4 (Anupama Arora & Rajender Kaur eds., 2017).

58 *See id.* at 4–5.

59 Smith, *supra* note 53 (noting Williams v. Cabarrus, 1 N.C. (Mart.) 54, 54–56 (1793) (discussing testimony as to whether the racehorse "Hyder Ali" had "run unfairly" in a race against "the Centinel")).

60 *See* BARNEY, *supra* note 50, at 11.

61 Nabob of the Carnatic v. E. India Co. (1793) 30 Eng. Rep. 521; 2 Ves. Jun. 56.

62 *See* Robert Travers, *A British Empire by Treaty in Eighteenth-Century India*, *in* EMPIRE BY TREATY: NEGOTIATING EUROPEAN EXPANSION, 1600–1900, at 132, 132 (Saliha Belmessous ed., 2015) (discussing "emergence of a novel style of 'empire by treaty' in India during the second half of the eighteenth century"); DIRKS, *supra* note 42, at 61 ("While the story of the debts of the nawab of Arcot [also known as the Nawab of the Carnatic] rarely figures importantly in imperial histories of the conquest of India, it was in fact of critical significance for several reasons . . . .").

earnest when it sent Sir Thomas Roe to seek trading privileges from the Mughal Emperor Nur-ud-din Muhammad Salim, known as Emperor Jahangir.[63]

The Company's first ambassador to the Mughal Empire was more boastful than successful. Roe would report that the Emperor "neuer vsed any Ambassadour with so much respect."[64] In fact, Roe and his embassage were "shoved into a substandard accommodation," rooms that were "'no bigger than ovens, . . . [with] no light but the door.'"[65] The message Roe took home was that the Company would not profit by making "warre," but instead by negotiating the terms of a "quiett trade" with the Emperor.[66]

The Mughal Empire was the foremost power in South Asia when Emperor Jahangir denied the Company's request for preferential trade relations.[67] Its administration, military, and extensive public works were funded by agricultural taxation of the peasantry.[68] As it centralized authority, the Empire's complex bureaucracy confronted local resistance and "internal strife."[69] Over time, the system divided and layered authority under the Emperor, with various office holders whose legitimacy depended upon imperial recognition. These included various governors and deputies of the Emperor, such as the "nawabs," provincial Muslim governors who owed their legitimacy to imperial recognition.[70] Over time, some of these governors came to act more or less independently as they transformed their offices into

63 *See* WILLIAM DALRYMPLE, THE ANARCHY: THE RELENTLESS RISE OF THE EAST INDIA COMPANY xxvi, 15–16 (2019). The Company was founded and chartered in 1600. *Id.* at 9. In the aftermath of an 1857 uprising, which is now known in India as the "First War of Independence," Parliament ended company rule in India *See id.* at 391; *see also* Government of India Act 1858, 21 & 22 Vict. c. 106, (Gr. Brit.).

64 Letter of Sir Thomas Roe to Lord Carew (Jan. 17, 1615), *in* 1 THE EMBASSY OF SIR THOMAS ROE TO INDIA, 1615–1619, at 110, 112 (William Foster ed., 1899).

65 DALRYMPLE, *supra* note 63, at 18.

66 *Id.* at 20.

67 *See id.* at 16–18.

68 KEAY, *supra* note 39, at 325. Though "[t]he Mughal assessment was supposed to have been determined as a large fraction (one-third or one-half) of the average yield of a large number of (mainly rain-fed and highly variable) crops converted into money values," records of the tax assessments are "sometimes inaccurate," assessments "periodically changed," and "actual collections [were sometimes in some areas] less than" what was assessed. Sumit Guha, *Rethinking the Economy of Mughal India: Lateral Perspectives*, 58 J. ECON. & SOC. HIST. ORIENT 532, 548–49 (2015).

69 KEAY, *supra* note 39, at 325–28.

70 *Id.* at 362–63.

hereditary monarchies.[71] As Muhammad Ali's court chronicle put it, the "empire . . . had been divided."[72]

The East India Company would obtain its own recognition from Mughal Emperor Shah Allam II in 1765, who made the Company the *diwan* of Bengal, an office that afforded it territorial authority within the Mughal system of divided sovereignty.[73] The Mughal Emperor was not the only sovereign to afford the Company sovereignty or something like it. As Muhammad Ali well understood, the Company had gone from "merchants to the . . . rank of rulers."[74] Within the British Empire, it developed into a "Company-State"[75] that used treaties and violence to enrich its owners and officials. It was a subject and yet an agent of the sovereign Crown, one that (from 1661 onwards) had a charter to enter into treaties.[76] By the late eighteenth century, according to one Company official, the Company's governor-general in India was "firing off treaties at every man like a blunderbuss."[77] Under company policy, that is, the line between "warre" and "a quiett trade"[78] became rather difficult to draw.

III. EMPIRE IN THE ENGLISH COURT OF CHANCERY

Were matters of war and peace or those of trade the subject of the Company's 1781 treaty with the Nawab of the Carnatic? The Company's counsel would put this question to the Court of Chancery in pleading for a dismissal of the bill in *Nabob of the Carnatic v. East India Company*.

War in the Carnatic led to the filing of the bill. The eighteenth century saw intense conflicts among South Asian polities as the Mughal Empire's power waned, including between Mysore under Haidar Ali

71 *Id.* Muhammad Ali, for instance, asserted his "hereditary right to the administration of this kingdom" during his conflict with Chanda Sahib for control of the Carnatic. Wibulsilp, *supra* note 5, at 48.

72 2 HASAN, *supra* note 26, at 145.

73 *See* DALRYMPLE, *supra* note 63, at 208; KEAY, *supra* note 39, at 382.

74 1 HASAN, *supra* note 26, at 104–06.

75 PHILIP J. STERN, THE COMPANY-STATE: CORPORATE SOVEREIGNTY AND THE EARLY MODERN FOUNDATIONS OF THE BRITISH EMPIRE IN INDIA 3 (2011).

76 Michael Mulligan, *The East India Company: Non-State Actor as Treaty-Maker*, *in* NON-STATE ACTORS AND INTERNATIONAL OBLIGATIONS 39, 39 (James Summers & Alex Gough eds., 2018).

77 Travers, *supra* note 28, at 156 (quoting Henry St. George Tucker, who served as the Accountant General of the British East India Company).

78 *See supra* note 61 and accompanying citation.

and the Carnatic under Muhammed Ali Khan Wallajah.[79] During this period, Indian polities also fought with—and alongside—European powers, such as the British East India Company and the French East India Company.[80] The Carnatic was a "frontier zone" at the edge of the Mughal Empire,[81] a place of "periodic warfare" during the latter half of the eighteenth century, in part because of the Nawab's financial and military relationships with the Company.[82] The 1767–69 war between Mysore and the Carnatic was one example.[83] By the 1780s, the Nawab's "desperate attempt[s] to maintain the independence of his government"[84] led to the filing of the bill for relief in *Nabob of the Carnatic*. In 1791, Lord Chancellor Thurlow denied the Company's plea to bar the action in a 1791 decision.[85] After his dismissal from the bench, the commissioners discharging the office of chancellor dismissed the bill in 1793 because the Company's answer established that the underlying contract was a "political" treaty between sovereigns.[86]

A. Too Indebted to Fail?

The Nawab had become indebted to both the Company and to individuals, many of them Company agents. There were many such

79 Historians have staked out competing positions on this period in South Asia, with "imperial historical defenders of British rule" characterizing it as a time of collapse of Indian polities and European ascendancy in response to the "chaos" of the time, while more recent historians have seen it as a period during which particular polities persisted and even grew in political and economic power. *See* BURTON STEIN, A HISTORY OF INDIA 196 (David Arnold ed., 2d ed. 2010) (contrasting two views); *id.* at 197 ("In more recent work it has emerged that sustained and substantial, if uneven, economic growth and political development was more characteristic of the post-Mughal eighteenth century.").

80 *See* HOLDEN FURBER, RIVAL EMPIRES OF TRADE IN THE ORIENT 1600–1800, at 125, 146–69 (1976) (stating that "the 1740s would open a duel for empire between the English and French culminating in the firm establishment of British power at the close of the century").

81 Wibulsilp, *supra* note 5, at 3, 5.

82 *See* DIRKS, *supra* note 42, at 65.

83 *Id.* at 65 ("While a war with Mysore in 1767 began for defensive reasons, it was pursued in large part to protect financial interests."); *see also* Jim Phillips, *A Successor to the Moguls: The Nawab of the Carnatic and the East India Company, 1763–1785*, 7 INT'L HIST. REV. 364, 377 (1985) (discussing First Mysore War, "which was fought to acquire additional territory, and therefore additional revenue for the nawab which could increase the rate of debt repayment").

84 Phillips, *supra* note 83, at 387.

85 Nabob of the Carnatic v. E. India Co. (1791), 30 Eng. Rep. 391, 402; 1 Ves. Jun. 371, 393.

86 Nabob of the Carnatic v. E. India Co. (1793), 30 Eng. Rep. 521, 523; 2 Ves. Jun. 56, 60.

creditors: "By 1766, almost every European in Madras was involved in some way with [the Nawab's] debts, either as creditors or as executors for others."[87] Some of his most "notorious" creditors were members of Parliament.[88] War, including conflicts with Mysore, was an engine of the Nawab's mounting debts.[89] To obtain repayments and secure their loans, the Company and Company officials often accepted rights to "tax farming," that is, rights to taxes paid by peasants within the Carnatic.[90]

The Nawab had apparently banked on being too indebted to fail. In his thunderous "Speech on the Nabob of Arcot's Debts" in 1785, Edmund Burke would describe the Nawab's network of debt as evidence of the Company's corruption, in which the Nawab played his assigned role.[91] Similarly, some historians treated him as having become a dependent puppet of the East India Company.[92] But more recent work has painted a nuanced picture in which "the great debts of the Nawab had to a great extent put him in a favorable position,"[93] one in which he was successful in consolidating territorial control until 1776.[94] It was only then that his creditors began seriously to question the security of their position and therefore sought greater influence over the internal administration of the Carnatic.[95]

In 1780, the Second Mysore War began and the Nawab faced possible defeat and the need to take on even more debt.[96] One year later the Nawab entered into a treaty with the East India Company assigning the revenues from his territory for the duration of the war.[97] The war

87 DIRKS, *supra* note 42, at 65.

88 *Id.*

89 *Id.*

90 *See id.* at 62.

91 Speech on Nabob of Arcot's Debts (Feb. 28, 1785), *in* 5 THE WRITINGS AND SPEECHES OF EDMUND BURKE: INDIA: MADRAS AND BENGAL: 1774–1785, at 478, 490 (P.J. Marshall & William B. Todd eds., 1981).

92 *See* Wibulslip, *supra* note 5, at 33–43 (discussing East-India-Company records that imply that the Nawab had been reduced to a "puppet of the English East India Company" by the late 1700s).

93 *See, e.g.*, Wibulsilp, *supra* note 5, at 34.

94 *See* Phillips, *supra* note 83, at 367.

95 *Id.*

96 *Id.* at 386.

97 *Id.*

ended in 1784 with a treaty between Mysore and the Company restoring the status quo prior to the war.[98] But the Company's new Governor in Madras was not willing to resume the status quo in the Carnatic. Instead, the Company held onto the assignment of rights in the Carnatic, prompting the Nawab to direct his attorneys and agents in London to lobby the Company's officials there and Parliament for redress. They were unsuccessful, and subsequent agreements between the Nawab and the Company in 1785 and 1787 addressed but did not resolve the dispute.

B. A Bill for a Fair Account

The bill filed in *Nabob of the Carnatic* focused upon the 1781 agreement between the Nawab and the Company. The Nawab's counsel included John Freeman-Mitford, who had published a leading treatise on equity and would go on to become the 1st Baron Redesdale.[99] Freeman-Mitford and his co-counsel alleged that the Company "had received more [in revenues] than their demand [under the 1781 agreement] could amount to, and that upon a fair account a considerable balance would appear in favor of the Plaintiff."[100] If so, the bill requested that the balance be paid to the Nawab.[101] Their theory of the "case made by the bill is merely that of debtor and creditor"—placing the bill well within with Court of Chancery's jurisdiction to order an accounting.[102]

This theory of the case rested in part upon the authority of *Penn v. Lord Baltimore*.[103] In 1732, the Penns, heirs of the founder of Pennsylvania, and Charles Calvert, Fifth Baron Baltimore and Proprietary Governor of Maryland, signed an agreement in the hopes of settling a

98 Treaty of Mangalore, *in* 2 SELECTIONS FROM THE LETTERS, DESPATCHES, AND OTHER STATE PAPERS PRESERVED IN THE BOMBAY SECRETARIAT 314–16 (George W. Forrest ed., Bombay 1887).

99 JOHN MITFORD, A TREATISE ON THE PLEADINGS IN SUITS IN THE COURT OF CHANCERY BY ENGLISH BILL (London, 2d ed. 1787); *John Freeman-Mitford, 1st Baron Redesdale*, BRITISH MUSEUM, https://www.britishmuseum.org/collection/term/BIOG190033 [https://perma.cc/W5EW-HVEY] (last visited March 20, 2022).

100 Nabob of the Carnatic v. E. India Co (1791) 30 Eng. Rep. 391, 392; 1 Ves. Jun. 371, 372.

101 *Id.*

102 *Id.* at 399, 1 Ves. Jun. at 386.

103 Penn v. Lord Baltimore (1750) 27 Eng. Rep. 1132; 1 Ves. Sr. 444.

decades-long dispute concerning the boundary between the two colonies.[104] When the dispute continued, Lord Baltimore filed a petition with the Court of Chancery, to which the Penns responded with a counter petition.[105] Lord Chancellor Hardwicke thought it "certain" that the King and council had "original jurisdiction" over boundary disputes between provinces and dominions in the North American colonies.[106] Even so, he held that the Court had jurisdiction to act *in personam* and compel specific performance of the contract between the parties.[107] So too, the Nawab's counsel argued, could the Court take cognizance of the Nawab's demand for an accounting from the Company.[108]

Could the Nawab, a Muslim who was not an English subject, sue in an English court? This question arose during the litigation, although it is unclear whether the Company's counsel raised the objection in their initial pleadings. In *Calvin's Case*, Sir Edward Coke distinguished subjects from "infidels" and reasoned that non-Christians did not enjoy the full protections of the common law.[109] "All infidels," he wrote, "are in law *perpetui inimici*, perpetual enemies (for the law presumes not that they will be converted, that being *remota potentia*, a remote possibility) for between them, as with the devils, whose subjects they be, and the Christian, there is perpetual hostility, and can be no peace."[110] Here, in embryonic form, was the apology for English pretensions to conquest in North America. Charles II would rest a 1681 proclamation forbidding his subjects—other than the East India Company—from trading with "infidels or barbarous nations" in India.[111]

As the litigation proceeded, the Nawab's counsel felt compelled to address this prejudice. They rightly argued that English law no longer denied the capacity of non-Christians to sue in English courts: "There is one objection made to the person of the plaintiff in this case,

104 *Id.* at 1132–33; 1 Ves. Sr. 444.

105 *Id.* at 1133–34, 1 Ves. Sr. at 444–45.

106 *Id.* at 1134, 1 Ves. Sr. at 446.

107 *Id.* at 1134–35, 1 Ves. Sr. at 447–48.

108 *Nabob of the Carnatic*, 30 Eng. Rep. at 397–98, 1 Ves. Jun. at 384–85 ("The Company is not in a higher situation, than Lord *Baltimore* was as to the province of *Maryland*.").

109 Calvin's Case (1608) 77 Eng. Rep. 377; 7 Co. Rep. 1a.

110 *Id.* at 397; 7 Co. Rep. at 17a–b.

111 Charles II, King of Eng., A Proclamation for the Restraining All His Majesties Subjects but the East-India Company, to Trade to the East-Indies, *in* 1 A BIBLIOGRAPHY OF PROCLAMATIONS OF THE TUDOR AND STUART SOVEREIGNS AND OF OTHERS PUBLISHED UNDER AUTHORITY 1485–1714 WITH AN HISTORICAL ESSAY ON THEIR ORIGIN AND USE 452 (Robert Steele ed., 1910).

that he is not a Christian: but that objection has been over-ruled these many years."[112] Yet apparently Coke's *dictum* still resonated enough in the minds of English lawyers to require the Nawab's counsel to address it.

The Company's attorneys focused their jurisdictional pleas upon the sovereign character of the dispute, not upon the Nawab's faith or race. They pleaded that "treaties [between the Nawab and the Company] cannot be a subject for the municipal jurisdiction of any Court in the country of either of the contracting parties."[113] Their broadest theory stressed the intersovereign nature of the dispute: "The question intended to be submitted to the Court is, whether both parties being sovereign independent powers their contests can be made the subject of dispute here."[114] They pointed out that the Nawab's counsel had "not shewn a case, nor can they, in which both parties were sovereigns."[115] Rather, "[a] suit between sovereigns is perfectly new."[116]

Less broadly, the Company's attorneys argued that the Court lacked jurisdiction because of the nature of the underlying agreement. It was a "fœderal agreement" dealing with matters of "peace and war."[117] The Nawab's debt was for the Company's support in defending the Carnatic from invasion.[118] All the "dealings and transactions"

112 Nabob of Arcot v. E. India Co. (1793), 29 Eng. Rep. 841, 842; 4 Bro. C.C. 180, 183. Nineteen years earlier, for example, Lord Mansfield had disapproved of Coke's dictum. *See* Cambell v. Hall (1774) 98 Eng. Rep. 848 (K.B.). For discussion of prior cases "admitting that non-Christians could have a place, albeit limited, in the British polity and its legal mechanisms," including Chancery, see Mitch Fraas, *Making Claims: Indian Litigants and the Expansion of the English Legal World in the Eighteenth Century*, 15 J. COLONIALISM & COLONIAL HIST. (2014), https://muse.jhu.edu/article/542520 (discussing, among others, *Omichund v. Barker*). As Fraas concludes, however, "by the second half of the eighteenth century, the barriers to entry rose again," with the editor of the *Gazetteer and London Daily Advertiser* writing in 1764 that "it was still 'an open issue'" whether "non-Christians were allowed to swear oaths in court." *Id.*

113 Nabob of the Carnatic v. E. India Co (1791) 30 Eng. Rep. 391, 392; 1 Ves. Jun. 371, 372.

114 *Id.*

115 *Id.* at 399, 1 Ves. Jun. at 386. The Nawab's counsel had pointed to case-law supporting the right of a foreign sovereign to seek redress in English courts "for an injury done to them by the subjects" of the Crown. *Id.* at 397, 1 Ves. Jun. at 383 (citing *Spanish Ambassador v. Pountes*, (1615) 81 Eng. Rep. 381, 1 Roll. Rep. 133).

116 *Id.* at 400, 1 Ves. Jun. at 399. A related argument stressed the difficulty of doing justice between sovereigns with respect to a treaty-based claim. *Id.* at 399, 1 Ves. Jun. at 386. ("This Court could not do reciprocal and complete justice upon a treaty between the Company and any other country as *France* or *Spain*.").

117 *Id.* at 400–01, 1 Ves. Jun. at 389–91.

118 *See supra* notes 81–92 and accompanying text.

between two sovereigns concerned "peace and war" and therefore were "not cognizable in this Court or any municipal Court of Justice."[119]

The Company's attorneys also suggested that the Court should not adjudicate the matter because "[t]here is great reason to believe, the Nabob knows nothing of this suit."[120] Lord Chancellor Thurlow suspected that was the case but would not decide upon a ground with no support in the record.[121] Still, it was a sign of the confusing nature of the pleadings and proceedings, which apparently frustrated the judges throughout the litigation.[122]

C. "I am sorry, that such a cause must be determined in this manner"

In any event, the bill filed in the Nawab's name prevailed in the first stage of litigation. Given the record, Lord Chancellor Thurlow was skeptical of the Company's argument. He found the Company's distinction between a "fœderal" treaty and a justiciable contract to be less than pellucidly clear.[123] Lord Thurlow therefore restated the theory "without using the words 'peace and war,'" which were not helpful either.[124] As he understood it, the Company's "position [was], that wherever sovereign nations have contracted upon sovereign matters, the effect is a species of obligation, *ex quo non oritur actio*"[125]—that is, a promise from which no action arises. There was, he went on, a serious question whether "this Court would interpose upon a right of war and peace upon the *jus gentium*."[126] But that question was not properly pled. As the Nawab's counsel pointed out, the bill did not plead that the transactions at issue were between two sovereign powers, and the Company's pleadings failed to "state clearly" grounds for concluding otherwise.[127] For all the record revealed, the Company was "nothing but an artificial creature of the law of this country."[128] The Company's

119 *Nabob of the Carnatic*, 30 Eng. Rep. at 392, 1 Ves. Jun. at 372.

120 *Id.* at 399, 1 Ves. Jun. at 386.

121 *Id.* at 402, 1 Ves. Jun. at 393.

122 *See infra* note 134 and accompanying text.

123 *Nabob of the Carnatic*, 30 Eng. Rep. at 400, 1 Ves. Jun. at 389 ("[I]t is argued, that there is enough in the pleadings to shew, this was a fœderal agreement, which is not a very definite term . . . .").

124 *Id.*

125 *Id.* at 399–400, 1 Ves. Jun. at 389–91.

126 *Id.* at 394, 1 Ves. Jun. at 377.

127 *Id.* at 396, 1 Ves. Jun. at 381.

128 *Id.*

counsel asked for leave to amend its pleadings if necessary to put that issue before the Court.[129] Lord Chancellor Thurlow concluded that the record did not put the issue of the Company's sovereign status before the Court and therefore overruled the Company's plea.[130]

Lord Chancellor Thurlow's restatement of the Company's theory in the first stage of litigation pointed towards the principles for which the Court of Chancery's second decision would be cited by American lawyers. The parties apparently agreed that the Court could adjudicate at least some claims of private right arising under treaties.[131] But it was Lord Chancellor Thurlow who most clearly distinguished between "private right[s] of the individual" and "the public interests of [the] sovereign."[132] As for that distinction, "an action does not lie" when parties are "in the same situation, in which sovereign powers are with regard to all treaties contracted between them respecting the interests of the sovereign body."[133]

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129 *Id.* at 399, 1 Ves. Jun. at 386.

130 *Id.* at 402, 1 Ves. Jun. at 393.

131 The Nawab's attorneys argued that "[t]he Court must often judge of treaties between sovereigns, where they create private rights, and make persons amenable as debtors and creditors." *Id.* at 398, 1 Ves. Jun. at 384. The Company's attorneys seemed to agree with this principle and its potential application to suits brought by sovereigns. *Id.* at 395, 1 Ves. Jun. at 378 ("[I]f sovereigns have ever been suitors in the Courts of this kingdom, it has only been as to private rights, which are connected with the internal government of the state, and therefore subject to the municipal law.").

132 *Id.* at 401–02, 1 Ves. Jun. at 391–93.

133 *Id.* at 401, 1 Ves. Jun. at 390. This was not the first instance in which Thurlow opined upon a question of Chancery's jurisdiction to order an accounting with respect to the Company's affairs in India. In 1763, the Company approached Thurlow, then an "up-and-coming" solicitor, for advice as to whether the Court of Chancery could compel an accounting at the behest of Robert Clive, who claimed a right to "an annual salary (jagir)" from the Nawab of Bengal, which the Company denied. Thurlow reasoned that "Chancery could not decide upon any matter lying 'within the full and absolute jurisdiction of another imperial crown,'" especially one such as this, which was "founded not by the laws of England but by the use of force abroad." Edward Cavanagh, *The Imperial Constitution of the Law Officers of the Crown: Legal Thought on War and Colonial Government, 1719–1774*, 47 J. IMPERIAL & COMMONWEALTH HIST. 619, 628–29 & n.39 (2019) (quoting Report of Edward Thurlow (December 1763), *The Opinions of Mr. James Eyre*, xiii)). Clive secured contrary advice from, among others, two former attorneys general. *Id.* at 629. The Company then "sought advice from the best lawyers they could secure," including James Eyre, who "expected that Chancery would accept jurisdiction only to award for the company." *Id.* Apparently growing concerned that it "[r]isk[ed] not only a decision against [it] in the Court of Chancery, but also a public relations disaster," the Company gave Clive what he wanted: the jagir for ten years. *Id.* As Cavanagh notes, "20 years later, much of this band would get back together . . . to rework their opinions, in shuffled-around capacities," in the *Nabob of the Carnatic* case. *Id.* at 629 n.45. Unlike Clive, however, the Nawab would not get what he was aiming for.

To the extent that this dictum implied anything about political questions or political rights, it was limited to the international context. The question as Lord Chancellor put it was whether "sovereign nations [had] contracted upon sovereign matters."[134] And that was the question the Court of Chancery addressed when it dismissed the bill in 1793 after the Company filed its answer.

The Company answered by pointing to the 1785 and 1787 agreements between it and the Nawab.[135] The course of their dealings, it argued, showed that the Company acted as a sovereign in entering into treaties involving matters of war and peace.[136]

Counsel for both sides mostly repeated their earlier arguments.[137] The Nawab's attorneys conceded that "[a]s far as [the Company] treat[s] for peace or war, they act as the delegates of the state, and are not liable."[138] But, they argued, the bill did not "involve[] [a] matter of state."[139] To the contrary, the Company's counsel contended, the Company and the Nawab had entered into a "political alliance[]" that was "clearly in the nature of a fœderal treaty."[140] And, they continued, "no cause of action can arise from" a case "where one sovereign is dealing with another sovereign upon matters of sovereignty."[141] This case was not one of an individual claiming a right under a treaty, such as a "commercial treaty," which is, "from the nature of the subject, to be carried that way into effect."[142] Thus, the Company's attorneys distinguished between personal rights under commercial treaties and sovereign matters under political treaties. They distinguished *Penn v. Lord Baltimore*, the potentially contrary precedent that implicated questions of political authority, because both parties were "individual subjects of this country."[143] There, the Chancellor had opined that the King and

134 *Nabob of the Carnatic*, 30 Eng. Rep. at 400, 1 Ves. Jun. at 390.

135 Nabob of the Carnatic v. E. India Co. (1793) 30 Eng. Rep. 521, 521; 2 Ves. Jun. 56, 56–57.

136 *Id.* at 521, 2 Ves. Jun. at 56.

137 Brown's Chancery Cases describes the arguments, while Vesey Junior's report refers back to the arguments upon the plea. *Compare* Nabob of Arcot v. E. India Co. (1793) 29 Eng. Rep. 841, 842–49; 4 Bro. C.C. 180, 183–98, *with Nabob of the Carnatic*, 30 Eng. Rep. at 521, 2 Ves. Jun. at 56.

138 *Nabob of Arcot*, 29 Eng. Rep. at 844, 4 Bro. C.C. at 188.

139 *Id.* at 845, 4 Bro. C.C. at 188.

140 *Id.* at 846, 4 Bro. C.C. at 193.

141 *Id.* at 847, 4 Bro. C.C. at 193.

142 *Id.* at 848, 4 Bro. C.C. at 195.

143 *Id.* at 846, 4 Bro. C.C. at 192 (citing Penn v. Lord Baltimore (1750) 27 Eng. Rep. 1132; 1 Ves. Sen. 444).

council had jurisdiction over boundary disputes in the colonies, while still concluding that the Court had *in personam* jurisdiction over the parties.[144] In the Nawab's case, the Company argued, the Board of Control, constituted by Parliament in 1784, had authority relative "to all matters of war and peace" and "civil and military government of the *British* territories in *India*."[145] Thus, the bill presented a matter for the Board of Control, not the Court of Chancery.

Before the Court delivered its opinion, the Company's counsel informed it that Lord Cornwallis, the Governor-General of Bengal, had concluded a treaty with the Nawab that would "render this suit unnecessary."[146] The case was adjourned. When the Court again took it up, the Nawab's counsel argued that there was no new treaty that mooted the suit.[147] Apparently frustrated, Lord Commissioner Eyre apologized "that such a cause must be determined in this manner," but stated that the Court would not "suffer[] this to stand as an undecided cause."[148]

In Vesey Junior's report, the Court's reason for dismissing the bill is briefly stated and turns upon the international character of the dispute. The Court dismissed the bill on jurisdictional grounds because its plea depended upon a "political" treaty between sovereigns.[149] The Court accepted the Company's argument that it was acting not as a subject of the British Crown when it negotiated with the Nawab, but "as if" it were the Crown.[150] The Company's agreement with the Nawab was a "mutual treaty between persons acting in that instance as states independent of each other."[151] Thus, "it was not mercantile in its nature, but political."[152] It was, one might say, a matter of "warre," not of

144 *See Penn*, 27 Eng. Rep. at 1133–1134, 1 Ves. Sen. at 445–47.

145 *Nabob of Arcot*, 29 Eng. Rep. at 848, 4 Bro. C.C. at 197; *see* The East India Company Act 1784, 24 Geo. 3 c. 25, (Eng.). The Nawab's counsel argued that the Board's authority did not extend to demand for an accounting of debt plead by the bill. *Nabob of Arcot*, 29 Eng. Rep. at 845, 4 Bro. C.C. at 189–90.

146 Nabob of the Carnatic v. E. India Co. (1793) 30 Eng. Rep. 521, 522; 2 Ves. Jun. 56, 59.

147 *Id.*

148 *Id.* at 523, 2 Ves. Jun. at 60. Lord Chancellor Thurlow, who had overruled the plea in 1791, no longer held office in 1792 after he opposed a bill put forward by Prime Minister Pitt and the Prime Minister pushed for his dismissal. 26 ENCYCLOPÆDIA BRITANNICA 903–04 (1911). Rather, commissioners discharging the Office of Chancellor decided the case in 1793. *Nabob of Arcot*, 29 Eng. Rep. at 841, 844, 4 Bro. C.C. at 180, 187.

149 *Nabob of the Carnatic*, 30 Eng. Rep. at 523, 2 Ves. Jun. at 60.

150 *Id.*

151 *Id.*

152 *Id.*

"quiet trade."[153] The treaty "consequently [was] not a subject of private, municipal, jurisdiction."[154]

Neither equity nor politics stopped what was to come. The Parliamentary Register recorded that on March 5, 1792, while the case was still pending in Chancery, the House of Commons tabled a petition from "his Highness the Nabob" of the Carnatic.[155] It would remain there. Muhammad Ali died in 1795, ending the litigation before the House of Lords decided the appeal.[156] In 1801, the Company forced the negotiation of a treaty ceding to it control of all of the Carnatic.[157] By then, the Company was well on its way to being the most powerful government in India.

IV. *NABOB OF THE CARNATIC* CROSSES THE ATLANTIC

It did not take long for reports of the decision in *Nabob of the Carnatic* to cross the Atlantic. American lawyers cited the case for many different propositions, some having nothing to do with political rights or political questions. They debated the proper interpretation of Chancery's decision in some of the most politically explosive cases that came before the federal courts.

The imperial context of the case slipped in and out of the judicial picture of *Nabob of the Carnatic* between the nineteenth and twentieth centuries. Until the 1830s, the case was a handy citation for various procedural and jurisdictional rules. Then, as the United States began to force some of the most powerful American Indian tribes to leave their homelands, the imperial context of *Nabob of the Carnatic* came to the fore. It remained there in judicial discussions through the 1860s, when the Supreme Court cited the case to dismiss challenges to the Reconstruction Acts after the Civil War. After the Reconstruction Amendments were enacted, and election-related litigation increased,

153 *See* DALRYMPLE, *supra* note 63, at 20 (quoting Sir Thomas Roe's recommendation that the East India Company pursue a policy of "quiet trade," not "warre," in its relations with the Mughal Empire).

154 *Nabob of the Carnatic*, 30 Eng. Rep. at 523, 2 Ves. Jun. at 60.

155 XXXII THE PARLIAMENTARY REGISTER 2–20 (2d Sess., 17th Parliament 1792) (Gr. Brit.).

156 Parvathi Menon, *The Carnatic Debts and the Agrarian Crisis of the Eighteenth Century*, 9 REV. AGRARIAN STUDS.10, 13 (2019) ("The Nawab died in October 1795 . . . .").

157 The British had installed a new Nawab and seized the palace at Arcot. *See* JOHN MALCOLM, THE POLITICAL HISTORY OF INDIA, FROM 1784 TO 1823, at 298–308 (London, John Murray 1826) (explaining that the 1801 Treaty of the Carnatic "vested the whole civil and military government of the Carnatic in the Company").

the imperial politics dropped out again. In the twentieth century, Justice Frankfurter celebrated the case in his *Baker v. Carr* dissent without referring to its facts.[158]

Thus, over time, *Nabob of the Carnatic* came to be cited less for a specific rule about judicial enforcement of "political" treaties[159] and more for a general principle distinguishing judicial from political authority. By the twentieth century, some judges and scholars would treat *Nabob of the Carnatic* as the first link in a chain of political question precedents stretching back to the Court of Chancery in 1793.

A. A Case of Many Propositions

In the first three decades of the nineteenth century, federal and state judges cited *Nabob of the Carnatic* in published opinions for discrete rules of law discussed in Lord Chancellor Thurlow's 1791 opinion for the Court. Justice Story was the first federal judge to cite the case in a published opinion. Riding circuit in 1815, he cited it for a proposition about prize jurisdiction, a topic that the counsel in *Nabob of the Carnatic* had touched upon in their arguments before the Court of Chancery.[160] State court judges in the next decade cited the case for various propositions, including that foreign sovereigns may sue in state courts and that foreign sovereigns are immune from suit.[161] Beginning in 1831 with *Cherokee Nation v. Georgia*, judges cited the Court of Chancery's decision for its rule concerning treaty enforcement.[162] The conflict between the Cherokee Nation and Georgia arose after gold was discovered in Cherokee lands and Georgia sought by statute to terminate the Cherokee Nation's sovereignty and authorize settlement of its territory.[163] The Cherokee Nation's representatives lobbied the federal government and also sued in the Supreme Court for enforcement

158 Baker v. Carr, 369 U.S. 186, 288 n.21 (1962) (Frankfurter, J., dissenting) (stating only that "[c]onsiderations similar to those which determined the *Cherokee Nation* case and *Georgia v. Stanton* no doubt explain the celebrated decision in *Nabob of the Carnatic v. East India Co.*, rather than any attribution of a portion of British sovereignty, in respect of Indian affairs, to the company") (citation omitted).

159 *Nabob of the Carnatic*, 30 Eng. Rep. at 523, 2 Ves. Jun. at 60.

160 DeLovio v. Boit, 7 F. Cas. 418, 440 n.41 (Story, Circuit Justice, C.C.D. Mass. 1815) (No. 3,776).

161 *See* Pinson v. Ivey, 9 Tenn. (1 Yer.) 296, 346–47 (1830); Andrews v. Herriott, 4 Cow. 508, 509 n.a (N.Y. Sup. Ct. 1825); Bank of Marietta v. Pindall, 23 Va. (2 Rand.) 465, 466–67 (1824).

162 Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 20 (1831).

163 *Id.* at 13–14.

of U.S. treaties that promised protection to the Nation.[164] The Court dismissed the bill but split on the reasons for doing so. Chief Justice Marshall, writing what would become the canonical opinion, concluded that the Cherokee Nation was not a "foreign nation[]" that could sue in the Court's original jurisdiction.[165]

A majority of the Justices who decided *Cherokee Nation* thought there was a line between a political controversy and a judicially cognizable bill for equitable relief. But where was that line? Justice Johnson would have held, as in *Nabob of the Carnatic*, "that as between sovereigns, breaches of treaty [are] not breaches of contract cognizable in a court of justice."[166] Justice Thompson and Justice Story distinguished "mere political rights" that are "recognized and secured by treaty," which were nonjusticiable, from "mere right[s] of property," which were justiciable.[167] While the Court could not remedy "any matter properly falling under the denomination of political power," it could issue an injunction "to prevent the further execution of [Georgia's] laws" that violated the statutes and treaties of the United States.[168] Chief Justice Marshall thought that the Court might have had jurisdiction to issue equitable relief to protect the Cherokee Nation's possession of its lands, had there been no other jurisdictional defect with the bill.[169] But he doubted that the Court had equitable jurisdiction over the portion of the bill that "require[d] [the Court] to control the legislature of Georgia, and to restrain the exertion of its physical force,"

164 *See* Rennard Strickland, *The Tribal Struggle for Indian Sovereignty: The Story of the Cherokee Cases*, *in* INDIAN LAW STORIES, 64–79 (Carole Goldberg, Kevin K. Washburn & Philip P. Frickey eds., 2011).

165 *Cherokee Nation*, 30 U.S. (5 Pet.) at 17. The Court would adjudicate the questions of political power in the Cherokee Nation's bill with *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 529 (1832), a case in law that arose when Georgia imprisoned a Northern missionary for violating its laws limiting entry into Cherokee territory. The Cherokee Nation's attorneys represented Worcester in the case. *Id.* at 534; *Cherokee Nation*, 30 U.S. (5 Pet.) at 14.

166 *Cherokee Nation*, 30 U.S. (5 Pet.) at 30 (Johnson, J., concurring). He added that injunctive relief would be inappropriate in light of "the utter impossibility of doing justice, at least even handed justice, between the parties" and discussed the difficulties in crafting and providing such relief to the Cherokee Nation. *Id.* at 29.

167 *Id.* at 59 (Thompson, J., dissenting) ("The judiciary is certainly not the department of the government authorised to enforce all rights that may be recognized and secured by treaty. In many instances, these are mere political rights with which the judiciary cannot deal.").

168 *Id.* at 51, 80.

169 *Id.* at 20 (majority opinion).

because that "savour[ed] too much of the exercise of political power."[170]

In his 1838 *Commentaries on Equity Pleadings*, Justice Story discussed *Nabob of the Carnatic* and *Cherokee Nation* and qualified the principle limiting judicial enforcement of political treaties. His commentary identified four jurisdictional demurrers to equitable relief.[171] The first ground was "[t]hat the subject is not cognizable by any municipal court of justice."[172] The principal case was *Nabob of the Carnatic*.[173] As Story read it, enforcement of "political treaties [involved] . . . subject-matter [that] was not properly cognizable by any municipal court of justice," but instead was "properly a matter of State."[174] This principle had exceptions under the U.S. Constitution, Justice Story stressed, because treaties are "the supreme law of the land" and cases arising under them fall within the Article III courts' jurisdiction.[175] First, a federal court would have jurisdiction when the bill for enforcement of a foreign treaty involved "private rights" or other "objects properly redressible in courts of justice, and having no connexion with, and involving no rights or duties of sovereignty."[176] Both Lord Chancellor Thurlow and counsel for the Company had similarly distinguished personal rights from intersovereign matters under international treaties. Second, a federal court had equitable authority to enforce treaties between Indian tribes and the United States: "Questions may arise under our treaties with the Indian tribes, which are properly cognizable by our courts of justice, although they may involve political considerations applicable to the due exercise of State sovereignty. Such were the questions involved in [*Cherokee Nation v. Georgia*]."[177]

The Supreme Court discussed *Nabob of the Carnatic* in an opinion published the same year as Justice Story's commentary. In *Rhode Island v. Massachusetts*, the Court read *Nabob of the Carnatic* to *support* jurisdiction in an intersovereign dispute, while acknowledging that the case

170 *Id.*

171 JOSEPH STORY, COMMENTARIES ON EQUITY PLEADINGS, AND THE INCIDENTS THERETO, ACCORDING TO THE PRACTICE OF THE COURTS OF EQUITY, OF ENGLAND AND AMERICA § 467, at 302 (A. Maxwell, London 1838).

172 *Id.*

173 *Id.* § 468, at 303–04.

174 *Id.* § 468, at 303.

175 *See id.* § 469, at 304 n.1.

176 *Id.* § 468, at 303.

177 *Id.* § 469, at 304 n.1.

was "commonly referred to in favour of a contrary position."[178] Massachusetts moved to dismiss Rhode Island's bill that sought judicial settlement of a boundary between them.[179] Counsel battled over the meaning of *Nabob of the Carnatic*, a case "much relied upon by the counsel of Massachusetts."[180] Focusing upon Lord Chancellor Thurlow's rejection of the Company's plea in the first stage of litigation, the Supreme Court read *Nabob of the Carnatic* to confirm that the Chancery Court had jurisdiction to settle a boundary dispute and thus incidentally determine questions of sovereignty and jurisdiction.[181]

Both *Cherokee Nation v. Georgia* and *Rhode Island v. Massachusetts* had obvious parallels with the international dispute in *Nabob of the Carnatic*. Less obvious was the connection between that case and the one arising from Dorr's Rebellion, when disenfranchised citizens drafted a new constitution for Rhode Island and organized their own elections. In *Luther v. Borden*, a trespass action and the Supreme Court's "first and still-leading [political question] case,"[182] Chief Justice Taney cited almost no caselaw in his opinion for the Court, which treated the question of which government was the legitimate government of Rhode Island as a political question.[183] But Justice Woodbury cited *Nabob of the Carnatic* as he agreed with the majority that judges must defer to "the

178 37 U.S. (12 Pet.) 657, 740 (1838).

179 *Id.* at 717 (argument of Rhode Island's counsel).

180 *Id.* at 692. Arguing that the judicial power of the United States was defined in "relation to English jurisprudence," Massachusetts's counsel cited *Nabob of the Carnatic* to stand for the proposition that suits "for the restitution of sovereignty . . . are not of the class belonging to law or equity." *See id.* at 685 (argument of Massachusetts's counsel). In response, Rhode Island's counsel addressed the "case, much relied upon by the counsel of Massachusetts," arguing that while "the charter of the company had placed it above the law," the U.S. Constitution had conferred jurisdiction in interstate disputes. *Id.* at 692–93 (argument of Rhode Island's counsel).

181 *Id.* at 739–43. The Supreme Court distinguished the 1793 Court of Chancery dismissal of the bill by reading it as turning upon the East India Company's refusal to submit to jurisdiction, "[n]ot because [the bill was] founded on a treaty." *Id.* at 742–43.

182 Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 607 (1976).

183 *See* Luther v. Borden, 48 U.S. (7 How.) 1 *passim* (1849); *id.* at 45 ("[W]henever a statute gives a discretionary power to any person to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts.") (quoting Martin v. Mott, 25 U.S. (12 Wheat.) 19, 31–32 (1827)).

proper political powers" on the "grave political questions" arising from Dorr's Rebellion.[184]

In retrospect, Justice Woodbury's citation marked *Nabob of the Carnatic*'s migration from international to domestic politics. Dorr's Rebellion involved a contest for empire of a sort, but Justice Woodbury recognized a distinction between this sort of contest and those involving international relations.[185] Generalizing from *Nabob of the Carnatic* and other cases, Justice Woodbury reasoned that disputes involving "political matters" and "political objects" are not "for judicial inquiry."[186]

In *Georgia v. Stanton* in 1867, the Court cited the Court of Chancery's 1791 decision in *Nabob of the Carnatic* for a general "distinction between judicial and political power" and held that a court may not offer its "judgment . . . upon political questions" or afford equitable relief to protect "political rights."[187] Georgia had filed a bill to enjoin the Secretary of War and two U.S. Army generals from implementing the Reconstruction Acts following the Civil War. The Court explained that the bill ran afoul of a "distinction between judicial and political power [that] is so generally acknowledged in the jurisprudence both of England and of this country, that we need do no more than refer to some of the authorities on the subject."[188] The first authority was *Nabob of the Carnatic*,[189] and the case "bearing most directly on the one before [the Court]," was *Cherokee Nation*, which the Court read as presenting "a political question."[190]

184 *Id.* at 56 (Woodbury, J., dissenting) (citing *Nabob of the Carnatic* as one type of political question case). Justice Woodbury dissented on a different point concerning the constitutionality of imposing martial law on Rhode Island during Dorr's Rebellion. *See id.* at 59.

185 *Id.* at 56–57 ("Another class of political questions, coming still nearer [to the present case than *Nabob of the Carnatic*], is, Which must be regarded as the rightful government abroad between two contending parties?").

186 *Id.* at 56.

187 73 U.S. (6 Wall.) 50, 59, 71 & n. †, 76–77 (1867).

188 *Id.* at 71.

189 *Id.* at 71 n. †.

190 *Id.* at 73, 74. Today, *Georgia v. Stanton* is read not as a political question case, but rather to limit Article III standing to vindicate political rights in intersovereign disputes. *See, e.g.*, Saginaw Cnty. v. STAT Emergency Med. Servs., Inc., 946 F.3d 951, 957 (6th Cir. 2020) (citing Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387, 393 (1995)).

B. The Political Question Doctrine's Foundation?

By the twentieth century, this reading of *Nabob of the Carnatic* as a political question case was unremarkable.[191] In 1875, the U.S. Supreme Court cited the case in passing as a political question decision,[192] and did so again in 1892.[193] In 1894, the New Jersey Supreme Court, citing the Court of Chancery's decision in relation to a dispute about who held the presidency of the New Jersey Senate, applied it as a political question case.[194]

To be clear, the cases cited *Nabob of the Carnatic* for more than one version of the political question doctrine. Traditionally, as Tara Leigh Grove has argued, courts would defer to the political branches' decisions on certain "political question[s]," such as recognition of foreign governments or American Indian Tribal governments, "whether those decisions were 'right or wrong.'"[195] Some citations to *Nabob of the Carnatic* concerned that traditional doctrine.[196] As John Harrison has argued, there was never just one political question doctrine, but rather "political question doctrines."[197] For instance, canonical cases such as *Georgia v. Stanton*, which cited *Nabob of the Carnatic*, tied the concepts of political right and political question together, where today we would pull them apart and treat *Stanton* as a standing case.[198]

In the first half of the twentieth century, American scholars and judges cited *Nabob of the Carnatic* to put the political question doctrine on historical footing. Among these scholars was Maurice Finkelstein, a founding faculty member at St. John's University School of Law, who published two papers on federal jurisdiction in 1924 and 1925, just a

191 That is not to say that the significance of the case for international relations was forgotten in the nineteenth century. In 1855, for example, Attorney General Cushing read the case as calling into question the jurisdiction of U.S. courts over suits by foreign sovereigns to enforce "things of *political* obligation, as distinguished from municipal engagement." United States Jud. Auth. in China, 7 U.S. Op. Atty's. Gen. 495, 520–21 (1855).

192 Philips v. Payne, 92 U.S. 130, 132 (1875).

193 *In re* Cooper, 143 U.S. 472, 503 (1892).

194 Att'y Gen. *ex rel.* Werts v. Rogers, 28 A. 726, 736–37 (N.J. 1894).

195 Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. REV. 1908, 1967 (2015) (quoting Williams v. Suffolk Ins. Co., 38 U.S. (13 Pet.) 415, 420 (1839)).

196 *In re* Cooper, 143 U.S. at 503.

197 John Harrison, *The Political Question Doctrines*, 67 AM. U. L. REV. 457 (2017).

198 *Id.* at 459.

few years after he took a seminar on public law with then-Professor Felix Frankfurter of the Harvard Law School.[199] In those papers Finkelstein argued that "there is no doubt . . . that [*Nabob of the Carnatic*] established the formula in English law that courts will not interfere with so-called political questions."[200] His former professor, now an Associate Justice, would label *Nabob of the Carnatic* a "celebrated decision" in his dissent from the Supreme Court's 1962 restatement of the political question doctrine in *Baker v. Carr*.[201]

This celebration was short-lived. In 1964, a three-judge district court dismissed a suit challenging the apportionment of Idaho's legislature, citing *Nabob of the Carnatic* to show that the High Court of Chancery traditionally would have denied relief in such a case, and was promptly and summarily reversed on the authority of *Baker v. Carr*.[202] No federal court has cited the case since.

* * *

It is unsurprising that *Nabob of the Carnatic* disappeared from the federal reporters in the 1960s. American lawyers had read it as a case limiting the adjudication of political rights and political questions. After *Baker v. Carr*, it was clear that political rights such as the right to vote were justiciable in Article III courts.[203] Justice Frankfurter's citation to *Nabob of the Carnatic* was an attempt to hold onto a doctrine that

199 Frankfurter et al., Tribute, *Maurice Finkelstein (1899–1957): A Memorial Tribute*, 31 SAINT JOHN'S L. REV. 238, 244 (1957).

200 Maurice Finkelstein, *Judicial Self-Limitation*, 37 HARV. L. REV. 338, 340 (1924); *see also* Finkelstein, *supra* note 17, at 240 ("It is important to understand the *Nabob* case, and to realize that it laid the foundation for the doctrine that courts will not interfere with political questions . . . ."). Repeating Finkelstein's account, historians and legal scholars in the mid-to-late twentieth century described this decision as the "English origin of the 'political question' concept." Michael A. Conron, *Law, Politics, and Chief Justice Taney: A Reconsideration of the* Luther v. Borden *Decision*, 11 AM. J. LEGAL HIST. 377, 378 n.3 (1967); *see also* Edwin B. Firmage, *The War Powers and the Political Question Doctrine*, 49 U. COLO. L. REV. 65, 68 (1977) (arguing that the political question concept in *Nabob of the Carnatic* "was brought to America as part of the common law"); Theodore Lawrence Craft, Note, *Political Questions—Classical or Discretionary Applications of Judicial Review*, 4 SUFFOLK U. L. REV. 127, 127 (1969) ("The proposition that courts of law will not exercise their power of review over so-called 'political questions,' found its genesis in early English cases, and was inherited by the courts in this country.") (internal citation omitted).

201 Baker v. Carr, 369 U.S. 186, 288 n.21 (1962) (Frankfurter, J., dissenting).

202 Hearne v. Smylie, 225 F. Supp. 645, 653 (D. Idaho 1964), *rev'd*, 378 U.S. 563 (1964).

203 Political process cases such as *Baker* did not involve a treaty-recognized "political right" of territorial authority and thus differed from the "political rights" at issue in an intersovereign case such as *Cherokee Nation v. Georgia*. *Cf.* Cherokee Nation v. Georgia, 30

the Court's majority had rejected. The disappearance of citations to that case thus marks a decisive break with an English tradition against adjudication of so-called "political questions" that was in no small measure invented.[204]

CONCLUSION: THE POLITICAL ECONOMY OF EQUITY IN EMPIRE

An English tradition invented by American lawyers? Perhaps that pushes the point too hard and too far. But the Court of Chancery's 1793 decision in *Nabob of the Carnatic* was a strange foundation to select for a sweeping principle that equity will not answer political questions and will not protect political rights, except in one respect. The timing of *Nabob of the Carnatic* is just about right if the question is what the Court of Chancery was up to in 1789.

Doctrinally, the question is an important one because the Supreme Court has held that the Court of Chancery's practice then guides what the federal courts can do in equity now. The challenge with applying this doctrine, as Samuel Bray has put it, "is that equity is an old and complex juridical tradition, and in such a tradition 'the past speaks with many voices.'"[205] The problem when it comes to *Nabob of the Carnatic* is even more complex than that, for the decisions speak in two different voices: Lord Chancellor Thurlow, who overruled the Company's plea, and Lord Commissioner Eyre, who dismissed the Nawab's bill after the Company answered.[206]

Nabob of the Carnatic, moreover, was not the first (or the last) time that equity was called upon to address a political dispute. Equity did not always remain silent in the face of controversies over political power. Lord Chancellor Hardwicke was ready to intervene in *Penn v. Lord Baltimore*, notwithstanding his recognition that the King and council had "original jurisdiction" over territorial disputes in the North American colonies.[207] That bill pleaded questions of contract and property within Chancery's *in personam* jurisdiction over subjects

U.S. (5 Pet.) 1, 59 (1831) (Thompson, J., dissenting) (discussing "mere political rights" that are "recognized and secured by treaty").

204 *See generally* THE INVENTION OF TRADITION (Eric Hobsbawm & Terence Ranger eds., 1983).

205 Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 1017 (2015) (quoting Martin Krygier, *Law as Tradition*, 5 L. & PHIL. 237, 242 (1986)).

206 *Compare* Nabob of the Carnatic v. E. India Co. (1791) 30 Eng. Rep. 391, 1 Ves. Jun. 371, *with* Nabob of the Carnatic v. E. India Co. (1793) 30 Eng. Rep. 521, 2 Ves. Jun. 56.

207 27 Eng. Rep. 1132, 1134, 1 Ves. Sen. 444, 446 (1750).

of the Crown.[208] It could be distinguished from the bill in *Nabob of the Carnatic* and apparently was distinguished to the Commissioners' satisfaction in that case.

Drawing these distinctions—between subjects and foreign sovereigns, and between property and sovereignty—shielded the East India Company's strategy of "empire by treaty" from an accounting.[209] The Court of Chancery did not rely upon the distinction between Christians and infidels that Coke had drawn in *Calvin's Case*.[210] Indeed, Lord Chancellor Thurlow's initial decision implicitly repudiated it. Yet the Court's ultimate dismissal of the bill drew a distinction between those within the imperial metropole who enjoyed equity's protections and those within the periphery left outside equity. Its decision fits within an eighteenth century pattern of jurisdictional struggle over empire within English courts. These courts would sometimes hear claims arising from empire abroad.[211] At the same time, in 1753, the East India Company succeeded in "sharply limit[ing] Indians' access to English courts in India."[212] In 1793, with *Nabob of the Carnatic* the Company succeeded in closing off the Court of Chancery to enforcement of its treaties with Indian sovereigns.

The case was a contest for empire that equity did not avoid even as it professed to do so. The Court of Chancery held that the East India Company had authority to act as an independent state within India, while denying jurisdiction to review the Company's actions.[213] The Court did not avoid these questions of political power. It answered them.

It would not be the last time that application of a facially neutral principle had the effect of perpetuating domination. *Nabob of the Carnatic* came to be cited for the principle that equity will not intervene to protect political rights. In the early twentieth century, after the failure of Reconstruction and the rise of Jim Crow segregation in the former

208 *Id.*

209 Travers, *supra* note 28, at 132.

210 *See supra* notes 101–03 and accompanying text.

211 *See* Christian Burset, *An Empire of Laws: Legal Pluralism in the Eighteenth-Century British Empire* ch. 5 (forthcoming 2022) (manuscript on file with the *Notre Dame Law Review*).

212 *See* Christian R. Burset, *Quebec, Bengal, and the Rise of Authoritarian Legal Pluralism*, *in* ENTANGLING THE QUEBEC ACT: TRANSNATIONAL CONTEXTS, MEANINGS, AND LEGACIES IN NORTH AMERICA AND THE BRITISH EMPIRE 131, 134 (Ollivier Hubert & François Furstenberg eds., 2020) ("[A] coalition of Indian elites and EIC officials obtained a new EIC charter in 1753 that sharply limited Indians' access to English courts in India.").

213 Travers, *supra* note 28, at 132.

Confederate states, the U.S. Supreme Court cited this principle in *Giles v. Harris*, though without reference to *Nabob of the Carnatic*. In *Giles*, the Court held that "[t]he traditional limits of proceedings in equity have not embraced a remedy for political wrongs" and that equity "cannot undertake . . . to enforce political rights."[214] The Court would not, therefore, afford relief to Jackson Giles and other similarly situated black voters who were eligible to vote but denied registration by election officials in Montgomery County, Alabama. Equity would not, in other words, address White Alabamians' Jim Crow empire.[215]

In 1903, the year that the Supreme Court decided *Giles*, it also decided *Lone Wolf v. Hitchcock*.[216] In that case, leaders of the Kiowa, Comanche, and Apache Nations filed a bill in equity to protect their treaty-guaranteed property rights against allotment.[217] The allotment policy aimed to break up tribal power by parceling out tribal lands into individual plots, with some parcels going to individual tribal members and others being sold off to white settlers as "surplus" lands.[218] This was a taking of property rights. It seemed a paradigmatic case for equity to intervene. The effect of intervention might be to protect tribal sovereignty, but only as an incident of protecting property. The Supreme Court did not deny any of that. Still, it dismissed the bill because "Congress possessed full power in the matter" and "relief must be sought by an appeal to that body for redress."[219] In this contest for empire, it seems not even a property right could ground equitable jurisdiction to provide relief.

Contrast *Lone Wolf* with *In re Debs*, a case that pitted the power of the U.S. government against that of striking workers.[220] In that case, equity intervened in 1894 on behalf of the federal executive in its suit to enjoin the Pullman strikers.[221] The pretense for this intervention was to protect the U.S. mails, but the interest and the political contest was not limited to that claim of a property right.

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214 189 U.S. 475, 486–87 (1903) (citing Green v. Mills, 69 F. 852 (Fuller, Circuit Justice, 4th Cir. 1895)).

215 *Id.*

216 Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

217 *Id.* at 560.

218 *Id.*

219 *Id.* at 568.

220 158 U.S. 564 (1895).

221 *Id.*; *see* Seth Davis, *Implied Public Rights of Action*, 114 COLUM. L. REV. 1, 21 (2014) (noting that "the Court adverted to the government's corporate interest in protecting its property in the United States mails").

Lone Wolf and *Debs* are American variations on the English theme of sovereign prerogative in equity. *Lone Wolf* lodges a so-called plenary power in Congress to authorize the breaking of Indian treaties and taking of Indian lands.[222] *Debs* grounds an executive prerogative to seek equitable relief to pursue political ends. American lawyers do not tend to link equity and sovereignty in this way. Instead, they tend to see equity as a source of remedies when the political branches abuse their authority. In doing so, they ignore the English tradition within which the Chancellor's authority to do justice was based upon the Crown's sovereignty over the realm.[223] Over time, equity may have dislodged itself from the Crown's personal prerogative,[224] but its foundations in that prerogative were consonant with Chancery's refusal in *Nabob of the Carnatic* to provide a remedy against the East India Company in favor of an Indian sovereign.

Empire, in short, is in equity's tradition. Justice Johnson was wrong to suggest that the question is whether equity will intervene in a contest for empire. The question instead is when equity will intervene, and for whom.

222 In her essay for this Symposium, Professor Sohoni identifies the various ways in which American jurisprudence has identified the sovereign within equity, with Congress sometimes enjoying that status. *See* Mila Sohoni, *Equity and the Sovereign*, 97 NOTRE DAME L. REV. 2019 (2022).

223 *See, e.g.*, *id.*

224 *See* THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 193 (5th ed. 2001) (arguing that while "extreme royalists asserted that Chancery was a prerogative court" in the early seventeenth century, it was "wild speculation . . . that the Court of Chancery and the system of equity were dependent upon a personal prerogative of the monarch").